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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

S.C. SUPREME COURT

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.

RECORD ON APPEAL

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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.
)

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.

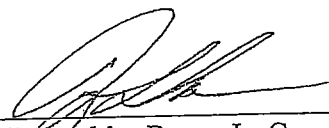
2. Plaintiffs are hereby granted the right to amend their Amended Complaint pursuant to Rule 15. Defendants will not be prejudiced if Plaintiffs amend their Complaint and justice can be served by such amendment. Plaintiffs shall have thirty (30) days from October 6, 2011 to serve a Second Amended Complaint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

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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), SCRCF. Further, because Plaintiffs' pleading also demonstrates that Plaintiffs

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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 (2010) (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

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. &*

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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

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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.

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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.

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 ¶¶ 199-121. 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.

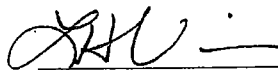
Conclusion

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.

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Letitia H. Verdin
Presiding Judge

M. HOPE BLACKLEY

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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	William Mark Casey	Ray E "Chuck" Thompson
Upstate Lung and Critical Care Specialists PC	Devendra T Shantha, MD	Charles M Fogarty MD	
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:

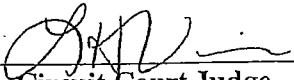
INFORMATION FOR THE PUBLIC INDEX

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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SPARTANBURG COUNTY
2012 FEB - 1 AM 11:41
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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

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 PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

M. Hope Blackley

Hope Blackley - Spartanburg County Clerk Of Court

Pat Dotson

Court Reporter

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SPARTANBURG COUNTY
2012 FEB -1 AM 11:41
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.

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

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Circuit Court Judge

2162

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4/30/2012

Date

5/14/12

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5/14/12

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

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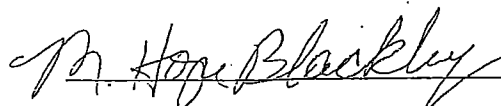
Matthew Holmes Henrikson, Henrikson Law Firm, LLC,
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Dunbar Street #200 Spartanburg, SC 29306

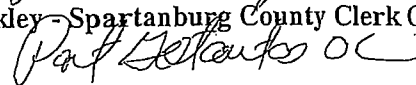
Ellen S. Cheek, Michael Wilkes Law Firm, PA, 127 Dunbar
Street, Suite 200, Spartanburg, SC 29306

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Hope Blackley - Spartanburg County Clerk Of Court



Court Reporter

M. HOPE BLACKLEY

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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.

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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.

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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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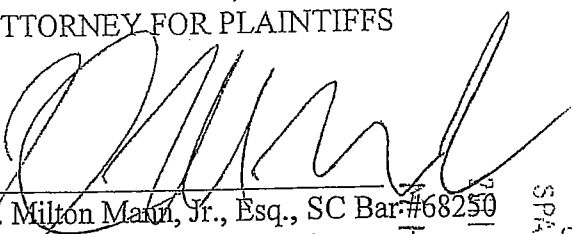
137. Special Damages incurred as a direct result of the allegations within the Second Cause of Action, include, but are not limited to, additional and unnecessary attorneys' fees pursuant to the recovery of the MRI disk from the out-of-state hospital; additional and undue emotional distress of being 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

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October 11, 2011
Spartanburg, South Carolina

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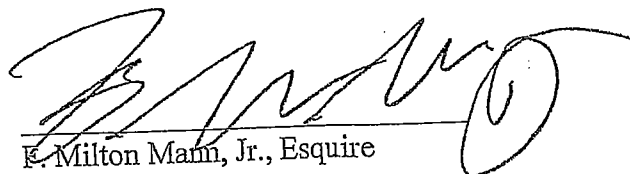
South Carolina Rules of Civil Procedure 52(b) and 59(e) and shall be made upon such grounds as it may appear at the hearing on such motion and any supporting memorandum.

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.



K. 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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5 GREGORY J. FELDMAN, MD, JOSEPH A.
6 BOSCIA, III, MD, UPSTATE LUNG &
7 CRITICAL CARE SPECIALISTS, PC,
AND DEVENDRA SHANTHA, MD,

8 PLAINTIFFS,

9 vs.

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

12 DEFENDANTS.
13
14

TRANSCRIPT
OF
RECORD

2010-CP-42-05743

15 September 8th, 2011
16 Spartanburg, South Carolina
17
18

19 B E F O R E:

20 THE HONORABLE ROGER L. COUCH, Judge.
21
22
23
24
25

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.

17

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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

) COURT OF COMMON PLEAS

) Case No(s) : 2010CP4205743.

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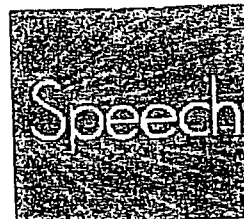
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EXHIBITS PAGE

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u> <u>EV</u>
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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. ~~A~~
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

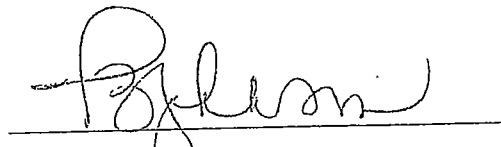
CERTIFICATE

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

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

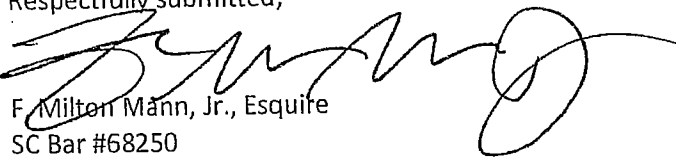
Honorable Letitia Verdin
Greenville County
March 6, 2012
Page Two

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

GREENVILLE SC 29601
AUG 2003 PM 3 1



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

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.

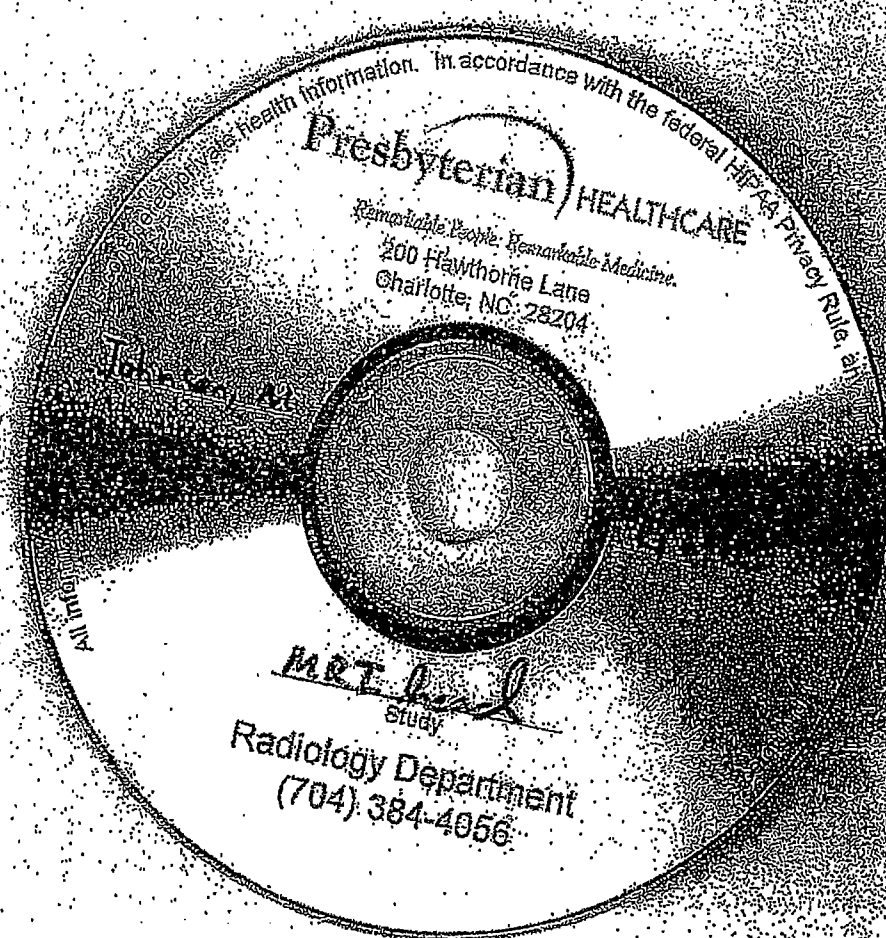
FILE COPY

date & exen
2-4-07

Record #
53305541

Mark Johnson
date: 10-18-88

Click on **enlarge**.
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**.



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

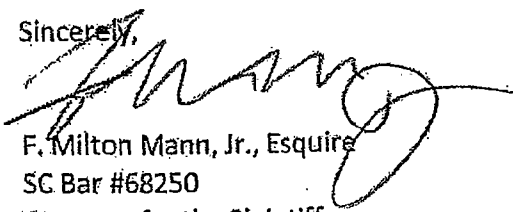
Re: Gregory Feldman, MD, et al v. William Mark Casey, et al
Case No. 2010-CP-42-5743

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 Henricksen, 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.

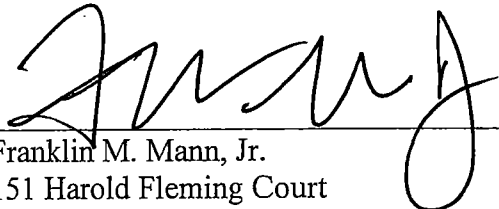
--

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



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

COPY

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.

APPENDIX TO RECORD ON APPEAL

Joe Mooneyham
Mooneyham, Barry & Pope, LLC
P.O. Box 8359
Greenville, SC 29604
Attorney for Respondent Casey

F. Milton Mann
151 Harold Fleming Court
Spartanburg, SC 29303
Attorney for Appellants

Matthew H. Henrikson
Henrikson Law Firm
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Greenville, SC 29607
Attorney for Respondent Thompson

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

RECEIVED
JUN 07 2013

SC Court of Appeals

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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 T. Shantha, MD,

Plaintiffs,

vs.

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

Defendants.

2010-CP-42-5743

Complaint
(Jury Trial Demanded)

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

CLERK OF
SPARTANBURG COUNTY
2010 OCT 27 PM 12:26
M. HOFFMAN, CLERK

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.

Factual Allegations

4. The medical malpractice action from which this complaint arises 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, William Mark Casey through his attorney, Mr. Ray E. "Chuck" Thompson, alleged Doctors Feldman, Boscia and Shantha breached the standard of care respecting his medical treatment and as a result, Mr. Casey suffered various injuries including traumatic brain damage.

6. Mr. Casey sought actual and punitive damages arising out of certain treatment and care, which took place by the Doctors from May 28, 2004 through June 3, 2004.

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

8. As part of the medical work-up at the emergency room, a chest x-ray was done on that date which revealed a small metallic density foreign body, appearing to be within Mr. Casey's airway.

9. Accordingly, Dr. Boscia performed a flexible bronchoscopy, which revealed abnormal tissue within Mr. Casey's airway, but did not result in retrieval of a foreign object.

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

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

12. Dr. Feldman performed the rigid bronchoscopy with Dr. Shantha, who was the attending anesthesiologist.

13. At the close of the rigid bronchoscopy, Mr. Casey suffered a pneumothorax, a known risk, requiring his stay in the hospital through June 6, 2004.

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

15. After Doctors Feldman and Boscia would not support Mr. Casey's disability claims, Mr. Casey then came to be under the care of Charles Fogarty, M.D., another Spartanburg Pulmonologist.

16. Mr. Casey, Mr. Thompson and Dr. Fogarty asserted that as a result of the rigid bronchoscopy, Mr. Casey suffered a permanent brain injury due to bubbles or air emboli migrating to Mr. Casey's brain.

17. The office notes of Joseph Grace, Ph.D., a psychologist and therapist in Spartanburg who has seen Mr. Casey on a semi-weekly basis since his alleged injuries were allowed into evidence in the medical malpractice action by agreement of the parties.

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

19. Mr. Casey and his attorney, Mr. Thompson, knew of this information contained within paragraph number 18.

20. 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.

21. 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.

22. It was clear Mr. Casey continued to play golf with a reasonable degree of frequency after the treatment and care by Doctors Feldman, Boscia and Shantha.

23. Mr. Casey and his attorney, Mr. Thompson, knew of this information contained within paragraph numbers 20, 21 and 22.

24. 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 Doctors Feldman, Boscia and Shantha and which experts acknowledged would be the type forces which induce depression.

25. Some examples where that 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.

26. Mr. Casey and his attorney, Mr. Thompson, knew of this information contained within paragraph number 24 and 25.

27. 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.

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

29. Mr. Casey and his attorney, Mr. Thompson, knew of this information contained within paragraph numbers 27 and 28.

30. Before seeing Mr. Casey as a patient within his medical practice, Dr. Fogarty incredibly hatched a theory that Mr. Casey had suffered a brain injury, despite being a Pulmonologist and not a Neurologist or any other specialist relating to such brain injuries.

31. That theory was cultivated by Dr. Fogarty along with a number of allegations of deviations from the standard of care by Doctors Feldman, Boscia and Shantha and suit was filed in 2006.

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 alleged injuries were unsupported by any medical literature.

33. Dr. Fogarty's role on behalf of Mr. Casey far exceeded the reasonable role of a treating physician or expert witness and he became an active co-conspirator and catalyst of the litigation team, thereby seeking to ensure success for the nefarious venture.

34. Dr. Fogarty attempted to hide his role and level of involvement in the medical malpractice action by making material misrepresentations during his deposition.

35. Dr. Fogarty was well known by Doctors Feldman and Boscia, prior to the medical malpractice action.

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

37. The Feldman/Fogarty separation from joint medical practice had been acrimonious.

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38. In addition, Doctors Feldman and Boscia had formed a pharmaceutical research company, which Dr. Fogarty viewed as competition to his own medical practice and research company.

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

40. During the medical malpractice action, Mr. Thompson, Mr. Casey's attorney, arranged for a diagnostic medical test (MRI) to be performed on Mr. Casey's brain under a fictitious name and birth date.

41. 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.

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

43. 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.

44. To maintain the secrecy of the MRI test and findings, Mr. Thompson instructed Mr. Casey 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 and Mr. Casey did so.

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

46. The MRI test results were very important, inasmuch as it would tend to negate the theory that Mr. Casey suffered irreversible brain damage on June 3, 2004.

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47. It was a material, important piece of evidence to the Doctors, which was withheld, concealed, and secreted from them by Mr. Casey and his counsel, with a very high degree of impropriety.

48. 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.

49. These depositions included all of the Doctors, eight treating physicians and five medical experts.

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

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

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

FIRST CAUSE OF ACTION
(Abuse of Process)

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

54. Defendants have misused the legal process of the medical malpractice action in an attempt to accomplish a purpose for which said proceedings were not allowed by law, specifically, the assassination of Plaintiffs' reputations by publicizing serious and unfounded allegations against them, and the attempted misuse of the legal process for personal, professional, and economic gain.

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55. Defendants have acted with malice and conscious disregard for the rights of the Plaintiffs by committing willful acts of submission of false statements and attempted suppression of evidence, which was required to be produced by the process of litigation, in an effort to injure the Plaintiffs.

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

57. That said damages, loss and harm was the proximate and legal result of the misuse of such legal process aforementioned.

SECOND CAUSE OF ACTION
(Civil Conspiracy)

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

59. Defendants joined together to injure and damage the Plaintiffs. The common and shared purpose of the enterprise, or conspirators, was to economically reward themselves at the expense of the Plaintiffs through the misuse of the medical malpractice action.

60. Defendants sought monetary gain by way of settlement or judgment. Further, Defendant Fogarty also sought to professionally damage the Plaintiffs, thereby increasing his own business value and productivity at the expense of the Plaintiffs' businesses and their productivity.

61. The Defendants' actions resulted in damages, including, but not limited to, loss of productivity, attorneys' fees and costs, emotional distress, damage to professional Plaintiffs' reputations, accounting expenses and further damages to be ascertained through this lawsuit.

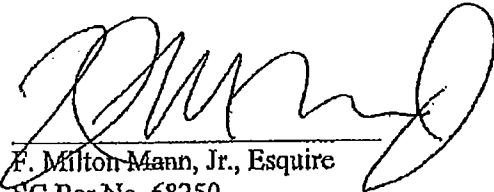
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WHEREFORE, plaintiff prays that this court enter judgment:

- a. For a jury trial to be conducted in this matter;
- a. For actual and compensatory damages in an amount to be determined by the jury;
- b. For punitive damages in an amount to be determined by the jury; and
- c. 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 PLAINTIFF

BY:


F. Milton Mann, Jr., Esquire
SC Bar No. 68250
1089 Boiling Springs Road
Spartanburg, South Carolina 29303
(864) 208-0359

October 27, 2010

Spartanburg, South Carolina

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2010-CP-42-5743

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

Plaintiffs,)

vs.)

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

Defendants.)

DEFENDANT WILLIAM MARK CASEY'S
MOTION TO DISMISS

TO: The plaintiffs, and F. Milton Mann, Jr., Esquire, their counsel:

YOU WILL PLEASE TAKE NOTICE that the undersigned, as counsel for Defendant William Mark Casey, will move this Honorable Court, on the tenth day after service hereof, or as soon thereafter as counsel may be heard, and at such time and place as the Court shall direct, for an Order, dismissing the plaintiffs' complaint against him.

The grounds for the motion are that the plaintiffs' complaint fails to facts sufficient to constitute a cause of action against this defendant. The motion is made pursuant to Rule 12(b)(6), *South Carolina Rules of Civil Procedure*.

In the alternative, and as further grounds for the dismissal of the complaint, Defendant Casey will move for dismissal on the grounds that the plaintiffs have failed to join a party under Rule 19(a), *South Carolina Rules of Civil Procedure*. The motion is made pursuant to Rule 12(b)(7), *South Carolina Rules of Civil Procedure*.

The motion will be supported by any memoranda to be filed by the defendant, by the applicable precedents, and by such argument of counsel as the Court may allow.

Counsel hereby affirms that as this motion is a motion to dismiss, no consultation with opposing counsel is required, pursuant to Rule 11(a), *South Carolina Rules of Civil Procedure*.

Respectfully submitted,
Mooneyham, Berry & Karow, LLC



Joe Mooneyham, S.C. Bar No. 004041
Attorneys for Defendant William Mark Casey
Post Office Box 8359
Greenville, South Carolina 29604
864.421.0036 Fax 864.421.9060
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Greenville, South Carolina

December 15, 2010

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Gregory J. Feldman, M.D., Joseph A.
Boscia, III, M.D., Upstate Lung and
Critical Care Specialists, P.C., and
Devendra T. Shantha, M.D.,

Plaintiffs,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

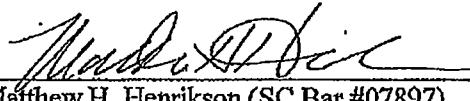
C.A. NO.: 2010-CP-42-05743

MOTION TO DISMISS OF DEFENDANT
RAY E. "CHUCK" THOMPSON

To: Plaintiffs and their counsel:

Defendant, Ray E. "Chuck" Thompson, by and through his undersigned attorneys,
hereby moves this Honorable Court at such time and place as counsel may be heard for an Order
dismissing the Complaint filed against him herein. This motion is made pursuant to SCRCF
Rule 12(b)(6) and is based on the fact that each cause of action pled in the Plaintiffs' Complaint
fails to state facts sufficient to constitute a cause of action and should be dismissed. The motion
is further based on SCRCF Rule 12(b)(7).

This motion may be supported by any memoranda as may be filed with the Court.


Matthew H. Henrikson (SC Bar #07897)
CLARKSON WALSH TERRELL & COULTER, P.A.
Attorneys for Defendant Thompson
Post Office Box 6728
Greenville, South Carolina 29606
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mhenrikson@clarksonwalsh.com

December 16, 2010
Greenville, South Carolina

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STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

7th JUDICIAL CIRCUIT

COUNTY OF SPARTANBURG)

CASE NO.: 2010-CP-42-5743

Gregory Feldman, MD, Joseph Boscia, III, et
al.

MOTION AND ORDER INFORMATION

Plaintiff,)

FORM AND COVERSHEET

vs.)

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

Defendant.)

Plaintiff's Attorney: F. Milton Mann, Bar No. 68250 Address: 1089 Bolling Springs Rd. Spartanburg, SC 29303 Phone: 864-208-0359 Fax 864-208-0233 E-mail: milton.mann@gmail.com Other: _____		Defendant's Attorney: Charles M. Fogarty, MD, Bar No. Pro Se Address: 450 Mudd Creek Rd Inman, SC 29349 Phone: 864-431-694 Fax 864-583-1518 E-mail: cfogarty@medresearch.com Other: _____	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: 12(b)(6) Motion to Dismiss Complaint Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type			
☐ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for ☐ Plaintiff / ☐ Defendant		December 20, 2010 Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$ 25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____			

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

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

Plaintiffs,)

vs.)

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

IN THE COURT OF COMMON PLEAS

2010-CP-42-5743

Defendant Fogarty's Motion
To Dismiss Plaintiffs' Complaint

Defendant, Charles M. Fogarty, MD Motion to Dismiss Complaint of Gregory J. Feldman, MD, Joseph A. Boscia III, MD, Upstate Lung and Critical Care Specialists PC, and Devendra T. Shantha, MD Pursuant to SCRCP 12(b)(6) With Memorandum in Support.

Defendant Charles M. Fogarty, MD, acting *pro se*, hereby gives notice of his intent to move and does so move this Court to dismiss the Complaint of Gregory J. Feldman, MD, Joseph A. Boscia, III, MD, Upstate Lung and Critical Care Specialists PC, and Devendra T. Shantha, MD (collectively referred to as "Plaintiffs" or "Doctors Feldman, Boscia, and Shantha") pursuant to Rule 12 (b) (6) of the SCRCP. The Plaintiffs have alleged two causes of action: abuse of process and civil conspiracy. The Plaintiffs' Complaint should be dismissed for the following reasons:

- 1) Plaintiffs' civil conspiracy claim is time barred by the applicable statute of limitations.

- 2) Plaintiffs' civil conspiracy claim does not meet the pleading requirements under South Carolina Law and should be dismissed since the civil conspiracy claim does not state any additional acts in furtherance of the conspiracy, but merely incorporates the same allegations contained in the abuse of process claim.
- 3) Plaintiffs' abuse of process claim is time barred by the applicable statute of limitations.
- 4) Plaintiffs' abuse of process claim does not state facts sufficient to support the tort of abuse of process against the Defendants because the Complaint does not allege any facts or reasonable inferences that could be drawn to support the allegation that the primary objective of the medical malpractice action against Doctors Feldman, Boscia, and Shantha was outside the scope of a medical malpractice action.

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS'
COMPLAINT**

Issue 1 -- Civil Conspiracy Claim is Time Barred by Applicable Statute of Limitations.

In South Carolina, civil conspiracy has a three (3) year statute of limitations. According to Paragraph 59 and Paragraph 60 of the Complaint, Charles M. Fogarty along with the other Defendants (Mark Casey, the patient in the underlying medical malpractice action, and Chuck Thompson the attorney who filed the malpractice action) conspired together to damage the Plaintiffs by suing the Plaintiffs for medical malpractice. The Complaint alleges that the civil

conspiracy was that the "Defendants [Fogarty, Thompson, Casey] sought monetary gain by way of settlement or judgment" (Complaint Paragraph 60). Furthermore, according to the Complaint, the malpractice lawsuit filed against Doctors Feldman, Boscia, and Shantha commenced in 2006. The medical malpractice suit made demands for judgment against Doctors Feldman, Boscia, and Shantha (Complaint Paragraphs 4, 5, 6 and 31). The Plaintiffs' Complaint states that Doctors Feldman, Boscia, and Shantha were damaged by the filing of the medical malpractice action against them. The Complaint avers that in seeking monetary redress from Doctors Feldman, Boscia, and Shantha for their alleged substandard care of Casey, Defendants Fogarty, Casey, and Thompson were engaging in a civil conspiracy. Therefore, even when reading the Complaint in the light most favorable to the Plaintiffs, the statute of limitations on the civil conspiracy claim began to accrue in 2006 when the medical malpractice lawsuit was filed because the medical malpractice lawsuit sought "damages" which according to the Plaintiffs' Complaint was the overt conspiracy "act" which damaged them. The Complaint asserts that Doctors Feldman, Boscia, and Shantha were aware of the lawsuit against them in 2006. According to the Complaint, Doctors Feldman, Boscia, and Shantha were aware of two of the alleged conspirators (Casey and Thompson) in 2006 and Doctors Feldman, Boscia, and Shantha discovered in 2006 that they were the alleged victims of a conspiracy. Therefore, the applicable statute of limitations for the alleged civil conspiracy that Doctors Feldman, Boscia, and Shantha now assert began to accrue in 2006. The statute of limitations begins to run when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right has been invaded or that some claim against another party might exist. (Wiggins v Edwards, 442 S.E 2d 169, 170). The statute of limitations is triggered when the plaintiff discovers the injury, not when he discovers the identity of another alleged tortfeasor. (See

Wiggins, 442 S.E. 2d at 170). According to the Complaint, Doctors Feldman, Boscia, and Shantha were damaged by the commencing of the lawsuit by two of the alleged conspirators (Casey and Thompson) in 2006. There is absolutely no uncertainty according to the Complaint that Doctors Feldman, Boscia, and Shantha knew of Thompson and Casey's identities in 2006. Furthermore, Doctors Feldman, Boscia, and Shantha have alleged in their Complaint that they suffered damages in 2006 as a result of the malpractice lawsuit being filed against them. Even reading the Complaint in the light most favorable to Doctors Feldman, Boscia, and Shantha, the Complaint fails to allege facts sufficient to support a claim for civil conspiracy because the applicable statute of limitations expired in 2009; yet the Plaintiffs did not file this action until October 2010.

Issue 2 – Civil Conspiracy Claim Fails to State Additional Acts in Furtherance of the Conspiracy.

Even if this Court were to reject the argument that the civil conspiracy claim is due to be dismissed due to the applicable statute of limitations, the civil conspiracy claim should still be dismissed because the conspiracy claim fails to state **additional** and **independent** acts in furtherance of the conspiracy that have not already been incorporated in the abuse of process cause of action.

The South Carolina Court of Appeals in Hackworth v Greywood at Hammett, LLC 2009 S.C. App. LEXIS 381,*,385 S.C. 110; 682 S.E.2d 871 in its opinion reaffirming a lower court's decision to dismiss a civil conspiracy claim for failing to meet the requirements under South Carolina law, stressed that a claim for civil conspiracy must plead additional and independent acts which are not covered by other causes of action. The Appeals Court averred as follows:

An unexecuted civil conspiracy is not actionable. Charles v. Tex. Co., 199 S.C. 156, 163, 18 S.E.2d 719, 727 (1942). The conspiracy becomes actionable, however, once overt acts occur which proximately cause damage to the plaintiff. Todd, 276 S.C. at 292, 278 S.E.2d at 611. In a civil conspiracy claim, one must plead additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim. See id. at 293, 278 S.E.2d at 611 (dismissing plaintiff's civil conspiracy claim because "the [civil conspiracy] action does no more than incorporate the prior allegations and then allege the existence of a civil conspiracy and pray for damages resulting from the conspiracy. No additional acts in furtherance of the conspiracy [were] plead"); [*7] Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 611, 538 S.E.2d 15, 31 (Ct. App. 2000) ("Because [the third party plaintiff] . . . merely realleged the prior acts complained of in his other causes of action as a conspiracy action but failed to plead additional acts in furtherance of the conspiracy, he was not entitled to maintain his conspiracy cause of action."); Doe v. Erskine Coll., No. 8:04-23001RBH, 2006 U.S. Dist. LEXIS 35780, 2006 WL 1473853, at *17 (D.S.C. May 25, 2006) (granting defendant's motion for summary judgment on plaintiff's civil conspiracy action because "the Complaint does not plead specific facts in furtherance of the conspiracy; instead the Complaint simply restates alleged wrongful acts pled in relation to the plaintiff's other claims for damages."); James v. Pratt & Whitney, 126 Fed. Appx. 607, 613 (D.S.C. 2005) ("If appellant failed to allege facts for his civil conspiracy claim separate and distinct from his other two claims, then his civil conspiracy claim would fail under Todd").

The conspiracy claim of the Plaintiffs' Complaint incorporates all of the preceding paragraphs of the complaint and then sets forth four (4) additional paragraphs numbered 58, 59, 60, and 61. Paragraph 58 of the Complaint states the following:

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

Paragraphs 59, 60, and 61 of the Complaint do not allege any additional acts in furtherance of the conspiracy by the Defendants that had not already been pled under the abuse of process claim.

Paragraphs 59, 60, and 61 state the following:

59. Defendants joined together to injure and damage the Plaintiffs. The common and shared purpose of the enterprise, or conspirators, was to economically reward themselves at the expense of the Plaintiffs through the misuse of the medical malpractice action.

60. Defendants sought monetary gain by way of settlement or judgment. Further, Defendant Fogarty also sought to professionally damage the Plaintiffs, thereby increasing his own business value and productivity at the expense of the Plaintiffs' business and their loss of productivity.

61. The Defendants' actions resulted in damages, including, but not limited to, loss of productivity, attorneys' fees and costs, emotional distress, damage to professional Plaintiffs' reputations, accounting expenses and further damages to be ascertained through this lawsuit.

However, Plaintiffs alleged the same substantive matter in paragraph 6 of their Complaint and paragraph 54 of their Complaint under the abuse of process claim:

6. Mr. Casey sought actual and punitive damages arising out of certain treatment and care, which took place by the Doctors from May 28, 2004 through June 3, 2004.

54. Defendants have misused the legal process of the medical malpractice action in an attempt to accomplish a purpose for which said proceedings were not allowed by law, specifically, the assassination of Plaintiffs' reputations by publicizing serious and unfounded allegations against them, and the attempted misuse of the legal process for personal, professional, and economic gain.

The Plaintiffs have failed to articulate in their Complaint any independent and additional act that the conspirators took in furtherance of the conspiracy. The conspiracy claim is simply a rehash

of prior allegations made in the abuse of process claim with the added assertion that the Defendants were conspiring together for a common shared purpose. The Plaintiffs' Complaint fails to meet the pleading requirements for civil conspiracy and thus is due to be dismissed consistent with prior South Carolina Case Law.

Issue 3 – The Abuse of Process Claim is Time Barred by the Applicable Statute of Limitations.

In South Carolina, abuse of process has a three (3) year statute of limitations. Doctors Feldman, Boscja, and Shantha maintain in their Complaint that the Defendants were misusing the legal process of medical malpractice to damage their reputations. In Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 75, 567 S.E.2d 251, 256 (Ct. App. 2002) the Court of Appeals held that an "entire lawsuit" can be viewed as an abuse of process if the suit is brought not to recover on the stated cause of action, but to accomplish a purpose for which it was not designed. Id

Food Lion correctly observes that an abuse of process action may lie if a party prosecutes an "entire lawsuit" for collateral purposes. ⁿ⁵ See 1 Am. Jur. 2d Abuse of Process § 11 at 420 (1994) ("If the suit is brought not to recover on the cause of action stated in the complaint, but to accomplish a purpose for which the process was not designed, there is an abuse of process."). Id

In the current Complaint against Fogarty, Thompson, and Casey, Doctors Feldman, Boscja, and Shantha have alleged that the entire lawsuit against them was pursued for the purpose of assassinating their reputations and publicizing unfounded allegations against them. (Complaint Paragraph 54). Looking solely at the Plaintiffs' Complaint and viewing the facts most favorable to the Plaintiffs, it is evident that the Plaintiffs believe that the entire lawsuit was

an abuse of process. However, as articulated in the previous arguments to dismiss the civil conspiracy claim, there is no way around the simple fact that the Plaintiffs were put "on notice" that they had a viable claim for abuse of process in 2006 when they suffered damages as a result of the filing and publication of the lawsuit. Therefore, as was the case in the civil conspiracy claim, the abuse of process claim is no longer viable since the statute of limitations expired in 2009.

In the event that this Court finds that the abuse of process claim is not time barred because the Plaintiffs do not allege that the entire lawsuit was an abuse of process, but rather that the abuse commenced within 3 years of the filing of this Complaint, the Court should still dismiss the abuse of process claim for the reasons set forth below:

Issue 4 – The Complaint Fails to State Facts Sufficient to Support a Cause of Action for Abuse of Process against Dr. Fogarty and the other Defendants.

The elements of an abuse of process claim are: (1) an ulterior purpose and (2) a "willful" or overt act "in the use of the process" that is improper because it is either unauthorized or aimed at an illegitimate collateral objective. Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 71, 567 S.E.2d 251, 253-54 (Ct. App. 2002). Importantly, an ulterior purpose or bad intention is insufficient to state a claim. *There must be proof that a collateral objective was the sole or paramount reason for acting.* "[A] party who simply pursues a lawsuit with a collateral purpose in mind has done nothing improper." *Id.* at 76, 567 S.E.2d at 256.

The existence of an ulterior motive, malice or bad intent in bringing the suit does not alone give rise to an action for abuse of process. There must also be a willful act by the defendant whereby the defendant attempts to use that process to harass or pressure the plaintiff with respect to a matter outside the scope of the original writ. Indeed, the essence of the tort of abuse of process centers on events occurring outside of the process, namely:

The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort. Swicegood v. Lott Opinion No. 4405, COURT OF APPEALS OF SOUTH CAROLINA, April 9, 2008, Heard, June 6, 2008, Filed,

The Plaintiffs have failed to offer any matter outside the scope of the medical malpractice action that Casey and Thompson were harassing or pressuring Drs. Feldman, Boscla, and Shantha on. The Plaintiffs have not alleged that Casey and Thompson were using the medical malpractice action to gain a comparative advantage in another dispute. In an abuse of process action the key ingredient is that one party is improperly using the legal process for leverage / extortion in some completely unrelated dispute or matter.

In Swicegood v. Lott, it was alleged that Sheriff Lott was using the threat of a criminal investigation against Swicegood for allegedly double dipping on his timesheets to coerce Swicegood into changing his testimony to support Lott's contention that Swicegood's partner had acted improperly in another matter. Swicegood alleged that Lott stated that he (Lott) would make the Federal and State Criminal charges for double dipping "go away" if Swicegood

provided testimony implicating his partner. The vital element was the Lott offered to make the other pending criminal charges "go away" if Swicegood changed his sworn testimony to placate Lott's wishes. The Court correctly surmised that the criminal charges brought against Swicegood for "double dipping" were pursued primarily as a means to pressure Swicegood to testify according to Lott's desires because Lott was offering to make the criminal charges "go away" once he achieved his real primary objective, namely for Swicegood to change his testimony about his partner's activities.

The factual allegations of the Complaint support only one reasonable conclusion and inference: Casey and Thompson were primarily acting to win the medical malpractice case. The allegations in the Complaint that Casey and Thompson may have acted improperly in failing to turn over evidence in a timely manner or that Fogarty may have made false statements in his deposition do not support any theory that any of the Defendants had some other primary objective in mind other than trying to win the malpractice suit.

The Plaintiffs assert that the medical malpractice action was brought in "an attempt to accomplish a purpose for which said proceedings were not allowed by law, specifically, the assassination of the Plaintiffs' reputations by publicizing serious and unfounded allegations against them, and the attempted misuse of the legal process of the legal process for personal, professional, and economic gain." (Complaint Paragraph 54). However, the South Carolina Court of Appeals has already ruled that statements such as these are insufficient to support a claim for abuse of process. In their discussion of Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 75, 567 S.E.2d 251, 256 (Ct. App. 2002) the Court of Appeals referenced a case where abuse of process could not be predicated on general allegations that a

lawsuit was allegedly motivated to generate negative publicity against a competitor or cause a competitor to lose sales. Where abuse of process claims are supported only by general assertions that there was some ulterior motive, the courts have held that such pleadings are insufficient to support a cause of action for the tort of abuse of process. The courts have consistently upheld that in order to bring action for abuse of process the Complaint must set forth specific facts which support the requirement that the primary objective of the legal action was not to seek a redress for the alleged wrong doing, but rather some other objective not normally purported with the underlying case. In Food Lion, the Appeals Court of South Carolina states:

Moreover, nowhere in the complaint did Food Lion claim the Union did not use the Bryant lawsuit for its stated purpose, i.e., to redress the termination and health care grievances of several former Food Lion employees. As a result, the amended complaint failed to assert any facts sufficient to show the acts undertaken by the Union in the Bryant proceeding were aimed not at its purported, and therefore proper, purpose of remedying alleged wrongs, but towards a primary purpose of achieving a collateral objective. n7 We therefore find Food Lion did not adequately allege the second element of the tort. n8 See Mozzochi v. Beck, 204 Conn. 490, 529 A.2d 171, 174 (Conn. 1987) ("[Existing case law demonstrates that there is no bright line that clearly distinguishes between the ends ordinarily associated with litigation and the ulterior purpose that the tort of abuse of process is intended to sanction. Much [*19] turns on the specificity of the pleadings . . . [Courts have held [general] complaints to be legally insufficient because they do not allege conduct showing the use of process to accomplish a purpose for which it was not designed. . . . So general an allegation of abuse does not satisfy the requirement of showing the use of legal process 'primarily to accomplish a purpose for which it is not designed. . . .'] (citations omitted); Hart, 647 A.2d at 552 ("[The complaint fails to address an essential element of the tort of abuse of process, i.e., that the process was used primarily for a purpose for which the process was not designed. It is not enough that the process employed was used with a collateral purpose in mind. . . . Appellants'

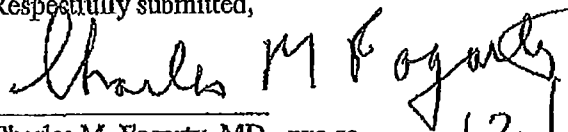
complaint [must] factually set forth that the continuance was not used for the purpose for which continuances are intended.") (internal citations omitted) (emphasis added); Baubles & Beads v. Louis Vuitton, S.A., 766 S.W.2d 377, 379 (Tex. App. 1989) (holding pleadings insufficient to state a cause of action for abuse of process where plaintiffs merely averred "Defendants improperly used the process [*20] to intimidate Plaintiffs, to obtain publicity and to increase Christmas sales of [Louis Vuitton] products, to decrease the sales of Defendants, to threaten Defendants with criminal prosecution, and to falsely accuse Defendants of a crime"). [Bold added for emphasis] Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 75, 567 S.E.2d 251, 256 (Ct. App. 2002)

Plaintiffs Feldman, Boscia, and Shantha have failed to articulate any willful actions, facts, or any other inferences that could be reasonably drawn by this Court in reading the Complaint in the light most favorable to the Plaintiffs, that a cause of action exists for abuse of process. The Plaintiffs have failed to assert that the primary object of the medical malpractice lawsuit was not to seek legal redress for the wrongdoing that Casey claimed in his medical malpractice action against Feldman, Boscia, and Shantha. To the contrary, the alleged willful acts of attempted suppression of evidence and submission of false statements by the Defendants, even if true, were allegedly done in attempt to help Mr. Casey prevail in his malpractice claim against Doctors Feldman, Boscia, and Shantha. The alleged bad "acts" by the Defendants do not support any theory that there was another primary objective other than seeking redress for the medical malpractice action that Casey would normally be entitled to under law. Seeking a judgment or settlement for medical malpractice by Casey and Thompson was not an objective outside the scope of a malpractice action. Plaintiffs, in order to state a cause of action for abuse of process, have to assert that the Defendants primary objective in pursuing the medical malpractice claim against Doctors Feldman, Boscia, and Shantha were not

seeking a proper legal remedy (i.e. a judgment against them or settlement), but rather the Plaintiffs have to assert that Casey, Thompson, and Fogarty were primarily trying to achieve some other objective which would not be consistent with a medical malpractice claim. However, the Complaint fails to set forth any facts and reasonable inferences whereby Defendants Casey and Thompson (the plaintiff in the original medical malpractice action and his attorney) were not acting in a manner consistent with seeking legal redress for the substandard medical care that they alleged occurred. The Complaint asserts that Fogarty, the medical expert, was motivated to help Casey and Thompson succeed in winning the medical malpractice case due to Fogarty's alleged acrimonious relationship with Feldman and Boscia, but even if true, that only supports the proposition that Fogarty was not engaged in an abuse of process since he wanted to "ensure the success" of the medical malpractice action by helping Casey prevail at trial. Thus as a matter of law, the Plaintiffs' Complaint fails to state a cause of action for the abuse of process and should be dismissed.

Wherefore, Defendant Charles M. Fogarty requests that this Court grants his Motion to Dismiss the Plaintiffs' Complaint with the added stipulation that should this Court agree that some, if not all, of the Plaintiffs' causes of action are time barred by the applicable statute of limitations that said claims be dismissed with prejudice.

Respectfully submitted,



Charles M. Fogarty, MD, *pro se*
450 Mudd Creek Road
Inman, South Carolina 29349
Telephone: 864-431-6964
Facsimile: 864-583-1518

12/20/10

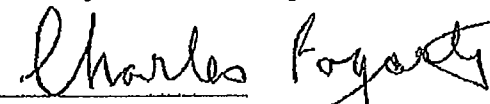
CERTIFICATE OF SERVICE

The undersigned, by affixing his signature hereto, certifies that he has, on December 20, 2010, served a copy of this pleading on counsel for the Plaintiffs by mailing a true and correct copy by United States Mail, first class postage prepaid and addressed as follows:

F. Milton Maun, Jr., Esquire
1089 Boiling Springs Road
Spartanburg, South Carolina 29303
Attorney for Plaintiffs

Joe Mooneyham
Post Office Box 8359
Greenville, South Carolina 29604
Attorney for Mark Casey

Matthew Holmes Henrikson
Post Office Box 6728
Greenville, South Carolina 29606
Attorney for Chuck Thompson

 12 20 '10
Charles M. Fogarty, MD, *pro se*

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Gregory J. Feldman, MD, Joseph A. Boscia,
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.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-42-5743

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

Plaintiffs' Attorney: F. Milton Mann, Jr., Bar No. 68250 Address: 1089 Bolling Springs Road, Spartanburg Phone: 864/208-0359 Fax _____ E-mail: _____ Other: _____		Defendant's Attorney: Joe Mooneyham, Bar No. _____ Address: PO Box 8359, Greenville, SC 29605 Phone: _____ Fax _____ E-mail: _____ Other: _____	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and II) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: to Amend Complaint		Court Reporter Needed: ☐ YES / ☒ NO	
Estimated Time Needed: 10 Minutes			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order			
I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for ☒ Plaintiff / ☐ Defendant		8/29/2011 Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$			
☐ EXEMPT: (check reason)			
☐ Rule to Show Cause in Child or Spousal Support			
☐ Domestic Abuse or Abuse and Neglect			
☐ Indigent Status ☐ State Agency v. Indigent Party			
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief			
☐ Motion for Stay in Bankruptcy			
☐ Motion for Publication ☐ Motion for Execution (Rule 69; SCRCP)			
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions			
Name of Court Reporter: _____			
☐ Other: _____			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order.		JUDGE CODE _____	
☐ Other: _____		Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____			
☐ MOTION FEE COLLECTED: \$ _____			

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 AUG 29 PM 1:08
M. HOPE BLACKBURN

☐ CONTESTED - AMOUNT DUE: \$ _____

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2011 AUG 29 PM 1:36
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

Gregory J. Feldman, MD, Joseph A.)
Boschia, 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.)

IN THE COURT OF COMMON PLEAS

NOTICE OF MOTION AND
MOTION TO AMEND COMPLAINT

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

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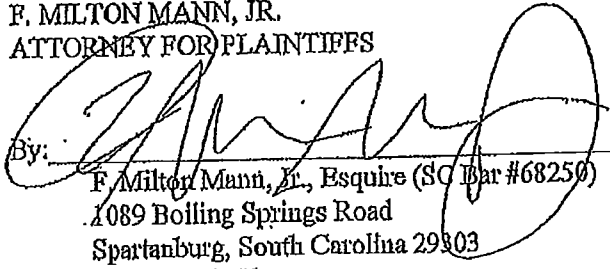
TO: JOE MOONEYHAM, ATTORNEY FOR DEFENDANT, WILLIAM MARK CASEY,
MATTHEW H. HENRICKSON, ATTORNEY FOR DEFENDANT RAY E. "CHUCK"
THOMPSON AND DEFENDANT CHARLES M. FOGARTY, M.D.:

YOU WILL PLEASE TAKE NOTICE that Plaintiffs, by and through their undersigned attorneys, will move on the tenth (10th) day after service hereof or as soon thereafter as counsel can be heard before the presiding Judge of the Court of Common Pleas for Spartanburg County, 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 necessary parties be named as parties hereto in this action and to correct a scrivener's error.

Defendants will not be prejudiced by Plaintiffs being allowed to amend their Complaint and justice will be served by such amendment.

F. MILTON MANN, JR.
ATTORNEY FOR PLAINTIFFS

By: 

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

August 29, 2011

Spartanburg, South Carolina

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SPARTANBURG COUNTY
2011 AUG 29 PM 1:36
M. HOPE BLACKLEY

CERTIFICATE OF SERVICE

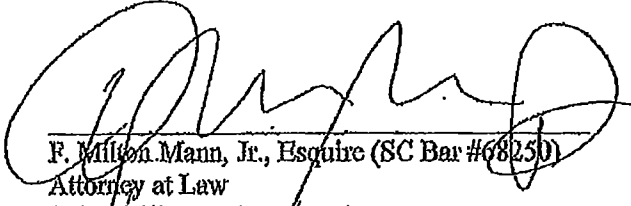
I, F. Milton Mann, Jr., attorney for the Plaintiffs, Gregory J. Feldman, M.D., Joseph A. Boscia, III, M.D., Upstate Lung and Critical Care Specialists, PC, and Devendar T. Shantha, M.D., do hereby certify that I have served a copy of the Notice of Motion and Motion to Amend Complaint by placing copies in the U.S. Mail, first class postage prepaid, to the following addresses:

Joe Mooneyham, Esquire
Post Office Box 8359
Greenville, South Carolina 29605
Attorney for Defendant Mr. Casey

Matthew H. Henrikson, Esquire
Clarkson, Walsh, Terrell, Coulter, P.A.
Post Office Box 6728
Greenville, South Carolina 29606
Attorney for Defendant Mr. Thompson

Charles M. Fogarty, M.D.
450 Mudd Creek Road
Irman, South Carolina 29349
Pro Se Defendant

FILED
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SPARTANBURG COUNTY
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F. Milton Mann, Jr., Esquire (SC Bar #68250)
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1089 Bolling Springs Road
Spartanburg, South Carolina 29303
(864) 208-0359 (864)-208-0233 - fax
Milton.mann@gmail.com

August 29, 2011
Spartanburg, South Carolina

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.

Amended Complaint
(Jury Trial Demanded)

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

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CLERK OF COURT
Spartanburg County, SC

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.

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.

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 Bosola.

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.

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.

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, Bosola 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, Bosola 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.

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 Bosola.

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 Bosola, 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 Boscia by publishing and disseminating fraudulent theories of injuries of Mr. Casey and thereby materially prolonging the litigation for his direct benefit.

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 Bosola 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.

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.

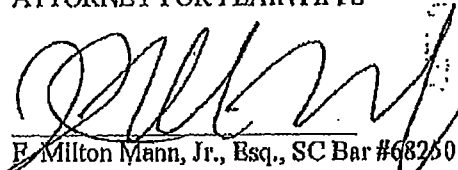
125. The Defendants' concerted efforts directly and proximately resulted in damages, including, but not limited to, loss of productivity, attorneys' fees and costs, emotional distress, damage to professional Plaintiffs' reputations, accounting expenses and further damages to be ascertained through this 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 #68260
1089 Bolling Springs Road
Spartanburg, South Carolina 29303
(864) 208-0359

June 16th, 2011
Spartanburg, South Carolina

CERTIFICATE OF SERVICE

I, P. Milton Mann, Jr., Esq., attorney for the Plaintiff, Gregory J. Feldman, M.D., Joseph A. Boscia, III, M.D., Upstate Lung and Critical Care Specialists, PC and Devendar T. Shantha, M.D., do hereby certify that I have served a copy of the pleading(s) hereinbelow specified by placing copies in the U.S. Mail, first class postage prepaid, to the following address(es):

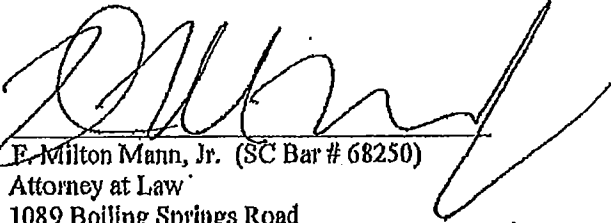
Pleadings: **AMENDED COMPLAINT**

Party(ies) Served: Joe Mooneyham, Esquire
Post Office Box 8359
Greenville, SC 29605
Attorney for Defendant Mr. Casey

Matthew H. Henrikson, Esquire
Clarkson, Walsh, Terrell, Coulter, P.A.
Post Office Box 6728
Greenville, SC 29606
Attorney for Defendant Mr. Thompson

Charles M. Fogarty, MD
450 Mydd Creek Road
Inman, SC 29349
Pro Se Defendant

2011 JUN 15 PM 1:22
U.S. MAIL
FIRST CLASS
POSTAGE PREPAID
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P. Milton Mann, Jr. (SC Bar # 68250)
Attorney at Law
1089 Boiling Springs Road
Spartanburg, SC 29303
864-208-0359
864-208-0233 fax
milton.mann@gmail.com

June 16, 2011
Spartanburg, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Gregory J. Feldman, M.D., Joseph A. Boscia, III,
M.D., Upstate Lung and Critical Care Specialists,
PC, and Devendar T. Shantha, M.D.,
☒ Plaintiff

v.

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

IN THE COURT OF COMMON PLEAS

CASE NO.

2010-CP-42-5743

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: F. Milton Mann, Bar No. 68250 Address: 1089 Boling Springs Road, Spartanburg, SC 29303 phone: (864) 208-0359 fax: (864) 208-0233 e-mail: other:		Defendant's Attorney: Joe Mooneyham, Bar No. 004041 Address: PO Box 8359, Greenville, SC 29605 phone: (864) 421-0036 fax: (864) 421-9060 e-mail: other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Motion to Dismiss Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type			
☐ Written motion attached ☐ Form Motion/Order I hereby move for relief of action by the court as set forth in the attached proposed order, Signature of Attorney for ☐ Plaintiff / ☒ Defendant Date submitted July 5, 2011			
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION		CLERK OF COURT SPARTANBURG COUNTY 2011 JUL -5 PM 4:17 M. HOPE BLANCHLEY	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:			
CLERK'S VERIFICATION			
Collected by: _____		Date Filed: _____	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2010-CP-42-5743

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

Plaintiffs,)

vs.)

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

Defendants.)

DEFENDANT WILLIAM MARK CASEY'S
MOTION TO DISMISS

TO: The plaintiffs, and F. Milton Mann, Jr., Esquire, their counsel:

YOU WILL PLEASE TAKE NOTICE that the undersigned, as counsel for Defendant William Mark Casey, will move this Honorable Court, on the tenth day after service hereof, or as soon thereafter as counsel may be heard, and at such time and place as the Court shall direct, for an Order, granting the following relief:

- 1) For an Order dismissing the plaintiffs' first cause of action against him.
- 2) For an Order dismissing the plaintiffs' second cause of action against him.

The grounds for the motion are that the plaintiffs' amended complaint fails to facts sufficient to constitute a cause of action against this defendant. The motion is made pursuant to Rule 12(b)(6), *South Carolina Rules of Civil Procedure*.

In the alternative, and as further grounds for the dismissal of the complaint, Defendant Casey will move for dismissal on the grounds that the plaintiffs have failed to join parties who

would be indispensable under Rule 19(b), *South Carolina Rules of Civil Procedure*. The motion is made pursuant to Rule 12(b)(7), *South Carolina Rules of Civil Procedure*.

The motion will be supported by any memoranda to be filed by the defendant, by the applicable precedents, and by such argument of counsel as the Court may allow.

Counsel hereby affirms that as this motion is a motion to dismiss, no consultation with opposing counsel is required, pursuant to Rule 11(a), *South Carolina Rules of Civil Procedure*.

Respectfully submitted,
Mooneyham, Berry & Karow, LLC



Joe Mooneyham, S.C. Bar No. 004041
Attorneys for Defendant William Mark Casey
Post Office Box 8359
Greenville, South Carolina 29604
864.421.0036 Fax 864.421.9060
joe@upstatetriallawyers.com

Greenville, South Carolina

July 5, 2011

CLERK OF COURT
SPARTANBURG COUNTY
2011 JUL -5 PM 4:17
H. HOPE BLANCHLEY

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Gregory J. Feldman, M.D., Joseph A.
Boscia, III, M.D., Upstate Lung and
Critical Care Specialists, P.C., and
Devendra T. Shantha, M.D.,

Plaintiffs,

v.

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

Defendants.

) IN THE COURT OF COMMON PLEAS

) SEVENTH JUDICIAL CIRCUIT

) C.A. NO.: 2010-CP-42-05743

) **DEFENDANT THOMPSON'S MOTION**
) **TO DISMISS AMENDED COMPLAINT**

Defendant, Ray E. "Chuck" Thompson, by and through his undersigned attorneys,
hereby moves this Honorable Court at such time and place as counsel may be heard for an Order
dismissing the Amended Complaint filed against him herein. This motion is made pursuant to
SCRCP Rule 12(b)(6) and is based on the fact that each cause of action pled in the Plaintiffs'
Complaint fails to state facts sufficient to constitute a cause of action and should be dismissed.
This motion is further based on SCRCP Rule 12(b)(7).

This motion may be supported by any memoranda as may be filed with the Court.

P. Christopher Smith, Jr. for

Matthew H. Henrikson (SC Bar #07897)

CLARKSON WALSH TERRELL & COULTER, P.A.

Attorneys for Defendant Thompson

Post Office Box 6728

Greenville, South Carolina 29606

Phone: (864) 232-4400

mhenrikson@clarksonwalsh.com

Dated: July 5, 2011
Greenville, South Carolina

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 JUL -7 AM 9:46
M. HOPE BLACKLEY

) IN THE COURT OF COMMON PLEAS

) SEVENTH JUDICIAL CIRCUIT

) C.A. NO.: 2010-CP-42-05743

)
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)
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)
) DEFENDANT CHARLES M. FOGARTY'S
) MOTION TO DISMISS PLAINTIFF'S
AMENDED COMPLAINT

Y.

)
)
)
)
)

Defendants.

To: Plaintiffs and their counsel:

Defendant Charles M. Fogarty, acting *pro se*, hereby moves this Honorable Court at such time and place as the parties may be heard to dismiss the Amended Complaint filed against him herein. This motion is made pursuant to SCRCF Rule 12(b)(6) and is based on the facts that each cause of action pled in the Plaintiffs' Amended Complaint fails to state facts sufficient to constitute a cause of action and should be dismissed.

This motion may be supported by any memoranda as may be filed with the Court.

Charles M Fogarty

Charles M. Fogarty
450 Mudd Creek Rd
Inman, SC 29349
Phone: (864) 431-6964
Fax: (864) 583-9360
cfogarty@medresearch.com

July 5, 2011
Spartanburg, South Carolina

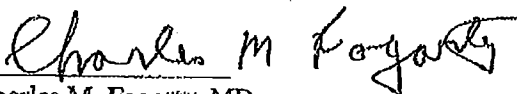
CERTIFICATE OF MAILING

The undersigned, by affixing his signature hereto, certifies that he has, on July 5, 2011, served a copy of this pleading by mailing a true and correct copy by United States Mail, first class postage prepaid and addressed as follows:

F. Milton Mann, Jr., Esquire
1089 Boiling Springs Road
Spartanburg, South Carolina 29303
Attorney for Plaintiffs

Joe Mooneyham
Post Office Box 8359
Greenville, South Carolina 29604
Attorney for Mark Casey

Matthew Holmes Henrikson
Post Office Box 6728
Greenville, South Carolina 29606
Attorney for Chuck Thompson


Charles M. Fogarty, MD, *pro se*

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2010-CP-42-5743

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

Plaintiffs,)

vs.)

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

Defendants.)

DEFENDANT CHARLES M. FOGARTY'S
MOTION TO DISMISS
SECOND AMENDED COMPLAINT

TO: The Plaintiffs, and F. Milton Mann, Jr., Esquire, their counsel:

YOU WILL PLEASE TAKE NOTICE that Charles M. Fogarty, acting pro se, will move this Honorable Court, on the tenth day after service hereof, or as soon thereafter as counsel may be heard, and at such time and place as the Court shall direct, for an Order, dismissing the Plaintiffs' Second Amended Complaint against him.

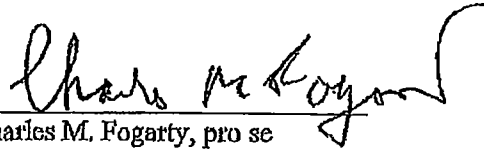
The grounds for the motion are that the Plaintiffs' Second Amended Complaint fails to state facts sufficient to constitute a cause of action against Charles M. Fogarty. The motion is made pursuant to Rule 12(b)(6), *South Carolina Rules of Civil Procedure*.

In the alternative, and as further grounds for the dismissal of the Second Amended Complaint, Charles M. Fogarty will move for dismissal on the grounds that the Plaintiffs have failed to join a party under Rule 19(a), *South Carolina Rules of Civil Procedure*. The motion is made pursuant to Rule 12(b)(7), *South Carolina Rules of Civil Procedure*.

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CLERK OF COURT
SPARTANBURG COUNTY
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HOPE BLANKEN

The motion will be supported by any memoranda to be filed by Charles M. Fogarty and
by the applicable precedents.

Respectfully submitted,



Charles M. Fogarty, pro se
450 Mudd Creek Rd
Inman, SC 29349
(864) 494-6106
(864) 583-9360 (fax)
cfogarty@medresearch.com

Spartanburg, South Carolina

October 25, 2011

FILED
CLERK OF COURT
SPARTANBURG COUNTY
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M. HOPE BLACKLEY

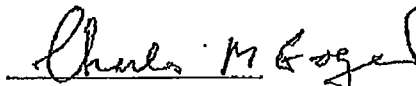
CERTIFICATE OF MAILING

The undersigned, by affixing his signature hereto, certifies that he has on October 25, 2011 served a copy of this pleading on the parties listed below by mailing a true and correct copy by United States Mail, first class postage prepaid and addressed as follows:

F. Milton Mann, Jr., Esquire
1089 Boiling Springs Road
Spartanburg, South Carolina 29303
Attorney for Plaintiffs

Joe Mooneyham
Post Office Box 8359
Greenville, South Carolina 29604
Attorney for Mark Casey

Matthew Holmes Henrikson
Post Office Box 6728
Greenville, South Carolina 29606
Attorney for Chuck Thompson


Charles M. Fogarty, MD, *pro se*
450 Mudd Creek Rd
Inman, SC 29349

FILED
CLERK OF COURT
SPARTANBURG COUNTY
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M. HOPE BLACKLEY

F. MILTON MANN, JR.

ATTORNEY AT LAW
LICENSED IN SC, GA & FL

COPY

August 28, 2012

Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: 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 - Case No. 2010-CP-5743

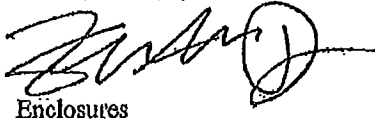
Dear Ms. Kitchings:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal on the Respondents.
- (2) A copy of the Orders which are to be challenged on Appeal.
- (3) A filing fee of \$100.00.

Respectfully submitted,

F. Milton Mann, Jr.



Enclosures

cc: Hope M. Blackely, Spartanburg County Clerk of Court (Enclosures)
Joe Mooneyham, Esquire (Enclosures)
Matthew H. Henrikson, Esquire (Enclosures)
Ellen Cheek, Esquire (Enclosures)

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 Appendix 61

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.

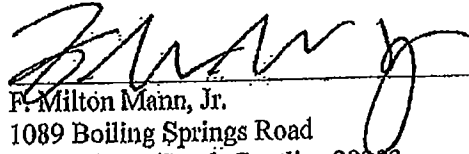
William Mark Casey, Ray E. "Chuck" Thompson,
And Charles M. Fogarty,

Respondents.

NOTICE OF APPEAL

Gregory J. Feldman, MD, Joseph A. Boscia, III, MD, Upstate Lung & Critical Care Specialists, PC, and Devendra Shantha, MD, appeal the Orders of the Honorable Letitia H. Verdin dated January 30, 2012, March 21, 2012, and April 30, 2012. Appellants received written notice of entry of the January 30, 2012 Form 4 Order (Exhibit A), indicating a formal order to follow, on February 7, 2012. Appellants received written notice of entry of the March 21, 2012 Order (Exhibit B) on March, 28, 2012. Appellants timely filed their Notice of Motion and Motion for Reconsideration and to Amend (Exhibit C) on April 9, 2012. Appellants received written notice of entry of the April 30, 2012 Form 4 Order (Exhibit D), indicating a formal order to follow, on May 16, 2012. Appellants inquired of the Court, by letter (Exhibit E), on August 24, 2012, as to when a formal order might be expected. Appellants received email notice (Exhibit F) on August 24, 2012, that no formal order would be forthcoming and that a clerical error had occurred indicating a formal order would follow the Form 4 Order dated April 30, 2012.

August 28, 2012

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

F. Milton Mann, Jr.
1089 Boiling Springs Road
Spartanburg, South Carolina 29303
(864) 680-5079
Attorney for Appellants

Other Counsel of Record:

Joe Mooneyham, Esquire (with enclosures)
Mooneyham, Barry & Karow, LLC
PO Box 8359
Greenville, South Carolina 29604
Phone: (864) 421-0036
Attorney for Respondent Casey

Matthew H. Henrikson, Esquire (with enclosures)
Henrickson Law Firm
1164 Woodruff Road
Greenville, South Carolina 29607
Phone: (864) 672-7106
Attorney for Respondent Thompson

Ellen Cheek, Esquire (with enclosures)
Wilkes Law Firm
127 Dunbar Street, Suite 200
Spartanburg, SC 29306
Phone: (864) 591-1113
Attorney for Respondent Fogarty

EXHIBIT A

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 Upstate Lung and Critical Care Specialists PC	Joseph A. Bosela, III Devendra T. Shanthan, MD	William Mark Casey Charles M. Fogarty MD.	Ray E. "Cluck" 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. Dismiss);
- ☐ Rule 43(b), SCRCP (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(b), 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:

5

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment is filed to real estate property and an 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

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 FEB -1 AM 11:41
K. HOPE S. ROWLEY

5

For Clerk of Court Office Use Only

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

Franklin Milton Mann, Jr., J. Milton Mann, Jr. Atty at Law,
1089 Bolling Springs Road, Spartanburg, SC 29303

ATTORNEY(S) FOR THE PLAINTIFF(S)

Court Reporter

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

Patricia A. ...

CLERK OF COURT
SPARTANBURG COUNTY
2012 FEB -1 AM 11:41
H. HOPE BLACKLEY

EXHIBIT B

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Gregory J. Feldman, MD, Joseph A. Boschn, 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 (Cl. 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. Oratoro*, 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

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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 bronchoscopy 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

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 trial, the jury returned a defense verdict in favor of Plaintiffs in this case. See Second Amended Complaint at ¶ 100.

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.

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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.

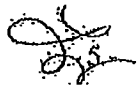
On January 18, 2012, at the hearing on Defendants' Motions to Dismiss Plaintiffs' Second Amended Complaint, Plaintiffs withdrew their civil conspiracy claim, expressly reserving the right to re-file such claim if additional facts were discovered during discovery in this case that Plaintiffs believed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

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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." *Montes 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 (2010) (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 Elev. 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 (Cl. 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 she 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. [illegible]*

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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 (Cl. 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.

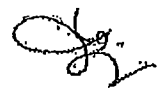
• In 2006, when the Medical Malpractice Action was filed, Plaintiffs knew that Casey and Thompson had filed a medical malpractice lawsuit against them, which suit Plaintiffs believed was for a purpose other than to redress legitimate medical injuries sustained by Casey. Plaintiffs knew Casey and Thompson were claiming that Plaintiffs had committed medical malpractices 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. 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 Bogarty's involvement in the Medical Malpractice Action until sometime during the pendency of

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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.

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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 Comty.*, 389 S.C. 546, 565, 698 S.E.2d 845, 855 (Cl. 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 "perpetrated 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 ¶¶ 199-221. 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 Falls To State A Claim Upon Which Relief Can Be Granted.

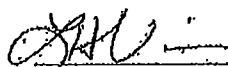
Because this Court finds that Plaintiffs' claims against Defendants for abuse of process and civil conspiracy are time-barred by the statute of limitations; the Court has not reached or ruled upon Defendants' additional arguments that Plaintiffs have failed to plead actionable claims for abuse of process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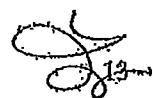


EXHIBIT C

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-42-5743

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

Plaintiffs,

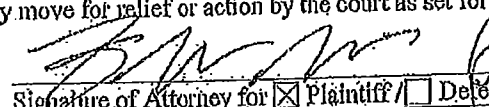
vs.

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

Defendants.

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

Plaintiffs' Attorney: F. Milton Mann, Jr., Bar No. 68250 Address: 1089 Boiling Springs Road, Spartanburg Phone: 864/680-5079 Fax 866/452-2276 E-mail: _____ Other: _____		Defendant's Attorney: *SEE DEFENSE ATTORNEY'S LISTED BELOW _____, Bar No. _____ Address: _____ Phone: _____ Fax: _____ E-mail: _____ Other: _____	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: <u>Reconsideration of March 21, 2012 Order and to Amend</u> Estimated Time Needed: 30 Minutes Court Reporter Needed: ☐ YES / ☒ NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for ☒ Plaintiff / ☐ Defendant		04/09/2012 Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$ ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE CODE _____ Date: _____	

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Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED - AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

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Attorney for Defendant Dr. Fogarty

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STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

Gregory J. Feldman, MD, Joseph A.
Bosola, III, MD, Upstate Lung and Critical
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Plaintiffs,

vs.

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Thompson, and Charles M. Fogarty, MD,

Defendants.

IN THE COURT OF COMMON PLEAS

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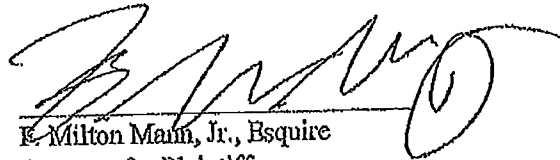
South Carolina Rules of Civil Procedure 52(b) and 59(e) and shall be made upon such grounds as it may appear at the hearing on such motion and any supporting memorandum.

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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CHARLESTON COUNTY
2012 APR -9 AM 11:58
M. JOSEPH LAKLEY

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

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 APR -9 AM 11:58
M. HOPE BLACKLEY

CERTIFICATE OF SERVICE

I, Holly Jo Mann, do hereby certify that I have served a copy of the **Motion and Order Information Form and Coversheet and Notice of Motion and Motion for Reconsideration and to Amend** by email and by placing copies in the U.S. Mail, first class postage prepaid, to the following addresses, on this 9th day of April, 2012:

Joe Mooneyham, Esquire
Mooneyham, Barry & Karow, LLC
PO Box 8359
Greenville, South Carolina 29604
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joe@upstatetrialattorneys.com
Attorney for Defendant Mr. Casey

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Holly Jo Mann, JD - Law Clerk for
F. Milton Mann, Jr., Esquire
Attorney for Plaintiffs
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Spartanburg, SC 29302
Phone: 864/680-5076
Fax: 866/452/2276
Milton.Mann@gmail.com

EXHIBIT D

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 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	

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 Plaintiff's Motion to Reconsider pursuant to Rule 59(e) SCRCP. Plaintiff's Motion to Reconsider and for Rehearing is denied.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

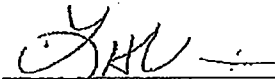
Additional Information for the Clerk:

5

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property. 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

 4/30/2012
 Date

5/14/12 For Clerk of Court Office Use Only 5/14/12

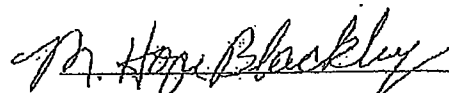
This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on, to attorneys of record or to parties (when appearing pro se) as follows:

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

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 PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)


 Hope Blackley - Spartanburg County Clerk Of Court


Court Reporter

MAY 14 9 12 AM
 M. HOPE BLACKLEY

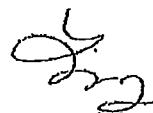


EXHIBIT E

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

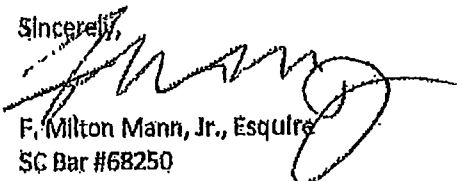
Re: Gregory Feldman, MD, et al v. William Mark Casey, et al
Case No. 2010-CP-42-5743

Dear Judge Verdin:

I hope this letter finds you well. We are in receipt of your Form 4 Order docketed 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 Henriksen, Esquire
Joe Mooneyham, Esquire
Mr. Overby - by email only

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

EXHIBIT F



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 11:16 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 bolling springs road
spartanburg, sc 29303
cell: 864/384-0421 <tel:864%2F384-0421>
fax: 866/452-2276 <tel:866%2F452-2276>

CERTIFICATE OF SERVICE

I, Holly Jo Mann, do hereby certify that I have served a copy of the Notice of Appeal by placing copies in the U.S. Mail, first class postage prepaid, to the following addresses, on this

28th day of August, 2012:

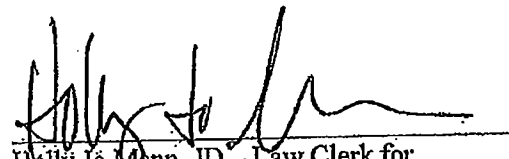
Joe Mooneyham, Esquire
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Ellen Cheek, Esquire
Wilkes Law Firm
127 Dunbar Street, Suite 200
Spartanburg, SC 29306
Phone: 864/591-1113

By hand-delivery to:

Hope M. Blackely,
Spartanburg County Clerk of Court
180 Magnolia Street
Spartanburg, SC 29306



Holly Jo Mann, JD -- Law Clerk for
F. Milton Mann, Jr., Esquire
Attorney for Appellants
1090 Boiling Springs Road
Spartanburg, SC 29302
Phone: 864/680-5076
Fax: 866/452/2276
Milton.Mann@gmail.com

Ellen Cheek

From: charles fogarty <cfogarty@medresearch.com>
Sent: Wednesday, February 13, 2013 2:46 PM
To: Ellen Cheek
Subject: FW: feldman v. casey

Charles M. Fogarty, MD
Spartanburg Medical Research
(864) 583-1556
(864) 431-6964 (Cell)

From: Couch, Roger L, Law Clerk (Mark A. Nowell) [mailto:rcouchlc@sccourts.org]
Sent: Wednesday, October 05, 2011 5:39 PM
To: holly mann; milton.mann@gmail.com; Joe Mooneyham(Joe@upstatetriallawyers.com); mhenrikson@clarksonwalsh.com; charles fogarty
Subject: RE: feldman v. casey

All:

There appears to be some confusion as to Judge Couch's ruling on the 12(b)(6) motions to dismiss in the above-referenced case. Since my September 30th email did not indicate any deficiencies in the abuse of process cause of action, Plaintiffs appear to have inferred that Judge Couch was denying Defendants' motions as to that claim. This is not the Court's intention. Rather, my email was only meant to inform Plaintiffs that the Court had granted them leave to amend for a second time. The Defendants' motions have not been denied as to the abuse of process cause of action. Moreover, even though my email did specify some deficiencies in Plaintiffs' civil conspiracy claim, Judge Couch did not grant the motions as to that claim.

Bottom-line: The Court has neither denied nor granted any part of Defendants' 12(b)(6) motions to dismiss. Rather, the Court's ruling is that Plaintiffs are permitted to amend for a second time in order to fix all shortcomings in their Complaint. Defendants' motions to dismiss shall be continued until after service of the Second Amended Complaint. Plaintiffs will have 30 days to file a Second Amended Complaint following the issuance of an order. Defendants will have 15 days to respond to the Second Amended Complaint. Defendants need not answer the First Amended Complaint prior to the filing of the Second Amended Complaint. 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

From: holly mann [mailto:holly.jo.mann@gmail.com]
Sent: Wednesday, October 05, 2011 4:26 PM
To: Couch, Roger L, Law Clerk (Mark A. Nowell); milton.mann@gmail.com; Joe

Mooneyham(Joe@upstatetriallawyers.com); mhenrikson@clarksonwalsh.com; [charlesfogarty](mailto:charlesfogarty@medresearch.com)
(cfogarty@medresearch.com)
Subject: feldman v. casey

gentlemen -

attached please find the letter to judge couch, coversheet and draft proposed order. i understand that certain parties have concerns with the language utilized in the draft proposed order. i ask that you address those concerns directly with judge couch.

thank you and, i look forward to hearing from you.

FMMjr/hjm

...
holly mann, j.d.
1089 boiling springs road
spartanburg, sc 29303
cell: 864/384-0421
fax: 864/208-0233

Certificate of Counsel

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

May 6, 2013



Michael B. T. Wilkes (SC Bar # 6107)

mwilkes@wilkeslaw.com

Ellen S. Cheek (SC Bar # 69642)

echeel@wilkeslaw.com

WILKES LAW FIRM, PA
127 Dunbar Street, Suite 200
Spartanburg, South Carolina 29306
(864) 591-1113
(864) 591-1767 (fax)

Attorneys for Respondent Charles M. Fogarty, MD

COPY

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.

JOINT BRIEF OF RESPONDENTS

Joe Mooneyham
Mooneyham, Barry
& Pope, LLC
P.O. Box 8359
Greenville, SC 29604
Attorney for: William
Mark Casey

Matthew H. Henrikson
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"Chuck" Thompson

Michael B.T. Wilkes
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M. Fogarty

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STATEMENT OF THE ISSUES ON APPEAL

- I. Whether The Circuit Court Correctly Held That Appellants' Abuse Of Process Claim Is Time-Barred And Dismissed That Claim With Prejudice.
- II. Whether the Circuit Court Correctly Refused To Equitably Toll The Statute Of Limitations As To Appellants' Abuse Of Process Claim.
- III. Whether The Circuit Court Properly Dismissed Appellants' Civil Conspiracy Claim With Prejudice On Grounds That It Is Time-Barred.
- IV. Whether The Circuit Court Properly Denied Appellants' Request For Leave To File A Third Amended Complaint.

STATEMENT OF THE CASE

Appellants commenced this matter on October 27, 2010, claiming Respondents engaged in abuse of process and civil conspiracy with respect to an underlying medical malpractice suit that was filed against Appellants in 2006, *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*, in the Court of Common Pleas for Spartanburg County, Seventh Judicial Circuit, Case No. 2006-CP-42-1728 (the "Medical Malpractice Action").¹ (R. at 22, ¶ 4.) Appellants contend the plaintiff in the Medical Malpractice Action, Respondent William Mark Casey ("Casey"), and his lawyer, Respondent Ray E. ("Chuck") Thompson ("Thompson"), conspired with pulmonologist Respondent Charles M. Fogarty ("Fogarty") to injure Appellants by instituting the Medical Malpractice Action and maintaining therein claims that Appellants breached their applicable standard of medical care in treating Casey, and caused Casey to suffer permanent brain injury. (R. at 22-40.) In an order dated March 21, 2012, and filed on

¹ Plaintiffs' Second Amended Complaint does not specify the date the Medical Malpractice Action was filed; but the action's case number (2006-CP-42-1728) indicates the suit was filed in 2006. (Second Am. Compl. ¶ 4.)

March 23, 2012, the Circuit Court granted Respondents' motions to dismiss Appellants' Second Amended Complaint, ruling that Appellants' claims for abuse of process and civil conspiracy are time-barred. (R. at 4-16.) Appellants have appealed the Circuit Court's order. (R. App. at 62-97.)

The facts as alleged by Appellants, in the light most favorable to them, are as follows.^{2, 3} Casey filed the Medical Malpractice Action in 2006, in relation to medical services and treatment Appellants provided him after Casey experienced chest pain at work on May 28, 2004. (R. at 23-24, ¶¶ 6-13.) Upon Casey's admission to the hospital that day, he received a chest x-ray that showed a small metallic foreign body in the x-ray field. (R. at 23, ¶ 8.)⁴ To "clinical[ly] correlate" (or investigate) the foreign body shown on the x-ray, Appellant Boscia, a pulmonologist who practices with Appellant Upstate Lung and Critical Care Specialists, PC ("Upstate Lung"), performed on Casey a flexible bronchoscopy,⁵ which did not reveal a foreign object in Casey's lungs. (R. at 23, ¶ 9.) Several days later, Boscia's medical partner at Upstate Lung, Appellant Feldman, and the

² When reviewing a motion to dismiss, the appellate court applies the same standard of review as the lower court; so the facts alleged and inferences reasonably deducible therefrom must be viewed in the light most favorable to the plaintiff. *Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 6, 732 S.E.2d 876, 878 (2012).

³ Respondents unqualifiedly deny Appellants' claims that they engaged in any wrongdoing as to Appellants. The factual recitations set forth herein are drawn directly from Appellants' Second Amended Complaint for the exclusive purpose of this Court's consideration under the applicable standard of review, which requires the pleadings to be construed in the light most favorable to Appellants.

⁴ The foreign object was a screw that was not located inside Casey's chest, but instead had fallen out of the x-ray's slide casing into the x-ray screen.

⁵ Bronchoscopy is the "[i]nspection of the interior of the tracheobronchial tree through a bronchoscope." *STEDMAN'S MEDICAL DICTIONARY* 271 (28th ed. 2006). A bronchoscope is "[a]n endoscope for inspecting the interior of the tracheobronchial tree, either for diagnostic purposes (including biopsy) or for the removal of foreign bodies. There are two types: flexible and rigid." *Id.*

attending anesthesiologist, Appellant Shantha, performed a rigid bronchoscopy on Casey. (R. at 23-24, ¶¶ 10, 12.) During that procedure, Casey suffered a pneumothorax,⁶ for which he was hospitalized. (R. at 24, ¶ 13.)

After Casey was discharged from the hospital in June 2004, he complained to Appellants Feldman and Boscia that he suffered from forgetfulness, short-term memory loss, personality changes and permanent disability caused by the rigid bronchoscopy and resulting pneumothorax. (R. at 24, ¶¶ 14-16.) Casey, who allegedly had abused prescription drugs and was facing “significant stressors” in his life at that time, including financial difficulties and a divorce, also asked Feldman and Boscia to increase his pain medications and support a disability claim. (R. at 29, ¶¶ 54-56.) Feldman and Boscia believed Casey’s complaints and requests were not medically supported; so they rejected Casey’s complaints, and refused to support his effort to obtain disability benefits and narcotics. (R. at 29, ¶ 56.)

In 2004, after Feldman and Boscia refused to continue treating Casey, Casey began treating with a psychologist and therapist in Spartanburg. (R. at 29, ¶¶ 58-59.) Casey also became a patient of Respondent Fogarty, a pulmonologist and medical researcher who previously had been medical partners with Feldman, and who operates a medical research business in competition with Feldman and Boscia’s own medical research business. (R. at 24, ¶¶ 18-22.) Upon assuming Casey’s treatment, Fogarty reviewed Casey’s medical records, including those relating to Casey’s bronchoscopies

⁶ A pneumothorax is “[t]he presence of free air or gas in the pleural cavity.” *STEDMAN’S MEDICAL DICTIONARY* 1526 (28th ed. 2006). An “iatrogenic pneumothorax” is one “caused by a medical procedure, most often central venous catheter insertion, thoracentesis, or transbronchial and transthoracic lung biopsy.” *Id.*

and pneumothorax, and saw Casey at Fogarty's medical office and Fogarty's medical research facility. (R. at 24, ¶ 18; R. at 27, ¶ 40; R. at 28, ¶ 48.) Based thereon, Fogarty began developing in 2004 the opinion that during Casey's rigid bronchoscopy, he suffered a cerebral air embolism⁷ that resulted in permanent brain injury; and that Appellants deviated from the applicable standard of medical care in treating Casey. (R. at 25, ¶ 28; R. at 26, ¶ 31.)

In early 2005, Feldman and Boscia sued Fogarty through their medical research company, S. Carolina Pharmaceutical Research ("S. Carolina"), alleging that Fogarty was interfering with S. Carolina's business efforts. (R. at 25, ¶¶ 23-26.) Appellants claim that during the course of that litigation, Fogarty determined to use his position as Casey's treating physician to retaliate against Feldman and Boscia for suing him. (R. at 25, ¶ 26.) Specifically, Fogarty continued to develop his theory that Casey had suffered a permanent brain injury because Feldman, Boscia, and Shantha had deviated from the applicable standard of medical care in treating Casey. (R. at 25, ¶¶ 26-29; R. at 26, ¶¶ 33-36.) Fogarty did not refer Casey to a neurologist or order an MRI of Casey's brain in relation to this opinion.^{8,9} (R. at 26, ¶ 34.) On July 21, 2005, Fogarty "prominently"

⁷ An embolism is an "[o]bstruction or occlusion of a vessel by an embolus," *i.e.*, "a plug, composed of a detached thrombus or vegetation, mass of bacteria, or other foreign body, occluding a vessel." *STEDMAN'S MEDICAL DICTIONARY* 626, 627 (28th ed. 2006). An air embolism is an embolism "caused by air bubbles in the vascular system[.]" *Id.* at 626.

⁸ MRI is an "[a]bbreviation for magnetic resonance imaging. *STEDMAN'S MEDICAL DICTIONARY* 1232 (28th ed. 2006). Magnetic resonance imaging "is a nonionizing (non-x-ray) technique using magnetic fields and radio frequency waves to visualize anatomic structures." *Id.* at B13.

⁹ Fogarty did not believe an MRI would indicate whether Casey had, in fact, suffered an air embolism and/or permanent brain injury. He did not order an MRI,

noted his opinion that Casey had suffered a “permanent brain injury” in Casey’s medical records. (R. at 25, ¶ 28; R. at 26, ¶ 36.) According to Appellants, Fogarty intended for this brain injury theory to be the basis for Casey to claim and receive disability benefits, and to be the “cornerstone of orchestrated ‘expert’ testimony” against Appellants in the Medical Malpractice Action. (R. at 27, ¶¶ 37-38.)¹⁰

In 2005 and 2006, Respondent Thompson, a Spartanburg lawyer who went to high school with Casey, provided Casey legal assistance in relation to Casey’s applications for disability benefits. (R. at 28, ¶ 49; R. at 31, ¶ 75; R. at 32, ¶ 77.) Because Fogarty was Casey’s treating’s physician, Thompson consulted Fogarty and included Fogarty’s opinion regarding Casey’s medical condition and Fogarty’s office notes regarding same in Casey’s applications for private and Social Security disability benefits. (R. at 27, ¶ 37; R. at 31, ¶¶ 74-76.)

Also in 2006, Thompson filed the Medical Malpractice Action on Casey’s behalf, alleging that Appellants breached the standard of care with respect to Casey’s medical treatment, causing him damage that include neurological injury and permanent disability. (R. at 23, ¶¶ 4-6.) Appellants claim that this suit lacked any legitimate medical basis, and that Casey filed the Medical Malpractice Action in order to obtain narcotics and disability benefits; Thompson filed the suit to obtain disability benefits for Casey; and Fogarty intended the suit to damage his business competitors and induce them to dismiss the S.

because Fogarty understands that unless an MRI is taken contemporaneously with an air embolism’s occurrence, the MRI may not detect whether an air embolism occurred; and that an MRI may not be a reliable indicator of whether a patient suffered a brain injury from an air embolism.

¹⁰ The Medical Malpractice Action was not filed until 2006. *See supra* note 1.

Carolina lawsuit against Fogarty. (R. at 25, ¶¶ 27, 29; R. at 27, ¶¶ 37-38; R. at 35, ¶¶ 105-108; R. at 36, ¶¶ 110-111.) Thompson identified Fogarty as a fact witness and later as an expert witness in the Medical Malpractice Action, and also consulted Fogarty on occasions with respect to medical matters relating to that case.¹¹ (R. at 27, ¶ 42; R. at 28, ¶ 46; R. at 31, ¶ 76.)

In February 2007, during the course of discovery in the Medical Malpractice Action, Thompson arranged for Casey to obtain from Thompson's brother-in-law in North Carolina an MRI of Casey's brain under a fictitious name and date of birth. (R. at 33, ¶¶ 86-90.) Thompson and Casey did not reveal the MRI, which a radiologist reported was negative for indicia of brain injury, to Appellants. (R. at 33, ¶¶ 88-91; R. at 38, ¶ 126.) Fogarty was not involved in, nor did he know about, Casey's having the MRI; and Fogarty was not involved in, nor did he know about, Thompson's and Casey's discovery-related efforts with respect to the MRI. (R. at 22-43.) Appellants and Fogarty learned of the MRI after one of Appellants' lawyers in the Medical Malpractice Action received an anonymous letter regarding it.¹² (R. at 33, ¶ 92.)

The Medical Malpractice Action was tried before a Spartanburg County jury beginning on May 11, 2010. (R. at 34, ¶ 99.)¹³ On May 28, 2010, after a 14-day trial,

¹¹ Although Fogarty was deposed in the Medical Malpractice Action (R. at 27, ¶ 41), he did not testify at the trial of that case.

¹² According to Appellants' Brief, Appellants' trial counsel received this anonymous letter in August 2008. (Appellants' Br. at 19.)

¹³ Although Appellants claim Fogarty's opinion that Casey suffered a brain injury is "unfounded" and not medically supported (R. at 25, ¶ 27; R. at 36, ¶¶ 31-35), other medical experts in the Medical Malpractice Action testified that Casey had suffered a permanent brain injury as a result of Appellants' treatment of Casey. This issue was disputed to the extent that the case was tried for two weeks. (R. at 34, ¶¶ 99-100.)

the jury returned a defense verdict in favor of Appellants. (R. at 34, ¶ 100.)

On October 27, 2010, Appellants filed their initial Complaint in this case, claiming Respondents engaged in abuse of process and civil conspiracy in relation to the Medical Malpractice Action. (R. App. at 2-12.) Respondents timely filed respective motions to dismiss the Complaint, arguing that Appellants' claims for abuse of process and civil conspiracy are time-barred, and that Appellants' Complaint failed to state facts sufficient to maintain those claims. (R. App. at 11-12; R. App. at 13; R. App. at 15-28.) The Circuit Court heard these motions on May 19, 2011, and took them under advisement.

On June 16, 2011, before the Circuit Court issued its ruling, Appellants filed their Amended Complaint without leave of court. (R. App. at 34.) Casey, Thompson, and Fogarty moved to dismiss that amended pleading, again on grounds that Appellants' abuse of process and civil conspiracy claims are time-barred, and that the amended pleading failed to state facts sufficient to constitute a cause of action against Respondents. (R. App. at 53-54; R. App. at 55; R. App. at 56.)

On August 29, 2011, before the Circuit Court ruled on Casey's and Fogarty's motions, Appellant filed a Motion to Amend Complaint, seeking leave to file a second amended pleading. (R. App. at 31-32.) After the Circuit Court heard arguments on Appellants' and Respondents' motions and took them under advisement,¹⁴ the court's law clerk sent the parties an email advising that the court planned to allow Appellants to amend their pleading a second time, and directing Appellants to "specifically plead the

¹⁴ This hearing occurred on September 8, 2011.

existence of special damages in the civil conspiracy cause of action as well as allege facts tying Defendant Casey to the alleged civil conspiracy.” (R. at 103.) The law clerk subsequently advised that while his prior email did not indicate any deficiencies in Appellants’ abuse of process cause of action, the Circuit Court was not denying Respondents’ motions to dismiss that claim, but was granting Appellants leave to amend their pleading “for a second time in order to fix all shortcomings in their Complaint,” and was continuing Respondents’ motions to dismiss until after the service of the Second Amended Complaint. (R. App. at 98-99.) On October 6, 2011, the Circuit Court issued an order, which was filed on October 7, 2011, reserving ruling on Respondents’ motions to dismiss, and granting Appellants leave to amend their pleading a second time. (R. at 2-3.)

On October 11, 2011, Appellants filed their Second Amended Complaint. (R. at 22-43.) Again in lieu of filing an answer, Fogarty moved to dismiss Appellants’ pleading. (R. App. at 58-60.) Casey and Thompson rested on their prior motions to dismiss, which the Circuit Court had continued. (R. at 2-3.)

On January 18, 2012, the Circuit Court held a hearing on Fogarty’s Motion to Dismiss Appellants’ Second Amended Complaint, and Casey’s and Thompson’s previously-filed motions to dismiss Appellants’ pleadings. (R. at 66, lines 6-7; R. at 67, lines 12-13.)¹⁵ At the beginning of that hearing, with the agreement of Respondents’ counsel, Appellants’ counsel dismissed Appellants’ civil conspiracy claim without prejudice. (R. at 67, lines 12-24.) The hearing proceeded as to Appellants’ abuse of

¹⁵ Although this hearing was held on January 18, 2012, the hearing transcript erroneously indicates that the hearing was held on February 18, 2012.

process claim. (R. at 67, line 25 – R. at 68, lines 1-3.)

On March 21, 2012, the Circuit Court issued an order, filed on March 23, 2012, granting Respondents' Motions to Dismiss Plaintiffs' Second Amended Complaint. (R. at 4-16.) The Circuit Court held the applicable three-year statute of limitations on Appellants' abuse of process claim expired before Appellants filed this action in October 2010, because Appellants had notice of a potential claim for abuse of process in 2006, when the Medical Malpractice Action was filed against them. (R. at 11-14.) The Circuit Court also held that the three-year statute of limitations on Appellants' civil conspiracy claim began to run when the Medical Malpractice Action was instituted in 2006, and that Appellants therefore are time-barred from reasserting that claim against Respondents at any time in the future. (R. at 14-16.) The Circuit Court did not reach or rule on Respondents' arguments that Appellants failed to plead actionable claims for abuse of process and civil conspiracy. (R. at 16.)

Appellants subsequently moved for reconsideration and for leave to amend their Second Amended Complaint. (R. at 41-43.) On May 14, 2012, the Circuit Court issued an order denying Appellants' motion for reconsideration and to amend. (R. at 20.)

ARGUMENT

I. The Circuit Court Correctly Held That Appellants' Abuse Of Process Claim Is Time-Barred And Dismissed That Claim With Prejudice.

The Circuit Court properly found that Appellants' abuse of process claim is time-barred and dismissed that claim, because the facts alleged in Appellants' Second Amended Complaint clearly show that the three-year statute of limitations on that claim began to run in 2006, when Appellants were served with the Medical Malpractice Action.

A. Standard of Review.

In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review used by the trial court. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001). The appellate court is required to view the evidence and inferences that reasonably can be drawn from the evidence in the light most favorable to the non-moving party. *Id.* The appellate court properly sustains the circuit court's grant of a motion to dismiss if the facts alleged in the complaint do not support relief under any theory of law. *Id.*

B. Abuse of Process.

1. Legal elements.

"An abuse of process is the employment of legal process for some purpose other than that which it was intended by the law to effect." *Food Lion, Inc. v. United Food & Commercial Workers Intern. Union*, 351 S.C. 65, 69, 567 S.E.2d 251, 253 (Ct. App. 2002) (citation and internal punctuation omitted). 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). "The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 403, 697 S.E.2d 551, 556 (2010).

2. Statute of limitations.

Abuse of process claims are governed by a three-year statute of limitations period.

S.C. Code Ann. § 15-3-530 (2005); *Whitfield Const. Co. v. Bank of Tokyo Trust Co.*, 338 S.C. 207, 525 S.E.2d 888 (Ct. App. 1999). “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 (2010) (citations and internal punctuation omitted).

The limitations period established by S.C. Code Ann. § 15-3-530 (2005) 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). Therefore, 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 limitations begins to run on 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 Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981).

The discovery rule thus focuses on when the complaining party acquired knowledge of any existing facts sufficient to put the party on inquiry which, if developed, would disclose alleged wrongdoing. *Burgess v. American Cancer Soc., South Carolina Div., Inc.*, 300 S.C. 182, 186-87, 386 S.E.2d 798, 800 (Ct. App. 1989). "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.* The statute of limitations therefore begins to run on 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 she 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) (citation omitted).

The date on which discovery of the cause of action should have been made is an objective question. *Estate of Livingston v. Livingston*, 2013 WL 342675, *4 (Ct. App. 2013); *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 Dep't of Corrections*, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999).

C. The Statute Of Limitations Began to Run On Appellants' Abuse of Process Claim When the Medical Malpractice Action was Served in 2006.

Appellants' abuse of process claim is time-barred because the facts alleged in the Second Amended Complaint, when taken in the light most favorable to Appellants, show that such claim arose at least when Appellants were served with the Medical Malpractice Action in 2006, over three years before Appellants filed the current action in 2010.

1. Appellants' claim is time-barred because they knew they possessed an abuse of process claim when the Medical Malpractice Action was instituted.

Appellants knew or should have known that they possessed an abuse of process claim when they were served with the Medical Malpractice Action, because it is an abuse of process for a plaintiff to file a medical malpractice lawsuit against his treating physician not for the purpose of seeking redress for injuries resulting from substandard care, but instead for the purpose of obtaining narcotics and disability benefits; and because this is precisely what Appellants believed Casey was doing when Thompson and he instituted the Medical Malpractice Action. Specifically:

- In 2004, before the Medical Malpractice Action was filed, Appellants knew Casey claimed he had suffered brain injury and permanent disability as a result of the pneumothorax Casey experienced during the rigid bronchoscopy. Casey also had asked Appellants Feldman and Boscia to increase his prescription drugs and support his disability claim. Appellants believed Casey's claims of injury and permanent disability, and his request for increased prescription drugs, were illegitimate and lacked medical support, and Appellants ceased treating Casey as a patient. (R. at 24, ¶¶ 13-18; R. at 29, ¶ 56.)

- In 2006, when the Medical Malpractice Action was served against them, Appellants knew Casey and Thompson had filed legal process against them, and were claiming that Appellants had breached their standard of care in treating Casey. Appellants did not believe they had committed malpractice in treating Casey, nor did they believe Casey had suffered physical harm as a result of that treatment. (R. at 23, ¶¶ 4-5.)

- Appellants believed Casey and Thompson filed the Medical Malpractice Action for a purpose other than to redress legitimate medical injuries sustained by Casey. Appellants believed Casey's motivation for filing the Medical Malpractice Action was to obtain prescription pain medication and disability benefits, and that Thompson filed that suit to obtain disability benefits for Casey. (R. at 35, ¶¶ 106-107; R. at 36, ¶¶ 110-111.)

In sum, when Appellants were served with the Medical Malpractice Action in 2006, they possessed facts supporting both elements of an abuse of process claim: Appellants knew (1) Casey and Thompson had alleged, ulterior purposes in filing

the Medical Malpractice Action against Appellants, and (2) Casey and Thompson allegedly sought to use that lawsuit in a manner in which it was not intended to be used. *See Food Lion*, 351 S.C. at 69-70, 567 S.E.2d at 253. Appellants believed the suit was an abuse of process, because Appellants already had determined that Casey had not sustained any permanent injury, and because they believed Casey was seeking to obtain prescription narcotics and disability benefits. *See Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 209, 153 S.E.2d 693, 694 (1967) (explaining improper purpose element of abuse of process claim); R. at 35, ¶¶ 106-107 and R. at 36, ¶¶ 110-111 (specifying Respondents' alleged ulterior motives); R. at 98, lines 23-25 – R. at 99, lines 1-5 (summarizing Appellants' contentions regarding Respondents' alleged "ulterior motives"). Appellants also believed the actual filing of the Medical Malpractice Action was a willful act committed with the intent of achieving Respondents' alleged ulterior motives. *See Food Lion*, 351 S.C. at 71, 567 S.E.2d at 253 (explaining willful act element of abuse of process claim); R. at 35, ¶¶ 106-108, R. at 36, ¶¶ 109-111, R. at 36, ¶¶ 113-114 (specifying Respondents' alleged willful acts of using suit to advance improper motives); and R. at 99, lines 7-14 ("[W]ithin the four corners of the [Second Amended] Complaint, the willful acts as to what these individuals were trying to do and trying to accomplish as best as we know today prior to discovery are alleged in [paragraphs] 106, 107 and 108, 109, 110, 111, 113, 114. And the term "willfully" and "willingly" is used repeatedly. Why? Because that's the requirement of the pleading at this juncture.") The statute of limitations on Appellants' abuse of process claim thus began to run at least from the date the Medical Malpractice Action was filed in 2006, and prevents Appellants from maintaining that claim in this case, which was filed in

2010. *See Gibson*, 383 S.C. at 406, 680 S.E.2d at 782.

2. The discovery rule bars Appellants' claim even if they did not fully learn Fogarty's role in the Medical Malpractice Claim until 2008.

Significantly, the discovery rule bars Appellants' abuse of process claim regardless of the fact that Appellants claim they were unaware of Fogarty's involvement in and motivations with respect to the Medical Malpractice Action until Fogarty was deposed on December 22, 2008. (Appellants' Br. at 18.) 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 Appellants on grounds and for purposes they believe were illegitimate – “not the date of the discovery of the wrongdoer.” *Wiggins*, 314 S.C. at 128, 442 S.E.2d at 170. “[U]nder South Carolina law, the date when a plaintiff learns of a potential new defendant has absolutely no bearing on the timing of the statute of limitations.” *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 371, 597 S.E.2d 27, 29 (Ct. App. 2004). Although Appellants allege Fogarty's “involvement” in the Medical Malpractice Action was concealed from Appellants until the “11th hour” of that case (R. at 27, ¶ 42), the claimed fact that Appellants did not know the identity of all alleged wrongdoers in that suit or their particular alleged motivations regarding it did not prevent the statute of limitations from running when the action was instituted. *See Wiggins*, 314 S.C. at 128, 442 S.E.2d at 170. This is because the service of the Medical Malpractice Action reasonably put Appellants – who believed the suit to be meritless and only interposed to harm them (R. at 24, ¶ 18; R. at 26, ¶ 30; R. at 29, ¶ 56) – on notice that some right of theirs may have been invaded, regardless of whether Appellants knew the identity of the alleged wrongdoer(s) other than Casey and

Thompson, whose identities and roles were evident from the pleading. *See Young*, 333 S.C. at 719, 511 S.E.2d at 416. Because Appellants had notice in 2006 that they possessed an abuse of process claim, the alleged fact that Appellants did not comprehend the full extent of their damage and/or Fogarty's involvement in or with respect to that action is immaterial. *Grillo v. Speedrite Products, Inc.*, 340 S.C. 498, 503, 532 S.E.2d 1, 3 (Ct. App. 2000).

3. Fogarty's alleged role in the Medical Malpractice Action was easily determinable through the exercise of reasonable diligence.

That the statute of limitations began to run when Appellants were served with the Medical Malpractice Action also is clear because that suit gave Appellants sufficient information which, through the exercise of reasonable diligence, they could have developed to disclose Fogarty's alleged wrongful involvement in that lawsuit. *See Snell*, 276 S.C. at 303, 278 S.E.2d at 334. "[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 n.3, 718 S.E.2d 220, 224 n.3 (Ct. App. 2011). In fact, "the general rule is that expert testimony is required in a [medical] malpractice case to show that the defendant failed to conform to the required standard, which is, such reasonable and ordinary knowledge, skill and diligence as physicians in similar neighborhoods and surroundings ordinarily use under like circumstances." *Green v. Lilliewood*, 272 S.C. 186, 192, 249 S.E.2d 910, 913 (1978) (citation omitted).

Whether a patient experiencing a pneumothorax has suffered an air embolism resulting in a brain injury falls outside the knowledge and experience of laypersons. A

reasonable person in Appellants' position therefore would have known 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 Appellants believed the suit to be baseless, Appellants knew or should have known that some alleged claim against that medical expert might exist.

Further, Appellants knew in 2004 that Fogarty had assumed Casey's medical care; so when the Medical Malpractice Action was filed in 2006, Appellants could have quickly subpoenaed Casey's medical records from Fogarty and/or noticed Fogarty's deposition in order to determine his opinion regarding Casey's alleged medical condition. In fact, Appellants did subpoena Casey's medical records from Fogarty, and later deposed Fogarty. (R. at 24, ¶ 18; R. at 27, ¶ 41.) While Appellants claim Fogarty sought to "evade his deposition," Appellants also admit that Casey's medical records "prominently and categorically reflected [Fogarty's] baseless injury assertions." (R. at 26, ¶ 36; R. at 27, ¶ 41.) These allegations prove that Fogarty's identity as a potential wrongdoer, and his alleged involvement in the claimed abuse of process, were easily determinable to Appellants through the exercise of reasonable diligence. Because Fogarty's identity and alleged "role" in the Medical Malpractice Action were facts and circumstances Appellants could have developed through the exercise of ordinary care and reasonable diligence when they were served with the Medical Malpractice Action was filed in 2006, Appellants' claim for abuse of process is time-barred.

D. Appellants' Claim That Respondents Concealed Facts During Discovery in the Medical Malpractice Action Does Not Toll the Statute of Limitations' Running on Appellants' Abuse of Process Claim.

Appellants argue that the statute of limitations on their abuse of process claim did

not begin running when they were served with the Medical Malpractice Action in 2006, because Respondents actively concealed “essential facts in establishing the necessary elements of their causes of action” until 2008. (Appellants’ Br. at 19-20.) According to Appellants, these essential facts were (1) Fogarty’s alleged role and level of involvement in the Medical Malpractice Action, which Appellants claim they learned during Fogarty’s deposition on December 20, 2008; and (2) that Thompson and Casey had secretly obtained an MRI and concealed the results thereof, which Appellants learned in August 2008. (Appellants’ Br. at 19-20.)

1. The statute of limitations began running when the Medical Malpractice Action was filed in 2006, and not when Fogarty was deposed in December 2008.

Appellants cannot avoid application of the statute of limitations to their abuse of process claim by arguing that they did not discover the extent of Fogarty’s alleged purpose and role in the Medical Malpractice Action until Fogarty’s deposition in that case in 2008. (R. at 26, ¶¶ 31-36; R. at 27, ¶¶ 37-42; R. at 35, ¶ 108; R. at 36, ¶109; Appellants’ Br. at 18.) As discussed above, South Carolina law clearly holds that the statute of limitations runs on a party’s cause of action even if that party claims ignorance of existing facts and circumstances, if the party could have known those facts and circumstances through the exercise of ordinary care and reasonable diligence. *Burgess*, 300 S.C. at 186-87, 386 S.E.2d at 800. Appellants’ abuse of process claim is time-barred because they admit knowing in 2006 that Casey and Thompson filed a medical claim Appellants believed was interposed for wrongful purposes, and that Fogarty had been Casey’s treating physician since 2004. (R. at 24, ¶ 18; R. at 27, ¶ 42.) Because these known facts were sufficient to put Appellants on notice in 2006 that they possessed an

abuse of process claim at least against Casey and Thompson, Appellants' argument that they did not know the *extent* of Fogarty's role and involvement in the Medical Malpractice Action until December 2008 is wholly irrelevant. (Appellants' Br. at 18.)

Specifically, Appellants allege that in 2004, Fogarty began to develop a theory that Casey suffered a cerebral air embolism during the rigid bronchoscopy, and that Fogarty noted this in Casey's medical records on July 21, 2005, all with the purpose of injuring Appellants. (R. at 25, ¶¶ 27-28; R. at 26, ¶¶ 31-36.) Appellants claim Fogarty then "initiated" the Medical Malpractice Action and "orchestrated 'expert' testimony" in that suit in an attempt to damage Feldman's and Boscia's reputations and businesses. (R. at 25, ¶¶ 23-27; R. at 35, ¶ 108.) Appellants claim Fogarty and Thompson attempted to conceal Fogarty's "role as a mastermind of the lawsuit" and his "involvement in the execution of the 'permanent brain injury' scheme" by making material misrepresentations; by Fogarty's seeing Casey at Fogarty's medical research facility instead of Fogarty's medical practice; and by attempting to "obstruct and evade his deposition." (R. at 27, ¶¶ 38-42; R. at 35, ¶ 108.)¹⁶ According to Appellants, Respondents succeeded in shielding these alleged matters from Appellants until Fogarty's deposition in the Medical Malpractice Action on December 22, 2008. (*See* R. at 27, ¶ 41.)

Appellants' contentions and arguments do not alter the fact that the three-year statute of limitations began running on Appellants' abuse of process claim when

¹⁶ The Second Amended Complaint does not detail Fogarty's alleged material misrepresentations, nor does it explain how Fogarty allegedly attempted to evade his deposition. (R. at 22-40.) Again, Respondents deny Appellants' claims.

Appellants were served with the Medical Malpractice Action in 2006. Whether Appellants subjectively were unaware of Fogarty's alleged motivations and involvement until December 2008 has "absolutely no bearing on the timing of the statute of limitations." *Cline*, 359 S.C. at 371, 597 S.E.2d at 29; *Wiggins*, 314 S.C. at 128-29, 442 S.E.2d at 170. This is because Appellants objectively knew of their alleged injury in 2006 – *i.e.*, that Casey and Thompson had filed a medical malpractice claim that Appellants believed was imposed for an improper purpose – and because they knew or should have known then that "some claim against another party might exist." *Id.* Although Appellants claim to have only later fully discovered Fogarty's role as an alleged "wrongdoer" with respect to that case, Appellants knew or should have known that they might have some claim against Fogarty and/or some other party with the medical background necessary to provide the information and opinions necessary to support Casey's malpractice suit. Appellants' claim they remained unaware until 2008 of the alleged extent of and motivations behind Fogarty's involvement in the Medical Malpractice Action is thus irrelevant, and does not prevent the statute of limitations from barring their abuse of process claim.

2. The statute of limitations began running when the Medical Malpractice Action was filed in 2006, and not when Appellants became aware in August 2008 of alleged discovery abuse regarding Casey's MRI.

Also insufficient to defeat the statute of limitations' barring of Appellants' abuse of process claim is Appellants' argument that the limitations period began running on that claim in 2008, when Appellants discovered that Casey and Thompson had failed to reveal during discovery in the Medical Malpractice Action that Casey had obtained an MRI that revealed no brain injury. (R. at 33-34, ¶¶ 86-94; Appellants' Br. at 18-19.) According to

Appellants, Casey and Thompson's concealing this fact prevented Appellants from learning information necessary to establish their abuse of process (and conspiracy) causes of action. (Appellants' Br. at 20.) Fogarty was not involved in, nor did he know about, Casey's having the MRI; and Fogarty was not involved in, nor did he know about, Thompson's and Casey's discovery-related efforts with respect to the MRI. (R. at 22-43.) Still, Appellants cannot properly evade the statute of limitations' bar on Appellants' abuse of process claim on the basis that Casey and Thompson allegedly violated discovery rules during the Medical Malpractice Action.

As discussed above, a statute of limitations is a procedural device that ensures litigation is brought within a reasonable period of time. *Capco*, 368 S.C. at 142, 628 S.E.2d at 41. One purpose of a statute of limitations is to ensure evidence is reasonably available to the litigants during discovery in an action. *Transportation Ins. Co. and Flagstar Corp.*, 389 S.C. at 428, 699 S.E.2d at 690. However, the statute of limitations itself is not affected by the discovery process. Instead, and wholly apart from applying statutes of limitations, South Carolina's courts govern parties' discovery rights and obligations by enacting and enforcing the South Carolina Rules of Civil Procedure. Courts may address and punish discovery abuses under these rules – and not by altering the application of statutes of limitations established by the Legislature. Specifically, pursuant to Rule 37(b)(2)(C), SCRCPP, when a party fails to obey an order to provide or permit discovery, the court may “make such orders in regard to the failure as are just,” including an order dismissing the action or proceeding, or any part thereof. *Jamison v. Ford Motor Co.*, 373 S.C. 248, 270, 644 S.E.2d 755, 766 (Ct. App. 2007). The court may not, as Appellants argue, rule that the statutory limitations period began to run from the

date one party learns of alleged discovery abuses by the opposing party.

Likewise, through their contempt authority, “courts have the inherent power to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice.” *Ex parte Cannon*, 385 S.C. 643, 661, 685 S.E.2d 814, 824 (Ct. App. 2009); S.C. Code Ann. § 14-5-320. The statutorily authorized punishment for contempt of court includes fines or imprisonment, but it does not include alteration of the applicable limitations period. S.C. Code Ann. § 14-5-320.

As discussed above, Appellants’ cause of action for abuse of process accrued when they were served with the Medical Malpractice Action, because Appellants – who believed at that time that the suit was meritless and only interposed to harm them (R. at 24, ¶ 18; R. at 26, ¶ 30; R. at 29, ¶ 56) – received notice that some right of theirs had been or may have been invaded. *See Young*, 333 S.C. at 719, 511 S.E.2d at 416. That Casey and Thompson subsequently engaged in conduct Appellants believe violated certain discovery and/or ethical rules and obstructed the administration of justice in the Medical Malpractice Action does not and cannot change the fact that the statute of limitations expired as to Appellants’ abuse of process claim before Appellants filed this suit. Appellants’ allegations regarding Casey’s MRI, even if taken as true, have no bearing on Appellants’ alleged knowledge and belief concerning their legal rights in 2006, when the Medical Malpractice Action was filed. Allegedly, the MRI was negative; but since Appellants believed in 2006 that Casey had not suffered a brain injury, their 2008 “discovery” of a negative MRI did not impede or prevent them from timely filing a complaint for abuse of process after being served with the Medical Malpractice Action in 2006. In sum, while Casey and Thompson’s alleged conduct during discovery arguably

could have subjected them to sanctions by the trial court for discovery abuse and/or contempt of court, *see* Rule 37, SCRCP, and *Cannon*, 385 S.C. at 661, 685 S.E.2d at 824, such alleged conduct does not change the date Appellants' abuse of process claim accrued, or alter the fact that such claim is time-barred by the applicable three-year limitations period.

E. The South Carolina Frivolous Proceedings Act did not Prevent Appellants From Filing their Abuse of Process Claim within the Applicable Limitations Period.

Also legally deficient is Appellants' argument that their abuse of process claim is not time-barred because the South Carolina Frivolous Proceedings Sanctions Act, S.C. Code Ann. §§ 15-36-10, *et seq.* (the "Frivolous Proceedings Act"), prevented them from filing that claim when the Medical Malpractice Action was instituted in 2006. (Appellants' Br. at 20.) Appellants assert that until they discovered Casey's MRI and deposed Fogarty in 2008, they lacked "essential facts required in establishing the necessary elements of their causes of action" for abuse of process and civil conspiracy; and that filing those claims in 2006 would have been "bad faith" that subjected them to judicial sanctions under the Frivolous Proceedings Act. (Appellants' Br. at 20.)

The Frivolous Proceedings Act provides that an attorney or pro se litigant may be sanctioned for filing a frivolous pleading if "a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law[.]" S.C. Code Ann. § 15-36-10(A)(4)(a)(ii). As explained fully above, when Appellants were served with the Medical Malpractice Action in 2006, they and their counsel possessed facts supporting both the

issuance of process and the ulterior purpose elements of an abuse of process claim, because they knew Casey and Thompson had filed suit against Appellants for what Appellants believed were ulterior purposes. (R. at 23, ¶¶ 4-5; R. at 24, ¶¶ 13-18; R. at 35, ¶¶ 106-07.) Because the alleged facts known to Appellants and their counsel in 2006 fully supported their filing an abuse of process claim at least as to Casey and Thompson, *see Wiggins*, 314 S.C. at 128, 442 S.E.2d at 170, the Frivolous Proceedings Act would not have been implicated had Appellants' counsel filed an action asserting that cause of action.

Further, the Frivolous Proceedings Act expressly states that it "shall not alter the South Carolina Rules of Civil Procedure or the South Carolina Appellate Court Rules." S.C. Code Ann. § 15-36-10(I). It follows even more clearly that the Frivolous Proceedings Act's provisions also shall not alter the statutory limitations period established by S.C. Code Ann. § 15-3-530 (2005), or South Carolina law applying that statute. *See generally State ex rel. McLeod v. Mills*, 256 S.C. 21, 26, 180 S.E.2d 638, 641 (1971) (explaining that if two statutes can stand together "by any reasonable construction . . . they must so stand").

For this additional reason, the Circuit Court's finding that Appellants' abuse of process claim is time-barred should be upheld.

II. The Circuit Court Correctly Refused To Equitably Toll The Statute Of Limitations As To Appellants' Abuse Of Process Claim.

The Circuit Court's dismissal of Appellants' abuse of process claim also was proper because the Second Amended Complaint contains no facts justifying the application of equitable tolling to delay the statute of limitation's running on that claim.

A. Relevant Procedural History.

At the January 18, 2012, hearing on Respondents' motions to dismiss Appellants' Second Amended Complaint, Appellants' counsel asked the Circuit Court to deny Respondents' motions, or in the alternative, to advise Appellants how to amend their pleading to correct any deficiency therein. (R. at 100, lines 18-21.) In its Dismissal Order, the Circuit Court dismissed Appellants' abuse of process claim as being time-barred. (R. at 4-16.) Appellants then filed a Motion for Reconsideration and to Amend, in which Appellants moved the Circuit Court for leave to amend "on grounds that justice requires Equitable Tolling" of the statute of limitations' running on their abuse of process claim, because Appellants "could not have discovered essential information bearing on their claims" by exercising reasonable diligence. (R. at 42.) The Circuit Court denied Appellants' motion. (R. at 20.)

B. Equitable Tolling.

Equitable tolling is a judicially-created device that allows courts to suspend or extend the statutory limitations period to ensure fundamental practicality and fairness. *Hooper v. Ebenezer Sr. Servs. and Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify equitable tolling's use. *Id.* Generally, equitable tolling applies in cases in which a defendant engages in some conduct that prevents the plaintiff in some extraordinary way from filing suit or discovering the facts essential for filing suit. *See id.*, 386 S.C. at 116-18, 687 S.E.2d at 32-34 (applying equitable tolling when a defendant failed to list its registered agent for service with the Secretary of State,

thus hindering the plaintiff's pursuit of timely service); *Ross v. Ross*, 394 S.C. 261, 266, 715 S.E.2d 359, 361-62 (Ct. App. 2011) (extending the statute of limitations period by equitable tolling when a husband abused and threatened his wife with physical violence to prevent her from bringing an alimony action); *Skipper v. Marlowe Mfg. Co.*, 242 S.C. 486, 488, 131 S.E.2d 524, 525 (1963) (applying equitable tolling when an employer induced an employee to believe a worker's compensation claim would be resolved without the employee's filing a claim). Still, "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." *Hooper*, 386 S.C. at 117, 687 S.E.2d at 33. This relief should be granted only when, "in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." *Id.*

C. Appellants' Argument as to Equitable Tolling.

Appellants contend that per the doctrine of equitable tolling, the statute of limitations on their abuse of process claim began running in 2008, because (1) Fogarty allegedly sought to prevent discovery efforts respecting the level and purpose of his involvement in the Medical Malpractice Action, and succeeded in doing so until his deposition on December 22, 2008; and (2) Casey and Thompson secretly obtained an MRI of Casey's brain in February 2007, determined for Casey to lie about the test during his deposition, and concealed the MRI from Appellants until August 2008. (Appellants' Br. at 22-23.) Appellants claim these alleged acts prevented Appellants from discovering "essential elements of Appellants' claims," and caused Appellants delay in asserting those claims. (Appellants' Br. at 23.) According to Appellants, the doctrine of equitable tolling therefore should apply to prevent the statute of limitations' running "until at least

August or December 2008.” (Appellants’ Br. at 23.)

D. Equitable Tolling Does Not Properly Apply to Suspend the Statute of Limitations’ Running on Appellants’ Abuse of Process Claims.

The Circuit Court properly refused to apply the doctrine of equitable tolling in this case, because Respondents’ alleged malfeasance did not hinder or prevent Appellants from filing an abuse of process claim within three years of being served with the Medical Malpractice Action. As discussed fully above, the statute of limitations began to run on Appellants’ abuse of process claim when Appellants were served with the Medical Malpractice Action, because such suit would put a reasonable person of common knowledge and experience on notice that an abuse of process claim against another party might exist. *See Epstein v. Brown*, 363 S.C. 372, 381, 610 S.E.2d 816, 821 (2005). Specifically, Appellants’ Second Amended Complaint demonstrates clearly that when Appellants were served with the Medical Malpractice Action in 2006, they did not believe Casey had a valid medical malpractice claim against them, and believed Casey and Thompson interposed that lawsuit for improper purposes. (R. at 23, ¶¶ 4-5; R. at 24, ¶¶ 13-18; R. at 35, ¶¶ 106-07.) Appellants thus possessed in 2006 facts supporting both the issuance of process and ulterior purpose elements of an abuse of process claim; and the statute of limitations began to run on that claim, regardless of whether Appellants then knew of Fogarty’s alleged involvement with the Medical Malpractice Action. *See Wiggins*, 314 S.C. at 128, 442 S.E.2d at 170.

Significantly, and as discussed above, neither Fogarty’s alleged motives with respect to and/or his degree of involvement in the Medical Malpractice Action, nor Casey and Thompson’s alleged concealment of Casey’s MRI, justify the equitable tolling of the

statute of limitations on Appellants' abuse of process claim. This is because neither circumstance prevented Appellants from realizing in 2006 that they possessed an abuse of process claim, or from filing that suit within the three-year limitations period. It is well-settled under South Carolina law that under the discovery rule, it is immaterial that the injured party may not comprehend the full extent of its damage, may not have sought advice of counsel, and/or may not have developed a full-blown theory of recovery. *See Gibson*, 383 S.C. at 406, 680 S.E.2d at 782. Likewise, under the discovery rule, the statute of limitations' running is not delayed until the plaintiff subjectively believes it is able to investigate its case, discover a cause of action existed, or determine who or what caused its injury; even the fact that a plaintiff does not know the identity of a wrongdoer does not toll the statute of limitations. *See Wiggins*, 314 S.C. at 128, 442 S.E.2d at 170. It follows that the statute of limitations also is not tolled when a party knows an alleged wrongdoer's identity, but has not discovered the extent of that wrongdoer's alleged acts or involvement with the claimed injury. Because this is exactly what Appellants claim with respect to Fogarty, the Circuit Court properly refused to equitably toll the statute of limitations as to Appellants' abuse of process claim until Appellants deposed Fogarty in December 2008.

The Circuit Court also properly refused to toll the statute of limitations in light of Appellants' allegations that Casey and Thompson concealed Casey's February 2007 MRI from Appellants until August 2008. That Casey and Thompson allegedly engaged in discovery abuse during the Medical Malpractice Action does not change the operative fact that when Appellants were served with that suit in 2006, they knew they had an abuse of process claim. Appellants "discovery" of the MRI in 2008 did not hinder or

impede Appellants' filing suit when they were served with the Medical Malpractice Action in 2006, because Appellants already believed Casey's brain injury as alleged in that suit was non-existent, and that the malpractice case was being used improperly to obtain narcotics and disability benefits. Because Casey and Thompson's alleged acts regarding the MRI did not prevent or impede Appellants' filing suit against them, the Circuit Court properly refused to apply equitable tolling to Appellants' abuse of process claim.

III. The Circuit Court Properly Held That Appellants' Civil Conspiracy Claim Is Time-Barred And Should Be Dismissed.

This Court also should affirm the Circuit Court's dismissal of Appellants' civil conspiracy claim, despite the fact that Appellants had previously dismissed that claim without prejudice at the beginning of the hearing on Respondents' motions to dismiss. This is because the Circuit Court did not violate Appellants' due process rights in dismissing their civil conspiracy claim; because the ruling did not prejudice Appellants; and because affirming the dismissal of that claim promotes judicial economy.

A. Relevant Procedural History.

Appellants filed their initial Complaint in this case on October 27, 2010, asserting claims for abuse of process and civil conspiracy. (R. App. at 2-10.) Appellants included amended versions of both of these claims in their Amended Complaint and Second Amended Complaint. (R. App. at 34-50; R. at 22-43.) Fogarty's motions to dismiss each of Appellants' three pleadings asserted and detailed Fogarty's position that Appellants' abuse of process and civil conspiracy claims are barred by the applicable statute of limitations, and that Appellants' pleadings failed to state actionable claims for abuse of process and civil conspiracy. (R. App. at 15-28; R. App. at 56-57; R. App. at 58-60.)

At the hearing on Respondents' motions to dismiss Appellants' Second Amended Complaint, Appellants' counsel advised the Circuit Court that Appellants wished to dismiss their civil conspiracy claim without prejudice, and to reserve the ability to re-file that claim in the future. (R. at 67, lines 12-25 – R. at 68, lines 1-2.) The Circuit Court stated, "All right." (R. at 68, line 3.) Still, in its order granting Respondents' motions to dismiss the Second Amended Complaint, the Circuit Court held that the three-year statute of limitations on Appellants' civil conspiracy claim expired before Appellants filed this case, and that Appellants are therefore time-barred from re-asserting that claim against Respondents at any time in the future. (R. at 14-16.)

On appeal, Appellants argue that the Circuit Court deprived them of due process by dismissing their civil conspiracy claim, because "the matter was not before the Court, hence Appellants made no arguments respecting this claim." (Apps.' Brief at 24.)

B. The Circuit Court did not Violate Appellants' Due Process Rights in Dismissing Appellants' Civil Conspiracy Claim.

The Circuit Court did not deprive Appellants of due process by dismissing their civil conspiracy claim in the Dismissal Order, because Appellants had sufficient notice and the opportunity to be heard on that issue, and because the Circuit Court properly reviewed and considered the applicable facts and law governing its determination.

"The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). Regarding the due process elements of notice and an opportunity to be heard, a court can dismiss a non-moving party's pleading on grounds not specified in the motion before it, if that party has

received notice that the issue is before the court, and has had the opportunity to argue the merits of that issue. See *Financial Federal Credit Inc. v. Brown*, 384 S.C. 555, 683 S.E.2d 486 (2009) (finding circuit court did not err in dismissing action on 12(b)(6) jurisdictional ground not raised in defendant's motion). Regarding judicial review, a circuit court considering a Rule 12(6)(6) motion meets that due process element if it views the facts alleged in the complaint and inferences arising therefrom in the light most favorable to the plaintiff, and dismisses the pleading only if those facts and inferences do not entitle the plaintiff to relief on any theory. See *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 121, 634 S.E.2d 5, 7 (Ct. App. 2006); *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995).

All of the elements of due process were met with respect to the Circuit Court's dismissal of Appellants' civil conspiracy claim, because Appellants had notice of and the repeated opportunity to argue the merits of that issue before the Circuit Court issued its reasoned decision on it. Specifically, the issue of whether the statute of limitations bars Appellants' abuse of process and civil conspiracy claims was well-known to all of the parties and well-briefed by Respondents before the Circuit Court entered its Dismissal Order in March 2012. (R. App. at 15-28; R. App. at 56-57; R. App. at 58-60.) Respondents' motions gave Appellants abundant and repeated notice that the statute of limitations issue was before the court as to Appellants' abuse of process and civil conspiracy claims, and Appellants had multiple opportunities to present memoranda and oral arguments on that issue.¹⁷ Appellants twice amended their pleading in an attempt to

¹⁷ Appellants did not file a brief in response to any Respondent's motion to dismiss

resolve deficiencies therein, some of which were specifically noted to Appellants by the Circuit Court's law clerk. (R. at 103; R. App. at 98-99.) Further, at the hearing on Respondents' motions to dismiss, Appellants' counsel presented a statute of limitations argument as to Appellants' abuse of process claim, the court's decision on which is governed by the very same facts and discovery rule trigger that time-bar Appellants' civil conspiracy claim. (R. at 99, lines 15-25 – R. at 100, lines 1-7.) In sum, Appellants had substantial notice that Respondents sought to dismiss Appellants' civil conspiracy claim on statute of limitations grounds, and had multiple opportunities to argue the merits of that issue.

Further, the Circuit Court engaged in a thorough judicial review of Appellants' pleadings and applicable law before dismissing Appellants' civil conspiracy claim. The Circuit Court's Dismissal Order reflects that the court properly assessed that the three-year statute of limitations on Appellants' civil conspiracy claim began to run when the Medical Malpractice Action was filed in 2006, and that Appellants are therefore time-barred from re-asserting that claim against Respondents at any time in the future. (R. at 11-16.)

Specifically, the Circuit Court correctly recognized that civil conspiracy claims are governed by a three-year statute of limitations; and that a civil conspiracy becomes actionable only "once overt acts occur which proximately cause damage to the plaintiff." (R. at 14-15, *citing Burgess*, 300 S.C. at 187, 386 S.E.2d at 800-01 and *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009).)

any of Appellants' three complaints.

The Circuit Court determined that 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." (R. at 15, *citing 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. (R. at 15, *citing Wiggins*, 314 S.C. at 128, 442 S.E.2d at 170.)

Applying this law to Appellants' Second Amended Complaint, the Circuit Court found that Appellants' civil conspiracy is time-barred, because Appellants failed to file this action within three years after the Medical Malpractice Action was instituted, at which time Appellants knew or could have known pertinent facts sufficient to apprise themselves of their claim's alleged existence. (R. at 15.) The Circuit Court explained that 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." (R. at 15, *citing* Second Am. Compl. ¶¶ 199-211.) Based on these pleadings, the Circuit Court determined that Respondents' alleged conspiracy was to manufacture a pretext to sue Appellants for malpractice; and the overt "act" in furtherance of the conspiracy was the filing of the Medical Malpractice Action. (R. at 15.) Accordingly, the Circuit Court found that once Appellants were sued for malpractice, they were damaged by the alleged conspiracy, and the statute of limitations on that claim began to run, regardless of whether Appellants claim that they only later learned of Fogarty's "involvement" in the alleged scheme. (R. at 15, *citing Hackworth*, 385 S.C. at 115, 682 S.E.2d at 874.) The

Circuit Court also found that when the Medical Malpractice Action was instituted in 2006, Appellants knew the identity of two of the alleged conspirators, Casey and Thompson; and because medical malpractice claims require expert medical testimony, the suit's existence also put Appellants on notice that some other physician was involved in the alleged case-filing conspiracy, thus triggering the statute of limitations. (R. at 15-16.) Based on this thorough and proper judicial review and analysis, the Circuit Court found that the three-year statute of limitations on Appellants' civil conspiracy claim expired in 2009, and that such claim was and would remain time-barred. (R. at 16.)

Because the Circuit Court did not deprive Appellants of due process by dismissing Appellants' civil conspiracy claim with prejudice, it committed no error warranting reversal in that regard.

C. Even if the Circuit Court Erred in Dismissing Appellants' Civil Conspiracy Claim, the Ruling Should be Upheld Because it Did Not Prejudice Appellants.

Even if the Circuit Court erred in dismissing Appellants' civil conspiracy claim, this Court should uphold that ruling, because Appellants cannot show they were prejudiced by that decision. "To warrant reversal, an appellant must show not only error, but also prejudice." *Ketterman v. South Carolina Farm Bureau Mut. Ins. Co.*, 302 S.C. 276, 279, 395 S.E.2d 187, 189 (Ct. App. 1990), *quoting Dibble v. Thomas*, 391 S.E.2d 729, 730, 391 S.E.2d 729, 730 (Ct. App. 1990). "Where a party shows no prejudice, the error, if any, is harmless." *Wright v. Trask*, 329 S.C. 170, 185, 495 S.E.2d 222, 230 (Ct. App. 1997), *quoting GTE Sprint Communications Corp. v. Public Service Comm'n of South Carolina*, 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986).

Appellants cannot show prejudice from the Circuit Court's dismissing their civil

conspiracy with prejudice after Appellants dismissed that claim without prejudice, because the statute of limitations on that claim expired before Appellants dismissed it. As discussed above, the three-year limitations period on Appellants' civil conspiracy claim began to run when the Medical Malpractice Action was served in 2006, and expired in 2009. Therefore, when Appellants voluntarily dismissed their civil conspiracy claim with prejudice at the motion to dismiss hearing held on January 18, 2012, Appellants could not properly re-file that claim at any time in the future, regardless of Appellants' having reserved the right to do so. This is the case even assuming, exclusively for the sake of argument, that Appellants could succeed in claiming that the three-year limitations period on their conspiracy claim was equitably tolled until August or December 2008 (which, as discussed fully above, Appellants cannot properly do). In that hypothetical instance, the statute of limitations on Appellants' civil conspiracy claim expired in 2011; so Appellants still could never properly re-file that claim after dismissing it in January 2012.

Because Appellants can show no prejudice from the Circuit Court's ruling, the Circuit Court did not commit reversible error in dismissing Appellants' civil conspiracy claim with prejudice.

D. Judicial Economy Supports this Court's Affirming the Circuit Court's Dismissal with Prejudice of Appellants' Civil Conspiracy Claim.

Finally, even if the Circuit Court arguably abused its discretion in dismissing Appellants' civil conspiracy claim, it would be proper for this Court to consider the issue of whether the statute of limitations expired on that claim, and to uphold the Circuit Court's dismissal of that claim with prejudice. South Carolina's appellate courts may

properly consider issues in the interest of judicial economy. *See Southern Bell Tel. & Tel. Co. v. Hamm*, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) (holding that the appellate court properly decided a “purely advisory” matter in the interest of judicial economy, because both parties had fully briefed the issue, and because the issue would be raised to the court at some future time); *Jeter v. S.C. Dep’t of Transp.*, 369 S.C. 433, 441 n.6, 633 S.E.2d 143, 147 n.6 (2006) (noting that, regardless of any preservation problems, the appellate court would address an issue in the interest of judicial economy). Since the issue of whether Appellants’ civil conspiracy claim is time-barred would be raised to the court at some future time, and since the parties have had numerous opportunities to brief and argue the issue, judicial economy clearly would support this Court’s deciding the matter now. *See Southern Bell*, 306 S.C. at 75, 409 S.E.2d at 778. Based on the facts and legal authority discussed above, in Fogarty’s Brief in Support of Motion to Dismiss Second Amended Complaint, and in the Circuit Court’s Dismissal Order, this Court should hold that Appellants’ civil conspiracy claim is barred by the statute of limitations, and is dismissed with prejudice.

IV. The Circuit Court Properly Denied Appellants’ Request For Leave To File A Third Amended Complaint.

This Court also should affirm the Circuit Court’s decision to dismiss Appellants’ Second Amended Complaint with prejudice and deny Appellants’ request to amend their pleading for a third time, because Appellants have not asserted and cannot plead any new factual allegations that would change the time-barred nature of Appellants’ claims.

A. A Trial Court May Properly Deny a Plaintiff’s Request to Amend its Pleadings.

Trial courts possess the authority to dismiss a plaintiff’s complaint with prejudice

and deny the plaintiff the opportunity to amend its pleading. See *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 153-54, 723 S.E.2d 835, 840-41 (Ct. App. 2012) (affirming trial court's dismissal of plaintiff's complaint with prejudice and its denial of plaintiff's motion to amend his complaint for a second time). Trial courts have wide latitude in deciding whether to allow an amendment; these decisions "will rarely be disturbed on appeal." *Id.*, quoting *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997). Generally, when a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal is without prejudice. *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006). However, a complaint is subject to dismissal with prejudice if it appears "to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations." *Id.* (citation omitted). If the plaintiff fails to cite any additional factual allegations that would convert the deficient pleadings into claims on which relief may be granted, the appellate court properly affirms the dismissal of the complaint with prejudice. *Id.*; *Sullivan*, 397 S.C. at 153-54, 723 S.E.2d at 840-41.

B. The Circuit Court Properly Denied Appellants' Motion for Leave to Amend Their Second Amended Complaint.

The Circuit Court's dismissal of Appellants' Second Amended Complaint with prejudice should be affirmed, because Appellants have failed repeatedly to plead or cite any new factual allegations that would change the time-barred nature of their claims for abuse of process or civil conspiracy. Before the Circuit Court dismissed Appellants' abuse of process and civil conspiracy claims with prejudice, Appellants twice amended their initial Complaint in an attempt to overcome Respondents' assertions that

Appellants' causes of action are time-barred and fail to state an actionable claim. (R. App. at 15-28; R. App. at 34-50; R. App. at 56-57; R. at 22-40.) Appellants filed their Second Amended Complaint after the Circuit Court's clerk issued specific directions regarding Appellants' civil conspiracy claim, and indicated deficiencies also existed in Appellants' abuse of process claim. (R. at 103; R. App. at 98-99.) Still, in both of their amended pleadings, Appellants alleged facts which clearly demonstrate that their claims for abuse of process and civil conspiracy arose upon their being served with the Medical Malpractice Action in 2006. Appellants have not presented, and cannot present, any supplemental factual allegations which prevent the discovery rule's being triggered when the Medical Malpractice Action was served.

Appellants' claims remain time-barred despite the fact that Appellants' brief to this Court itemizes three proposed allegations they seek to assert in a third amended pleading, as follows:

1. Prior to August of 2008, Appellants had insufficient knowledge that Respondents' actions had ulterior purposes in respect to the medical malpractice action for them to allege in good faith a cause of action against Respondents for abuse of process.
2. Prior to August of 2008, Appellants had insufficient knowledge that Respondents' [sic] were willfully acting within the medical malpractice action in a manner not proper in its conduct for them to allege in good faith a cause of action against Respondents for abuse of process.
3. Prior to August of 2008, Appellants had insufficient knowledge that Respondents had joined together for the purpose of injuring and causing special damages to the Appellants in order for them to allege in good faith a cause of action against Respondents for civil conspiracy.

(Appellants' Br. at 27.) These allegations are insufficient to convert Appellants' time-barred causes of action into actionable claims, because they are subjective statements that

do not alter or change the date on which Appellants' claims objectively arose.

As discussed fully above, the date on which a cause of action arises is an objective question that is answered by application of the discovery rule. *Livingston*, 2013 WL 342675, *4; *Joubert*, 341 S.C. at 191, 534 S.E.2d at 9. It is well settled that "whether the particular plaintiff actually knew he had a claim is not the test." *See Young*, 333 S.C. at 719, 511 S.E.2d at 416. Because service of the Medical Malpractice Action put Appellants on notice that they possessed claims for abuse of process and civil conspiracy against at least Casey and Thompson, it triggered the statute of limitations' running as to those claims. *See Burgess*, 300 S.C. at 186-87, 386 S.E.2d at 800. Proper application of the discovery rule achieves this result regardless of when Appellants claim they fully discovered Fogarty's alleged motives and role in the Medical Malpractice Action, and regardless of whether Casey and Thompson allegedly concealed Casey's MRI from Appellants. *See Gibson*, 383 S.C. at 406, 680 S.E.2d at 782; *Wiggins*, 314 S.C. at 128, 442 S.E.2d at 170. Because Appellants' proposed allegations contain subjective assertions regarding when Appellants actually knew they had claims against Respondents, those allegations do not affect the running of the statute of limitations on those claims. *See Joubert*, 341 S.C. at 191, 534 S.E.2d at 9. The Circuit Court thus properly dismissed Appellants' claims with prejudice and denied their motion to amend, and this Court should affirm the Circuit Court's ruling.

CONCLUSION

The Circuit Court properly held that Appellants' abuse of process claim is time-barred, because application of the discovery rule to the facts alleged in Appellants' Second Amended Complaint clearly shows that the statute of limitations began to run on

that cause of action when Appellants were served the Medical Malpractice Action in 2006. When that suit was served, Appellants had notice that they possessed an abuse of process claim against Casey, Thompson, and possible third parties, because Appellants' pleading states that Appellants believed the malpractice claim lacked merit and had been imposed for a wrongful purpose. Appellants' claim that Fogarty concealed the scope and purpose of his involvement in that case, and that Casey and Thompson failed to comply with applicable discovery rules during that litigation, do not alter the underlying facts triggering the running of the limitations period. Similarly, these alleged acts by Respondents do not justify the equitable tolling of the statute of limitations as to Appellants' abuse of process claim, because the claimed wrongful acts do not alter the facts alleged in Appellants' pleading that triggered the statute's running when Appellants were served with the Medical Malpractice Action.

The Circuit Court also properly dismissed Appellants' civil conspiracy claim with prejudice after Appellants voluntarily dismissed that claim without prejudice at the hearing on Respondents' motions to dismiss Appellants' Second Amended Complaint. This ruling did not violate Appellants' due process rights, because Appellants had multiple opportunities to brief and argue this issue, and because the Circuit Court properly considered the facts and applicable law supporting its ruling. Further, even if the Circuit Court arguably erred in dismissing Appellants' civil conspiracy claim, that ruling does not justify reversal, because Appellants voluntarily dismissed their claim outside the limitations period; so the Circuit Court's holding that Appellants are time-barred from reasserting that claim did not prejudice Appellants. Similarly, even if the Circuit Court arguably erred in dismissing Appellants' civil conspiracy claim, this Court

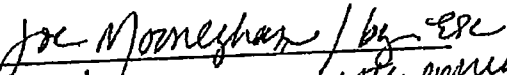
would properly uphold that ruling in the interest of judicial economy.

Finally, the Circuit Court did not err in dismissing Appellants' Second Amended Complaint and refusing to allow Appellants to amend that pleading for a third time. Neither the draft allegations Appellants now propose to add to a fourth pleading, nor any other allegations regarding when Appellants subjectively realized they possessed such claims, can alter the fact that the statute of limitations on Appellants' abuse of process and civil conspiracy claims began to run when Appellants were served with the Medical Malpractice Action in 2006. Accordingly, the Circuit Court properly denied Appellants' motion to amend their pleadings.

For all of the above reasons, Respondents respectfully request that this Court uphold the Circuit Court's dismissal with prejudice of Appellants' abuse of process and civil conspiracy claims.

Respectfully Submitted,

May 6, 2013

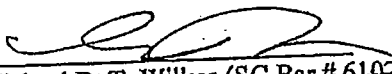

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

FINAL BRIEF OF APPELLANTS

May 29, 2013

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STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Common Pleas err in dismissing Plaintiffs' Second Amended Complaint through its application of the discovery rule respecting the statute of limitations despite allegations of material misrepresentations and active concealment of the Defendants including, but not limited to suborning perjury, perjury and discovery abuses?
2. Did the Court of Common Pleas err in dismissing Plaintiffs' Second Amended Complaint despite the allegations of material misrepresentations and active concealment of Defendants including, but not limited to suborning perjury, perjury and discovery abuses, by its failure to apply the doctrine of equitable tolling of Plaintiffs' claims for damages?
3. Did the Court of Common Pleas deprive Appellants of due process by dismissing with prejudice a claim that had previously been dismissed without prejudice and thereby precluding arguments respecting the statute of limitations as it related to the Second Cause of Action of the Second Amended Complaint?
4. Did the Court of Common Pleas err in dismissing Plaintiffs' Second Amended Complaint with prejudice when Appellants are able to advance additional factual allegations in clarification of the relevant timeline as it relates to the discovery rule and statute of limitations?

Statement of the Case

The lower court action was commenced on October 27, 2010, when Appellants filed a Summons and Complaint initiating an action for Abuse of Process and Civil Conspiracy in the Spartanburg County Court of Common Pleas against Respondents seeking damages, along with attorneys' fees and costs, arising as a result of alleged wrongdoings during a medical malpractice action 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 and tried, commencing on May 11, 2010, before the Honorable Roger L. Couch to a defense verdict on May 28, 2010.

Respondents moved to dismiss Appellants' original Complaint in lieu of answering same. Upon hearing the oral arguments of Respondents before the Honorable Roger L. Couch, on May 19, 2011, Appellants filed an Amended Complaint on June 16, 2011, as of right, reasserting against Respondents claims for abuse of process and civil conspiracy. Respondents moved to dismiss the Amended Complaint with the motion being heard before the Honorable Roger L. Couch on September 8, 2011. Based upon the questions of the Court respecting the civil conspiracy count, the Appellants moved for leave of court to file their Second Amended Complaint. (R. p. 58, lines 2-17) Leave was granted with instructions by Judge Couch by an email dated September 30, 2011, to amend certain aspects of the civil conspiracy claim, with a subsequent Order dated October 6, 2011, and said Second Amended Complaint was filed as instructed on October 11, 2011. (R. p. 103 and R. pp. 2-3) Respondents renewed their motions to dismiss and a

hearing was scheduled on January 18, 2012.

At the onset of said hearing before the Honorable Letitia H. Verdin, there was an oral motion and stipulation by all parties, for the Civil Conspiracy claim to be dismissed without prejudice. The motion was granted. (R. p. 67, line 12-p.68, line 3) Respondents then submitted or rested on previously submitted briefs and oral arguments were made. During oral arguments, Appellants' attorney requested that, in the interest of justice, Appellants be allowed to amend any technical errors in the Complaint. (R. p. 100, lines 18-21)

Appellants received written notice of entry of the January 30, 2012 Form 4 Order, indicating a formal order to follow, on February 7, 2012. On March 28, 2012, attorney for the Appellants received, by U.S. Mail, the Court's written Order dated March 21, 2012 which was clocked by the Spartanburg County Clerk of Court on March 23, 2012. In the Order, Respondents' respective Motions to Dismiss Appellants' Second Amended Complaint were granted, Appellants' abuse of process and civil conspiracy claims were dismissed with prejudice.

Appellants timely filed their Notice of Motion and Motion for Reconsideration and to Amend on April 9, 2012. On May 16, 2012, Appellants received written notice of entry of the April 30, 2012 Form 4 Order denying Appellants Motion for Reconsideration and to Amend, indicating a formal order to follow. Appellants inquired of the Court, by letter, on August 24, 2012, as to when a formal order might be expected. Appellants received email notice on August 24, 2012, that no formal order would be forthcoming and that a clerical error had occurred indicating a formal order would follow the Form 4 Order dated April 30, 2012.

It is from the Orders of the Honorable Letitia H. Verdin dated January 30, 2012 and March 21, 2012, granting Respondents Motions to Dismiss and the Order of the Honorable Letitia H. Verdin dated April 30, 2012, denying Appellants Motion for Reconsideration and to Amend that Appellants appeal.

Statement of Facts

Appellants allege the following relevant facts from their Second Amended Complaint, which are quoted herein:

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, (Respondent) Mr. William Mark Casey through his attorney, (Respondent) Mr. Ray E. “Chuck” Thompson, alleged (Appellants) 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.

18. Mr. Casey came under the care of (Respondent) 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.

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.

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.

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.

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.

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 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.

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.

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.

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.

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 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. Thomson 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.

ARGUMENTS

1. The Court of Common Pleas erred in dismissing Plaintiffs' Second Amended Complaint with prejudice through its application of the discovery rule respecting the statute of limitations by its failure to consider the allegations of material misrepresentations and active concealment of the Defendants including, but not limited to suborning perjury, perjury and discovery abuses.

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.

2. The Court of Common Pleas erred in dismissing Appellants' Second Amended Complaint with prejudice by determining that equitable tolling did not apply to Appellants' claims despite allegations of material misrepresentations and active concealment of the Respondents including, but not limited to suborning perjury, perjury and discovery abuses.

In Hooper v. Ebenezer Senior Services, 377 S.C. 217, 659 S.E.2d 213 (Ct. App. 2008), the Court of Appeals discussed the doctrine of equitable tolling in detail. In its opinion, the Court of Appeals said, "The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine." Hooper at 231, 220 (quoting 51 Am.Jur.2d Limitation of Actions § 174 (2007)).

"It has been held that equitable tolling applies principally if the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his or her rights. However, it has also been held that the equitable tolling doctrine does not require wrongful conduct on the part of the defendant,

such as fraud or misrepresentation.” Hooper at 232, 221 (quoting 51 Am.Jur.2d Limitation of Actions § 174 (2007)). Hooper makes it clear that the equitable tolling of a time limit may be warranted when there is evidence of fraud or misrepresentation and even in situations where the Defendant does not commit any wrong. Hooper at 232, 221.

In this action, the Respondents went beyond fraud or deception and persisted in a course of conduct that included acts of perjury, suborning perjury, material misrepresentations and discovery abuses in their efforts to conceal essential elements of Appellants’ claims. 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 of 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 conspiracy, willingly took part with Respondent Thompson, and other unnamed third party(ies) in the scheme 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, included the Appellants, eight treating physicians and five medical experts. (R. p. 34, ¶¶ 95-96) In short, the Second Amended Complaint clearly states that the Respondents actively concealed their inappropriate actions from the Appellants thru perjury, suborning perjury, material misrepresentations and discovery abuses until at least August or December of 2008 precluding discovery of the Respondents' ulterior purposes, willful acts in the use of the process not proper in the conduct of the proceedings and their conjoined efforts.

Public policy and the interests of justice are in favor of a reversal and remand of this matter. The Court of Common Pleas erred when it determined that the Respondents' acts of perjury, suborning perjury, material misrepresentations and discovery abuses did not result in Appellants' delays in bringing their claims as a result of essential elements of Appellants' claims being actively concealed by the Respondents. 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.

3. The Court of Common Pleas deprived Appellants of due process by dismissing with prejudice a claim that had previously been dismissed without prejudice and thereby precluding argument respecting the statute of limitations as it related to the Second Cause of Action of the Second Amended Complaint.

At the onset of said hearing before the Honorable Letitia H. Verdin, there was an oral motion and stipulation by all parties, for the Civil Conspiracy Claim of Appellants' Second Amended Complaint to be dismissed without prejudice. The motion was granted by the Court. (R. p. 67, line 12-R. p. 68, line 3). As such, this matter was not before the Court, hence Appellants made no arguments respecting this claim. However, the Court of Common Pleas' Order subsequently dismissed this claim with prejudice which unjustly quashed Appellants ability to address the issue.

In Griffin v. Capital Cash, 310 S.C. 288, 423 S.E.2d 143 (S.C.App. 1992), the court found, "[I]t is an error of law for a court to decide a case on a ground not before it. See, Friedberg v. Goudeau, 279 S.C. 561, 309 S.E.2d 758 (1983); Turbeville v. Floyd, 288 S.C. 171, 341 S.E.2d 651 (Ct.App.1986). " However, the court in The City of North Myrtle Beach v. Lewis-Davis, et al., 360 S.C.225, 599 S.E.2d 462 (S.C.App. 2004), provides a remedy in such instances, as in the instant case, stating, "A reversal is required when the trial court's ruling exceeds the limits and scope of the particular motion before it. Skinner v. Skinner, 257 S.C. 544, 550, 186 S.E.2d 523, 526 (1972)."

In the interest of justice, the reversal and remand of this matter is necessary to allow Appellants their due process rights in addressing the issue which was dismissed with prejudice in the Court of Common Pleas' Order of March 21, 2012. The Court thereby deprived Appellants of due process by dismissing with prejudice a claim that had previously been dismissed without prejudice and thereby precluding arguments respecting the statute of limitations as it related to the Second Cause of Action of the Appellants' Second Amended Complaint.

Appellants request that the Court of Common Pleas' Order Dismissing their Second Amended Complaint, as respecting its Second Cause of Action, be reversed and this matter remanded for a hearing on the merits of their claims for damages.

4. The Court of Common Pleas erred in dismissing Plaintiffs' Second Amended Complaint with prejudice when Appellants are able to advance additional factual allegations in clarification of the relevant timeline as it relates to the discovery rule and statute of limitations.

During oral arguments, Appellants' requested that in the interest of justice, Appellants be allowed to amend any technical errors in the Complaint. (R. p. 100, lines 18-21). Appellants further made motions for leave to amend in their Motion for Reconsideration and to Amend which was filed with the Court of Common Pleas for Spartanburg County, Seventh Judicial Circuit on April 9, 2012. (R. p. 109) The motion was denied in Judge Verdin's Form 4 Order of April 30, 2012.

Appellants should be allowed leave to amend. In Higgins v. Medical University of South Carolina, 326 S.C. 592, 486 S.E.2d 269 (S.C.App. 1997), the

court recognized that “in many instances, plaintiffs dismissed pursuant to 12(b)(6) are granted leave to amend. See Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); Dockside Ass'n v. Detyens, Simmons & Carlisle, 297 S.C. 91, 374 S.E.2d 907 (Ct.App.1988) (citing Foman and stating that where a complaint is dismissed under 12(b)(6), plaintiff should be granted leave to file an amended complaint). In Foman, the United States Supreme Court stated:

In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the [trial court], but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the [rules].”

Specifically within this matter, Appellants request to amend their Second Amended Complaint as follows: Paragraph 4 to include the date the underlying medical malpractice action was filed – May 24, 2006; Paragraph 87 to include the undisputed date of the secreted MRI, which was known by the Respondents prior to the Appellants’ knowledge – February 4, 2007; Paragraph 88 to include the undisputed date of the Radiologist’s report, which was known by the Respondents prior to the Appellants’ knowledge February 4, 2007; and Paragraph 92 to include the date of the U.S.P.S. stamp on the envelope which contained the anonymous letter to attorney Spencer King regarding the secreted MRI, which was known by the Respondents prior to Appellants’ lawsuit being filed - August 18, 2008.

Further, Appellants are willing to make the following additional allegations:

1. Prior to August of 2008, Appellants had insufficient knowledge that Respondents' actions had ulterior purposes in respect to the medical malpractice action for them to allege in good faith a cause of action against Respondents for abuse of process.

2. Prior to August of 2008, Appellants had insufficient knowledge that Respondents' were willfully acting within the medical malpractice action in a manner not proper in its conduct for them to allege in good faith a cause of action against Respondents for abuse of process.

3. Prior to December of 2008, Appellants had insufficient knowledge that Respondents had joined together for the purpose of injuring and causing special damages to the Appellants in order for them to allege in good faith a cause of action against Respondents for civil conspiracy.

In the instant case, Respondents would not be prejudiced by Appellants' amendment to the paragraphs enumerated and proposed above. Given that each of the Respondents were active participants in the underlying medical practice action, they are fully aware of the dates which Appellants seek to include, as those dates are all part of the record in the underlying medical malpractice action. Further, given the willful conduct of the Respondents, they are fully aware of their own actions of perjury, suborning perjury, material misrepresentations and discovery abuse. Finally, Respondents are well aware of when their unjustifiable actions failed, resulting in Appellants becoming aware of their breach of

Appellants' rights. As a practical matter, with Respondents' unclean hands there can be no prejudice to them by the sought amendments.

Reversal of the Court of Common Pleas' Order and the remand of this matter allowing the Appellants to amend their Complaint are necessary for the interest of justice and as a matter of public policy. The Court of Common Pleas erred in dismissing Plaintiffs' Second Amended Complaint with prejudice when Appellants are able to advance additional factual allegations in clarification of the relevant timeline as it relates to the discovery rule and statute of limitations.

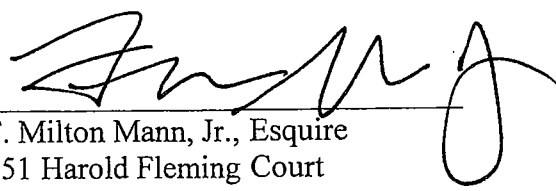
Appellants request that the Court of Common Pleas' Order Dismissing their Second Amended Complaint be reversed, Appellants be granted leave to amend their Second Amended Complaint, and for this matter to be remanded for a hearing on the merits of Appellants' claims for damages.

CONCLUSION

For the reasons stated above, Appellants request that the Court of Common Pleas Order granting Respondents' Motions to Dismiss Appellants' Second Amended Complaint be reversed and this matter remanded for a trial on the merits.

Respectfully submitted,

May 29, 2013



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