STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Unpublished Opinion No. 2014-UP-273 (S.C. Ct.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

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

v.

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

PETITION FOR A WRIT OF CERTIORARI

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Certificate of Counsel

Counsel for Petitioners certify that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 4, 2014.

Question Presented

Whether the Court of Appeals erred in finding that the allegations of Respondents' complaint do not support a finding that their abuse of process claim is barred by the statute of limitations, when Respondents sued Petitioners in October 2010 for allegedly filing a meritless medical malpractice action in 2006, based on a false medical diagnosis that was formed and publicized in 2005, and that Respondents admit they believed was false and had caused them damage at least by February 2007?

Statement of the Case[1]

Respondents' abuse of process claim is time-barred because the allegations of the Second Amended Complaint, and a judicially noticeable dismissal of a related case in February 2007, demonstrate that Respondents knew or should have known more than three years before bringing suit that Petitioners' medical malpractice action against them was an abuse of process interposed to harm them.

Respondents are physicians in Spartanburg with a history of confrontation and litigation with another local physician, Petitioner Fogarty. Respondents allege that after an acrimonious partnership split in 2000 and the start of Respondents' competing medical

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[1] Petitioners unqualifiedly deny Respondents' claims that they engaged in any wrongdoing as to Respondents. The factual recitations set forth herein are drawn directly from Respondents' Second Amended Complaint for the exclusive purpose of this Court's consideration of whether the Court of Appeals erred in reversing the dismissal of Respondents' abuse of process claim pursuant to Rule 12(b)(6), SCRCP, which requires the pleadings to be construed in the light most favorable to Respondents.

research business in 2004, Fogarty sought to interfere with Respondents' business and patient care in various ways. (R. at 24-25, ¶¶ 20-24.) Respondents claim that in addition to maligning Respondents' business and reputations to a point that Respondents sued Fogarty in 2005 to end those attacks, Fogarty also caused to be instituted a retaliatory medical malpractice suit against Respondents. (R. at 25, ¶¶ 24-27; R. at 26-27, ¶¶ 36-38; R. at 38, ¶ 126.) It is this medical malpractice action that Respondents claim was an abuse of process. (R. at 35-37, ¶¶ 103-116.)

The malpractice suit against Respondents was filed in 2006 by one of Fogarty's patients, Petitioner Casey, and Casey's attorney, Petitioner Thompson. (R. at 23, ¶¶ 4-5.) Casey, who Respondents allege was a prescription drug abuser who wanted to obtain disability benefits despite not being disabled, had been treated by Respondents in 2004. (R. at 23-24, ¶¶ 7-13; R. at 29, ¶ 55.) During a bronchoscopy performed by Respondents, Casey experienced a pneumothorax, a known risk of that procedure, and was hospitalized for several days. (R. at 24, ¶ 13.) Respondents claim Casey knew he had not suffered any permanent injury from this incident. (R. at 35, ¶ 105); however, after being discharged from the hospital, Casey "actively sought increases in his pain medications and support for his disability claims" from Respondents. (R. at 29, ¶ 56.) Respondents did not believe Casey was disabled or needed additional narcotics, and denied his requests as being not medically supported. (R. at 29, ¶ 56.)

After Respondents denied Casey's post-treatment requests for narcotics and disability support, Casey became a patient of Fogarty, and sought help from Fogarty and Thompson with his disability claims. (R. at 24, ¶ 18; R. at 29, ¶¶ 56, 58; R. at 31, ¶ 75.) According to Respondents, Fogarty saw his involvement with Casey as "a golden

opportunity" to retaliate against Respondents for the wrongs Fogarty believed they had committed against him, and Fogarty determined that he could use Casey to damage Respondents by embroiling them in protracted litigation based on a false injury claim. (R. at 25, ¶¶ 26-27; R. at 26-27, ¶¶ 32-38.)

Respondents further contend as follows: Fogarty, who has no qualifications within any neurological specialty and ordered no neurological testing of Casey, then developed a baseless, medically unsupported theory that Casey suffered a debilitating brain injury during Respondents' treatment. (R. at 26-27, ¶¶ 31-35.) On July 21, 2005, Fogarty published his false brain injury assertion in Casey's medical records. (R. at 26-27, ¶¶ 28, 36-38.) Fogarty's false brain injury theory was the "cornerstone of orchestrated 'expert' testimony" against Respondents, and was the catalyst for the baseless civil suit. (R. at 27, ¶ 38.) Then, Petitioners filed that suit based on Fogarty's theory and with the intent of damaging Respondents. (R. at 35-36, ¶¶ 103-112.)

In addition to instituting the medical malpractice action, Fogarty allegedly used his baseless brain injury theory to thwart Respondents' business lawsuit against him. (R. at 25, ¶¶ 26, 29.) According to Respondents:

> Fogarty directly benefitted 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.

(R. at 25, ¶ 29.) Respondents admit the *S. Carolina* case was dismissed because of these "baseless allegations." This dismissal with prejudice occurred on February 15, 2007.

(Appendix 22.)[2]

Respondents allege that the medical malpractice action constituted an abuse of process upon its filing, because it was based on Petitioners' bad acts of forming and publishing a false brain injury theory on which to base a meritless legal action, and was interposed to harm them. (R. at 35, ¶ 104.) Respondents also allege that during that litigation, they were not fully aware of Fogarty's role and level of involvement in that case until Fogarty was deposed in December 2008. (R. at 27, ¶¶ 41-42.) Further, Respondents allege that during the medical malpractice action, Thompson arranged for Casey to have an MRI performed under a fictitious name at an out-of-state hospital, and then failed to disclose the negative results of that exam in a timely manner. (R. at 33, ¶¶ 86-92.)[3] According to Respondents, the MRI test results "totally confirmed" Respondents' prior beliefs, namely, that Casey had suffered no permanent neurological impairment. (R. at 33, ¶ 93.)

Respondents ultimately obtained a defense verdict in the medical malpractice action after a 14-day trial in May 2010. (R. at 35, ¶¶ 99-100.) On October 27, 2010, Respondents sued Petitioners, alleging that the medical malpractice suit was an abuse of

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2 That a Stipulation of Dismissal with Prejudice in *S. Carolina* was filed with the Spartanburg County Circuit Court on February 15, 2007, is a judicially noticeable fact. *See Masters v. Rodgers Dev. Group*, 283 S.C. 251, 255, 321 S.E.2d 194, 196 (Ct. App. 1984) (judicial notice may be taken of a fact if "its accuracy is capable of verification by reference to readily available sources of indisputable reliability").

3 Respondents allege that Fogarty did not perform or order any neurological testing of Casey, and specifically did not order MRI study of Casey's brain. (R. at 26, ¶¶ 32-34.) The Court of Appeals' factual finding that Fogarty's treatment of Casey "allegedly including arranging for Casey to obtain an MRI under a fictitious name and date of birth" directly contradicts these allegations. (Appendix 3.) In the Petition for Rehearing, Fogarty asked the court to correct this error. (Appendix 19-20.)

process because it was based on Fogarty's published false brain injury theory and filed for reasons other than to redress medical injuries sustained by Casey. (R. App. at 2-10.) Respondents also sued Petitioners for an alleged conspiracy, but later withdrew that claim. (*See* Appendix 5-6.)

Petitioners moved to dismiss Respondents' complaint, and two successive amended complaints, on grounds that the three-year statute of limitations period on Respondents' abuse of process claim expired before Respondents filed this action. (R. App. at 11-12, 13, 15-28, 53-54, 55, 56, 58-60.) Petitioners argued that when Respondents were sued in 2006 for medical malpractice, they were put on notice that they had a viable abuse of process claim, because they believed, and therefore knew or should have known, that they had been damaged by the filing and publicizing of a baseless lawsuit. (R. App. at 15-28; R. at 54-56, 75-79, 82, 88-89.)

The circuit court dismissed Respondents' claim as being time-barred, finding that Respondents knew or should have known when the medical malpractice action was filed that they possessed a claim for abuse of process against Petitioners, because Respondents alleged various pre-suit facts that should have put them on notice when the civil action was filed that such suit was not interposed to redress legitimate injuries suffered by Casey, and instead was filed for ulterior purposes, including harming Respondents. (R. at 8-14.) Applying the discovery rule to Respondents' complaint, the circuit court further held that when the medical malpractice suit was filed, Respondents could have discovered Petitioners' alleged wrongdoing through the exercise of ordinary care and reasonable diligence. (R. at 8-14.) The circuit court concluded that because Respondents failed to file suit for abuse of process within three years of the date the medical

malpractice action was filed, their abuse of process claim is time-barred. (R. at 12-14.)

The Court of Appeals reversed, finding that the allegations of Respondents' complaint do not support a finding that their abuse of process claim is barred by the statute of limitations. (Appendix 5.) The court first held that the "paragraphs of the complaint cited by the circuit court" to support its finding – *i.e.*, that Respondents knew or should have known that they may have had an abuse of process claim when the medical malpractice action was filed – do not indicate when Respondents knew or should have known that "Casey was obtaining narcotic drugs and disability benefits as a result of" the civil action, or had filed the suit with that objective. (Appendix 5.) Second, the Court of Appeals held that even if the complaint does indicate that Respondents had reason to believe the medical malpractice action lacked merit, "the complaint does not allege any specific point in time at which [Petitioners] committed a willful and improper act in their use of the legal process." (Appendix 5.)

Petitioners sought a rehearing of the court's decision, on the basis that the court apparently overlooked or misapprehended the multiple allegations of the complaint that identify by date the acts Respondents claim rendered the medical malpractice action an abuse of process, and that Respondents have directly alleged that they knew of Fogarty's wrongful acts and motives as to the false brain injury scheme no later than February 15, 2007. (Appendix 7-22, 33-42.) That date – which is more than three years before Respondents filed their abuse of process claim – is when the *S. Carolina* suit against Fogarty was dismissed with prejudice because of what Respondents allege was "tremendous pressure created in their lives by the publicizing of the baseless allegations of a 'permanent brain injury' within the destructive scheme." (R. at 25, ¶ 29; Appendix

22.) Since Respondents knew by February 2007 that Fogarty – to them, a known nemesis who has no neurological expertise – had formed and published a false brain injury theory that was negatively affecting them, and since Respondents knew they had just been sued for medical malpractice based on that very same theory, a reasonable person would have been put on notice that the civil suit might not be a legitimate action, and that it might support a claim for abuse of process. (Appendix 7-22, 33-42.) Nevertheless, the Court of Appeals declined to reconsider or revise its decision. (Appendix 45.)

Petitioners ask this Court to reverse the Court of Appeals' decision and affirm the circuit court's judgment that Respondents failed to file suit for abuse of process within three years of when they admit they believed, and therefore knew or should have known, that they possessed an abuse of process claim against Petitioners. This is because the Court of Appeals erred in its primary and secondary holdings as to whether Respondents' abuse of process claim is time-barred, and because such errors caused the court improperly to conclude that the statute of limitations does not bar Respondents' claim.

Argument

I. The Court Of Appeals Erred In Holding That The Allegations Of Respondents' Complaint Do Not Support A Finding That Their Abuse Of Process Claim Is Barred By The Statute Of Limitations, Because The Court Did Not Review Respondents' Entire Complaint, And Therefore Overlooked Operative Allegations Establishing When Respondents' Claim Arose.

A. The Court of Appeals Erred by Failing to Review Respondents' Entire Complaint.

The Court of Appeals erred, because it did not consider Respondents' entire complaint in deciding whether, based on Respondents' pleadings, Respondents have alleged pre-suit facts which they characterize as a "destructive scheme" that culminated

in the filing of the medical malpractice action and resulted in the dismissal of the *S. Carolina* case, and whether those "destructive scheme" facts would have put a person of common knowledge or experience on notice more than three years before Respondents filed this action that an abuse of process claim might exist. Instead, the court reviewed only limited allegations of Respondents' complaint – specifically, the "paragraphs of the complaint cited by the circuit court" in support of its finding that a reasonable person would have been put on notice of a possible abuse of process claim when the medical malpractice action was filed. (Appendix 5.)

"When reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 497 (2014). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009) (internal quotations omitted). While on a motion to dismiss a court must construe the plaintiff's allegations in the light most favorable to the non-moving party, it cannot selectively consider only those alleged facts supporting its decision, and ignore the other facts alleged. *See Parrish v. Allison*, 376 S.C. 308, 327, 656 S.E.2d 382, 392 (Ct. App. 2007). "In construing a complaint or responsive pleading, the court must review the entire pleading." *Id.*

This standard of review required the Court of Appeals to consider Respondents' entire complaint in reviewing the dismissal of their abuse of process claim on statute of limitations grounds. The Court of Appeals, however, stated that it looked only to "[t]he

paragraphs of the complaint cited by the circuit court" in deciding whether Respondents knew or should have known they might possess an abuse of claim more than three years before filing this action. (Appendix 5.) The court did not specify which paragraphs of the complaint the circuit court cited in support of its finding that the limitations period on Respondents' claim expired more than three years before they filed this suit. However, the circuit court's order lists the following paragraphs in support of that finding: paragraphs 4, 5, 13-18, and 106-107. (R. at 11-12.) To discharge properly its appellate function, the Court of Appeals should have reviewed all 137 paragraphs of Respondents' complaint, not just the ten paragraphs cited by the circuit court in support of a particular finding. Its failure to do so was error.

Further, in reviewing this improperly limited portion of Respondents' complaint, the court appears to have focused its review exclusively on what the circuit court's cited paragraphs allege against Casey and Thompson, and to have ignored completely the time-barring effect of Respondents' multiple allegations against Fogarty – who allegedly "mastermind[ed]" in 2004 and 2005 the false and destructive "scheme to establish civil liability" against Respondents and to damage their reputations, and whose publicized "fraudulent theory of liabilities" formed the basis of the 2006 medical malpractice case, and so negatively affected Respondents that the *S. Carolina* case against Fogarty was dismissed with prejudice in February 2007. (R. at ¶¶ 27-29, 108, 126.) In failing to consider the entirety of Respondents' complaint, including Respondents' allegations against their known adversary Fogarty, the court did not employ the proper standard of reviewing the dismissal of Respondents' claim pursuant to Rule 12(b)(6), SCRCP.

B. A Proper Review of the Entirety of the Complaint Demonstrates that Respondents' Abuse of Process Claim is Time-Barred.

The Court of Appeals' failure to employ the required standard of review for considering the dismissal of a case pursuant to Rule 12(b)(6), SCRCP, caused the court to err by reversing the circuit court order finding that Respondents' abuse of process claim is time-barred. A proper review of Respondents' entire pleading demonstrates that by no later than February 2007, they admit knowledge of facts constituting what they describe as a "destructive scheme," the perfect predicate of an abuse of process claim, and that a person of common knowledge and experience would have been put on notice by such "destructive scheme" knowledge that he might possess an abuse of process claim against Petitioners more than three years before Respondents filed such claim. This is because it is clear from the complaint, and the judicially noticeable dismissal of *S. Carolina*, that Respondents believed, and therefore knew or should have known, by February 2007 that the medical malpractice action was not interposed to redress actual medical injury Casey had sustained, but instead was based on the alleged false injury theory Fogarty devised and publicized in order to harm Respondents and achieve Petitioners' ulterior purposes.

"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). This Court has

explained that the filing and prosecution of a legal proceeding can constitute abuse of process if the defendant has engaged in willful and improper coercive acts before the issuance of process, which "taint" the entire proceeding. *Huggins v. Winn–Dixie Greenville, Inc.*, 249 S.C. 206, 209, 153 S.E.2d 693, 694 (1967). Accordingly, "the willful act requirement is not limited to those abusive acts occurring *after* process has issued, but includes coercive or extortionate acts that *cause* process to issue in the first instance." *Food Lion*, 351 S.C. at 71 n.3, 567 S.E.2d at 254 n.3 (emphasis in original).

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). Under the discovery rule, the limitations period 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). "This determination is objective, rather than subjective." *Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 576, 593 S.E.2d 624, 627 (Ct. App. 2004). Thus, the question is not whether a particular plaintiff actually knew he or she had a claim. *Id.* Instead, the court must decide whether the facts and 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. *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981).

Here, the Court of Appeals had to decide whether Respondents' complaint alleged facts that had put Respondents on notice, or would have put a person of common knowledge and experience on notice, that an abuse of process claim against another party

might exist as a result of the medical malpractice action, more than three years before Respondents filed suit in October 2010. As discussed above, in answering this question, the court improperly limited its review of Respondents' complaint, and did not review the entirety of that pleading. Had the Court of Appeals properly discharged its appellate function, it would have recognized that Respondents' complaint and the judicially noticeable *S. Carolina* dismissal reveal that more than three years before Respondents sued Petitioners in October 2010, Respondents believed, and therefore knew or should have known, that the medical malpractice action was an abuse of process.

That Respondents' abuse of process claim is time-barred becomes readily apparent when Respondents' allegations are reviewed chronologically. Respondents allege that in 2000, Fogarty and Respondent Feldman separated from their joint medical practice in a manner so acrimonious that it was "very well known" in the Spartanburg medical community. (R. at 24, ¶¶ 20-21.) In 2004, Respondents formed a medical research company that Fogarty viewed as a threat to his own medical practice and research business. (R. at 24, ¶ 22.) Thereafter, Fogarty "actively sought to interfere" with Respondents' research company and patient care, and to damage their reputations and business. (R. at 24-25, ¶¶ 22-24.) In addition to attempting to hamper Respondents' business efforts, Fogarty also determined that he could use one of his patients, Casey, to "retaliate" against Respondents for what Fogarty perceived were their "wrongs" against him. (R. at 25, ¶¶ 24, 26.)

Casey had been treated by Respondents in 2004, after being admitted to the hospital with chest pain. (R. at 23, ¶ 7.) Casey's medical records "clearly document[]" that before this event, Casey suffered from depression and had abused prescription drugs.

(R. at 29, ¶ 55.) After undergoing a flexible bronchoscopy by Respondent Boscia, Casey was scheduled for a rigid bronchoscopy by Feldman. (R. at 23, ¶¶ 9-11.) During that procedure, Casey suffered a pneumothorax, and was hospitalized for three days. (R. at 24, ¶ 13.) Immediately after leaving the hospital, Casey – who "was willing to do whatever it took to ensure his narcotic course and obtain disability benefits to keep him from returning to [his] backbreaking work" – began complaining of memory loss and personality changes, and filed disability claims with the government and his personal insurer. (R. at 24, ¶ 22; R. at 31, ¶ 72.) Casey asked Respondents to support his disability claims, and for increased pain medications. (R. at 29, ¶ 56.) Respondents denied Casey's requests, because they were "not medically supported." (R. at 29, ¶ 56.)

In 2004, after Respondents refused to support Casey's disability claims, Casey began treating with Fogarty. (R. at 24, ¶ 18; R. at 28, ¶ 48.) Fogarty used Casey and Thompson "in his efforts of destruction aimed primarily" at Feldman and Boscia. (R. at 28, ¶ 45.) Fogarty is a pulmonologist with no qualifications in any neurological specialty. (R. at 26, ¶ 31.) Nevertheless, after reviewing Casey's medical records, Fogarty "hatched a theory" that Casey had suffered a permanent brain injury as a result of the pneumothorax, and that this injury was causing Casey's claimed personality changes and cognitive defects. (R. at 25-26, ¶¶ 27-28, 31.) Casey knew he did not have a brain injury, but wanted to ensure a source for narcotic drugs and to receive disability benefits. (R. at 31, ¶ 72; R. at 35, ¶ 105.) Fogarty provided an increase in drugs to Casey, who was willing to advance a false injury theory in order to continuing to obtain them. (R. at 31, ¶¶ 69-72; R. at 35, ¶¶ 105-107.) Thompson also knew Fogarty's brain injury theory was false, but wanted to help Casey obtain disability benefits and to maintain the medical

malpractice case to suit his own personal agenda. (R. at 29, ¶ 51; R. at 32, ¶ 77.)

Respondents were aware of Fogarty's efforts to impede their business and damage their reputations, to the point that they sued Fogarty. (R. at 25, ¶ 24.). Specifically, in 2005, because of Fogarty's significant efforts to hamper Respondents' business, they filed suit against Fogarty to "clear their names" and "prevent further damage to their reputations and business." (R. at 25, ¶¶ 24-25.) This lawsuit was entitled *S. Carolina Pharmaceutical Research v. Charles M. Fogarty, M.D.*, Spartanburg County Court of Common Pleas, Case No. 2005-CP-42-1085 ("*S. Carolina*"). (R. at 25, ¶ 25.)

While *S. Carolina* was pending, Fogarty saw two ways that his involvement with Casey was "a golden opportunity to retaliate" against Feldman and Boscia for starting a competing research company and filing suit against him. (R. at 25, ¶ 26.)

First, Fogarty "continued masterminding" his unfounded theory that Casey had suffered a permanent brain injury "to injure his business competitors by damage to their reputation and through bogging them down for years in the protracted litigation defending against their scheme." (R. at 25, ¶ 27.) This "scheme" was to establish civil liability against Respondents for causing Casey "fictitious permanent brain damage," and to prolong the litigation as much as possible. (R. at 38, ¶ 126; R. at 26-27, ¶¶ 36-38.) Toward this end, on July 21, 2005, Fogarty published his permanent brain injury theory in Casey's medical records, so that those records "prominently and categorically" reflected Fogarty's baseless injury assertions. (R. at 25, ¶ 28; R. at 26, ¶ 36.) Fogarty intended these medical records to be used in Casey's disability appeal, as well as a medical malpractice case. (R. at 31, ¶ 76.) Fogarty achieved this goal in 2006, when Fogarty initiated the medical malpractice suit in an effort to damage Respondents'

reputations "by publishing and disseminating fraudulent theories of injuries" of Casey. (R. at 23, ¶¶ 4-5; R. at 35, ¶¶ 104-108.)

Second, Fogarty used his "destructive scheme" to embroil Respondents in vexatious litigation with Casey to "directly benefit[] himself by derailing his business competitors' efforts" in *S. Carolina.* (R. at 25, ¶ 29.) Specifically, Fogarty's "publicizing of the baseless allegations of a 'permanent brain injury' within the destructive scheme" created such "tremendous pressure" in Respondents' lives that they dismissed their *S. Carolina* lawsuit. (R. at 25, ¶ 29.) Respondents filed this dismissal on February 15, 2007 – more than three years before bringing this suit for abuse of process in October 2010. (Appendix 22.)

Respondents' complaint does not contain a direct allegation of when Respondents actually believed, and therefore knew, that the medical malpractice action was an abuse of process filed for the illegitimate purpose of damaging them, and not for the legitimate purpose of obtaining a tort recovery for an injured patient. However, this is irrelevant for statute of limitations purposes, because the date on which discovery of a cause of action should have been made is an objective, not subjective, question. *Graham v. Welch*, 404 S.C. 235, 239, 743 S.E.2d 860, 862 (Ct. App. 2013). "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).

It is clear from the complaint, and the judicially noticeable dismissal of *S.*

Carolina, that Respondents believed, and therefore knew or should have known, at least by February 2007 that the medical malpractice action might be an abuse of process. At and before that time, Respondents knew that their nemesis, Fogarty, had been acting for years to damage their business and reputations, to the point they sued Fogarty. They knew that although Casey had not been injured by their treatment in 2004, he filed suit against them in 2006 asserting such a claim. They knew that Fogarty, who lacks "any qualifications within any neurological specialty," had developed and published a false theory that Casey had been brain injured at Respondents' hands, and that this theory formed the basis of Casey's lawsuit. They also allege that they had been so negatively affected by Fogarty's publicized false brain injury theory that the *S. Carolina* suit against Fogarty was dismissed.

These alleged facts clearly indicate that when the medical malpractice action was filed in 2006, and at the very least by February 2007, Respondents knew or should have known that the civil suit might be illegitimate and interposed to harm them, so as to support a claim for abuse of process. Even if Respondents lacked full or complete knowledge regarding their damages or any other facts attending their claim, the limitations period began running at that time. *See, e.g., Dean v. Ruscon Corp.*, 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996) ("the fact that an injured party may not comprehend the full extent of the damage is immaterial" to the question of when the statute of limitations begins to run on a claim); *Snell*, 276 S.C. at 303, 278 S.E.2d at 334 (the statute of limitations begins to run when a person has notice that some claim against another party might exist, "and not when advice of counsel is sought or a full-blown theory of recovery developed"). Because Respondents waited until October 2010 to file

this action against Petitioners, the statute of limitations bars that claim, and the Court of Appeals erred in holding otherwise.

C. Respondents' Allegations that Petitioners Engaged in Discovery Misconduct do not Affect the Application of the Statute of Limitations.

Notably, Respondents' allegations that Petitioners engaged in dilatory or deficient discovery during the medical malpractice action do not affect the application of the statute of limitations to Respondents' abuse of process claim, because Petitioners' alleged conduct during the pendency of that case does not change the operative notice and knowledge Respondents possessed by February 2007. Because Respondents knew or should have known at least by February 2007 that the medical malpractice action might be an abuse of process, the limitations period began running at that time. No alleged conduct by Petitioners during the medical malpractice action changed or extinguished Respondents' actual or constructive knowledge that the civil suit was based on Fogarty's alleged false brain injury theory and was interposed to harm Respondents.

The complaint and *S. Carolina* dismissal show that by February 2007, Respondents knew Fogarty had developed and published the alleged false brain injury theory on which Casey's illegitimate case was based. (R. at 25, ¶ 29.) Although Respondents knew that Fogarty was involved with Casey's lawsuit as the source of the subject brain injury theory, they allege that during case discovery, Fogarty sought to mislead Respondents regarding his level of involvement with the suit, and intentionally failed to keep records of some of the treatment he provided Casey. (R. at 27, ¶¶ 39-40.) Respondents claim that until Fogarty was deposed in December 2008, they did not understand his role in the case. (R. at 27-28, ¶¶ 41-42, 44.)

These allegations do not change the fact that the three-year limitations period on Respondents' abuse of process claim began running at least by February 2007, more than three years before Respondents filed this action. Per the discovery rule, the limitations period begins running on the date a plaintiff knew or should have known he had a claim, not when the plaintiff has fully discovered the facts supporting his claim. *Gibson v. Bank of America, N.A.*, 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009). In order for Fogarty's alleged conduct during the civil suit to have prevented the limitations period from beginning to run at least by February 2007, Respondents would have to allege that until they deposed Fogarty, they believed his brain injury theory regarding Casey was meritorious, and that the medical malpractice case was a legitimate action in which Casey was seeking redress for actual injuries sustained at Respondents' hands. Respondents did not so allege, and in fact could not so plead without conflicting with the remainder of Respondents' complaint. Thus, Respondents' allegations regarding Fogarty's discovery conduct do not spare Respondents' complaint from being time-barred.

Respondents' discovery-related allegations as to Casey and Thompson also do not toll the running of the limitations period, which began to run at least by February 2007. Respondents allege that Casey and Thompson secretly obtained an MRI, and failed to disclose the test or its negative results to Respondents. (R. at 33, ¶¶ 85-90.) Operatively, Respondents do not claim that discovering this MRI changed what they knew or should have known by February 2007, which was that the uninjured Casey had filed a meritless civil suit against them, based on a false brain injury theory that Fogarty had devised, published, and was using to damage Respondents. Instead, Respondents claim the MRI "totally confirmed the fact" that Casey had not suffered a brain injury as a result of

Respondents' care. (R. at 33, ¶ 93.) Respondents had known this "truth" since 2004, when they denied Casey's request that they support his disability claim and request for drugs, because the requests were not medically supported. (R. at 29, ¶ 56; R. at 33, ¶ 93.)

In sum, Respondents' discovery-related allegations do not change the information and knowledge Respondents actually or constructively possessed at least by February 2007 as to the nature and purpose of the medical malpractice case; so those allegations do not change the fact that the limitations period started running on or before that date, and expired before Respondents filed their abuse of process claim.

D. Reversing the Court of Appeals' Decision and Enforcing the Statute of Limitations as to Respondents' Claim Would Promote Public Policy.

Reversing the Court of Appeals' decision would uphold the standard of review applicable to Rule 12(b)(6) dismissals, ensuring that all litigants' cases are decided on appeal fully and according to the proper legal standard. Holding otherwise would allow to stand a decision based on less than a complete review of the material our appellate courts must consider in determining whether a claim is time-barred.

Reversing the court's decision also would promote this State's public policy in enforcing statutes of limitations and ensuring certainty as to the time period in which litigants may face suit. "[S]tatutes of limitations are not simply technicalities, but are fundamental to a well-ordered judicial system. *Pelzer v. State*, 378 S.C. 516, 520, 662 S.E.2d 618, 620 (Ct. App. 2008). "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." *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). Were Respondents permitted to litigate their

abuse of process claim outside the three-year limitations period, this policy would be subverted. It also could promote attempts by plaintiffs to avoid the application of the discovery rule by creative pleading. For example, a plaintiff could intentionally omit from its pleadings any allegation of when it obtained actual knowledge of an actionable harm, and then argue that without such a direct statement, the complaint cannot be time-barred. Or, a plaintiff whose alleged facts clearly demonstrate that its claim was untimely could attempt to defeat a Rule 12(b)(6) motion simply by including in its pleading a direct allegation that it knew its rights had been infringed at some later date.

These negative possibilities can be avoided by dismissing Respondents' abuse of process claim based on the applicable statute of limitations.

II. The Court Of Appeals' Decision That The Complaint Does Not Specify When Appellants Committed Intentional Acts In Their Use Of The Legal Process Conflicts Directly With *Huggins* And Other Applicable Precedent.

The Court of Appeals also erred in reaching its secondary conclusion with respect to whether Respondents' abuse of process claim was time-barred, which was that the complaint did not state "any specific point in time at which [Petitioners] committed a willful and improper act in the use of the legal process." (Appendix 5.) This is because to reach this decision, the court necessarily had to have reviewed only limited paragraphs of the complaint, or improperly considered that only acts committed after the malpractice action was filed can constitute the "bad act" element of an abuse of process claim.

As detailed above, Respondents' complaint alleges, by date and time period, specific improper acts that Petitioners committed before the medical malpractice action was filed, which culminated in the filing of that illegitimate suit and rendered it an abuse of process. These willful acts include, but are not limited to, Fogarty's having developed

his baseless brain injury theory during 2004 and 2005, with the intent of damaging Respondents' business and reputations; Fogarty's having published this false theory in Casey's medical records on July 21, 2005, to ensure its publication and dissemination to others; Petitioners' distributing Casey's records to disability insurers and experts to support illegitimate disability applications and the medical malpractice suit in 2005 and 2006; and Petitioners' filing the civil action in 2006 to embroil Respondents in vexatious litigation. Thus, contrary to the court's decision, Respondents' complaint *does* allege specific points in time at which Petitioners engaged in willful acts leading up to and culminating in their improper use of the malpractice action. It follows that the court either failed to consider the entire complaint in reviewing the Rule 12(b)(6) dismissal of Respondents' abuse of process claim, or errantly determined that the willful act element of such a claim can be met only by conduct occurring after process has issued.

A. If the Court Reviewed Only Limited Portions of the Complaint in Reaching this Decision, it Failed to Employ the Proper Standard of Review.

If the court disregarded any of Respondents' allegations in concluding that the "complaint does not allege any specific point in time at which [Petitioners] committed a willful and improper act in their use of the legal process," the court failed to engage in the proper review of the Rule 12(b)(6) dismissal of Respondents' claim, as discussed above.

B. If the Court Determined that Only Acts Occurring After Process Issued can Satisfy the Intentional Act Element of an Abuse of Process Claim, it Failed to Follow *Huggins* and Other Applicable Precedent.

If the court determined that the "willful act" required in an abuse of process claim can occur only *after* process has issued, such that the acts Respondents committed before the medical malpractice action was filed are irrelevant to the statute of limitations

question, then the court's decision conflicts directly with this Court's ruling in *Huggins v. Winn–Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (1967), and the Court of Appeals' decisions in *Food Lion, Inc. v. United Food & Commercial Workers Intern. Union*, 351 S.C. 65, 567 S.E.2d 251 (Ct. App. 2002), and *Sierra v. Skelton*, 307 S.C. 217, 414 S.E.2d 169 (Ct. App. 1992). These cases hold that the wilful acts forming an abuse of process claim include improper acts that cause process to issue, and are not limited to abusive acts occurring after process has issued. "[T]he willful act requirement is not limited to those abusive acts occurring *after* process has issued, but includes coercive or extortionate acts that *cause* process to issue in the first instance." *Food Lion*, 351 S.C. at 71 n.3, 567 S.E.2d at 254 n.3 (emphasis in original).

Thus, in considering whether Respondents' abuse of process claim is time-barred, the Court of Appeals should have examined whether the complaint alleges that Petitioners engaged in willful and improper coercive acts before the medical malpractice action was filed, which tainted the entire proceeding and rendered it an abuse of process. Had the court employed such review, it would have recognized that the complaint alleges multiple willful acts committed by Respondents between 2004 and 2006, which culminated in the filing of the medical malpractice action and rendered that entire suit an abuse of process. *See Food Lion*, 351 S.C. at 71 n.3, 567 S.E.2d at 254 n.3; *see also Huggins*, 249 S.C. at 209, 153 S.E.2d at 694.

The court's failure to follow *Huggins* and its progeny caused it to misconstrue the effect of the complaint's direct allegations in considering whether Respondents' claim was time-barred. Specifically, the court disregarded the pre-suit acts that Respondents claim culminated in the medical malpractice action's filing in 2006 and rendered that suit

an abuse of process, and the fact that by February 2007, Respondents were aware of and so negatively affected by Fogarty's public scheme to injure them through Casey that they dismissed their *S. Carolina* lawsuit against Fogarty. As a result, the Court of Appeals erred in concluding that that the complaint does not demonstrate that Respondents failed to file their abuse of process claim within the three year limitations period.

Reversing the court's decision would achieve the correct result and resolve the decision's direct conflict with *Huggins*, *Food Lion*, and *Skelton*. This, in turn, would prevent uncertainty among South Carolina's litigants regarding the proper scope and elements of the cause of action of abuse of process.

Conclusion

For these reasons, Petitioners respectfully ask this Court to grant this petition.

Respectfully Submitted,

October 3, 2014

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STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

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

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

v.

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

PROOF OF SERVICE

I certify that I have served the *Petition for a Writ of Certiorari* on Respondents Gregory J. Feldman, MD, Joseph A. Boscia, III, MD, Upstate Lung & Critical Care Specialists, PC, and Devendra Shantha, MD, via UPS overnight, on October 3, 2014, addressed to their attorney of record, F. Milton Mann, Jr., Esquire, at his office at 151 Harold Fleming Court, Spartanburg, South Carolina, 29303.

Additionally, I hereby certify that I have served the *Petition for a Writ of Certiorari* on co-Petitioners, William Mark Casey and Ray E. ("Chuck") Thompson, by depositing a copy of it in the United States Mail, postage prepaid, on October 3, 2014, addressed to their attorneys, Joe Mooneyham, Esquire, PO Box 8359, Greenville, South

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

October 3, 2014

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October 3, 2014

Sent via UPS Overnight Mail
The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

Re: ***Gregory J. Feldman, MD, Joseph A. Boscia, III, MD, Upstate Lung & Critical Care Specialists, PC, and Devendra Shantha, MD, Respondents v. William Mark Casey, Ray E. ("Chuck") Thompson and Charles M. Fogarty, Petitioners***
Unpublished Opinion No. 2014-UP-273 (S.C. Ct.App. filed June 30, 2014

Dear Mr. Shearouse,

Enclosed for filing in the referenced matter are the following:

1. Original and seven copies of the Petition for a Writ of Certiorari filed on behalf of all Petitioners;

2. Original (bound) and two (unbound) copies of Appendix to Petition for a Writ of Certiorari;

3. Original (bound) and one (unbound) copy of Petitioners' supporting materials which include the following:

   a. Record on Appeal;
   b. Appendix to Record on Appeal;
   c. 01-02-13 Initial Brief of Appellants;
   d. 05-06-13 Joint Brief of Respondents;
   e. 05-29-13 Final Brief of Appellants; and

4. Filing Fee check in the amount of $100.

Please mark one extra copy of the Petition for Writ of Certiorari and Appendix to Petition "filed" and return them to me in the enclosed, postage-paid envelope.

Thank you for your assistance in this regard.

Sincerely,

Ellen S. Cheek / by Ashley Henderson with express permission

Ellen S. Cheek
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Enclosures
ESC:amh

cc: V. Claire Allen, Deputy Clerk
S.C. Court of Appeals (Petition only)
(via U.S. Mail)
cc: F. Milton Mann, Jr., Esquire (via UPS Overnight Mail)
cc: Joe Mooneyham, Esquire (via U.S. Mail)
cc: Matthew H. Henrikson, Esquire (via U.S. Mail)
cc: Michael B.T. Wilkes, Esquire (via Email Only)