

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

IN THE COURT OF COMMON PLEAS

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

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

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SC Court of Appeals

This action came before me for hearing on October 19, 2017, on the Motion for Reconsideration filed by Plaintiffs Gregory J. Feldman, MD, Joseph A. Boscia, III, MD, and Upstate Lung & Critical Care Specialists, PC ("Plaintiffs"). Plaintiffs' motion (the "Motion"), which Plaintiffs submitted under Rule 52 and Rule 59, SCRPC, seeks the alteration or amendment of this Court's July 20, 2017, Order Granting Defendants' Motion for Summary Judgment (the "Order"). For the following reasons, the Court denies Plaintiffs' Motion.

The Order

The Order fully and properly decided the issue presented by Defendants' Motion for Summary Judgment, based on the record evidence and applicable law. The Order holds that Plaintiffs' cause of action for abuse of process against Defendants is time-barred, because the indisputable evidence in this case shows that the statute of limitations on that claim expired more than three years before Plaintiffs filed this action on October 27, 2010. *See* Order 3.

Specifically, based on the record, the Order finds that after Plaintiffs were named as defendants in the medical malpractice lawsuit styled *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, Spartanburg County Court of Common Pleas, Case No. 2006-CP-42-1728 (the “MMA”), Plaintiffs formed the belief that the MMA was an invasion of their legal rights that had damaged them, and that supported Plaintiffs’ bringing claims against Defendants in relation to the MMA. *See* Order 2-3. Plaintiffs’ own documents and testimony show clearly that Plaintiffs formed this actual belief more than three years before Plaintiffs asserted two of those causes of action against Defendants in this suit. *See* Order 2-3. This is because between August 11, 2007, and September 29, 2007, Feldman – whose acts and assertions Boscia has expressly adopted as his own in this case – wrote a series of emails declaring and discussing the legal claims Plaintiffs believed they held against Defendants in relation to the MMA, including the abuse of process and civil conspiracy claims Plaintiffs eventually asserted in this action. *See* Order 2-3. These emails prove that by the dates those emails were written, Plaintiffs had formed and held the actual belief that triggered the running of the limitations period as to their claims arising from the MMA. *See* Order 3-5. Because Plaintiffs failed to file this action within three years of forming this actual belief, their abuse of process claim against Defendants is time-barred. *See* Order 5.

The Order also holds that equitable tolling does not apply to prevent the running of the statute of limitations on Plaintiffs’ abuse of process claim. *See* Order 5-7.

Discussion

Plaintiffs’ Motion, and the Reply Brief Plaintiffs filed in support of it, advance no legitimate grounds for the Order to be amended under Rule 52 or 59 of the South Carolina Rules of Civil Procedure.

I. Rule 52 Does Not Require The Order To Include Any Specific Findings Of Fact Or Conclusions Of Law.

Rule 52 defeats Plaintiffs’ claim that the Court’s Order is “factually and legally deficient,” because it does not identify a particular “willful act” that Defendants allegedly committed in relation to the MMA, or state when that act occurred. (*See* Pls.’ Br. 1, 2.) Rule 52(a) specifically

provides that “[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56[.]” Rule 52(a), SCRCP. “[S]uch findings and conclusions are not required for appellate review.” *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 526–27, 753 S.E.2d 428, 433 (2014).

In this case, the Court chose to include in its Order certain Findings of Fact and Conclusions of Law supporting its conclusion that Plaintiffs’ abuse of process claim against Defendants is time-barred. *See* Order 2-7. However, Rule 52(a) clearly provides that the Order granting summary judgment in Defendants’ favor did not need to include any findings of facts or conclusions of law. Plaintiffs’ argument that the Order is “deficient” because it does not include a particular finding of fact that Plaintiffs believe it should include is hereby rejected.

II. Plaintiffs’ Motion Does Not Advance Any Argument Supporting Amendment Or Alteration Of The Order Under 59(e).

Plaintiffs’ Motion also fails to advance any grounds appropriate for seeking an amendment or alteration of the Order under Rule 59(e).

Rule 59(e), SCRCP, provides:

A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.

“The purpose of Rule 59(e), SCRCP, to alter or amend the judgment, is to request the trial judge to reconsider matters properly encompassed in a decision on the merits.” *Coward Hund Const. Co., Inc. v. Ball Corp.*, 336 S.C. 1, 3, 518 S.E.2d 56, 58 (Ct. App. 1999) (internal quotations and citations omitted). A Rule 59(e) motion is also the proper vehicle for correcting factual errors in an order. *Doe v. Doe*, 324 S.C. 492, 502, 478 S.E.2d 854, 859 (Ct. App. 1996).

No reported South Carolina case decision specifically addresses when a Rule 59 motion to alter a judgment may be granted, but the Fourth Circuit Court of Appeals has done so with respect to Rule 59’s federal counterpart, FRCP 59(e). Federal court decisions instruct that a court may alter or amend its prior judgment under FRCP 59(e): (1) to accommodate an intervening change in

controlling law; (2) to account for new evidence not available previously; or (3) to correct a clear error of law or prevent manifest injustice. *Zinkland v. Brown*, 478 F.3d 634, 637 (4th Cir. 2007); *Bogart v. Chapell*, 396 F.3d 548, 555 (4th Cir. 2005). A party cannot use Rule 59(e) to “‘rehash’ the same arguments and facts previously presented” or to raise new arguments. *Rouse v. Nielsen*, 851 F. Supp. 717, 734 (D.S.C. 1994). Likewise, a Rule 59(e) motion may not be used to raise arguments which could have been raised before the judgment was issued, or “to enable a party to complete presenting his case after the court has ruled against him.” *Pacific Insurance Co. v. American National Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998).

Plaintiffs have not met the standard under Rule 59 for having this Court alter or amend its Order. Each of the positions Plaintiffs’ Motion and Reply Brief have advanced are arguments that Plaintiffs raised in opposition to Defendants’ summary judgment motion. Plaintiffs also have not argued and cannot prove that any changes in the applicable law have occurred, nor have the facts of this case changed. Further, as discussed below, this Court did not misapprehend those facts in holding that Plaintiffs’ claim is time-barred.

A. The August 11, 2007, Email Fully Supports The Order’s Finding That Plaintiffs’ Abuse of Process Claim Is Time-Barred.

Plaintiffs’ primary argument that the Motion re-asserts is that Feldman’s August 11, 2007, email (the “August 11 Email”) cannot support a decision that Plaintiffs’ abuse of process claim is time-barred. This argument asserts no legitimate grounds for altering this Court’s Order under Rule 59, because it previously was presented by Plaintiffs during the summary judgment hearing, was considered fully by this Court, and was rejected. In addition, as discussed below, the Court made no factual error in finding that the August 11 Email supports its holding that the statute of limitations started running on Plaintiffs’ abuse of process claim more than three years before Plaintiffs filed this suit.

South Carolina law is clear: the focus of a Court deciding when the statute of limitations

begins running on a plaintiff's claim is the date the plaintiff discovers an injury. *Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994). It is not the date the plaintiff discovers the identity of the wrongdoer. *Id.* It is not the date that the plaintiff hires or consults a lawyer. *Gibson v. Bank of America, N.A.*, 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009). It is not the date that the plaintiff knew he had a particular claim. *Young v. S.C. Dep't of Corrections*, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999). It also is not the date that the plaintiff develops a full-blown theory of recovery, or obtains actual knowledge of either the potential claim or the facts giving rise thereto. *Gibson*, 383 S.C. at 406, 680 S.E.2d at 782. Instead, "[t]he important date under the discovery rule is the date that a plaintiff discovers the injury 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*, 314 S.C. at 128, 442 S.E.2d at 170.

Plaintiffs' abuse of process claim against Defendants is time-barred, because the August 11 Email and Feldman's other August and September 2007 messages show that when those emails were written, Plaintiffs held the actual belief that their legal rights had been infringed by the MMA, and that they possessed claims against Defendants for their resulting damages. The August 11 Email plainly states:

1. We have at least Casey plus his Lawyer [Thompson] and Possibly Fogarty plus Chuck Thompson's Wife
2. As for Abuse of Process that is already fact (He had no right to speak to Press about trial matter..Violation of Civil Procedure.

(Mann 1168.) Feldman followed this August 11 Email with other messages exploring the claim elements of the abuse of process cause of action he believed Plaintiffs could assert against Defendants, and even the statute of limitations applicable to the claims he believed Plaintiffs held against Defendants. (Mann 1167, 1183, 22478, 22484.) These documents plainly show that when Feldman authored these emails, Plaintiffs actually held the beliefs that are operative to this Court's

finding that the statute of limitations on Plaintiffs' abuse of process claim had started running at least by the date of those messages: Plaintiffs believed that the MMA was an unfounded lawsuit interposed against them by Defendants with the intent to injure them; Plaintiffs believed they had been injured by the filing of the MMA; and Plaintiffs believed they had legal claims against Defendants as a result thereof.

Significantly, these actual beliefs of Plaintiffs that are stated and reflected in Feldman's August and September 2007 emails are entirely consistent with Plaintiffs' deposition testimony and other evidence in the case record, including, *inter alia*:

- When Plaintiffs were served with the MMA in May 2006, they did not believe even for "a second" that the lawsuit was a legitimate malpractice action, or that Casey was actually seeking legal redress for an injury that had been caused by Plaintiffs. (Feld. Dep. 296.)
- In May or early June 2006, when Plaintiffs first met with their counsel in the MMA after that lawsuit was filed, Feldman expressed his belief that the MMA was unfounded and meritless. (*See* King Dep. 70.)
- By July 2006, Plaintiffs had received a copy of the written note Fogarty made of his July 21, 2005, office visit with Casey (the "July 21, 2005 Note") in the documents Thompson produced in the MMA, and saw that the air embolism and brain damage theory stated in that record was the basis of the claims that were asserted against them in the MMA. (Feld. Dep. 8-9, 104, 191-192, 201-202, 296; Boscia Dep. 90, 98-99; King Dep. 74.) This solidified Plaintiffs' existing belief that the MMA lacked any merit, and caused them to believe that Fogarty had prepared the July 21, 2005 Note in order to have the MMA filed against Plaintiffs, with the goal of damaging their reputations. (Feld. Dep. 199-203; Boscia Dep. 99, 124.)
- Beginning early in the MMA and persisting throughout that case, Feldman advised Plaintiffs' MMA counsel that he believed Plaintiffs held counterclaims against Defendants for filing the MMA against them, and that he wanted to sue Defendants. (King Dep. 80-82.)
- As early as June 2007, Feldman had started performing research on tort claims he believed Plaintiffs might be able to assert against Defendants in relation to the MMA, including invasion of privacy. (Mann 84.)
- On August 11, 2007, Feldman sent Boscia the August 11 Email, which contained legal research Feldman had performed on the causes of action he believed Plaintiffs possessed against Defendants, and stated that Plaintiffs actually had causes of action against Defendants for abuse of process and conspiracy. (Mann 1168.)

- Feldman followed up his August 11 Email with additional emails on August 17 and September 27, 2007, containing additional legal research Feldman had performed regarding the abuse of process claim he believed Plaintiffs possessed against Defendants in relation to the MMA, and the statute of limitations applicable to Plaintiffs' claims. (Mann 1167, 1183, 22478, 22484.)

- On September 4, 2007, Plaintiffs' insurance counsel for the MMA, Spencer King, reported to Plaintiffs' insurer that, *inter alia*, Feldman and Fogarty were "bitter rivals" and that "Dr. Feldman, in this case, believes Dr. Fogarty is supporting Casey in this litigation." (JUA Docs. 389-391.)

- Similarly, on October 10, 2007, King reported:

Just for your information, I am copying you on some, but not all of the e-mails that Dr. Feldman has sent to me attempting to direct this litigation, most of which deal with ancillary issues, minutia such as the article in the Herald-Journal, all suits against competitors, etc., etc. I have directed him to seek legal advice of others (he has his own attorney) if he feels he has redress. My sole job is to defend this lawsuit. That does not include filing suit against anyone.

(King Docs. 1571.)

These documents and related case evidence are consistent with this Court's finding that the August 11 Email states Feldman's actual belief that Plaintiffs held claims against Defendants relating to the MMA, and contradict Plaintiffs' current argument to the contrary. Further, because the case record shows conclusively that when Feldman wrote the August 11 Email and his other August and September 2007 emails, Plaintiffs *actually had determined and believed* that their legal rights had been infringed by the MMA and that they held resultant claims against Defendants, this Court did not need to determine whether or when Plaintiffs *should have* discovered that the MMA allegedly infringed on their legal rights and damaged them. Likewise, because Plaintiffs held these actual beliefs in August and September 2007, the statute of limitations had started running on the claims Plaintiffs later asserted against Defendants in this lawsuit – regardless of whether Feldman had yet to determine conclusively what facts or damages Plaintiffs could allege in support of those claims.

For these reasons, the Court's Order properly granted summary judgment in Defendants'

favor, and Plaintiffs' argument regarding the August 11 Email does not warrant any alteration or amendment of that Order.

B. Plaintiffs' Abuse Of Process Claim Is Based On Events Occurring Prior To 2008.

Also deficient under Rule 59 is Plaintiffs' argument that the statute of limitations on their abuse of process claim could not have started running until 2008, because the acts that form the basis of their claim did not occur until 2008. In addition to re-arguing a position Plaintiffs previously presented in opposition to Defendants' summary judgment motion, Plaintiffs have not proved that the law applicable to this matter has changed, or that this Court made any factual errors in the Order. Instead, as shown below, the Court properly construed the case evidence in issuing its Order, because the record shows conclusively that Plaintiffs' abuse of process claim is based on alleged acts that Plaintiffs contend Defendants committed prior to and at the time the MMA was filed in May 2006, and that rendered the entire MMA an abuse of process. Plaintiffs' current argument stands directly contrary to the fact that Plaintiffs' abuse of process claim is based primarily on Fogarty's July 21, 2005 Note, and on Plaintiffs' belief that Fogarty fraudulently created that record for the purpose of causing the MMA to be filed against Plaintiffs, and damaging them. It is clear that Plaintiffs' abuse of process claim had accrued and that the statute of limitations for that claim had started to run no later August and September 2007, when Feldman wrote his emails stating Plaintiffs' actual belief that they held such a claim against Defendants.

In their attempt to avoid dismissal of their claim, Plaintiffs argue that this Court must find that Plaintiffs' cause of action arose in 2008 – a date less than three years before Plaintiffs filed this action in October 2010. Plaintiffs argue that 2008 is the earliest year in which their claim could have accrued and the statute of limitations on that claim could have started running, because Plaintiffs' Second Amended Complaint (SAC) alleges that it was during 2008 that:

- Plaintiffs discovered that Dr. Grace's notes stated that Fogarty had seen Casey at his research facility before the date of the July 21, 2005 Note;

- Fogarty testified during his deposition that his first office visit with Casey did not occur until July 21, 2005, when Fogarty wrote his July 21, 2005 Note;
- The records Fogarty produced at his deposition did not contain all of the records Plaintiffs believe Fogarty generated as to Casey; and
- Casey had an MRI under an assumed name that was arranged by Thompson.

(Pls.' Br. 4-6.) Plaintiffs also point to the Feldman Affidavit that Plaintiffs submitted on the eve of the Court's June 16, 2017, hearing on Defendants' summary judgment motion, in which Feldman declared, *inter alia*:

Plaintiffs' lawsuit is based upon the information received during the depositions of of [sic] Dr. Grace, Dr. Waid, Dr. Fogarty, and the fraudulent MRI, which all occurred in year [sic] 2008.

Feldman Aff. ¶ 22.

As discussed below, Plaintiffs' argument fails on procedural, legal, and factual grounds to assert any legitimate basis for the alteration or amendment of this Court's Order.

1. Plaintiffs' argument fails procedurally.

Plaintiffs' argument that this Court must base its summary judgment decision on the allegations of the SAC is incorrect procedurally, because in deciding Defendants' Rule 56 motion, the Court is not confined to Plaintiffs' pleadings, and instead must consider the record evidence – which in this case includes Plaintiffs' depositions and the parties' and third parties' document productions. *See* Rule 56, SCRPC. In addition, Plaintiffs' argument regarding the SAC ignores other paragraphs of that pleading which clearly state that Plaintiffs' claims are based on alleged acts Plaintiffs believe Defendants committed prior to the MMA's filing, including Fogarty's alleged act of fraudulently creating his July 21, 2005 Note for the purpose of instituting the MMA against Plaintiffs in 2006, in an effort to damage Plaintiffs. *See* SAC ¶¶ 26-28, 35-38, 76, 108.

2. Plaintiffs' argument fails legally.

Plaintiffs' argument that their abuse of process claim did not accrue for statute of limitations purposes until 2008 also fails legally. This is because in making that argument, Plaintiffs incorrectly state that the improper act element of an abuse of process claim cannot pre-date the issuance of the process that was allegedly abused. As discussed below, this position directly contravenes South Carolina law.

In support of their Motion, Plaintiffs assert that the filing of a lawsuit "legally fail[s]" to satisfy the willful act element of an abuse of process claim. (Pls.' Br. 2, 3.) Plaintiffs cite *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 351 S.C. 65, 567 S.E.2d 251 (Ct. App. 2002), claiming that it holds that "the mere filing of a lawsuit does not give rise to a cause of action for an abuse of process claim," and that willful acts may occur only in the conduct of the proceeding at issue. (Pls.' Br. 2.) With this mis-statement of law, Plaintiffs seek to turn this Court's attention away – at least for statute of limitations purposes – from the alleged wrongful acts Plaintiffs have consistently contended that Defendants committed when Fogarty wrote his July 21, 2005 Note and the MMA was filed. Plaintiffs seek instead to focus the Court solely on alleged acts Plaintiffs claim occurred or were discovered in 2008, a date that falls within the limitations period.

South Carolina law refutes Plaintiffs' argument. "The tort of abuse of process consists of two elements: an ulterior purpose, and a willful act in the use of the process that is not proper in the regular conduct of the proceeding." *McBride v. School Dist. of Greenville County*, 389 S.C. 546, 698 S.E.2d 845 (Ct. App. 2010). Contrary to Plaintiffs' position, allegedly wrongful acts occurring before a lawsuit is filed can meet the willful act requirement of an abuse of process claim. In *Food Lion*, the Court of Appeals explained that "the willful act requirement is not limited to those abusive acts occurring after process has issued, but includes coercive or extortionate acts that cause process to issue in the first instance." *Id.* at 71, 567 S.E.2d at 254, n. 3 (emphasis added). The *Food Lion* Court then expressly held that "an abuse of process action may lie if a party prosecutes an 'entire

lawsuit' for collateral purposes." *Id.* 351 S.C. at 73, 567 S.E.2d at 255.

Likewise, in *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 212, 153 S.E.2d 693, 696 (1967), the South Carolina Supreme Court recognized that an entire lawsuit can constitute an abuse of process, when that lawsuit results from and is "tainted throughout" by improper acts that cause the process to issue in the first place. The court rejected the defendant's argument that its store manager's actions in detaining a shopper and demanding that the shopper pay for items the manager thought he had stolen on a prior occasion could not support an abuse of process claim, because those acts occurred before the manager called the police and had the shopper arrested. *Id.*

The *Huggins* Court explained:

Appellant contends that since respondent's arrest in the store and his subsequent arrest on the warrant for shoplifting took place after the actions of its store manager, those actions did not constitute abuse of process because 'process' was not then in existence. The argument is unsound in our opinion. *Appellant cannot divorce itself from responsibility for the proceedings that resulted from the store manager's actions . . . all of which [proceedings]. . . were tainted throughout with the ulterior and improper purpose of coercing the respondent to pay for merchandise that the store manager 'felt' or suspected he had previously taken.*

Id.

The holdings of *Food Lion* and *Huggins* are clear. Alleged improper acts preceding the issuance of process can form the basis of an abuse of process claim, and can render the entirety of the lawsuit an abuse of process. In addition, the filing of a lawsuit itself can support an abuse of process claim, if a party prosecutes the entire action for collateral purposes. The record evidence in this case, as discussed herein, shows clearly that Plaintiffs' abuse of process claim against Defendants was based on alleged acts Plaintiffs claim occurred prior to and at the time of the MMA's filing in May 2006, and not just on acts allegedly occurring during or after 2008. This evidence also shows Plaintiffs' belief that the entirety of the MMA was improper, such that the filing of the MMA itself constituted an abuse of process. The Court properly considered that evidence in deciding that Plaintiffs' abuse of process claim accrued, and that the statute of

limitations on that claim expired, more than three years before Plaintiffs filed this action.

3. Plaintiffs' argument fails factually.

Plaintiffs' argument that their abuse of process claim cannot be time-barred because it is based on alleged acts that occurred in 2008 also fails factually. This is because the case record clearly establishes that Plaintiffs' abuse of process claim is based primarily on Fogarty's July 21, 2005 Note, and on Plaintiffs' belief that Fogarty fraudulently created that record for the purpose of instituting the MMA against Plaintiffs and damaging them. In fact, Plaintiffs believe the legal process was abused by the filing of the MMA, which they insist was instituted for the exclusive and improper purpose of embroiling them in litigation. Notably, neither Plaintiffs' Motion nor the Feldman Affidavit disclaims Plaintiffs' longstanding and articulated belief that Defendants abused the process of the MMA by filing that action on the July 21, 2005 Note as part of an alleged scheme to injure them. Likewise, Plaintiffs have not disavowed Feldman's deposition testimony in this case, which repeatedly and consistently identified Fogarty's July 21, 2005 Note and Defendants' filing of the MMA as the reason Plaintiffs have sued Defendants for abuse of process. Those facts thus remain part of the case record that this Court properly and fully considered in granting Defendants' Motion for Summary Judgment.

Nevertheless, Plaintiffs' Motion and the Feldman Affidavit attempt to direct this Court's attention away from the alleged acts Plaintiffs believe Defendants committed in 2005 and 2006 that form the primary basis of Plaintiffs' cause of action, and toward alleged misconduct Plaintiffs claim Defendants committed during the MMA in 2008. Plaintiffs, however, cannot selectively limit the facts this Court must consider in deciding Defendants' summary judgment motion, or in determining whether the Order contains some alleged factual error. This Court properly considered the entire case record in issuing its Order, and relied on the overwhelming evidence contained therein in concluding that the statute of limitations on Plaintiffs' abuse of process action claim expired more than three years before Plaintiffs filed this suit.

The Court's Order is entirely consistent with the evidence in this case, including the deposition testimony of Feldman, which shows conclusively that Plaintiffs' claim is based on alleged acts of Defendants that Plaintiffs believe occurred prior to and/or at the time the MMA was filed – and that it is not, as Plaintiffs currently argue, based exclusively on alleged misconduct Plaintiffs claim Defendants committed in 2008, during the pendency of the MMA. Multiple times during his deposition, Feldman testified that the reason Plaintiffs have sued Defendants is that Fogarty wrote the July 21, 2005 Note, and that Defendants then used that record to file the MMA against Plaintiffs in order to damage them. For one of many examples, Feldman testified:

A. We are suing Dr. Fogarty not for seeing Mr. Casey. We are suing Dr. Fogarty for fabricating the scheme. That's why we're suing him. Somehow you tried to say it's about medicine. It isn't. It has nothing to do with medicine.

Q. It's about what Dr. Fogarty wrote down. You're suing him because he wrote down something that was false, in your opinion, and used it as the basis of a lawsuit.

A. I don't know why, Ellen, you decided to put words in my mouth. For the past two hours I'm trying to explain to you that he did not write the note for the patient. He wrote the note for the lawyer. It is not a medical record. It's a legal record to file the lawsuit. That's what he's getting sued for. He got caught. Okay? He got caught in writing record, not for the medical purpose, but for legal purpose. A legal purpose was to hang his colleagues, to embroil them in multi-year litigation and to destroy their careers. That's what he's getting sued for.

Q. And you had told me earlier that in order to do that, in order to have a record to be used for a lawsuit, he had to put the word undoubtedly in there?

A. Yes.

Q. So, at its core, what Dr. Fogarty did wrong was he wrote that Mr. Casey undoubtedly had air embolism?

A. What do you mean wrong? He changed his note to become a linchpin of his lawsuit, Fogarty lawsuit. That lawsuit was Fogarty lawsuit. He needed a linchpin. He changed it. He changed it way after it was written.

Feldman Dep. p. 76, line 21 – p. 77, line 24. Feldman testified consistently with these statements on multiple occasions throughout his deposition. *See, e.g.*, Feldman Dep. p. 48, line 9 – p. 49, line

12; Feldman Dep. 71, line 17 - p. 72, line 13; Feldman Dep. p. 85, lines 13-20; Feldman Dep. p. 153, lines 3-21. Boscia has adopted Feldman's positions as his own in this case, and Plaintiffs have not asserted that Feldman's testimony was in any way false or inaccurate; so Plaintiffs lack factual support for their present claim that Plaintiffs have sued Defendants only for acts they allegedly committed during 2008.

In addition to Feldman's own deposition testimony, the record evidence supporting this Court's Order includes correspondence from Plaintiffs' MMA counsel, which further confirms that more than three years before Plaintiffs filed this lawsuit, they believed their legal rights had been infringed by Defendants as to the MMA, and they wanted to sue Defendants. King's September 4, 2007, report to Plaintiffs' insurer in the MMA clearly stated Feldman's belief that Fogarty was "supporting" Casey in the MMA, and King's October 10, 2007, report directly advised that Feldman desired to sue his "competitors" to seek redress he believed Plaintiffs were owed as a result of the MMA. (JUA Docs. 389-391.)

This evidence, and the case record as a whole, soundly refutes Plaintiffs' argument that their abuse of process claim is based only on acts that occurred in or after 2008, and that the Court therefore made a factual error in finding that Plaintiffs did not assert that cause of action within the three-year limitations period. The Court therefore rejects Plaintiffs' argument under Rule 59.

C. The Evidence Shows That Plaintiffs Were Aware Of The Alleged Acts Forming The Basis Of Their Abuse of Process Claim Prior To 2008.

This same record evidence defeats Plaintiffs' next argument in support of their Motion, which is that even if the alleged acts that form the basis of Plaintiffs' abuse of process claim did occur before 2008, Plaintiffs did not learn about those acts prior to that date, so the statute of limitations could not have started running before 2008. As stated in Plaintiffs' Reply Brief, "Plaintiffs did not know they had a cause of action for abuse of process until 2008." (Reply Br. 5.) This argument appears to be the same equitable tolling argument that Plaintiffs presented to the

Court during the summary judgment hearing, and that this Court rejected. Plaintiffs' disagreement with how this Court applied the law to their case does not support Plaintiffs' request for altering or amending the Order under Rule 59.

Further, Plaintiffs have not demonstrated and cannot show that this Court somehow misapprehended the law or facts relevant to this issue in rendering its Order. This is because the record evidence, and Plaintiffs' stipulations regarding it, show conclusively that Plaintiffs were aware no later than July 2006 of the operative, alleged facts that Plaintiffs themselves have testified form the basis of their abuse of process claim against Defendants, and on which they sued Defendants. This is because by July 2006, Plaintiffs had assessed the MMA as being meritless and interposed to harm them; they had received a copy of Fogarty's July 21, 2005 Note and recognized it as the basis of the MMA; and they believed they had been damaged by the MMA. (*See* Feld. Dep. 8-9, 104, 191-192, 201-202, 296; Boscia Dep. 90, 98-99; King Dep. 70, 74.) All of these facts were known to Plaintiffs when Feldman prepared his emails of August and September 2007, which documents state and reflect Plaintiffs' actual belief that they possessed causes of action against Defendants arising from the MMA. As the Supreme Court instructed in *Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994), because Plaintiffs knew that they "had some claim against someone else, the statute of limitations [began] to run for all claims based on that injury."

For these reasons, the Court rejects Plaintiffs' argument and declines to alter or amend its Order.

D. The Order Need Not Identify A Particular Willful Act That Constitutes One Of The Elements Of Plaintiffs' Abuse of Process Claim.

Plaintiffs also are incorrect in arguing that the Court's Order should be altered or amended because the Court of Appeals instructed it to identify a particular bad or willful act that makes up one of the two required claim elements of Plaintiffs' abuse of process claim.

As an initial matter, and discussed above, Rule 52 does not require this Court to make any

specific findings in issuing a ruling on a Rule 56 motion. The fact that this Court chose to include in its Order some of the facts supporting its finding that the statute of limitations on Plaintiffs' claims started running no later than the dates Feldman wrote his August and September 2007 emails – approximately three years and one month before Plaintiffs filed this lawsuit – does not mean that this Court also must answer in its Order any particular fact or claim questions that Plaintiffs may request.

In addition, the Court of Appeals did not, as Plaintiffs argue, direct this Court to identify in any order the particular conduct that satisfied the willful act claim element of Plaintiffs' cause of action for abuse of process. When the Court of Appeals reversed the trial court's ruling on Defendants' motion to dismiss under Rule 12(b)(6), it found that the SAC did "not allege any specific point in time at which [Defendants] committed a willful and improper act in their use of the legal process." *See Feldman v. Casey*, 2014 WL 2969001 at *2 (S.C. Ct. App., June 30, 2014). The Court of Appeals expressly stated that its ruling on Defendants' motion to dismiss – which was based on the face of the SAC – did not prevent Defendants from "mov[ing] again for dismissal of this cause of action once the case [was] remanded to the circuit court." *Id.* n.2. The Court of Appeals did not instruct this Court that a summary judgment order based on the statute of limitations – or any other grounds – would have to specifically identify what "improper act" formed the basis of Plaintiffs' claims. This Court declines to do so, based on the terms of Rule 52.

Further, even if Rule 52 did not specifically exempt the Court from publishing findings of fact or conclusions of law in support of its ruling, no legitimate reason exists in fact or law for this Court to amend its Order to decide whether any particular act that Plaintiffs claim Defendants committed as to the MMA constitutes the "willful act" element of Plaintiffs' abuse of process claim. This is because such a ruling is wholly unnecessary to this Court's determination that, more than three years before Plaintiffs filed this suit, Plaintiffs formed, held, and stated in writing their actual belief that they had actionable claims against Defendants arising from the MMA.

In this case, the only facts determinative of that question are those reflecting when Plaintiffs formed the actual belief that they had legal claims against Defendants arising from the injuries Plaintiffs believed they had suffered in relation to the MMA. And, as discussed fully above, the record shows conclusively that Plaintiffs held and stated in writing those beliefs more than three years before they filed this lawsuit. Plaintiffs have consistently identified the allegedly improper and willful acts that they claim form the basis of their abuse of process claim. As detailed above, Feldman testified repeatedly his deposition that Plaintiffs' abuse of process claim is based on Fogarty's authoring the July 21, 2005 Note, and Defendants' using that note to cause Plaintiffs to be sued. Plaintiffs cannot legitimately argue that some other alleged acts occurring on some other dates form the exclusive basis for Plaintiffs' abuse of process claim against Defendants.

IV. Plaintiffs' Protest Regarding Feldman's Affidavit Does Not State Grounds For Altering Or Amending This Court's Ruling.

Plaintiffs' Motion, in addition to advancing the arguments discussed above, states that "Feldman takes exception to misrepresentations that his affidavit is a sham and inconsistent with his depositional testimony," and demands that "Feldman's assertions in his affidavit should be believed." (Pls. Br. 7.) This statement and demand do not advance any argument or grounds on which Plaintiffs' Motion could properly be based or granted under Rule 52 or Rule 59. Plaintiffs have not identified any factual error contained in the Order, much less argued that a change in controlling law has occurred, or that new evidence must be considered, or that a clear error of law has been committed. For this additional reason, the Court denies Plaintiffs' Motion.

Conclusion

The Order fully ruled on the statute of limitations issue raised by Defendants' Motion for Summary Judgment, and properly dismissed Plaintiffs' abuse of process claim on statute of limitations grounds. Plaintiffs' Motion has not advanced any arguments or positions justifying this Court's alteration or amendment of its Order under Rule 52 or 59. Plaintiffs' Motion for

Reconsideration is therefore denied.

END OF ORDER

JUDGE'S ELECTRONIC SIGNATURE PAGE TO FOLLOW

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Spartanburg Common Pleas

Case Caption: Gregory J Feldman Md , plaintiff, et al VS William Mark Casey ,
defendant, et al
Case Number: 2010CP4205743
Type: Order/Other

It is so Ordered.

s/ R. Keith Kelly - 2165