STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS
Gregory J. Feldman, MD, Joseph A. Boscia, III, MD, and Upstate Lung and Critical Care Specialists PC, Plaintiffs, vs. Ray E. "Chuck" Thompson and Charles M. Fogarty, MD, Defendants.	PLAINTIFFS' MOTION FOR RECONSIDERATION C.A. NO.: 2010-CP-42-5743

TO: THE HONORABLE R. KEITH KELLY, 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, pursuant to Rule 59(e), Plaintiffs Gregory J. Feldman, M.D., Joseph A. Boscia, III, M.D., and Upstate Lung & Critical Care Specialists, PC (collectively, "Plaintiffs") hereby submit this motion for reconsideration of the Court's Order Granting Defendants' Motion for Summary Judgment dated and entered July 20, 2017 (the "Order") as it relates to Plaintiffs' claims being time-barred and respectfully raises these issues:

That the Court's Order is factually and legally deficient in not identifying a willful act that should have been discovered by the Plaintiffs outside of the statute of limitations window; and

That Defendants' assertion respecting Dr. Feldman's affidavit being a sham is materially false.

This motion for reconsideration shall be based upon Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, the Summary Judgment Hearing Transcript, federal case law, statutory case law in the State of South Carolina including, but not limited to, 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.

WILLFUL ACTS

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) (emphasis added). 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) (emphasis added). 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.C. 65 (S.C.App. 2002) (emphasis added). "Furthermore, although an ulterior purpose may be inferred from an improper **willful act**, 'the inference is not reversible and it is not possible to infer [improper] acts from the existence of an improper motive alone.'" (footnotes omitted) (emphasis added) Id. The Court's Order does not specify a particular date as to when the statute of limitation was triggered or what **willful act** did so.

At the Summary Judgment hearing, Defendants' based their assertion on one (1) email from Plaintiff Feldman to Plaintiff Boscia, dated August 11, 2007, regarding a newspaper article and based upon said newspaper article publication, stated an abuse of process had occurred. Subsequent to the newspaper article being published and the referenced email being sent,

Defendant Casey was deposed on August 29, 2007, and, under oath, unequivocally denied speaking with anyone from the Herald Journal. (William Mark Casey Deposition Excerpt, August 29, 2007, p. 132-133, THOMPSON 065434, 065565-065566) Additionally, Defendant Fogarty testified in his December 22, 2008, deposition that he had not spoken with or provided any written statements to anyone with the Herald-Journal respecting the newspaper article. (Spartanburg Herald-Journal, May 31, 2006 newspaper article; Charles M. Fogarty, M.D. Deposition Excerpt, December 22, 2008, p.p. 219-220, THOMPSON 017687, 017906-017907.) Further, Defendant Thompson had an unfettered right to speak with and disseminate information to the reporter consistent with the complaint subject to South Carolina Rules of Professional Responsibility, Rule 3.6, Trial Publicity. Therefore, it is uncontroverted that the newspaper article is not a **willful act** and cannot serve as a basis for the Court's granting of Defendants' Motion for Summary Judgment. Finally, Dr. Feldman's affidavit is clear evidence, pursuant to South Carolina Rules of Civil Procedure, Rule 11 pleading requirements, that he investigated his mere suspicion and rejected the newspaper article as a willful act. (Affidavit of Gregory J. Feldman, filed June 16, 2017)

Defendants asserted **willful acts** surrounding the newspaper article and email, along with assertions regarding the filing of the lawsuit, Plaintiff Feldman's assertions of baselessness, suspicions, and perceived animosity legally fail as **willful acts**. Thus, Plaintiffs' actual allegations must be considered as pled in their Second Amended Complaint to find **willful acts** within this case. It was revealed during the deposition of Joseph Grace, PhD, on April 2, 2008, that Defendant Fogarty had been seeing Defendant Casey since 2004; that Fogarty had begun treating and testing Defendant Casey in 2004; and, that Defendant Fogarty had been seeing

Defendant Casey at his research facility. (Joseph Glover Grace, III Deposition Excerpt, April 2, 2008, THOMPSON 062140; Grace Notes attached as exhibits to Grace Deposition THOMPSON 062451-53.)

As stated within the Plaintiffs' Second Amended Complaint, Defendant Fogarty actively sought to prevent discovery efforts respecting the level of and purpose of his involvement in the litigation and was successful until his deposition on December 22, 2008. (King letter to Thompson and Turner, November 19, 2008, GUNN 001685-001686; Joseph Glover Grace, III Deposition Excerpt, April 2, 2008, THOMPSON 062140; Grace Notes attached as exhibits to Grace Deposition THOMPSON 062451-53) Unjustly, Defendant Fogarty and Defendant Thompson concealed their relationship to the extent of Defendant 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 Defendant Thompson suborning his perjury. (Charles M. Fogarty Deposition Excerpt, December 22, 2008, pp. 25-26, THOMPSON 017687, 177111-177112; Thompson letter to Parham Smith & Dodson, LLC, January 7, 2005, THOMPSON 000556-57; Grace Notes attached as exhibits to Grace Deposition THOMPSON 062451-53)

A **willful act** and concealment of the act was discovered during Defendant Fogarty's deposition on December 22, 2008, when he lied under oath as to the inception date of his involvement with Defendant Casey, which was learned during the Grace deposition. (Charles M. Fogarty Deposition Excerpt, December 22, 2008, pp. 25-26, 67, 80-82, 85-87, 116-117, 219-220, THOMPSON 017687, 017711-017712, 017754, 017767-017769, 017772-017774, 017803—017804, 017906-017907; Joseph Glover Grace, III Deposition Excerpt, April 2, 2008, pp. 55-56,

Notes, THOMPSON 062140, 062194-062195, 062451-062453) Defendant Thompson was in attendance and made no effort to correct Defendant Fogarty's statements.

A **willful act** of concealment was performed by Fogarty and Thompson at the time of Fogarty's deposition on December 22, 2008. In preparation for that deposition, defense attorney Spencer King (who was then defending Feldman in the Casey litigation) issued a subpoena to Fogarty to produce his entire record on Casey. (King Deposition, March 28, 2017, p. 15, Lines 15 – 24, p. 18, lines 20-22). The subpoena, identified as Exhibit 93 in King's deposition, required Fogarty to produce at his deposition (in the Casey litigation) all records of treatment generated by Fogarty for Casey and "any reports that he has rendered" as well as "any memorandums that you generated, any communication, whatever that you received from any third party." Fogarty did not do so as evidenced by Mr. King's Deposition (King Deposition, March 28, 2017, p. 32, line 18 through p. 33, line 9; King Deposition, March 28, 2017, p. 15, Lines 15 – 24, p. 18, lines 20-22; King Deposition, March 28, 2017, pp. 28-31, 34, 48-51)

It was not until Drs. Grace and Fogarty's depositions that Plaintiffs understood the lengths Defendants went to in order to fraudulently conceal their **willful acts** and to prevent Plaintiffs from knowing there was a potential cause of action. Knowing what Defendants did to hide evidence of their **willful acts**, Plaintiffs argue it is unsupportable for Defendants to put forth an argument which, is in essence, that they were so open and obvious with their hidden conduct, despite working together surreptitiously, intentionally preventing Plaintiffs from discovering their **willful acts**, that Plaintiffs were placed on notice that a cause of action existed. (Plaintiffs' Feldman, Upstate Lung and Critical Care Services, P.C. and Boscia Affidavits, filed June 16, 2017)

On February 4, 2007, Defendant Thompson and Defendant Casey engaged in secret medical testing, an MRI, which they knew, if negative, would be disastrous to their medical malpractice claim. The MRI was performed under a fictitious name, date of birth and in another state and only discovered by Plaintiffs on or about August 18, 2008. Approximately seven months after the secret MRI test, Defendant Thompson advised Defendant Casey to lie under oath during his deposition, thereby abandoning Defendant Thompson's ethical obligations to the Court pursuant to Rule 3.3, in an effort to continue their abuse of discovery efforts by the Plaintiffs. (Affidavit of H. Spencer King, January 28, 2009, GUNN 000631-000635) At a pretrial hearing before Circuit Court Judge Roger Couch on April 29, 2010, Thompson admitted his own involvement in setting up the MRI, instructing Casey to use a false name and false date of birth, and withholding the MRI from production. (Affidavit of H. Spencer King, January 28, 2009, GUNN 000631-000635)

Thus, Defendants' assertions that the email referencing the newspaper is a willful act fails and further ignores the actual willful acts of discovery abuse, perjury, and suborning perjury.

MISSTATEMENT OF FACT

"When ruling on a motion for summary judgment, the trial judge must consider all of the documents and evidence within the record, including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. Anthony v. Padmar, Inc., 307 S.C. 503, 415 S.E.2d 828 (Ct.App.1992); Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 (Ct.App.1986). However, factual statements of the attorneys, whether made during argument or in written briefs or memoranda, ordinarily may not be considered by the court in determining whether a genuine issue of material fact exists. Gilmore, 290 S.C. 53, 348 S.E.2d 180. Moreover, reliance on an unpublished order is improper. Plante v.

State, 315 S.C. 562, 446 S.E.2d 437 (1994) (partly discounting a litigant's argument by citing Rule 239(d)(2), SCACR, and holding that the party on appeal could not rely on an unpublished order)." Higgins v. Medical University of South Carolina, 486 S.E. 2d 269, 326 S.C. 592 (S.C. App., 1997).

"In determining whether a genuine issue of material fact exists, a court must consider everything in the record--pleadings, depositions, interrogatories, admissions on file, affidavits, etc. Keiser v. Coliseum Properties, Inc., 614 F.2d 406 (5th Cir.1980). Like its federal counterpart, Rule 44 did not, and new Rule 56 does not, 'distinguish between documents merely filed and those singled out by counsel for special attention--the court must consider both before granting a summary judgment.' Id. at 410." Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 (S.C. App., 1986). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. **The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor**. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) at 1608-1609." (emphasis added) Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Plaintiff Feldman takes exception to misrepresentations that his affidavit is a sham and inconsistent with his depositional testimony. (MSJ Hearing Transcript, June 20, 2017, Page 9, Lines 13-24) Dr. Feldman testified that during the S. Carolina litigation, he had no information regarding Dr. Fogarty's involvement with the newspaper article and expressly stated that the only involvement of Dr. Fogarty that he knew of at that time was the office visit note (Feldman

Deposition, October 17-18 & 21, 2016, Page 172, Lines 15-16). Plaintiff Feldman further testified:

> Q: And your contention is that Dr. Fogarty published this article or had some hand in its publication?
> A: Not at all. ...
> (Feldman Deposition, October 17-18 & 21, Page 167, Lines 6-8)
> Q: And what is the connection between Dr. Fogarty and the newspaper?
> A: Direct. We are going to have a jury decide that. ...
> (Feldman Deposition, October 17-18 & 21, Page 166, Lines 8-10)

> Q: You assessed early in the medical malpractice action that you had possible claims against the people that had brought the lawsuit against you. Correct?
> A: Did not. Did not. Did not. Totally did not. The first thing that have occurred in my mind is when they arrange for the fake x-ray. This is the first thing that I start getting really concerned. Okay? After the fake x-ray that was arranged by Thompson at Fogarty's office.
> (Feldman Deposition, October 17 -18 & 21, Page 296, Line 24-25 through Page 297, Lines 1-7)

> Q: At that time, you also thought that the suit was not justified. Correct?
> A: No. No, not at all. I thought the suit was going to be just dropped. I thought that's it. Okay? When I walked out of the deposition, I was expecting the lawsuit to just go away.
> (Feldman Deposition, October 17-18 & 21, Page 297, Lines 14-19)

> Q: So when was it that you had reason to think the lawsuit was going forward?
> A: Well, we had a deposition with Mr. Casey in 2007. I think it was October, September. And he said nobody told him he had brain damage. So I said that's it, the case is over. All right? That was over. Where my concern started crop up was in 2008. In 2008 there was a deposition of Dr. Paladugu taken in 2008. Paladugu, which he was hospitalist. And during that deposition, it was produced a letter where they have a – Thompson and Fogarty have created crazy x-ray. Okay? They sent it. They hook up something to the patient. Wasn't any medical reason. At the lawyer request. I start getting very worried. Whoa, whoa, whoa, whoa, whoa. A lawyer sending a patient for the x-ray to attach something to his body. Not to diagnose pneumonia, not to diagnose any medical condition. In a lawsuit. That was first sign I start getting worried. Okay? I said whoa, whoa, whoa, whoa, whoa. A lawyer sending the patient for the x-ray to the doctor's office, a totally unnecessary x-ray. I start getting worried. But after MRI, it was – it was clear that we got it.
> Q: And when was the MRI?

A: I'm talking about MRI of the brain.
Q: When was the MRI of the brain?
A: We discovered MRI of the brain in 2008, sometime in August, September. Anonymous letter was written and actual thing came to – it was 2009 when we got our hands on it, but – but that was it. After we got MRI, we knew what we got.
(Feldman Deposition, October 17-18 & 21, Page 105, Lines 8-25 through Page 106, Lines 1-13)

Q: You are. And I just asked a question.
A: And I just told you that 2006 and 2007, we were waiting for this lawsuit to be thrown out. Okay? Because the founder of the law firm, Mr. Turner, was a great patient of mine who wrote me a letter saying I have nothing to do with this, Greg, don't worry. Okay? In 2008, at Dr. Paladugu's office we have discovered a very, very troubling thing. Yes, we started to worry. Then Mr. Turner has requested research records. What did research record have to do with Mr. Casey? Of course, you're not testifying today. It's a rhetorical question. Nothing. Okay? And my emails to Mr. Mann is basically about, hey, why he requesting S. Carolina record. It's got nothing to do with this. ...
(Feldman Deposition, October 17-18 & 21, Page 160, Lines 10-23)

Q: Okay. You state under Evidence of Misconduct, "Dr. Fogarty is withholding records." And that's something you've talked to me today about, right, among these notes, that you believe that you didn't have all three of these notes?
A: Not at all. This is about prescription drugs. They were not produced in 2007. We started discovering his prescription drugs in 2008. Okay? We had nothing. All of a sudden with have a pharmacy in 2008 with Fogarty writing Lortab almost every other week. ...
(Feldman Deposition, October 17-18 & 21, Page 157, Lines 12-21)

Q: And the publishing of this was damaging to you?
A: That will be for the jury to determine, but yes, my contention it was extraordinarily damaging to me and others.
(Feldman Deposition, October 17-18 & 21, Page 168, Lines 15-18)

Q: And your contention is that Dr. Fogarty published this article or had some hand in its publication?
A: Not at all. My contention he mastermind everything, absolutely everything. This is just small part of it.
(Feldman Deposition, October 17-18 & 21, Page 167, Lines 6-9)
Q: And you also told me that you believe Dr. Fogarty was working on a brain injury theory during 2004, 2005. Correct?
A: Yeah. We have discovered that much, much later. We have discovered that from Grace reports. That was discovered much, much later. I knew about that personally in 2009, but it was discovered in 2008. But I read them, I read them in 2009. That's when the revelation was made that Dr. Fogarty was conducting tests, that Dr. Fogarty was seeing Casey and Carole regularly. Those revelations contained in Dr. Grace production which I read in 2009 in preparation to the trial. The trial was scheduled to be in September of 2009 until Honorable Judge Hayes has postponed it.
(Feldman Deposition, October 17-18 & 21, Page 313, Line 23 through Page 314, Line 11)

Q: Okay. So, there's many bases on which you're filing the case. Is that accurate?
A: Well, absolutely.
Q: Okay. Now, the July 21 visit is a part of it. Correct?
A: Yeah, it's part of the scheme. Yeah, it's part of the scheme, yes.
(Feldman Deposition, October 17-18 & 21, Page 16, Lines 14-20)

Nothing in Dr. Feldman's deposition contradicts the statements attested to in his June 16, 2017 affidavit. Therefore, based upon the aforementioned, as a non-moving party, Dr. Feldman's assertions in his affidavit should be believed and any consideration given to Defendants' unsupported statements, should be disregarded and the Order should be reversed.

CONCLUSION

"(N)o man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations." (footnote omitted) Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 3 L.Ed.2d 770, 79 S.Ct. 760 (1959). Plaintiffs respectfully request the Court's Order be reversed and this matter be reinstated.

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July 31, 2017