THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2017-002522
Case No. 2010-CP-5743

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

v.

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

INITIAL BRIEF OF APPELLANTS

April 20, 2018

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STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Common Pleas err in granting Respondents' Motion for Summary Judgment respecting Appellant's claim for Abuse of Process due to triable issues of disputed facts regarding the statute of limitations?
2. Did the Court of Common Pleas err in granting Respondents' Motion for Summary Judgment by determining that equitable tolling and Judicial Estoppel did not apply to Appellants' claims despite allegations of material misrepresentations and active concealment of the Respondents including, but not limited to suborning perjury, perjury and discovery abuses?

Statement of the Case

The lower court action was commenced on October 27, 2010, when Appellants filed a Summons and Complaint initiating an action for Abuse of Process and Civil Conspiracy in the Spartanburg County Court of Common Pleas against Respondents seeking damages, along with attorneys' fees and costs, arising as a result of alleged wrongdoings during a medical malpractice action captioned William Mark Casey v. Gregory J. Feldman, M.D., Joseph A. Boscia, III, M.D., Devendra Shantha, M.D. and Upstate Lung and Critical Care Specialists, PC, filed in the Court of Common Pleas for Spartanburg County, Seventh Judicial Circuit, case number 2006-CP-42-1728 and tried, commencing on May 11, 2010, before the Honorable Roger L. Couch to a defense verdict on May 28, 2010.

Respondents moved to dismiss Appellants' original Complaint in lieu of answering same. Upon hearing the oral arguments of Respondents before the Honorable Roger L. Couch, on May 19, 2011, Appellants filed an Amended Complaint on June 16, 2011, as of right, reasserting against Respondents claims for abuse of process and civil conspiracy. Respondents moved to dismiss the Amended Complaint with the motion being heard before the Honorable Roger L. Couch on September 8, 2011. The Appellants moved for leave of court to file their Second Amended Complaint. Leave was granted by Judge Couch, with a subsequent Order dated October 6, 2011, and said Second Amended Complaint was filed as instructed on October 11, 2011. Respondents renewed their motions to dismiss. The motion was granted. Appellants timely filed their Notice of Motion and Motion for Reconsideration and to Amend on April 9, 2012. On May 16, 2012, Appellants received written notice of entry of the April 30, 2012 Form 4

Order denying Appellants Motion for Reconsideration.

On August 28, 2012, Notice of Appeal was filed. In Unpublished Opinion No. 2014-UP 273, heard June 4, 2014 and filed June 30, 2014, the S.C. Court of Appeals affirmed in part, reversed in part and remanded the circuit court's decision. The Court of Appeals agreed that the circuit court misapplied the discovery rule in dismissing Appellants' complaint for abuse of process. On May 19, 2015 the case was remitted to the lower court.

Defendants' Amended Motion for Summary Judgement with Exhibit A was filed on March 30, 2017. Stipulation of Dismissal with Prejudice as to William Mark Casey occurred on July 18, 2017. Defendants' Motion for Summary Judgment was granted by order dated July 20, 2017. Plaintiff's filed a Motion for Reconsideration dated July 31, 2017. Plaintiffs' Motion for Reconsideration was denied on November 14, 2017. Plaintiffs' Notice of Appeal was filed December 8, 2017.

Statement of Facts

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

4. The medical malpractice action out of which this complaint arose was captioned William Mark Casey v. Gregory J. Feldman, M.D., Joseph A. Boscia, III, M.D., Devendra Shantha, M.D. and Upstate Lung and Critical Care Specialists, PC, filed in the Court of Common Pleas for Spartanburg County, Seventh Judicial Circuit, case number 2006-CP-42-1728.

5. In the medical malpractice action, (Respondent) Mr. William Mark Casey through his attorney, (Respondent) Mr. Ray E. "Chuck" Thompson, alleged (Appellants) Drs. Feldman, Boscia and Shantha breached the standard of care respecting his medical treatment and as a result of which Mr. Casey suffered permanent brain damage that rendered him totally disabled.

18. Mr. Casey came under the care of (Respondent) Charles Fogarty, M.D., another Spartanburg Pulmonologist, after Drs. Feldman and Boscia would not support Mr. Casey's disability claims.

19. To their misfortunes, Dr. Fogarty was well known by Drs. Feldman and Boscia, prior to the medical malpractice action in a very negative way.

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

21. The Feldman/Fogarty separation from joint medical practice was so acrimonious, in 2000, the event was very well known within the medical community of Spartanburg.

24. As a result of Dr. Fogarty's efforts to hamper the business efforts of Drs. Feldman and Boscia, in 2005 they were forced to sue Dr. Fogarty to clear their names and in an effort to prevent further damage to their reputations and business.

25. The Complaint was captioned S. Carolina Pharmaceutical Research v. Charles M. Fogarty, M.D., filed in the Court of Common Pleas for Spartanburg County, Seventh Judicial Circuit, case number 2005-CP-42-1085.

26. During the S. Carolina lawsuit, Dr. Fogarty, in a couple of ways, saw his involvement with Mr. Casey as a golden opportunity to retaliate against Drs. Feldman and Boscia for his perceived wrongs of them starting a research company and filing suit against him.

27. First, Dr. Fogarty continued masterminding the generation of the unfounded "permanent brain injury" claims to injure his business competitors by damage to their reputation and through bogging them down for years in the protracted litigation defending against his scheme.

39. Dr. Fogarty actively sought to mislead the doctors and their attorneys of his level and the purpose of involvement in the litigation by seeing Mr. Casey within his research facility as opposed to his medical practice, which would have created medical records that could have been discovered.

40. In addition, Dr. Fogarty conducted complex medical testing on Mr. Casey at his research facility, yet he did not maintain the medical records in an effort to conceal

the purpose of his involvement and in order to harm the doctors' discovery efforts thereby prolonging the medical malpractice case.

41. Until his deposition on December 22, 2008, Dr. Fogarty was very successful in shielding his role in the "permanent brain injury" scheme by his active efforts to obstruct and evade his deposition.

42. Dr. Fogarty and Mr. Thompson went to great lengths to ensure that Dr. Fogarty's role as an "expert" witness was concealed until the 11th hour from the doctors and their attorneys to further frustrate discovery efforts and to hide his level of involvement in the execution of the "permanent brain injury" scheme.

44. Even throughout his deposition, Dr. Fogarty continued his attempts to hide his role as a mastermind of the lawsuit and his level of involvement in the medical malpractice action by making material misrepresentations.

51. Dr. Fogarty and Mr. Thompson willingly implemented Dr. Fogarty's "permanent brain injury" baseless claim with ruthless disregard for the rights of the Plaintiffs.

77. In an effort to meet Mr. Casey's needs thereby ensuring his continuation in the scheme, Mr. Thompson became active in seeking a reversal of his Aetna disability denials, despite not being his attorney in such matters because the denials did not suit his personal needs or agenda.

78. Mr. Thompson's initial efforts centered around the purposeful redaction of Mr. Casey's medical records that were provided to both treating and retained expert witness with willful intent to make it appear that Mr. Casey suffered from a "permanent brain injury."

79. Despite the team's best efforts, Aetna fully rejected Mr. Casey's disability claim on October 13, 2006 in a letter addressed to Mr. Thompson.

80. In the rejection package, Aetna gave the team an analysis of the viability of the "permanent brain injury" claim, which included detailed reports from a Consulting Neuropsychologist and a Board Certified Neurologist.

81. In summary of the rejection, Aetna said that the speculations of Dr. Fogarty were not supported by objective neurological evidence or abnormal neurological examination findings.

82. Instead of heeding Aetna's review and addressing the stated concerns about the lack of any support for the existence of a legitimate "permanent brain injury" claim, the team continues to move forward with the medical malpractice scheme and fails to produce the Aetna report during discovery.

83. The Doctors' attorneys had to seek assistance from the Court to obtain a release from Mr. Casey to request the records directly from Aetna as opposed to Mr. Thompson merely turning over the report.

84. Mr. Thompson did place importance on one piece of information within the Aetna report, the need for an MRI study of the brain.

85. However, Mr. Thompson knew full well, based on the Aetna report, that a negative MRI study would be a death nail for the scheme.

86. Therefore in the cover of secrecy, Mr. Thompson, set the stage for an MRI to be performed on Mr. Casey's brain under a fictitious name and date of birth.

87. Mr. Thompson arranged for the test through his brother-in-law, a North Carolina general surgeon having no connection to Mr. Casey or the case, to be performed at an out of state hospital.

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

89. Mr. Thompson received this report, and then continued to litigate the matter for eighteen months thereafter without revealing the MRI test or the radiology report.

90. To maintain the secrecy of the MRI test and findings, Mr. Thompson instructed his client to deny having any diagnostic medical tests, including specifically, the MRI, in his sworn deposition testimony less than seven months after the MRI was performed.

91. At all times material, Mr. Thompson despite being well aware of his duties to the Court pursuant to Rule 3.3, Candor Toward The Tribunal, willfully sought to injure the Plaintiffs by instructing Mr. Casey to lie under oath and by Mr. Thompson's failure to protect the candor of the proceedings within the medical malpractice case.

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

94. It was a materially important piece of evidence to the Doctors, which was withheld, concealed, and secreted from them by Mr. Casey and Mr. Thompson, with a very high degree of impropriety.

95. By the time the Doctors' counsel received the Casey affidavit confirming the MRI and the results of the MRI, in excess of thirty depositions had been taken.

96. This included all of the Doctors, eight treating physicians and five medical experts.

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

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

125. Between February 4, 2007 and 2009, Mr. Casey, in furtherance of Dr. Fogarty and Mr. Thompson's permanent brain damage conspiracy, willingly took part with Mr. Thompson, and other unnamed third party(ies) in the scheme to circumvent the Rules of Civil Procedure.

126. Mr. Casey, in furtherance of Dr. Fogarty and Mr. Thompson's scheme to establish civil liability against Drs. Feldman and Boscia for causing Mr. Casey fictitious permanent brain damage, agreed to conceal the fact that on February 4, 2007 he had an MRI study of his brain.

127. Mr. Casey, in furtherance of Dr. Fogarty and Mr. Thompson's permanent brain damage conspiracy, agreed and proceeded to lie under oath in his deposition of August 30, 2007, in a willful and knowing effort to conceal the existence of the MRI report and image disc dated February 4, 2007.

128. Mr. Casey willingly participated in the concealment of the MRI report and image disc dated February 4, 2007, of the MRI study of his brain, which he received at the conclusion of the MRI study performed in the out-of-state hospital on February 4, 2007.

129. Mr. Casey was fully aware that the February 4, 2007, MRI study had been arranged by Mr. Thompson.

130. Mr. Casey utilized an assumed name and fictitious date of birth, given to him by Mr. Thompson, when submitting to the February 4, 2007, MRI study.

131. Mr. Thompson solicited unnamed third-party(ies) to conceal Mr. Casey's MRI report and image disc that were dated February 4, 2007.

132. Mr. Casey solicited unnamed third-party(ies) to conceal his MRI report and disc that were dated February 4, 2007.

133. Mr. Casey accepted funds from Mr. Thompson and/or unnamed third party(ies) to pay for his February 4, 2007, MRI study, knowing that such payment was never to be reported or claimed within his lawsuit.

134. In 2008, Mr. Thomson and Dr. Fogarty, in furtherance of their permanent brain damage scheme, agreed for Dr. Fogarty to make material misrepresentations, under oath, during his deposition pursuant to Discovery in the original lawsuit.

ARGUMENTS

1. The Court of Common Pleas erred in granting Respondents' Motion for Summary Judgment respecting Appellant's claim for Abuse of Process due to triable issues of disputed facts regarding the statute of limitations.

The lower court action is governed by a three-year statute of limitations period. S.C. Code Ann §15-3-530 (2005); see Whitfield Const. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 525 S.E.2d 888 (Ct. App. 1999) (applying three-year statute of limitations in abuse of process action); Burgess v. American Cancer So., South Carolina Div., Inc., 300 S.C. 182. 386 S.E.2d 798 (Ct. App 1989) (recognizing that Section 15-3-530's limitations period (which was previously six years) applies to conspiracy claims). "The limitations period is intended to run against those who are neglectful of their rights and who fail to exercise reasonable diligence in enforcing their rights. However, it is not the policy of the law to unjustly deprive an injured person of a remedy." Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

In determining when a cause of action arose under an applicable statute of limitations, South Carolina courts apply the "discovery rule," Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004). In Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005) the Court "recognized that, under the discovery rule, the statute of limitations begins to run when a reasonable person of common knowledge and experience would be on notice that a claim against another party might exist." However, "the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, **sufficient to put an injured**

person on notice of the existence of a cause of action against another." True v. Monteith, 327 S.C. 116, 118, 489 S.E.2d 615, 617 (S.C. 1997) (emphasis added).

Appellants' Second Amended Complaint forwards the cause of action, Abuse of Process as previously stated. 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). As stated within the Second Amended Complaint, Respondent Fogarty actively sought to prevent discovery efforts respecting the level, purpose and his involvement in the litigation and was successful until his deposition on December 22, 2008. (2nd Amend. Comp. ¶¶ 39, 40, 41.) Unjustly, Respondent Fogarty and Respondent Thompson concealed their relationship to the extent of Respondent Fogarty lying under oath during his deposition in a continuing effort to hide his role and level of involvement in the medical malpractice action, with Respondent Thompson suborning his perjury. (2nd Amend. Comp. ¶¶ 42, 44, 134.)

On February 4, 2007, Respondent Thompson and Respondent Casey engaged in secret medical testing, an MRI, which they knew if negative would be disastrous to their medical malpractice claim by having it performed under a fictitious name, date of birth and in another state. (2nd Amend. Comp. ¶¶ 85, 86, 87, 126.) Approximately seven months after the secret MRI test, Respondent Thompson advised Respondent Casey to lie under oath during his deposition, thereby abandoning Respondent Thompson's ethical obligations to the Court pursuant to Rule 3.3 in an effort to continue their abuse of discovery efforts by the Appellants. (2nd Amend. Comp. ¶¶ 90, 91.)

Between February 4, 2007 and 2009, Respondent Casey, in furtherance of Respondent Fogarty and Respondent Thompson's permanent brain damage scheme, willingly took part with Respondent Thompson, and other unnamed third party(ies) in their efforts to circumvent the Rules of Civil Procedure. (2nd Amend. Comp. ¶ 125.) Respondent Thompson received the negative results, yet continued to litigate the matter without revealing the MRI test or report to the Appellants, with the Appellants only learning of the MRI by virtue of an anonymous letter. (2nd Amend. Comp. ¶¶ 88, 89, 92, 126.)

The MRI was a materially important piece of evidence to the Appellants, which was withheld, concealed, and secreted from them by Respondent Casey and Respondent Thompson. (2nd Amend. Comp. ¶ 94.) By the time the Appellants were aware of the MRI, in excess of thirty depositions had been taken, including the Appellants, eight treating physicians and five medical experts. (2nd Amend. Comp. ¶¶ 95, 96.)

It is well settled that the mere filing of a lawsuit does not give rise to a cause of action for an abuse of process claim. ("Hence, to sustain a claim for the tort, a party must allege facts sufficient to show not only that the lawsuit was brought for an ulterior purpose, i.e. for collateral reasons, but that willful acts were taken through which the process was misapplied or abused." Food Lion, Inc. v. United Food & Commercial Workers Inter. Union, 567 S.E.2d 251, 351 S.A. 65 (S.C.App. 2002). An aggrieved party must be aware of facts sufficient to allege not only the inception of a lawsuit but an ulterior purpose and a willful act in the use of the process not proper in the conduct of the proceeding. (Food Lion, Inc. v. United Food & Commercial Workers Inter. Union, 567 S.E.2d 251, 351 S.A. 65 (S.C.App. 2002). Appellants' Second Amended Complaint

alleges, in great detail, the depths the Respondents conducted themselves to avoid discovery of their ulterior purposes, willful acts in the use of the process not proper in the conduct of the proceedings and their conjoined efforts which were concealed until sometime within 2008.

Plaintiffs' verified Second Amended Complaint and Plaintiffs' affidavits allege, in great detail, the depths the Defendants conducted themselves to avoid discovery of their ulterior purposes, willful acts in the use of the process not proper in the conduct of the proceedings and their conjoined efforts which were concealed until sometime within 2008. (Affidavits of Plaintiffs Feldman, Upstate Lung and Critical Care Specialists, P.C. and Boscia, filed June 16, 2017)

Defendants' did not specify a particular date as to when they believe the statute of limitation was triggered, but rather based their assertion on one (1) email from Plaintiff Feldman to Plaintiff Boscia dated August 11, 2007, before any depositions were taken. It is important to note that attorney Spencer King had to Notice Defendant Casey for deposition, as well as chase Defendant Fogarty for over a year, in the underlying medical malpractice litigation, in what seemed an insurmountable task even to get them to sit for their depositions and begin the discovery process. (EXHIBIT 1, King November 19, 2008 letter to Thompson and Turner, GUNN 001685-86)

It has been discovered subsequent to the April 1, 2016 discovery production that the three different versions of the July 21, 2005 note was published with each increasingly dramatizing Casey's alleged injury as well as its causation, ending in a final version which concluded that Casey had "undoubtedly" suffered brain injury as a result of the surgical procedure conducted by Feldman. (EXHIBIT 2, King Deposition, March

28, 2017, p. 32, line 18 through p. 33, line 9) Defendants assertion in this action that they produced all three different versions of the altered medical note during the Casey litigation fails because, despite being within Defendant Thompson's file and Defendant Fogarty's practice file were never produced together. (EXHIBIT 3, Letter from Donna C. Hill (Spencer King) to Lung and Chest Medical Associates of June 16, 2006, KING 002169; EXHIBIT 4, Letter from Defendant Thompson to Billy Gun on June 20, 2006, THOMPSON 000516, GUNN 004818-004820) Plaintiffs respectfully disagree and submit, as shown below, that their Second Amended Complaint clearly pleads in detail that the essential facts required in establishing the necessary elements of their causes of action were actively concealed from them by the Defendants until 2008.

Subsequent to the newspaper article being published and the referenced email being sent, Defendant Casey was deposed August 29, 2007, and, under oath, unequivocally denied speaking with anyone from the Herald Journal. (EXHIBIT 5, William Mark Casey Deposition Excerpt, August 29, 2007, p. 132-133, THOMPSON 065434, 065565-065566) In that same deposition, Defendant Casey stated that no one had told him he had brain damage,. (EXHIBIT 6, William Mark Casey Deposition Excerpt, August 29, 2007, p. 125, THOMPSON 065434, 065558) 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. (EXHIBIT 7, Spartanburg Herald-Journal, May 31, 2006 newspaper article; EXHIBIT 8, Charles M. Fogarty, M.D. Deposition Excerpt, December 22, 2008, p.p. 219-220, THOMPSON 017687, 017906-017907). Clearly, Defendants are disavowing any willful act respecting the newspaper article. Finally, Defendant

Thompson had an unfettered right to speak with and disseminate information to the reporter subject to South Carolina Rules of Professional Responsibility, Rule 3.6, Trial Publicity.

A September 18, 2007 email from Plaintiff Feldman to Plaintiff Boscia, copying Attorney Spencer King, shows that, as late as September 18, 2007, Plaintiff Feldman believed that Defendant Fogarty did not tell or was misinterpreted by Casey's sister and/or Defendant Thompson as to the diagnosis of a brain injury showing Plaintiffs continuing investigative efforts. (EXHIBIT 9, Feldman Email to Boscia and King, September 18, 2007, MANN 001005-001006)

Given the facts that, subsequent to the referenced email being sent, Defendants Casey and Fogarty denied any involvement in the publishing of the newspaper article and the knowledge that Defendant Thompson had an unfettered right to speak with the reporter subject to South Carolina Rules of Professional Responsibility, Rule 3.6, the Defendants were dissuaded from believing there was a cause of action and/or some willful act, which is a required element in an abuse of process action

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. (EXHIBIT 10, Joseph Glover Grace, III Deposition Excerpt, April 2, 2008, THOMPSON 062140; EXHIBIT 11, Grace Notes attached as exhibits to Grace Deposition THOMPSON 062451-53) This information served to show Defendant Fogarty's involvement dated back to 2004.

As stated within the 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. (EXHIBIT 12, King letter to Thompson and Turner, November 19, 2008, GUNN 001685-001686; EXHIBIT 10; EXHIBIT 11) 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. (EXHIBIT 13, Charles M. Fogarty Deposition Excerpt, December 22, 2008, pp. 25-26, THOMPSON 017687, 177111-177112; EXHIBIT 14, Thompson letter to Parham Smith & Dodson, LLC, January 7, 2005, THOMPSON 000556-57; EXHIBIT 11) It was not until after the April 1, 2016, exchange of discovery materials 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. Now knowing what Defendants did to hide evidence of their willful acts, Plaintiffs argue it is unsupportable for Defendants to put forth an argument which, in essence, that they were so open and obvious with their hidden conduct, despite working together surreptitiously, intentionally preventing Plaintiffs from discovering their willful deeds, 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)

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.

(EXHIBIT 15, 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; EXHIBIT 16, 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. (EXHIBIT 17, 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 (EXHIBIT 2; EXHIBIT 17; EXHIBIT 18, King Deposition, March 28, 2017, pp. 28-31, 34, 48-51)

At Defendant Fogarty's deposition, one version of the three notes was attached as Exhibit 20 to Fogarty's deposition and was the final amended version, in which Fogarty concluded that Casey had "undoubtedly" sustained "neurological impairment" during the surgery by Feldman. (EXHIBIT 15 at pp. 85-86, THOMPSON 017772-017773) Defendant Thompson was present at the Fogarty deposition and remained silent, not revealing his knowledge that Fogarty's production to King's subpoena was incomplete.

Defendant Fogarty owned the "undoubtedly" version of the July 21, 2005 note, read it into the record, and never indicated that this was a "draft" or the existence of previous notes. (EXHIBIT 15 at pp. 85-86, THOMPSON 017772-017773)

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 by having it performed under a fictitious name, date of birth and in another state. 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. (EXHIBIT 19, Affidavit of H. Spencer King, January 28, 2009, GUNN 000631-000635)

Between February 4, 2007 and 2009, Defendant Casey, in furtherance of Defendant Fogarty, and Defendant Thompson's permanent brain damage scheme, willingly took part with Defendant Thompson, and other unnamed third party(ies) in their efforts to circumvent the Rules of Civil Procedure. Defendant Thompson received the negative results, yet continued to litigate the matter for eighteen months, August of 2008, without revealing the MRI test or report to the Plaintiffs, with the Plaintiffs only learning of the MRI by virtue of an anonymous letter. The MRI was a materially important piece of evidence to the Plaintiffs, which was withheld, concealed, and secreted from them by Defendant Casey and Defendant Thompson.

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 social security number, and withholding the MRI from production.

(EXHIBIT 19) Thompson was well aware of the repercussions to license for perjury, suborning perjury and use of fraudulent documents. Defendant Thompson had two choices – to confess and suffer the consequences to his law license or proceed with the litigation. He chose to proceed with the litigation, including, but not limited to, dozens of depositions, fully knowing his only intent was to coerce and extort monies by applying financial pressure.

In Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000), the South Carolina Supreme Court stated, "[T]he rule the Court of Appeals' opinion is not whether Moriarty herself was on notice by a certain date (a subjective standard), but whether a reasonable person in her circumstances would have been on notice by a certain date (an objective standard). The statute begins to run on the date that the jury believed the repression ended and the resurfacing memories would have put a reasonable person on sufficient notice." Further, the Moriarty Court held that the "[A]pplication of the discovery rule contained in S.C. Code Ann. §15-3-535, as well as the determination of the date the statute began to run in a particular case, are questions of fact for the jury when the parties present conflicting evidence." See Johnston v. Bowen, 313 S.C. 61, 64 437 S.E.2d 45, 47 (1993) (whether a claimant knew or should have known that they had a cause of action is question for the jury); Manios v. Nelson, Mullins, Riley & Scarborough, LLP, 389 S.C. 126, 697 S.E.2d 644 (S.C. App 2010) (the date the statutes of limitations began to run involves questions for the jury ...). In denying Defendants' Motion for Summary Judgment, Plaintiffs still bear the burden of proving their Abuse of Process claim and the jury must determine when the Plaintiffs knew or should have known, "such that a person of common knowledge and experience

would be on notice that some right of [theirs had] been invaded or that some claim against another party might exist. It is on that date the statute of limitations begins to run." Moriarty, 334 S.C. at 169.

Again, 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.

In the instant case, there is obviously a conflict as to when the parties feel Plaintiffs knew or should have known that they had a claim against Defendants based upon willful acts within the process. Defendants' inferences in their favor and assertions not based on the face of the Complaint are in clear opposition to the facts asserted in Plaintiffs Second

Amended Complaint, as well as their own denials respecting the newspaper article. As such, the issue is one for the jury.

Thus, Plaintiffs' Second Amended Complaint should not be dismissed due to the totality of circumstances alleged within it and discovered during the litigation, which allege and establish that material facts were actively withheld from the Plaintiffs and that they were placed on notice no earlier than 2008, which was within the statute of limitations window to bring their claims.

2. The Court of Common Pleas erred in granting Respondents' Motion for Summary Judgment by determining that equitable tolling and Judicial Estoppel did not apply to Appellants' claims despite allegations of material misrepresentations and active concealment of the Respondents including, but not limited to suborning perjury, perjury and discovery abuses.

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

"It has been held that equitable tolling applies principally if the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his or her rights. However, it has also been held that the equitable tolling doctrine does not require wrongful conduct on the part of the defendant, such as fraud or misrepresentation." Hooper at 232, 221 (quoting 51 Am.Jur.2d Limitation of Actions § 174 (2007)). Hooper makes it clear that the equitable tolling of a time limit may be warranted when there is evidence of fraud or misrepresentation and even in situations where the Defendant does not commit any wrong. Hooper at 232, 221.

In this action, the Respondents went beyond fraud or deception and persisted in a course of conduct that included acts of perjury, suborning perjury, material misrepresentations and discovery abuses in their efforts to conceal essential elements of Appellants' claims. Respondent Fogarty actively sought to prevent discovery efforts respecting the level, purpose and his involvement in the litigation and was successful until his deposition on December 22, 2008. (2nd Amend. Comp. ¶¶ 39, 40, 41.) Unjustly, Respondent Fogarty and Respondent Thompson concealed their relationship to the extent of Respondent Fogarty lying under oath during his deposition in a continuing effort to hide his role and level of involvement in the medical malpractice action, with Respondent Thompson suborning his perjury. (2nd Amend. Comp. ¶¶ 42, 44, 134.)

On February 4, 2007, Respondent Thompson and Respondent Casey engaged in secret medical testing, an MRI, which they knew if negative would be disastrous to their medical malpractice claim by having it performed under a fictitious name, date of birth and in another state. (2nd Amend. Comp. ¶¶ 85, 86, 87, 126.) Approximately seven months after the secret MRI test, Respondent Thompson advised Respondent Casey to lie

under oath during his deposition, thereby abandoning Respondent Thompson's ethical obligations to the Court pursuant to Rule 3.3 in an effort to continue their abuse of discovery efforts of the Appellants. (2nd Amend. Comp. ¶¶ 90, 91.)

Between February 4, 2007 and 2009, Respondent Casey, in furtherance of Respondent Fogarty and Respondent Thompson's permanent brain damage conspiracy, willingly took part with Respondent Thompson, and other unnamed third party(ies) in the scheme to circumvent the Rules of Civil Procedure. (2nd Amend. Comp. ¶ 125.) Respondent Thompson received the negative results, yet continued to litigate the matter for eighteen months, August of 2008, without revealing the MRI test or report to the Appellants, with the Appellants only learning of the MRI by virtue of an anonymous letter. (2nd Amend. Comp. ¶¶ 88, 89, 92, 126)

The MRI was a materially important piece of evidence to the Appellants, which was withheld, concealed, and secreted from them by Respondent Casey and Respondent Thompson. (2nd Amend. Comp. ¶ 94) By the time the Appellants were aware of the MRI, in excess of thirty depositions had been taken, included the Appellants, eight treating physicians and five medical experts. (2nd Amend. Comp. ¶¶ 95, 96) In short, the Second Amended Complaint clearly states that the Respondents actively concealed their inappropriate actions from the Appellants thru perjury, suborning perjury, material misrepresentations and discovery abuses until at least August or December of 2008 precluding discovery of the Respondents' ulterior purposes, willful acts in the use of the process not proper in the conduct of the proceedings and their conjoined efforts.

Public policy and the interests of justice are in favor of a reversal and remand of this matter. The Court of Common Pleas erred when it determined that the Respondents'

acts of perjury, suborning perjury, material misrepresentations and discovery abuses did not result in Appellants' delays in bringing their claims as a result of essential elements of Appellants' claims being actively concealed by the Respondents. Appellants request that the Court of Common Pleas' Order Dismissing their Second Amended Complaint be reversed and this matter remanded for a hearing on the merits of their claims for damages.

South Carolina courts permit a statute of limitations defense to be defeated when the conduct of a defendant is so egregious that a mechanical approach of the limitations period would be manifestly unfair to justice. The South Carolina Supreme Court has noted that a determination of whether equitable estoppel bars a limitations defense is a question of law for the Court, not an issue for the jury. Gaymon v. Richland Memorial Hospital, 327 S.C. 66, 488 S.E.2d 332 (1997). An element of equitable estoppel as to a limitations period is "active concealment" by the defendants. Hedgepath v. American Tel & Tel.Co ., 348 S.C. 340, 559 S.E.2d 327 (Ct.App. 2001).

After learning of the existence of a secret MRI of Casey, performed at a North Carolina hospital using an assumed name and false date of birth, defense attorney Billy Gunn filed a Motion to Compel against Casey and Thompson, seeking the MRI results. Gunn's motion was filed on January 28, 2009. In response to the motion, Casey signed an affidavit admitting the secret MRI had occurred on February 4, 2007, but Thompson opposed production of the MRI results, arguing that the MRI results were "work product."

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.

Plaintiffs submit that the outrageousness of the conduct of the Defendants in this matter (both during this Casey litigation and the instant action) require a ruling, as a matter of law, that the statute of limitations in this action has not expired on the abuse of process of case, removing the issue from the trial of this matter.

CONCLUSION

Based upon the Affidavits William F. Alleyne, M.D., F.C.C.P., Gregory J. Feldman, M.D. and Upstate Lung and Critical Care Specialists, P.C., and Joseph A. Boscia, M.D. filed in this lawsuit, it is clear there is a genuine issue of material fact, hence, the moving party, Defendants in this case, is not entitled to a judgment as a matter of law. Based upon the law, affidavits, legal reasoning, exhibits, and the evidence and all inferences which can be reasonably drawn therefore viewed in the light most favorable to the Plaintiffs, Defendant has not met the burden on proving the absence of a genuine issue of material fact required under Rule 56(c), SCRCP. Therefore, Defendants' Motion for Summary Judgment should be reversed.

Respectfully submitted,

April 20, 2018

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2017-002522
Case No. 2010-CP-5743

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

v.

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

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellants and the Designation of Matter to be Included in the Record on Appeal on counsels of record by US Mail postage pre-paid as indicated below, on April 20, 2018.

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April 20, 2018

The Honorable Jenny Abbott Kitchings
Clerk of The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

BY U.S. MAIL

Re: Gregory J. Feldman, MD, Joseph A. Boscia, III and Upstate Lung & Critical Care Specialists, PC, Appellants v. Ray E. "Chuck" Thompson, and Charles M. Fogarty, MD, Respondents - Appellant Case No. 2017-002522

Dear Ms. Kitchings:

Please find enclosed, the original and one copy of the Initial Brief Appellants and the Designation of Matter in the above case, along with the Proof of Service on other counsels of record dated April 20, 2018.

Respectfully submitted,

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