THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2010-CP-5743

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

Appellants,

v.

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

Respondents.

FINAL BRIEF OF APPELLANTS

May 29, 2013

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

Statement of the Case

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

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

hearing was scheduled on January 18, 2012.

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

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

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

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

Statement of Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENTS

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

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

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

knowledge of facts, diligently acquired, **sufficient to put an injured person on notice of the existence of a cause of action against another.**" True v. Monteith, 327 S.C. 116, 118, 489 S.E.2d 615, 617 (S.C. 1997)(emphasis added).

Appellants' Second Amended Complaint is comprised of two causes of action, abuse of process and civil conspiracy. The elements of abuse of process are an ulterior purpose and a willful act in the use of the process not proper in the conduct of the proceeding. Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1967). "A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." McMillian v. Oconee Memorial Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006); Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 701 S.E.2d 39 (S.C.App. 2010).

As stated within the Second Amended Complaint, Respondent Fogarty actively sought to prevent discovery efforts respecting the level, purpose and his involvement in the litigation and was successful until his deposition on December 22, 2008. (R. p. 27, ¶¶ 39-41) Unjustly, Respondent Fogarty and Respondent Thompson concealed their relationship to the extent of Respondent Fogarty lying under oath during his deposition in a continuing effort to hide his role and level of involvement in the medical malpractice action, with Respondent Thompson suborning his perjury. (R. p. 27, ¶ 42 and R. p. 28, 44 and R. p. 39, ¶ 134)

On February 4, 2007, Respondent Thompson and Respondent Casey engaged in secret medical testing, an MRI, which they knew if negative would be disastrous to their medical malpractice claim by having it performed under a fictitious name, date of birth and in another state. (R. p. 33 ¶¶ 85-87 and R. p. 38, ¶126) Approximately seven months

after the secret MRI test, Respondent Thompson advised Respondent Casey to lie under oath during his deposition, thereby abandoning Respondent Thompson's ethical obligations to the Court pursuant to Rule 3.3 in an effort to continue their abuse of discovery efforts by the Appellants. (R. p. 33, ¶¶ 90-91)

Between February 4, 2007 and 2009, Respondent Casey, in furtherance of Respondent Fogarty and Respondent Thompson's permanent brain damage scheme, willingly took part with Respondent Thompson, and other unnamed third party(ies) in their efforts to circumvent the Rules of Civil Procedure. (R. p. 38, ¶ 125) Respondent Thompson received the negative results, yet continued to litigate the matter for eighteen months, August of 2008, without revealing the MRI test or report to the Appellants, with the Appellants only learning of the MRI by virtue of an anonymous letter. (R. p. 33, ¶¶ 88, 89, 92 and R. p. 38, ¶ 126)

The MRI was a materially important piece of evidence to the Appellants, which was withheld, concealed, and secreted from them by Respondent Casey and Respondent Thompson. (R. p. 34, ¶ 94) By the time the Appellants were aware of the MRI, in excess of thirty depositions had been taken, including the Appellants, eight treating physicians and five medical experts. (R. p. 34, ¶¶ 95-96)

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

sufficient to allege not only the inception of a lawsuit but an ulterior purpose and a willful act in the use of the process not proper in the conduct of the proceeding. (Food Lion, Inc. v. United Food & Commercial Workers Inter. Union, 567 S.E.2d 251, 351 S.A. 65 (S.C.App. 2002). Appellants' Second Amended Complaint alleges, in great detail, the depths the Respondents conducted themselves to avoid discovery of their ulterior purposes, willful acts in the use of the process not proper in the conduct of the proceedings and their conjoined efforts which were concealed until sometime within 2008.

The Court of Common Pleas' Order dismissing the Appellants' Second Amended Complaint applies the discovery rule as being triggered in 2006, when the underlying Medical Malpractice Action was filed. (R. p. 11-14) Appellants respectfully disagree and submit, as shown above, that their Second Amended Complaint clearly pleads in detail that the essential facts required in establishing the necessary elements of their causes of action were actively concealed from them by the Respondents until 2008. Upon receipt of the medical malpractice suit it would have been in bad faith for the Appellants to simply file an abuse of process claim and/or civil conspiracy claim, subjecting them to judicial sanction. (The South Carolina Frivolous Civil Proceedings Sanction Act, South Carolina Code Ann. § 15-36-10 (2005)).

In summation, Appellants contend that it would be against public policy and the interests of justice to affirm the Court of Common Pleas' Order which serves to reward the Respondents' intentional bad conduct, including Respondent Thompson's suborning perjury as an Officer of the Court, while condemning Appellants' caution in assuring that the ethical requirements of South Carolina's Frivolous Civil Proceedings Sanctions Act

were met before they filed suit. Appellants request that the Court of Common Pleas' Order Dismissing their Second Amended Complaint be reversed and this matter remanded for a hearing on the merits of their claims for damages.

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

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

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

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

In this action, the Respondents went beyond fraud or deception and persisted in a course of conduct that included acts of perjury, suborning perjury, material misrepresentations and discovery abuses in their efforts to conceal essential elements of Appellants' claims. Respondent Fogarty actively sought to prevent discovery efforts respecting the level, purpose and his involvement in the litigation and was successful until his deposition on December 22, 2008. (R. p. 27, ¶¶ 39-41) Unjustly, Respondent Fogarty and Respondent Thompson concealed their relationship to the extent of Respondent Fogarty lying under oath during his deposition in a continuing effort to hide his role and level of involvement in the medical malpractice action, with Respondent Thompson suborning his perjury. (R. p. 27, ¶ 42 and R. p. 28, ¶ 44 and R. p. 39, ¶ 134)

On February 4, 2007, Respondent Thompson and Respondent Casey engaged in secret medical testing, an MRI, which they knew if negative would be disastrous to their medical malpractice claim by having it performed under a fictitious name, date of birth and in another state. (R. p. 33, ¶¶ 85-87 and R. p. 38, ¶ 126) Approximately seven months after the secret MRI test, Respondent Thompson advised Respondent Casey to lie under oath during his deposition, thereby abandoning Respondent Thompson's ethical obligations to the Court pursuant to Rule 3.3 in an effort to continue their abuse of discovery efforts of the Appellants. (R. p. 33, ¶¶ 90-91)

Between February 4, 2007 and 2009, Respondent Casey, in furtherance of Respondent Fogarty and Respondent Thompson's permanent brain damage conspiracy, willingly took part with Respondent Thompson, and other unnamed third party(ies) in the scheme to circumvent the Rules of Civil Procedure. (R. p. 38, ¶ 125) Respondent Thompson received the negative results, yet continued to litigate the matter for eighteen months, August of 2008, without revealing the MRI test or report to the Appellants, with the Appellants only learning of the MRI by virtue of an anonymous letter. (R. p. 33, ¶¶ 88, 89, 92 and R. p. 38, ¶ 126)

The MRI was a materially important piece of evidence to the Appellants, which was withheld, concealed, and secreted from them by Respondent Casey and Respondent Thompson. (R. p. 34, ¶ 94) By the time the Appellants were aware of the MRI, in excess of thirty depositions had been taken, included the Appellants, eight treating physicians and five medical experts. (R. p. 34, ¶¶ 95-96) In short, the Second Amended Complaint clearly states that the Respondents actively concealed their inappropriate actions from the Appellants thru perjury, suborning perjury, material misrepresentations and discovery abuses until at least August or December of 2008 precluding discovery of the Respondents' ulterior purposes, willful acts in the use of the process not proper in the conduct of the proceedings and their conjoined efforts.

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

that the Court of Common Pleas' Order Dismissing their Second Amended Complaint be reversed and this matter remanded for a hearing on the merits of their claims for damages.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

May 29, 2013

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2010-CP-5743

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

Appellants,

v.

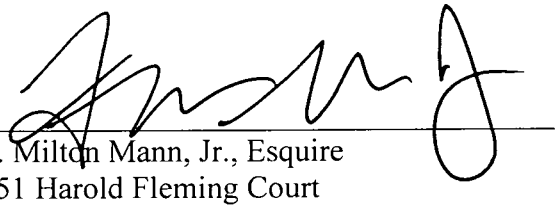
William Mark Casey, Ray E. "Chuck" Thompson,
and Charles M. Fogarty,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCAR.

May 29, 2013



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Respondents.

PROOF OF SERVICE

I certify that I have served Final Brief of Appellants upon Respondents William Mark Casey, Ray E. "Chuck" Thompson, and Charles M. Fogarty by depositing copies in the United States Mail, postage pre-paid, on May, 29, 2013, addressed to their respective attorneys' of record at the addresses listed below:

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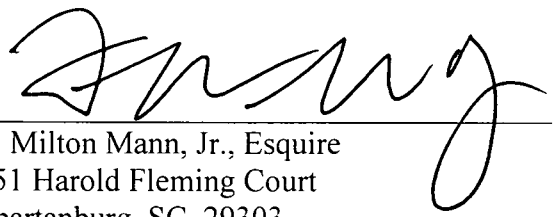
May 29, 2013



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