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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
R. Keith Kelly, Circuit Court Judge

Trial Court Case No. 2010-CP-42-05743

Appellate Case No. 2017-002522

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

v.

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

RESPONDENTS' FINAL BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

I. Whether The Circuit Court Correctly Held That Appellants' Abuse Of Process Claim Is Barred By The Statute Of Limitations.

II. Whether the Circuit Court Correctly Held That Equitable Tolling Does Not Prevent The Statute Of Limitations From Running On Appellants' Abuse Of Process Claim.

STATEMENT OF THE CASE

This case arises from Appellants' long-held and stridently-maintained belief that sometime before May 2006, Fogarty fraudulent created a false "legal record to file [a] lawsuit" against Appellants, in order "to embroil them in multi-year litigation and destroy their careers." (R. p. 1180, line 21-p. 1181, line 24; p. 1182, line 10-p. 1183, line 25.)[1] Appellants contend that the record Fogarty "fabricated with a legal intent" in order to "hang Greg Feldman and company" was an office note dated July 21, 2005, which stated that a former patient of Appellants, Mark Casey, "undoubtedly" had suffered an air embolism and resulting brain damage at Appellants' hands. (R. p. 1152, lines 9-17.) According to Appellants, this record was a "legal diagnosis" created for the purpose of filing a medical malpractice lawsuit against them, because Fogarty intentionally used "undoubtedly" to state his fraudulent diagnosis of Casey with the degree of medical certainty necessary for a lawsuit to be filed. (R. p. 1152, line 21-p. 1153, line 20; p. 1180, line 21-p. 1181, line 24; p. 1182, line 10-p. 1183, line 25.)

The medical malpractice action ("MMA") for which Fogarty's note allegedly was the "lynchpin" was filed by Respondent Chuck Thompson in May 2006. (*See* R. p. 1638.) Operatively, and as discussed fully below, Appellants received a copy of Fogarty's subject note no later than July 2006, at which time they saw that Fogarty – whom they considered an enemy – had authored the record on which the MMA was based. (R. p. 1303, line 10-p. 1306, line 24; p.

[1] Respondents strongly deny Appellants' allegations of wrongdoing.

2785, line 12-p. 2787, line 18.) Immediately assessing that Fogarty's note was fraudulent and rendered the entire MMA an abusive lawsuit filed to damage them, Appellants began researching the legal claims they believed they could assert against Respondents, and advising their counsel that they wanted to sue Respondents. (R. p. 1403, line 1-p. 1404, line 7; p. 1619, line 4-p. 1621, line 24; p. 2787, line 19-p. 2788, line 1; p. 2792, line 20-p. 2795, line 14.) By August and September 2007, Appellants had reduced to writing their belief that they could, in fact, sue Respondents for civil conspiracy and abuse of process. (R. p. 1622, line 8-p. 1626, line 18; pp. 5051-5053.)

From that time and continuing throughout the MMA, Appellants insisted to their counsel that they wanted to bring an action against Respondents. (R. p. 2795, lines 4-14.) Appellants, however, waited more than three years afterward, until October 27, 2010, to file this lawsuit asserting those claims. (*See* R. p. 53.)

The MMA

The MMA Complaint alleged that Casey suffered brain injury and other damages from malpractice Appellants committed in the course of treating him in 2004. (R. pp. 179-180, ¶ 7.) That treatment included a flexible bronchoscopy that Boscia performed on May 28, 2004, after Casey was admitted to the hospital with chest pain and a chest x-ray showed a small metallic object in the x-ray field. (R. p. 1190, line 9-p. 1191, line 12.) Although the flexible bronchoscopy did not reveal a foreign body in Casey's chest, and while a CT scan of Casey's chest also did not show a foreign body, Boscia recommended that Casey undergo a rigid bronchoscopy performed by his partner, Appellant Feldman, to remove a purported foreign body. (R. p. 2360, line 6-p. 2361, line 19.)

On June 3, 2004, Casey returned to the hospital for the rigid bronchoscopy, which

Feldman performed despite the fact that Casey's CT showed no foreign body, and after having spent only five or ten minutes with Casey in the surgical holding room at the hospital. (R. pp. 5040-5043.) Although Feldman did not see any metallic object or foreign body in Casey's lungs during the procedure, he nevertheless used a laser to vaporize portions of Casey's lung tissue. (R. pp. 5040-5043.) Casey then suffered a pneumothorax, which occurs when a patient's airway is perforated, and air leaks or is forced by a ventilator into other areas of the patient's body. (R. p. 2368, line 15-p. 2369, line 8.) Casey had a chest tube inserted to allow the air that had accumulated in his chest cavity to escape, was placed on life support, and remained in ICU until June 6, 2004. (R. p. 2359, line 8-p. 2360, line 1.)

The MMA Complaint alleged that when Casey's pneumothorax occurred, some of the air that entered his chest diffused into his bloodstream, forming an air embolism that traveled to Casey's brain and caused permanent damage. (R. pp. 179-180, ¶¶ 7-8; p. 2403, line 18-p. 2404, line 8.) Casey also alleged that Feldman breached the applicable standard of care by failing to obtain a complete history and physical before the rigid bronchoscopy, and by failing to obtain Casey's informed consent to the procedure. (R. pp. 179-180, ¶ 8.)

Appellants' immediate assessment of the MMA

Appellants were served with the MMA Complaint on or about May 25, 2006. (R. p. 1295, line 21-p. 1296, line 4.) Appellants saw that Casey was accusing them of malpractice, and was alleging that an air embolism had caused him to suffer brain damage and other injuries. (R. p. 1296, line 5-p. 1297, line 25.) Appellants immediately assessed Casey's claims as lacking merit. (R. p. 1400, lines 3-7; R. p. 2404, lines 2-16.) Feldman also did not believe Casey had been brain damaged, because he had seen Casey twice after his discharge from the hospital, and noted nothing wrong with him. (R. p. 1297, line 14-p. 1298, line 3.)

SHJ Article

On May 31, 2006, approximately a week after the MMA was filed, the *Spartanburg Herald Journal* published an article (the "*SHJ* Article") regarding the MMA and its allegations. (R. p. 1270, line 17-p. 1271, line 3, and R. p. 1850.) This article identified Appellants as the defendants in the MMA, and stated the case theory that Casey suffered brain injury when a perforated bronchial wall allowed air bubbles to escape from his lungs and travel to his brain. (R. p. 1850.) The article also contained quotes from Thompson regarding the MMA. (*See* R. p. 1850.)

Appellants' MMA-related damages

Feldman describes a medical malpractice lawsuit as "the most horrendous thing you can . . . possibly go through." (R. p. 1166, lines 7-13.) Feldman claims that he started suffering damages from the MMA as soon as the *SHJ* Article was published, because from that point on, Appellants' "lives were turned upside down." (R. p. 1269, line 15-p. 1272, line 18.) Likewise, Boscia claims that he began sustaining damages from the MMA as soon as that lawsuit was filed and the *SHJ* Article appeared in May 2006, because the allegations contained in the lawsuit directly affected patients' willingness to see him as a physician. (R. p. 2375, line 7-p. 2376, line 4; p. 2377, line 20-p. 2378, line 15.)

Appellants' MMA defense and involvement

After being served with the Complaint in the MMA, Appellants reported the lawsuit to their malpractice insurer, the JUA. (R. p. 1298, lines 4-6.) The JUA assigned Spencer King to represent Appellants, and assigned the defense of another case defendant to Billy Gunn, who later took over Boscia's representation in the MMA. (R. p. 1298, lines 4-16; p. 2323, lines 12-18.) Also representing Appellants in the MMA was their personal counsel, Milton Mann. (R. p. 1519, lines 5-15; p. 2323, lines 12-18.)

In or around June 2006, Appellants met with King and discussed the allegations asserted in the MMA Complaint, Appellants' opinion regarding those allegations, and plans for pursuing case discovery. (R. p. 1298, lines 17-24; p. 2775, line 12-p. 2776, line 6.) Feldman also advised King that he believed the MMA lacked any merit. (R. p. 2783, lines 10-15.)

From Appellants' initial meeting with King and continuing for the duration of the MMA, Feldman remained highly and directly involved in Appellants' defense of that lawsuit. (R. p. 1587, lines 6-24.) Feldman emailed King, Gunn, and the JUA prolifically throughout that litigation, and reviewed all of the testimony and documents in the MMA "endlessly and with a fine tooth comb." (R. p. 5036; p. 2783, line 19-p. 2784, line 12; p. 2821, line 22-p. 2822, line 16.) King, in turn, attempted during the MMA to provide Feldman copies of all of the records King procured. (R. p. 2821, line 22-p. 2822, line 3.)

Fogarty

One of the primary matters on which Feldman focused during the MMA concerned the doctor who opined that Casey had suffered an air embolism as alleged in the MMA: Feldman's former medical partner, Fogarty. (R. p. 2787, line 19-p. 2789, line 12; p. 2792, line 21-p. 2795, line 14; p. 2798, line 13-p. 2799, line 9; p. 5036.) Feldman had practiced pulmonology with Fogarty from 1992 to 2000, when he left Fogarty's practice on negative terms due to what Feldman perceived as Fogarty's personal animosity toward him, and the doctors have not spoken since that time. (R. p. 1245, line 23-p. 1246, line 18; p. 1253, line 25-p. 1254, line 3.)

After leaving Fogarty's practice, Feldman formed the belief that Fogarty developed an "unrelenting obsession" with Feldman, that he became determined to destroy Feldman and his associates, and that he started actively attempting to hamper Feldman and his associates' business efforts and to damage their reputations. (R. p. 1245, line 4-p. 1248, line 25.) In

September 2004, Feldman even sued Fogarty through a medical research business Feldman and Boscia had started, S. Carolina Pharmaceutical Research, alleging that Fogarty was defaming their company and intentionally interfering with its business contracts. (R. p. 1249, line 25-p. 1252, line 12; pp. 1840-1845.)

Casey's treatment with Fogarty's practice

In July 2004, several months before Feldman's company filed the S. Carolina lawsuit against Fogarty, and a month after Casey had suffered his pneumothorax, Casey sought treatment with Fogarty's pulmonology practice, Lung and Chest Medical Associates ("Lung and Chest"). (R. pp. 5078-5153, at p. 5122.) Casey had been experiencing various problems since his release from the hospital, including trouble sleeping, an inability to stop pacing, and personality changes. (R. pp. 5130-5136.) He had raised these concerns to Feldman and Boscia in a series of office visits that occurred after Casey's release from the hospital, but he did not feel that his questions had been answered. (R. p. 1220, line 9-p. 1229, line 21; pp. 5126-5141.) In fact, during Casey's last office visit with Boscia, Casey and his sister asked Boscia why Appellants had proceeded so quickly with the rigid bronchoscopy when Casey's CT scan showed no foreign body, and ended up telling Boscia that he would be hearing from their lawyers. (R. p. 2369, line 11-p. 2372, line 1; pp. 5130-5135.)

After Casey's subsequent move to Lung and Chest, he had office visits during 2004 and 2005 with several different physicians, beginning with Dr. Wilson Smith and ending up with Fogarty. (R. pp. 5078-5153.) Office notes and other medical records were generated in relation to each of these visits. (R. pp. 5078-5153.)

During an office visit with Smith on July 14, 2004, Casey described his treatment history with Appellants, and complained of experiencing anxiety and restlessness since being discharged

from the ICU. (R. pp. 5109-5121.) Smith wrote in his office visit note that he "wonder[ed] if [Casey] suffers from a posttraumatic stress disorder related to his injury and intensive care unit experience." (R. pp. 5109-5110.) Casey saw Smith on several more occasions during 2004, and had follow up visits with other Lung and Chest physicians into 2005. (R. pp. 5099, 5103, 5094-5095, 5090-5093.)

On July 21, 2005, Casey had an office visit with Fogarty, after which Fogarty began serving as Casey's physician at Lung and Chest. (R. pp. 5084-5086, 5078-5153.)

July 21 Note

Casey's July 21, 2005, office visit with Fogarty was memorialized in a medical record of that same date titled, "Office Note" (the "July 21 Note"). (R. pp. 5084-5086.) Among other things, the July 21 Note stated Fogarty's belief that the pneumothorax that occurred during Casey's rigid bronchoscopy had caused Casey to suffer an air embolism, and that this air embolism injured Casey and accounted for his cognitive complaints. (R. pp. 5084-5086.)

Three slightly different versions of the July 21 Note exist: an unsigned version ("Note A"); a signed version showing a cc: to Dr. Gonda ("Note B"), and a signed version showing a cc: to Dr. Gonda and to Dr. Grace (Note "C"). (R. pp. 1669-1671, 1672-1674, 1675-1677.) No record evidence exists proving the order in which the three versions of the July 21 Note were created, or the reasons why slight differences exist among them. Despite minor differences among the three versions of the July 21 Note, each of the versions contains Fogarty's same medical opinion, which is that during Casey's pneumothorax, an air embolism diffused into Casey's bloodstream and traveled to his brain, damaging it and causing Casey's post-surgical difficulties. (R. pp. 1669-1671, 1672-1674, 1675-1677; p. 2389, lines 10-17 (Boscia testimony stating that no significant differences exist among the three July 21 Note versions); p. 5054

(Feldman email describing the differences between Note A and Note C as "minor"); pp. 4305-4336, at p. 4334, lines 15-25 (Smith testimony agreeing that all three July 21 Note versions state Fogarty's same opinion that an air embolism caused Casey's medical condition as alleged in the MMA).)

Among the minor differences in the three July 21 Note versions is the fact that Note A is unsigned, "page three" is misspelled "page tree," and the "Comments" section on page three of that document states:

> With reference to the patient's difficulty concentrating, *he undoubtedly had air emboli* given his lengthy duration of anesthesia and laser perforation of the endotracheal tree with resultant leakage of air into extra pleural and vascular extra pleural mediastinal and vascular spaces.

(R. p. 1669-1671.) Note A shows a cc: to Dr. Gonda. (R. p. 1671.)

In slight contrast, Note B is signed by Fogarty, and lacks the "undoubtedly had air emboli" language contained in Note A. (R. pp. 1672-1674.) Note B also shows a cc: to Dr. Gonda, and the "Comment" section reads, in pertinent part:

> With reference to the patient's difficulty concentrating, *air emboli have been reported as a common complication when there is laser perforation of the endotracheal tree* with resultant leakage of air into extra pleural, vascular and mediastinal spaces.

(R. p. 1674 (emphasis added).)

Again in slight contrast, Note C is signed by Fogarty, and shows a cc: to Dr. Gonda and to Dr. Grace. (R. pp. 1675-1677.) Note C's Comment section reads:

> With reference to the patient's difficulty concentrating, *air emboli have been reported as a complication of laser bronchoscopy even without perforation of the endotracheal tree* with resultant leakage of air into extra pleural, vascular and mediastinal spaces.

(R. p. 1677 (emphasis added).)

Appellants' knowledge of Fogarty's originating theory of Casey's injury as pled in the MMA

Within weeks of the MMA's filing, Appellants and their counsel learned that the air embolism theory of injury on which Casey's claims were based had been originated by Fogarty. (R. p. 1303, line 10-p. 1306, line 24; p. 2787, lines 7-18; p. 2807, lines 7-17.) Appellants learned this fact through the medical records that King received in response to the subpoenas he had issued in June 2006 to Lung and Chest and other of Casey's medical providers. (R. p. 1303, line 10-p. 1304, line 24; p. 1306, lines 15-24; p. 2785, line 12-p. 2787, line 18.) This is because those records contained the July 21 Note, which stated the air embolism theory that was alleged in the MMA Complaint. (R. p. 1303, line 10-p. 1304, line 24; p. 1306, lines 15-24; p. 2785, line 12-p. 2787, line 18.)

Specifically, on June 16, 2006, King issued document subpoenas seeking Casey's medical records from Dr. Gonda and Lung and Chest. (R. p. 5046.) Appellants have stipulated that they received a copy of Note A no later than July 7, 2006. (R. p. 2807, lines 6-15.) Appellants also have stipulated that they received a copy of Note C no later than July 3, 2006, and a copy of Note B no later than August 14, 2006. (R. p. 2809, line 19-p. 2801, line 11.) In sum, by August 14, 2006, Appellants had received a copy of Note A, Note B, and Note C, and from that date were able to note the differences among the document, compare them, and explore them during MMA discovery. (R. p. 2807, line 7-p. 2810, line 11; p. 2814, lines 2-13; p. 2816, lines 10-18.)

When Appellants received the Lung and Chest file documents Thompson produced in the MMA in July 2006, Appellants reviewed the copy of Note A that was contained in that production, and saw that the air embolism and brain damage theory on which the MMA was based had been formed by Fogarty. (R. p. 1303, line 10-p. 1304, line 24; p. 1306, lines 15-24; p.

2785, line 12-p. 2787, line 18.) When Appellants realized that the medical theory on which the MMA was based had been authored by Fogarty, this amplified Appellants' opinion that the MMA lacked any merit. (R. p. 1305, line 22-p. 1307, line 6.) More important, Fogarty's involvement with the MMA caused Feldman to believe that the MMA was not simply a frivolous lawsuit, but instead was a fraudulent action orchestrated by Fogarty in order to damage him personally, and destroy him and his colleagues. (R. p. 1396, line 5-p. 1397, line 19; p. 1403, lines 1-13; p. 1619, line 14-p. 1626, line 18.)

The information Appellants possessed regarding Fogarty's involvement with the MMA was not confined to document productions and subpoena responses. On August 31, 2007, Thompson served supplemental responses to Casey's interrogatories in the MMA, which formally identified Fogarty as an expert witness expected to testify regarding his treatment and evaluation of Casey, the standard of care applicable to Appellants, and Appellants' breach thereof. (R. pp. 1872-1877, at p. 1873.)[2] Appellants also deposed Fogarty on December 22, 2008. (R. p. 2732, line 23-p. 2733, line 3.)

Feldman's belief that Respondents engaged in wrongful acts relating to the MMA

Feldman had been sued prior to the MMA, in a suit he describes as frivolous. (R. p. 1400, lines 8-23.) Feldman understood that a frivolous lawsuit "is not an actionable thing in [the] United States." (R. p. 1400, lines 13-19.) Initially, he assessed the MMA as a frivolous lawsuit – and thus one as to which Appellants could not seek legal redress. (R. p. 1400, lines 3-23.) However, after Feldman learned of Fogarty's involvement in the MMA through discovery in that case, his initial assessment of the MMA changed: he no longer believed the litigation was just frivolous, and instead believed the entire lawsuit was fraudulent and abusive, and that

2 Fogarty did not testify at the trial of the MMA.

Appellants therefore could sue Respondents and Casey in relation to that action. (R. p. 1189, lines 13-20; p. 1271, line 1-p. 1274, line 17; p. 1396, line 5-p. 1397, line 19; p. 1619, line 14-p. 1626, line 18.)

Fogarty's involvement with Casey and his status as the originator of the air embolism theory of injury alleged in the MMA caused Feldman to believe that Fogarty was orchestrating the MMA and attempting to use it to destroy Feldman and his colleagues. (R. p. 1115, line 12-p. 1116, line 17; p. 1271, lines 1-25.) Feldman also formed the belief that Fogarty, as the "mastermind" of the MMA, and had leaked news of that lawsuit to the newspaper, and thus caused the damaging *SHJ* Article to be published. (R. p. 1271, line 1-p. 1272, line 18; p. 2787, line 19-p. 2789, line 12.) According to Feldman, the *SHJ* Article was "just a small part" of Fogarty's scheme to destroy Feldman, which included causing the MMA to be filed and including in that suit the most damaging and destructive allegations possible. (R. p. 1271, line 1-p. 1272, line 18.)

Specifically, Feldman formed the belief that Fogarty improperly fabricated his air embolism theory of injury and wrote it in the July 21 Note in order to enable Thompson to file a fraudulent lawsuit intended to "destroy" Appellants. (R. p. 1115, line 12-p. 1116, line 17; p. 1123, lines 10-25; p. 1152, line 9-p. 1154, line 12; p. 1161, line 17-p. 1162, line 22; p. 1271, lines 1-25; p. 1180, line 9-p. 1181, line 24; p. 1318, line 25-p. 1320, line 17.) According to Feldman, Fogarty committed "the highest degree of fraud" in writing Note A, because Casey was not brain injured, but Fogarty wrote in Casey's chart that Casey "undoubtedly" had suffered an air embolism, so that the record would contain the medical certainty required for a lawsuit to be filed based upon it. (R. p. 1139, line 11-p. 1143, line 25; p. 1151, line 3-p. 1153, line 25; p. 1161, line 17-p. 1162, line 5; p. 1179, line 18-p. 1180, line 25.) Feldman believes that Fogarty

had "a legal, legal issue in mind, how to hang Greg Feldman and company. So he has fabricated medical record with a legal intent, not medical intent," with the goal of Thompson's using that record to file a fraudulent lawsuit. (R. p. 152, line 9-p. 1153, line 25; p. 1182, line 10-p. 1183, line 25.)

According to Feldman, Thompson helped Fogarty fabricate Note A in order to have the requisite medical opinion on which to file the MMA. (R. p. 1161, line 17-p. 1162, line 5; p. 1180, line 13-p. 1181, line 24.) Feldman also believes that Thompson abused the legal process by filing the MMA on the basis of the fraudulent July 21 Note, and that he did so in order to improperly obtain disability benefits for Casey, who was not injured. (R. p. 1186, line 23-p. 1189, line 20.) Likewise, Feldman believes Thompson abused the legal process by using Note A to "fil[e] a lawsuit for Dr. Fogarty to follow his agenda" of destroying Appellants. (R. p. 1186, line 23-p. 1189, line 20.)

Appellants' research and formation of belief regarding causes of action held against Respondents

Feldman believed that the bad acts he thought Respondents had committed in developing Note A and filing and publicizing the MMA provided Appellants grounds to sue Respondents. (R. p. 2792, line 21-p. 2799, line 9.) As early as June 2007, Feldman began researching causes of action he believed Appellants could assert against Respondents and Casey in relation to the MMA. (R. p. 1403, line 1-p. 1404, line 8; p. 1619, line 14-p. 1628, line 6.) Feldman's goal in performing this legal research was to educate himself on causes of action available to physicians on the basis of being named in a fraudulent and abusive lawsuit, which is what Feldman considered the MMA to be. (R. p. 1403, line 1-p. 1404, line 7; p. 1619, line 4-p. 1621, line 15; p. 1629, line 3-p. 1630, line 9.) By June 2007, Feldman had researched tort claims arising from an invasion of privacy, as well as claims for slander, conspiracy, and "definitely" abuse of process.

(R. p. 2301; p. 1403, line 1-p. 1404, line 8; p. 1626, line 21-p. 1628, line 6.) Feldman's initial research into the tort of abuse of process expanded into research of the willful act element of that cause of action. (R. p. 1619, line 4-p. 1621, line 15.) During the summer of 2007, Feldman was performing significant amounts of Internet research on civil conspiracy and abuse of process, the two causes of action that Appellants ultimately asserted against Respondents in this case. (R. p. 1622, line 8-p. 1626, line 23.)

Based on Feldman's research and his belief that the MMA was fraudulent and had been filed based on Fogarty's contrived Note A and with the intent to injure Appellants, Feldman formed the opinion that Appellants had causes of action against Respondents for civil conspiracy and abuse of process. (R. p. 1619, line 4-p. 1626, line 18.) On August 11, 2007, Feldman stated that belief in writing to Boscia in an email that excerpted Feldman's research on the claim elements of civil conspiracy, and stated:

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

(R. p. 1622, line 8-p. 1626, line 18; p. 2451.)

Feldman followed this email with other emails regarding the claims he believed Appellants possessed against Respondents in relation to the MMA. For example, on August 17, 2007, Feldman emailed himself regarding the definition and proof of the conspiracy claim he believed Appellants held against Respondents, and sent himself an email containing a link to material regarding "Physician Countersuits." (R. pp. 2305, 2304.) On September 29, 2007, Feldman emailed himself yet additional research he performed on the "Abuse of Process" claim he believed Appellants held against Respondents. (R. p. 5053.)

Another topic Feldman had researched by August 2007 was the statute of limitations

applicable to the claims he believed Appellants held against Respondents. (R. p. 5065.) On August 17, 2007, Feldman sent himself an emailed titled, "Statue [sic] of Limitations," excerpting legal research he had performed on the three-year limitations period applicable to one physician's suit against another doctor for defamation. (R. p. 5065.)

Feldman's discussing with legal counsel his belief that Appellants possessed legal claims against Respondents

No later than September 2007, Feldman had discussed with Appellants' MMA counsel his belief that Fogarty, on whose opinion the MMA was based, was orchestrating that lawsuit and had leaked news of it to the newspaper. (R. p. 1394, line 22-p. 1397, line 19; p. 2787, line 19-p. 2789, line 12; p. 2792, line 23-p. 2797, line 14.) Feldman sent King various emails expressing Feldman's belief that a lawsuit and/or counterclaims in the MMA should be filed against Thompson, Fogarty, and perhaps others. (R. p. 2792, line 21-p. 2794, line 20.) King, however, repeatedly advised Feldman that King's focus was to defend Appellants in the MMA, and that if Feldman wanted to sue Respondents, then he should seek legal advice from others. (R. p. 2793, line 23-p. 2796, line 17.) King also reported Feldman's beliefs and his desire to sue Respondents to the JUA in September and October 2007. (R. p. 2792, line 21-p. 2795, line 14.) Specifically, King's September 4, 2007, report to the JUA stated, *inter alia*:

> When [Casey] and his sister did not get satisfactory answers from the insureds [Feldman and Boscia], they visited the competitive pulmonary group Lung and Chest. Dr. Fogarty of Lung and Chest, and your insured, Dr. Feldman, are bitter rivals and have been involved in litigation. Apparently, both believe that every problem in their lives stem from some action of the other. Dr. Feldman, in this case, believes Dr. Fogarty is supporting Casey in this litigation.

(R. p. 5037-5039, at 5038.) Similarly, on October 10, 2007, King reported to the JUA:

> Just for your information, I am copying you on some, but not all of the e-mails that Dr. Feldman has sent to me attempting to direct this litigation, most of which deal with ancillary issues, minutia such as the article in the Herald-Journal, all suits against competitors, etc., etc. I have directed him to seek legal advice of

others (he has his own attorney) if he feels he has redress. My sole job is to defend this lawsuit. That does not include filing suit against anyone.

(R. p. 5044.)

Feldman also repeatedly relayed to Appellants' personal counsel, Mann, his desire to sue Respondents based on his belief that they had filed the MMA based on Fogarty's false air embolism theory in order to destroy Appellants. (R. pp. 5059, 5060.)

Appellants' receipt of legal advice that suit against Respondents could be filed only after the MMA concluded

Although by August and September 2007 Feldman held the belief that Appellants could and should sue Respondents for civil conspiracy and abuse of process, Appellants' lawyers maintained a consistent stance as to Feldman's desire to file suit against Respondents while the MMA was ongoing, repeatedly advising Feldman that the MMA needed to conclude before any such action was filed. King, for example, told Feldman on occasions no later than October 10, 2007, that the MMA would need to be over before Appellants pursued any claims their believed they had against Respondents – and that they would need to retain other counsel to do so. (R. p. 2793, line 23-p. 2796, line 17.) According to King, Feldman repeated to King his desire to sue Respondents on various occasions throughout the MMA's entire duration. (R. p. 2795, lines 9-14.)

Likewise, Feldman repeatedly asked Mann when Appellants could sue Respondents for the torts he believed Respondents committed in relation to the MMA. For example, on January 13, 2008, Feldman emailed Mann, "Milton, what prevents us from lawsuit of Abuse of Process?" (R. pp. 5069-5070.) Feldman included in this email research outlining the elements of an abuse of process cause of action, and distinguishing it from a malicious prosecution claim. (R. pp. 5069-5070.) Mann's response repeated what Mann had advised Feldman "from the start" of

Feldman's wanting to sue Respondents:

> I think the same thing I've said from the start on this. There is nothing that can be done outside that lawsuit while it is still going. Once it is dismissed then you can do something."

(R. p. 5069.) When Feldman then sent Mann another email attaching a summary of and decision from a case Feldman believed supported the ability to sue a lawyer for reputational damage, Mann responded: "I hear you and agree in theory, but that doesn't change the way this has to be addressed. If Spence[r King] will not file something, then we're going to have to wait till this case is over." (R. p. 5068.)

Feldman persisted, forwarding Mann on March 19, 2008, a copy of the "Abuse of Process" email Feldman sent himself on September 29, 2007, containing a definition and description of that tort. (R. p. 5053.) On September 16, 2008, Feldman emailed Mann additional legal research Feldman had performed on "Wrongful Use of Civil Proceedings; Abuse of Process; False Arrest," and commenting that "we have great case of Abuse of Process in this case[.]" (R. p. 5062.) Feldman emailed Mann again on November 17, 2008, declaring his continuing desire to "know how we can countersue in the same lawsuit," and explaining that Mann "said this many times we must seek Judge permission to file it!" (R. p. 5060.)

Despite King's efforts to focus Feldman on the defense of the MMA, and despite Mann's repeatedly advising Feldman that Appellants would have to wait until the MMA concluded before suing Respondents, Feldman and Mann continued throughout the MMA discussing between themselves and with King Feldman's desire to file suit against Respondents. (R. p. 2798, line 13-p. 2799, line 9; pp. 5056, 5057, 5058.) King's and the JUA's response remained consistent: Appellants needed to wait until after the MMA was concluded before Appellants filed any claims against Respondents. (R. p. 5044; p. 2798, line 13-p. 2799, line 9.) The JUA, in

fact, insisted that Appellants wait until after the MMA ended before Appellants filed any counter-action in relation to the MMA. (R. pp. 830-831, 1666-1667, 5049-5050; *see also* pp. 826-827 (email from JUA to Feldman stating that "as a general rule, absent malice, such things are not actionable by an adversary; and even if they are actionable, generally you must first 'win' the underlying suit before you can bring such an action. . . . So . . . they will get their's [sic] in good time.").). Appellants and Mann "pledged cooperation" with the JUA, confirming "that there would be no filings for sanctions, contempt etc." during the MMA without the JUA's express agreement. (R. pp. 5033-5035.)

Appellants' awareness of limitations period on intended claims against Respondents

As shown above, Feldman emailed himself on August 17, 2007, excerpts from his legal research on the three-year statute of limitations applicable to a physician's suit against another doctor for slander. (R. p. 5065.) As the MMA progressed, Feldman remained aware of the statute of limitations on the claims he believed Appellants possessed against Respondents in relation to that lawsuit, even as he was continually advised that Appellants had to wait until after that suit resolved to file any counter-action against Respondents. On March 19, 2008, after Feldman forwarded Mann his August 17, 2007, email regarding the statute of limitations, Mann replied, "Sure. Two things statute of limitations and statute of repose. Not too worried about this." (R. p. 5066.) In a November 6, 2008, email to Mann, Feldman questioned whether the statute of limitations had expired on at least one claim he wished to file against Respondents, asking, "Our Defamation issue has expiration date..3 years?" (R. p. 5061.)

Appellants' filing of this lawsuit after the MMA's final conclusion

Appellants ultimately did wait until the MMA's final conclusion before finally filing suit against Respondents for abuse of process and conspiracy, which were two of the tort claims

Feldman had researched as early as August 2007, and were claims he had believed since that time that Appellants held against Respondents. (R. p. 5052; *see also* p. 1619, line 14-p. 1626, line 18.) The MMA was tried before a jury beginning on May 11, 2010. On May 28, 2010, after a 14-day trial, the jury returned a defense verdict in favor of Appellants in the MMA. Afterward, Casey moved the court for a new trial. Although Appellants timely opposed that motion, the court's order denying the motion was not filed until on or after September 27, 2010. (*See* R. p. 5033.)

On October 27, 2010, within a month of the MMA jury verdict's becoming final, Appellants filed their initial Complaint in this case, alleging that Respondents and Casey engaged in abuse of process and civil conspiracy in relation to the MMA. (R. p. 53.)

Relevant procedural history

Respondents and Casey moved to dismiss Appellants' Complaint, and two successive amended complaints, on grounds that the statute of limitations on Appellants' abuse of process and civil conspiracy claims expired before Appellants filed this action. (R. pp. 116, 102-115, 99-100, 123-124, 118-119, 126-127.) Respondents and Casey argued that Appellants' pleadings showed that when the MMA was filed in 2006, Appellants were put on notice that they may have viable tort claims against Respondents arising from the MMA, because Appellants alleged that the MMA was baseless and that they had been damaged by its filing and publicizing. (R. pp. 116, 102-115, 99-100, 123-124, 118-119, 126-127.)

At the beginning of the hearing on Respondents' motions to dismiss, Appellants' counsel dismissed Appellants' civil conspiracy claim without prejudice. (R. p. 1004, lines 12-24.) The circuit court granted Respondents' and Casey's motions as to the remaining abuse of process claim, finding that Appellants' complaint showed that when the MMA was filed, Appellants

knew or should have known that they possessed an abuse of process claim against Respondents. (R. pp. 1-13.) Applying the discovery rule to Appellants' pleadings, the circuit court held that when the MMA was filed, Appellants could have discovered Respondents' and Casey's alleged wrongdoing through the exercise of ordinary care and reasonable diligence, and that because Appellants failed to file suit within three years of that filing date, the statute of limitations on that claim had expired. (R. pp. 1-13.)

The Court of Appeals reversed, disagreeing that Appellants' pleadings showed unequivocally that Appellants' claim is time-barred. (R. pp. 14-18.) In reaching this decision, the Court of Appeals focused on the two claim elements comprising the tort of abuse of process: an ulterior purpose, and a willful act in the use of the process that is not proper in the regular conduct of the proceeding. (R. p. 16.) As to the first element, the Court of Appeals found that the paragraphs of the complaint the circuit court cited to support its finding (*i.e.*, that Appellants knew or should have known when the MMA was filed that they may have an abuse of process claim) do not indicate when Appellants knew or should have known that Casey – who at that time remained a party defendant – allegedly filed the MMA with an improper objective. (R. pp. 16-17.)[3]

As to the second element, the Court of Appeals held that even if the complaint does indicate that Appellants had reason to believe that the MMA lacked merit, "the complaint does not allege any specific point in time at which [Petitioners] committed a willful and improper act in their use of the legal process." (R. p. 17.) The Court explained that without any information in the complaint as to when Respondents' acts allegedly occurred, it could not charge Appellants

[3] By the doctrine of *inclusio unius est exclusio alterius*, the decision indicates that the face of the complaint does indicate when Appellants knew or should have known that Thompson and Fogarty allegedly filed the MMA with an improper objective.

with knowledge that they had a potential abuse of process claim at the time the MMA was filed. (R. p. 17.)

The Court of Appeals expressly noted that because the case was decided on a motion to dismiss, its decision did not reach past the facts as alleged on the face of Appellants' complaint, and the Court invited Respondents and Casey to move again for dismissal of Appellants' abuse of process cause of action once the case was remanded for discovery and further proceedings. (R. pp. 15 n.1, and 17 n.2.)

Relevant case events

The case was returned to the circuit court on May 19, 2015. (R. p. 19.) In December 2015, the parties agreed to and the court accepted a discovery plan that required the parties' simultaneous production of file documents from the MMA. (R. pp. 21-22.) That production occurred on April 1, 2016, when Thompson produced a copy of his voluminous file in the MMA, bates labeled Thompson 1 – Thompson 83644, and Appellants produced financial records and documents from the files of Appellant's MMA counsel, including Mann, King, and Gunn.

Feldman was deposed on October 17, 18, and 21, 2016. (R. p. 1105, line 15.) Boscia was deposed on October 19, 2016. (R. p. 2306, lines 14-15.)

Respondents moved for summary judgment on December 7, 2016, on grounds that Appellants' abuse of process claim is barred by the statute of limitations, because Appellants' own emails and deposition testimony show conclusively that more than three years before Appellants filed this action, they believed that they possessed an abuse of process claim against Respondents in relation to the MMA. (R. pp. 128-131.) Respondents amended this motion on March 30, 2017, to clarify that Respondents sought summary judgment on statute of limitations grounds only. (R. pp. 132-134.)

On April 14, 2017, the circuit court entered a Discovery Order expressly acknowledging that Respondents' summary judgment motion, as amended, was scheduled for a hearing on June 20, 2017; requiring Appellants to complete by May 31, 2017, the depositions of the three witnesses they wished to depose prior to that hearing; and declaring that Respondents' depositions would not be scheduled unless the circuit court denied Respondents' summary judgment motion. (R. pp. 23-24.)

On June 16, 2017, Appellants filed an affidavit of Feldman stating, among other things, that the MMA "is based upon the information received during the depositions of Dr. Grace, Dr. Waid, Dr. Fogarty, and the fraudulent MRI, which all occurred in year 2008." (R. pp. 5027-5029, at ¶ 22.) Appellants also submitted an affidavit of Boscia affirming and adopting all of Feldman's testimony as Boscia's own. (*See* R. pp. 5031-5032, at ¶¶ 6-7.)

On June 20, 2017, the circuit court heard oral arguments on Respondents' motion for summary judgment. (*See* R. p. 1040.)

On July 18, 2017, Appellants dismissed with prejudice their claims against Casey. (R. pp. 970-971.)

Granting of Respondents' summary judgment motion

On July 20, 2017, the circuit court granted Respondents' summary judgment motion, holding that the record evidence, including Appellants' own emails, shows that no later than August 11, 2007, Appellants held the actual belief that they possessed an abuse of process claim against Respondents. (R. pp. 26-33, at 28-30.) The circuit court held that Appellants' actual belief that they possessed legal claims against Respondents arising from the MMA triggered the statute of limitations' running on those claims, and that the statute expired before Appellants filed the current lawsuit. (R. p. 30.) The order also held that equitable tolling does not spare

Appellants' suit from dismissal, because the record clearly shows that Appellants possessed information more than three years before filing this action that caused them to form the actual belief that they possessed an abuse of process claim against Respondents. (R. pp. 31-32.) Therefore, no facts allegedly were concealed from Appellants that prevented or delayed their forming the belief that they possessed an actionable claim against Respondents. (R. p. 32.)

On July 31, 2017, Appellants moved for reconsideration of the summary judgment order. The circuit court denied Appellants' motion for reconsideration on November 14, 2017. (R. pp. 34-52.) This appeal ensued. (R. pp. 1102-1104.)

STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming*, 350 S.C. at 493–94, 567 S.E.2d at 860.[4]

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[4] Appellants' Statement of Facts (appearing at Appellants' Br. 8-14) does not set forth any evidence properly considered by this Court in deciding the issues on appeal, because it merely recites allegations from Appellants' Second Amended Complaint. Rule 56(c), SCRCP; *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 117, 410 S.E.2d 537, 546 (1991) ("bald allegations" are insufficient to create a genuine issue of fact). Because Respondents denied these allegations, they do not constitute established facts in this case. *See Bates v. City of Columbia*, 301 S.C. 320, 322, 391 S.E.2d 733, 734 (Ct. App. 1990) (only admitted allegations are established as case facts).

ARGUMENT

I. The Circuit Court Correctly Held That Appellants' Abuse Of Process Claim Is Barred By The Statute Of Limitations.

The circuit court properly found that Appellants' abuse of process claim is barred by the statute of limitations. This is because the record shows that more than three years before Appellants filed this suit in October 2010, Appellants had formed the actual belief that they held actionable claims against Respondents, arising from improper acts they believed Respondents had committed in the course of developing Note A and filing the MMA. The record also shows that before concluding in writing that they possessed an abuse of process and civil conspiracy claim against Respondents, Appellants had assessed that Fogarty's fraudulent Note A and Thompson's filing suit based on that record rendered the entire MMA an abusive action filed for the improper purposes of damaging Appellants and improperly obtaining disability benefits for Casey, who they contend was not injured. Although Appellants knew they had been injured by Respondents' alleged bad acts by August 2007 and knew that they held some claims against Respondents for violating their legal rights, Appellants waited more than three years after that date to file the instant suit. Accordingly, their abuse of process claim is time-barred.

A. Abuse of Process

Abuse of process is "the employment of legal process for some purpose other than that for which it was intended by the law to effect – the improper use of a regularly issued process." *Huggins v. Winn–Dixie Greenville, Inc.*, 249 S.C. 206, 210, 153 S.E.2d 693, 695 (1967). "The essential elements of abuse of process are (1) an ulterior purpose, and (2) a willful act in the use of the process that is not proper in the regular conduct of the proceeding." *Palleres v. Seinar*, 407 S.C. 359, 370, 756 S.E.2d 128, 133 (2014).

To sustain an abuse of process claim, 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 abused. *Food Lion, Inc. v. United Food & Comm. Workers Int'l Union*, 351 S.C. 65, 76, 567 S.E.2d 251, 256 (Ct. App. 2003). Significantly, "the willful act requirement is not limited to those abusive acts occurring after process has issued, but includes coercive or extortionate acts that cause process to issue in the first instance." *Id.* at 71, 567 S.E.2d at 254, n. 3 (emphasis added). Accordingly, "an abuse of process action may lie if a party prosecutes an 'entire lawsuit' for collateral purposes." *Id.* 351 S.C. at 73, 567 S.E.2d at 255; *Huggins*, 249 S.C. at 212, 153 S.E.2d at 696 (recognizing that an entire lawsuit can constitute an abuse of process, when that lawsuit results from and is "tainted throughout" by improper acts that cause the process to issue in the first place). A defendant "cannot divorce itself from responsibility" for legal proceedings that result from improperly-motivated actions that precede the issuance of process. *Id.*

B. The Statute of Limitations and Discovery Rule

Abuse of process claims are governed by a three-year statute of limitations period. S.C. Code Ann. § 15–3–530; *Whitfield Const. Co. v. Bank of Tokyo Trust Co.*, 338 S.C. 207, 525 S.E.2d 888 (Ct. App. 1999).

"A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action." *Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). "Statutes of limitations are not simply technicalities;" instead, they "embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). These statutes relieve courts of the burden of trying stale claims of those who have slept on their

rights, and "ensure litigation is brought within a reasonable time in order that evidence be reasonably available and there be some end to litigation." *Transp. Ins. Co. and Flagstar Corp. v. S.C. Second Injury Fund,* 389 S.C. 422, 428, 699 S.E.2d 687, 690 (2010) (citations and internal punctuation omitted).

The limitations period established by S.C. Code Ann. § 15-3-530 begins to run when the plaintiff "knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. Code Ann. § 15-3-535. Therefore, in determining when a cause of action arose under an applicable statute of limitations, South Carolina courts apply the "discovery rule." *Rumpf v. Mass. Mut. Life Ins. Co.*, 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004). Under the discovery rule, the limitations period begins to run on the date the party either knew, or by the exercise of reasonable diligence should have known, that some legal right had been invaded. *City of Newberry v. Newberry Elec. Co-op., Inc.*, 387 S.C. 254, 260, 692 S.E.2d 510, 513 (2010). The exercise of reasonable diligence means that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981).

The discovery rule thus focuses on when the complaining party acquired knowledge of any existing facts sufficient to put the party on inquiry which, if developed, would disclose alleged wrongdoing. *Burgess v. Am. Cancer Soc., S.C. Div., Inc.*, 300 S.C. 182, 186-87, 386 S.E.2d 798, 800 (Ct. App. 1989). "Moreover, although a party claims ignorance of existing facts and circumstances, the same result [*i.e.*, the statute of limitation's running] follows if such facts and circumstances could have been known to the party through the exercise of ordinary care and

reasonable diligence." *Id.* The statute of limitations therefore begins to run on the date a plaintiff knew or should have known that he had a claim, and not when the plaintiff sought advice of counsel, or developed a full-blown theory of recovery, or discovered a witness to support or prove his case, or "obtain[ed] actual knowledge of either the potential claim or the facts giving rise thereto." *Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009). "Moreover, the focus is upon the date of discovery of the injury, not the date of discovery of the wrongdoer:

> The important date under the discovery rule is the date that a plaintiff discovers the injury, not the date of the discovery of the identity of another alleged wrongdoer. If, on the date of injury, a plaintiff knows or should know that she had some claim against someone else, the statute of limitations begins to run for all claims based on that injury.

Wiggins v. Edwards, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994) (citation omitted).

C. The Statute of Limitations Began Running on Appellants' Abuse of Process Claim No Later Than August 2007.

Appellants' abuse of process claim against Respondents is time-barred, because Feldman's emails prove that in August and September 2007, Appellants held the actual belief that they possessed actionable legal claims against Respondents – specifically, the two causes of action Appellants asserted in this case – and because the case evidence conclusively shows that Appellants formed those actual beliefs based on improper acts they believed Respondents had committed in manufacturing a false basis for and filing the MMA for improper purpose. The record clearly shows that the facts and circumstances of which Appellants were aware by July 2006 caused them to believe that they had been damaged by Respondents' abuse of the legal process that was the MMA, and that they possessed resulting legal claims against Respondents. In addition to researching the claims they believed arose from Respondents' alleged misdeeds relating to the MMA and advising their counsel that they wanted to sue Respondents,

Respondents then recorded in writing in August and September 2007 their actual beliefs that they possessed claims relating to their MMA-related injuries. More concrete proof that the statute of limitations on Appellants' claims expired before they filed this suit in October 2010 could hardly exist.

After learning in July 2006 that Fogarty had authored Note A and concluding that the MMA was a fraudulent filing that Fogarty was masterminding in order to destroy Appellants, Feldman carefully researched the claims Appellants could file against Respondents for embroiling them in fraudulent litigation. On August 11, 2007, Feldman emailed Boscia that they had claims against "at least" Respondents and Casey for civil conspiracy, and that "Abuse of Process . . . is already fact[.]" (R. p. 5052.) Feldman followed this email with messages in August and September 2007 regarding the elements of the abuse of process claim he believed Appellants held against Respondents, and even the statute of limitations applicable to those claims. (R. pp. 5051, 5053, 5065, 5067.)

Significantly, the actual beliefs stated in Feldman's August and September 2007 emails are entirely consistent with Appellants' deposition testimony and the case record as a whole, which show that prior to those dates, Appellants had assessed the MMA as being a fraudulent lawsuit that was based on a false medical record manufactured by Feldman's nemesis, and that was interposed to harm them and for other improper purposes; and that these beliefs prompted Feldman to conduct his extensive legal research into the claims Appellants could file against Respondents on those bases. More specifically, the record shows:

- Beginning in 2000, after Feldman left Fogarty's medical practice, Feldman believed Fogarty became obsessed with Feldman and started actively attempting to damage Feldman and his business associates. (R. p. 1245, line 4-p. 1248, line 25.)

- In September 2004, Feldman filed a business lawsuit against Fogarty, claiming that Fogarty was defaming Feldman's business and intentionally interfering with its contracts. (R. p. 1249, line 25-p. 1252, line 12; pp. 1840-1845.)
- In May 2006, when Appellants were served with the MMA, they immediately assessed the suit as lacking merit. Feldman never believed that Casey ever had brain damage, and Appellants did not believe even for "a second" that the lawsuit was a legitimate medical malpractice action. (R. p. 1400, lines 3-7.)
- In May 2006, when the MMA was filed and the *SHJ* Article publicizing it appeared, Appellants began suffering damages to their reputations and medical practice. (R. p. 1271, line 6-p. 1272, line 18; p. 2375, line 10-p. 2376, line 4; p. 2377, line 20-p. 2378, line 15.)
- By July 2006, Appellants learned of Fogarty's involvement with the MMA, when they obtained Fogarty's Note A through discovery. They recognized that Note A contained the air embolism theory that formed the basis of the claims asserted in the MMA. (R. p. 1303, line 10-p. 1304, line 24; p. 1306, lines 15-24; p. 2785, line 12-2787, line 18.)
- Feldman believed that Fogarty's statement in Note A that Casey "undoubtedly had air emboli" not only was "outlandish and crazy," but was a physical impossibility. (R. p. 1296, line 5-p. 1298, line 3.)
- Fogarty's involvement in the MMA and the fact that Note A declared that Casey "undoubtedly" had suffered an air embolism caused Appellants to believe the MMA was not simply a frivolous case, but instead was a fraudulent and abusive case orchestrated and masterminded by Fogarty. Appellants also believed that Thompson abused the legal process by filing the MMA to advance Fogarty's agenda of damaging Appellants, and to obtain unwarranted disability benefits for Casey. (R. p. 1187, line 22-p. 1189, line 20.)

- Feldman believed that a small part of Fogarty's scheme to destroy Appellants through the MMA included his leaking news of the lawsuit to the *Spartanburg Herald-Journal*. (R. p. 1271, line 1-p. 1272, line 18; p. 2787 line 4-p. 2789, line 12; p. 2792, line 21-p. 2794, line 25.)
- Beginning early in the MMA and persisting throughout that case, Feldman advised King that he believed Fogarty was orchestrating the MMA and was attempting to damage Appellants through that lawsuit and the publication of the *SHJ* Article. Feldman also believed and advised King that Appellants held legal claims against Respondents in relation to the MMA, and that he wanted to sue Respondents. (R. p. 1396, line 5-p. 1397, line 19; p. 1403, lines 1-13; p. 1691, line 14-p. 1626, line 18; p. 2787, line 19-p. 2789, line 12; p. 2792, line 21-p. 2795, line 14; p. 2796, line 18-2799, line 5.)
- No later than June 2007, Feldman started performing significant amounts of Internet research on tort claims he believed Appellants could assert against Respondents in relation to the misdeeds he believed they committed in relation to the MMA, which he believed rendered that entire lawsuit abusive. The causes of action Feldman explored included invasion of privacy, slander, civil conspiracy, and "definitely" abuse of process. (R. p. 5047; p. 1403, line 1-p. 1404, line 8; p. 1619, line 14-p. 1628, line 6.)
- On August 11, 2007, Feldman sent Boscia an email containing legal research Feldman had performed on the causes of action he believed Appellants possessed against Respondents as a result of the improper acts he believes they committed in forming and filing the MMA. (Mann 1168.) This email stated Feldman's belief that Appellants had causes of action against Respondents for abuse of process and conspiracy. (R. p. 5052.)
- On August 17, 2007, and September 27, 2007, Feldman sent himself additional emails which included his legal research regarding the abuse of process and civil conspiracy claims he

believed Appellants possessed against Respondents in relation to the MMA, and regarding the statute of limitations applicable to those claims. (R. pp. 5051, 5053, 5065, 5067.)

- On September 4, 2007, and October 10, 2007, King reported to the JUA that Feldman believed Fogarty was supporting Casey in the MMA and wished to file suit against him, and that King had advised Feldman to seek the advice of others if he wished to seek redress. (R. pp. 5037-5039, at 5038; p. 5044.)

- On regular bases throughout the MMA, Feldman reminded Mann that he wished to sue Respondents for abuse of process and other claims, and that he was aware that a statute of limitations applied to those claims. Feldman was consistently advised that Appellants needed to wait until after the MMA resolved to file any suit against Respondents. (R. pp. 5053, 5060, 5068, 5069-5070.)

- The final order in the MMA was filed on or after September 27, 2010. (*See* R. p. 5033.) Appellants filed this action on October 27, 2010.

The evidence that is contained in the case record and summarized above conclusively shows that when Feldman authored his August and September 2007 emails, Appellants held the actual beliefs that started the statute of limitations' running on Appellants' abuse of process claim at least by the date of those messages: Appellants believed that they held abuse of process and civil conspiracy claims against Respondents based on the improper acts Appellants believed Respondents had committed in relation to the MMA, and that they believed rendered that entire action an abuse of process that had damaged them. Those willful acts included Fogarty's having authored Note A prior to the MMA's filing in May 2006 to include the "undoubtedly" language required to file the MMA, when Casey was not actually injured, and for the wrongful purpose of embroiling Appellants in fraudulent litigation and damaging their reputations. Those willful acts

also included Thompson's abusing the process of the MMA by filing that lawsuit in May 2006 based on Fogarty's fraudulent Note A, in order to advance Fogarty's agenda of destroying Appellants and to secure disability benefits for the un-injured Casey. Those willful acts also included Fogarty's leaking news of the MMA to the media, such that the *SHJ* Article was published in May 2006.

Because Appellants held the actual belief in August and September 2007 that their legal rights had been invaded by the improper acts they believed Respondents had committed in developing the basis for and filing the MMA, the statute of limitations on their MMA-related claims had begun running at least by that time. *See City of Newberry*, 387 S.C. at 260, 692 S.E.2d at 513. Significantly, because Appellants knew that they "had some claim against someone" for the damages caused to them by the fraudulently developed and filed MMA, "the statute of limitations [began] to run for all claims based on that injury." *See Wiggins*, 314 S.C. at 128, 442 S.E.2d at 170. Likewise, because Appellants held these actual beliefs by August and September 2007, the statute of limitations had started running on the claims Appellants later asserted against Respondents in this lawsuit – regardless of whether Appellants had yet to determine conclusively what facts or damages they could allege in support of those claims, or had yet to develop a full-blown theory of recovery, or even had yet to obtain actual knowledge of the facts giving rise to those claims. *See Gibson*, 383 S.C. at 406, 680 S.E.2d at 782.

For these reasons, this Court should affirm the circuit court's grant of summary judgment in Respondents' favor.

D. Appellants Have Failed to Establish a Triable Issue of Fact Sufficient to Avoid the Entry of Summary Judgment in Respondents' Favor.

Each of the arguments Appellants have asserted in their attempt to avoid the application of the statute of limitations fails, for the reasons discussed below.

1. Appellants' argument regarding the August 11, 2007, email fails.

Appellants contend that Feldman's August 11, 2007, email cannot properly be construed as reflecting Appellants' actual knowledge that they possessed an abuse of process claim against Respondents, because the email references someone's having "no right to speak to Press about trial matter." (*See* Appellants' Br. 18, 19-20.) Appellants argue that after Feldman wrote this email, King advised Feldman that Thompson did have a right to discuss the MMA with the press, and Casey and Fogarty in their depositions "disavow[ed] any willful act respecting the newspaper article," (Appellants' Br. 19.)[5] According to Appellants, these events "dissuaded [Appellants] from believing that there was a cause of action and/or some willful act, which is a required element in an abuse of process action. (Appellants' Br. 20.)

This argument fails both factually and legally. Factually, the case record – including Feldman's own deposition testimony – shows clearly that before and by August 2007, Appellants' beliefs about what improper actions Respondents had taken with respect to the MMA's development, filing, and prosecution were not confined to their belief that Respondents and/or Casey had leaked news of the MMA to the press. After receiving Fogarty's Note A in July 2006 and seeing that Fogarty had originated the injury theory on which the MMA was based, Respondents formed their primary belief that Feldman consistently identified as being the core of Appellants' present lawsuit: that Respondents engaged in conduct that rendered the entire MMA an abuse of process when they developed and published Note A, because it contained a fraudulent theory of injury that was stated with the degree of medical certainty needed to file the MMA against Appellants, for the purpose of damaging Appellants and obtaining disability benefits for the non-injured Casey. Appellants thus cannot plausibly argue

[5] Casey was deposed in the MMA in August 2007; Fogarty was deposed in December 2008.

that in August and September 2007, they lacked knowledge of any allegedly willful and wrongful acts that Appellants believed Respondents committed in relation to the MMA that rendered that suit an abuse of process, especially when Appellants continue to identify those alleged acts as the bases for their claims against Respondents.

Additional record evidence defeats Appellants' current argument that they were induced after August 2007 into believing that Fogarty and Casey had not engaged in willful acts with respect to the *SHJ* Article. This is because Feldman testified during his deposition that his belief that Fogarty caused the damaging *SHJ* Article to be written – which belief he formed in or around July 2006 after receiving Note A in discovery – continues to be his belief in this case. (R. p. 1271, line 1-p. 1272, line 18.)

Appellants' argument also fails legally, because regardless of whether Feldman had yet to determine conclusively in August 2007 what facts or damages Appellants could allege in support of the claims he believed they held against Respondents, the statute of limitations already had started to run on whatever claims Appellants could assert from the damages they allegedly sustained in relation to the MMA. This is because by the time Feldman wrote his August 11, 2007, email and his related messages, Appellants *actually had determined and believed* that their legal rights had been infringed by Respondents' conduct as to the MMA, that they had been damaged, and that they held resultant claims against Respondents. South Carolina law is clear: the focus of a court deciding when the statute of limitations begins running on a plaintiff's claim is the date the plaintiff discovers an injury. *Wiggins*, 314 S.C. at 128, 442 S.E.2d at 170. "The important date under the discovery rule is the date that a plaintiff discovers the injury . . . . If, on the date of injury, a plaintiff knows or should know that she had some claim against someone else, the statute of limitations begins to run for all claims based on that injury." *Id.*; *see also Roe*

v. Doe, 28 F.3d 404, 407 (4th Cir. 1994) (noting that South Carolina's statute of limitations requires "very little to start the clock").

2. Appellants' argument regarding 2008 acts fails.

Also in their attempt to avoid dismissal of their claim, Appellants argue that their cause of action arose in 2008, less than three years before Appellants filed this action in October 2010. These arguments cannot overcome summary judgment in this case, because reasonable minds cannot differ on the facts and documents showing plainly that the applicable limitations period began running at least by August 2007, and thus expired more than three years before Appellants filed this lawsuit. *See Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984) (a party cannot avoid summary judgment by creating "an inference which is not reasonable or an issue of fact that is not genuine").

Appellants argue that 2008 is the earliest year in which their claim could have accrued and the statute of limitations on that claim could have started running, because their Second Amended Complaint (SAC) alleges that it was during 2008 that:

- Appellants discovered that the medical records of one of Casey's treating physicians, Dr. Grace, stated that Fogarty had seen Casey at Fogarty's research facility prior to the date of the July 21, 2005 Note;
- Fogarty testified during his deposition in the MMA in December 2008 that his first office visit with Casey did not occur until July 21, 2005, when Fogarty wrote his July 21, 2005 Note;
- The records Fogarty produced at his December 2008 deposition in the MMA did not contain all of the records Appellants believe Fogarty generated as to Casey, and when Fogarty was questioned on his Note A, he did not mention Note B or Note C; and

- In 2008, Appellants learned via an anonymous source that Casey had an MRI under an assumed name that was arranged by Thompson, that was not produced in discovery and that did not show evidence of an air embolism.

(Apps.' Br. 21-23, 26-29.)

Appellants also filed an affidavit of Feldman three business days before the circuit court's June 16, 2017, hearing on Respondents' summary judgment motion, in which Feldman declared, *inter alia*: "Plaintiffs' lawsuit is based upon the information received during the depositions of of [sic] Dr. Grace, Dr. Waid, Dr. Fogarty, and the fraudulent MRI, which all occurred in year [sic] 2008." (R. pp. 5027-5029, ¶ 22.)

Appellants' argument that their abuse of process claim cannot be time-barred because it is based on alleged acts that occurred in 2008, and not before, fails factually. This is because the case record decisively establishes that Appellants' abuse of process claim is based on Fogarty's allegedly having created Note A to support the MMA's filing in May 2006, and that when Appellants received Note A in July 2006, the revelation of Fogarty's involvement and his use of "undoubtedly" to state his air embolism theory caused Appellants to believe that the entire MMA was a fraudulent and abusive lawsuit masterminded by Fogarty for the purpose of destroying them. Multiple times during his deposition, Feldman testified that the reason Appellants sued Respondents is that Fogarty wrote Note A, and that Respondents used that fraudulent record to file the MMA and to damage Appellants. For one of many examples, Feldman testified:

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

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

A. I don't know why, Ellen, you decided to put words in my mouth. For the past two

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

(R. p. 1180, line 21-p. 1181, line 24.) Feldman testified consistently with these statements repeatedly throughout his deposition. (*See, e.g.*, R. p. 1152, line 9-p. 1153, line 25; p. 1175, line 17-p. 1176, line 13; p. 1189, lines 13-20; p. 1257, lines 3-21.)

The Feldman Affidavit does not create a triable issue of fact sufficient to avoid the entry of summary judgment in Respondents' favor. This is because the affidavit does not, and cannot, retract Feldman's deposition testimony, in which Feldman repeatedly identified Fogarty's writing Note A sometime before the MMA's filing in May 2006 as the reason Appellants are suing Respondents. Although the affidavit states that this "lawsuit is based upon the information received" during depositions that occurred in 2008 – and thus less than three years before Appellants filed this action – it does not declare that such information is the exclusive basis of the lawsuit, or that Feldman erred in his deposition when he consistently identified Fogarty's creating Note A sometime before the MMA was filed in 2006 as "what [Fogarty] is getting sued for." (R. p. 1181, lines 1-24.) Further, if and to the extent that the Feldman Affidavit can be construed as an attempt to retract or contradict deposition testimony on the critical issue of what Appellants claim were the acts Respondents committed that rendered the MMA an abuse of process and when they became aware of same, the affidavit should be rejected under *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) (delineating considerations for distinguishing between a sham and a clarifying affidavit), and *McMaster v. Dewitt*, 411 S.C. 138, 767 S.E.2d 451 (2014) (rejecting as evidence sufficient to create an issue of fact an affidavit submitted mere days before a summary judgment hearing to contradict party's own prior sworn

statement in an attempt to avoid summary judgment). The affidavit thus cannot properly be considered factual support for Appellants' present argument that they have sued Respondents only for acts allegedly committed in 2008.

Also insufficient to create a triable issue of fact are Appellants' attempts during their depositions to claim that they first became aware in 2008 that they might have a claim against Respondents, because the inference Appellants seek to create through this testimony is neither reasonable nor genuine. *See Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984) ("It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine."). This is because the "plain, palpable and undisputable" evidence discussed above – including Appellants' own testimony and documents, as well as the testimony and documents of their lawyers – shows that in 2006, Appellants believed that Fogarty fraudulently created Note A to cause the MMA to be filed against them to damage them outside the MMA, as well as within that suit; and that by August 2007, Appellants had researched and stated in writing their belief that they had an actionable civil conspiracy and abuse of process claims against Respondents. *See id.* Appellants' self-contradicting deposition testimony on this matter is "a vain attempt to create an issue of fact that is not genuine;" so it cannot defeat summary judgment on the basis of the statute of limitations. *See id.*

More specifically, Feldman admitted during his deposition that when he received a copy of Note A in July 2006, he immediately assessed that Fogarty wrote his "undoubtedly had air emboli" comment to provide Thompson the medical opinion necessary to file a lawsuit intended to injure Plaintiffs and allow Casey to obtain disability benefits. (R. p. 1182, line 10-p. 1183, line 25.) This fact is supported by Appellants' and King's documents and testimony. Nevertheless, Feldman then testified that it was not until 2008 that he developed any concern

regarding the MMA, and that he "[t]otally did not" have any idea prior to 2008 that Appellants might have a cause of action against Respondents. (R. p. 1206, line 20-p. 1210, line 15; p. 1400, line 24-p. 1401, line 7.) Feldman stated that it was only in 2008, when Appellants learned that Thompson had asked Fogarty to x-ray Casey with an earring in his pocket, and that Thompson had arranged for Casey to undergo an MRI under an assumed name that ended up being negative, that they "started to worry" about the MMA. (R. p. 1209, line 13-p. 1210, line 15; p. 1397, line 22-p. 1399, line 15.) Feldman also claimed during his deposition that 2008 was when he first received Note A and saw that Fogarty had written his "undoubtedly had air emboli" statement in it. (R. p. 1124, lines 7-17.)

Similarly, Feldman attempted to deny that his August 11, 2007, email to Boscia reflects that on that date, he held the belief that Appellants had cause of actions against Respondents for abuse of process and conspiracy. (R. p. 1623, line 4-p. 1625, line 8.) Feldman argued that the email reflected only "research" he had conducted and "mental impressions" he had at that time, not some conclusion he had reached – and that it was only in 2008 that he reached the conclusion that Plaintiffs had an abuse of process claim against Casey, after Plaintiffs learned about Casey's MRI. (R. p. 1623, line 4-p. 1625, line 8.) Feldman also initially attempted to deny that when he wrote his August 17, 2007 "Countersuit" email, he was not thinking about countersuits against Respondents, but ultimately admitted to doing so. (R. p. 1628, line 18-p. 1630, line 9.)

Boscia likewise attempted during his deposition to identify 2008 as the year in which he first had any indication that Plaintiffs might have a claim against Defendants. (R. p. 2429, line 20-p. 2431, line 1.) For example, Boscia testified that after Plaintiffs were served with the MMA, they had no idea that the MMA might be baseless – but that "in 2008, I mean, it was a different story." (R. p. 2395, line 6-p. 2396, line 14.) Like Feldman, Boscia stated that it was

only when Appellants learned in 2008 that that Casey had a negative MRI that they first thought the MMA was "strange" or "convoluted." (R. p. 2429, line 20-p. 2431, line 1.)

Appellants' transparent and ineffective attempt to establish 2008 as the year their claims in this case first arose took on an even more troubling and revealing hue during Boscia's deposition in this case, which was taken while Feldman's deposition was still continuing. While Boscia was under oath, Feldman sent him three emails, one of which attached a 2008 subpoena for Fogarty's deposition, and Feldman called Boscia on his lunch break during his deposition to discuss "what we knew in 2004 during the – or 2006 when we did the first discovery," and what records "were not shown to us" until later. (R. p. 2410, line 18-p. 2427, line 21; pp. 2442-2450.) Boscia also admitted that the night before his deposition, Feldman coached his testimony regarding the case timeline during a telephone call, which Boscia summarized as follows:

> So it was, put it into perspective, Joe. 2004, we opened up our research business. 2005, we had the letters sent to the sponsors. Then we wrote the lawsuit cease and desist. Are you following me? Yes, I got it. 2008, we finally go to, you know, the Casey lawsuit. 2010, we go to court. In 2008, we start noticing that there's some funniness going on in the discovery of information that Spencer King and – and Billy Gunn are going through.

(R. p. 2424, line 19-p. 2425, line 11.) Boscia also testified that he had yet another conversion with Feldman on the evening of the first day of Feldman's deposition, during which Feldman discussed the questions he was asked during his deposition, and what date ranges those questions concerned. (R. p. 2425, line 18-p. 2426, line 10.) Boscia and Feldman discussed, "Are they going back to 2004? Are they going specifically 2008 forward?," and other questions to allow Boscia "to put [his] mind in a time frame." (R. p. 2425, line 18-p. 2426, line 10.)

Appellants' attempt to establish 2008 as the year they first believed they might have some claim against Respondents is highly overt, and patently contradicted by the evidence. Feldman's repeated testimony and Appellants' and their attorneys' own documents show plainly that by

August 11, 2007, Appellants had formed and held the actual belief that they had an abuse of process claim against Respondents arising from Fogarty's having fraudulently created Note A and caused the entire MMA to be an abusive lawsuit aimed at damaging them. Because Appellants waited over three years after that time to file this suit, their claim is time time-barred.

In addition to Feldman's own deposition testimony, King's correspondence to the JUA further confirms that more than three years before Appellants filed this lawsuit, they believed that their legal rights had been infringed by Respondents' creation of Note A and their use of it to file the MMA, and that they wanted to sue Respondents. King's September 4, 2007, report to the JUA clearly stated Feldman's belief that Fogarty was "supporting" Casey in the MMA, and King's October 10, 2007, report directly advised that Feldman desired to sue his "competitors" to seek redress he believed Appellants were owed as a result of the fraudulent MMA. (R. pp. 5037-5039, at 5038.)

This evidence, and the case record as a whole, dispositively refutes Appellants' argument that their abuse of process claim is based only on acts that occurred in or after 2008.

II. The Circuit Court Correctly Held That Equitable Tolling Does Not Apply To Prevent The Running Of The Statute Of Limitations On Appellants' Claim.

The circuit court properly found that equitable tolling does not apply in this case to spare Appellants' claim from the operation of the statute of limitations.[6]

A. Equitable Tolling.

Equitable tolling is a judicially-created doctrine that allows courts to suspend or extend the statutory limitations period to ensure fundamental practicality and fairness. *Hooper v. Ebenezer Sr. Servs. and Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). Courts in this

[6]. The circuit court did not consider, nor did Appellants submit, any argument regarding judicial estoppel in opposing Respondents' summary judgment motion. Respondents therefore will not address in this brief Appellants' reference to that doctrine.

state rarely apply this doctrine to stop the running of statutes of limitations. *Pelzer v. State*, 378 S.C. 516, 520–22, 662 S.E.2d 618, 620–21 (Ct. App. 2008). Generally, equitable tolling applies in cases in which a defendant acts to prevent the plaintiff in some extraordinary way from filing suit or discovering the facts essential for filing suit. *See Hooper*, 386 S.C. at 116-18, 687 S.E.2d at 32-34 (applying equitable tolling because defendant hindered plaintiff's effort to serve a lawsuit by failing to list its registered agent for service with the Secretary of State); *Ross v. Ross*, 394 S.C. 261, 266, 715 S.E.2d 359, 361-62 (Ct. App. 2011) (extending limitations period because husband prevented wife from timely filing alimony action by threatening her with physical violence); *Skipper v. Marlowe Mfg. Co.*, 242 S.C. 486, 488, 131 S.E.2d 524, 525 (1963) (applying equitable tolling because defendant induced plaintiff's delay in filing worker's compensation claim by convincing plaintiff that claim would be resolved without litigation). Still, "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use," and the relief should be granted only when, "in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." *Hooper*, 386 S.C. at 117, 687 S.E.2d at 33.

B. Appellants' Decision to Wait to Sue Appellants Was Voluntary, and Was Made Based on the Advice of their Counsel and the JUA.

Equitable tolling does not apply to spare Appellants' abuse of process claim from being time-barred, because the evidence shows that the reason Appellants did not file this action within three years of the date their abuse of process claim arose was because they intentionally waited until after the MMA's conclusion to do so. The record reflects that Appellants' decision on when to sue Respondents was based on the advice and direction of their counsel and the JUA – not because of some act or omission by Respondents. Appellants cannot legitimately claim that they failed to file this suit before the limitations period because Respondents took some action

that prevented Appellants in some extraordinary way from filing suit. *See Hooper*, 386 S.C. at 116-18, 687 S.E.2d at 32-34. Further, the United States Supreme Court has recognized that the fact that a plaintiff does not timely file suit based on advice of counsel does not toll the running of the limitations period. *U.S. v. Kubrick*, 444 U.S. 111, 124 (1979).

The case evidence makes clear that Appellants formed the actual belief that they held causes of action against Respondents arising from misdeeds they allegedly committed in forming and filing the MMA no later than August 11, 2007, when Feldman emailed Boscia making that declaration. Also clear is why Appellants waited to file this suit until October 2010, more than three years after that date: they were told repeatedly by their counsel and the JUA that they needed to wait until the MMA ended before they filed any suit against Respondents; and the MMA concluded with finality in September 2010, less than a month before Appellants filed this action. For example, Mann advised Feldman "from the start" of the MMA that Appellants could not file an abuse of process claim against Respondents until after the MMA was dismissed or concluded. (R. pp. 5068-5070.) King, too, told Feldman that the MMA would need to be completed before Appellants filed any such claim, and the JUA advised that the "rules of engagement" were that Appellants could pursue a claim against Respondents only after the MMA ended. (R. p. 2796, line 18-p. 2799, line 9; pp. 826-831, 5034-5035, 5049-5050.) Appellants and Mann even "pledged cooperation" with the JUA in this regard, confirming that they would not file any suit or action during the MMA without the JUA's agreement. (R. pp. 5034-5035.)

These facts explain why Appellants – who by August 2007 had stated in writing their belief that they had a "countersuit" for abuse of process and civil conspiracy against Respondents – waited to file those claims until October 27, 2010, less than 30 days after the final order in the

MMA was entered on September 27, 2010. (*See* R. p. 5033.) Unfortunately for Appellants, by the time the MMA ended and they prepared and filed their complaint in this case, more than three years had passed since they stated in writing their belief that they had such a claim, thus establishing the very latest date on which the limitations period on Appellants' claims arising from the MMA could have started running. Appellants cannot reasonably attribute their choice of when to file this action, and their failure to do so within the limitations period, to some act or omission by Respondents. The circuit court therefore properly held that the statute of limitations bars Appellants' claim, and refused to apply equitable estoppel to change that result.

C. Appellants Lack Proof That Respondents Prevented Them from Discovering the Existence of Their Claim, or Timely Filing Their Claim.

Equitable tolling does not apply in this case for the additional reason that Appellants cannot prove that Respondents engaged in any conduct that prevented them from discovering that they might have a claim against Respondents, or that prevented Appellants from filing this action in a timely manner.

1. The fact that Appellants learned about Casey's MRI in 2008 does not justify the application of equitable tolling.

The fact that Appellants learned in 2008 that Casey had obtained a negative MRI under an assumed name, and that this was not revealed during discovery, does not support the application of equitable tolling to spare Appellants' claim from being time-barred. This is because Appellants' learning about the MRI in 2008 did not change the fact that by August 2007, Appellants already had formed the belief that they possessed legal claims against Respondents in relation to the misdeeds they allegedly committed in creating Note A and filing the MMA – and specifically, the two claims Appellants later filed in this action. Because Appellants believed by August 2007 that Respondents had violated their legal rights by creating a false basis for and

filing a fraudulent and abusive lawsuit against them, the limitations period on their claims arising from those actions claim began to run, and no later-gained evidence could change that circumstance.

Appellants' "discovery" of the MRI in 2008 also did not hinder their filing suit within three years of August 2007, because Appellants could have initiated this action at any time – but for their promise to the JUA not to do so. In fact, the negative MRI solidified for Appellants their already-existing belief that Respondents had engaged in abuse of process by creating the air embolism theory stated in Note A, filing the MMA with the intent to damage them and to seek unwarranted disability benefits for Casey, and leaking news of the suit to the newspaper. If anything, Appellants' discovery of the MRI in 2008 gave them additional reason to file suit against Respondents in a timely manner, as opposed to preventing them from discovering facts that would put a common person on notice that their rights may have been violated.

In sum, Appellants missed their filing deadline because they chose or agreed to wait until after the MMA ended to file suit against Respondents, not because they lacked information in 2007 on which to form a belief that they held claims against Respondents, and not because they learned in 2008 that Casey had obtained a negative MRI.

2. Appellants Were Fully Aware of Fogarty's Involvement in the MMA by July 2006.

Appellants' argument that Fogarty hid the nature and level of his involvement in the MMA until his deposition in December 2008, and that this prevented Appellants from discovering their claim against him for abuse of process, lacks factual support. The record reveals that within weeks of the MMA's filing, Appellants had learned not only that Fogarty was involved with Casey as his treating physician, but also that Fogarty had originated the very theory of injury on which the MMA was based. Specifically, Appellants gained this information

in July 2006, when they received the Lung and Chest file documents Thompson produced in the MMA. Later, on August 31, 2007 – also more than three years before Appellants filed this lawsuit – Appellants received Casey's supplemental interrogatory responses formally identifying Fogarty as an expert witness who was expected to testify regarding his treatment of Casey and his opinions regarding Appellants' breach of their standard of care as to Casey.

The evidence shows that Appellants needed no additional evidence regarding Fogarty's involvement with the MMA in order to formulate their belief that Fogarty had fraudulently created Note A and was orchestrating the MMA in order to injure them. To the contrary, the information Note A provided them in July 2006 clearly was sufficient to prompt Feldman to research the claims he believed Appellants held against Respondents as a result of those allegedly willful acts, to cause Feldman to conclude in writing which particular causes of action Appellants could assert in relation to same, to prompt Feldman to relay those beliefs to King in or prior to September 2007, and to communicate with Mann throughout the MMA regarding the claims Feldman wanted to file against Fogarty.

Appellants' argument regarding their knowledge of Fogarty's involvement in the MMA thus fails to support the application of equitable tolling to their claim.

3. Appellants possessed and knew about all three July 21 Note versions no later than August 2006.

Equally lacking in merit is Appellants' argument that the limitations period on their abuse of process claim should be equitably tolled because they did not possess or know about the Note B or Note C versions of Fogarty's July 21 Note until the Thompson Documents were produced in 2016. The facts belie Appellants' claim that Respondents intentionally concealed the existence of Note B and Note C from them during the MMA, thereby hindering Appellants' discovery of facts material to their abuse of process claim and delaying their filing of this action.

Discussed fully above is the fact that by August 2007, Appellants believed that Respondents created Note A for the purpose of filing the MMA to damage Appellants and to obtain unwarranted disability benefits for Casey, and they stated in writing their belief that those alleged willful acts and improper motives provided them ground to assert an abuse of process claim against Respondents. Even if Appellants could prove that they did not possess or know about all three of the July 21 Note versions until April 2016 – which Appellants cannot prove – such proof could not negate the notice and knowledge that Appellants possessed by August 2007 regarding their claims against Respondents, and that caused the limitations period on those claims to begin running.

Regardless, the evidence in this case shows that Appellants possessed all three of the July 21 Note versions no later than August 14, 2006, approximately two months after the MMA was filed, and more than four years before Plaintiffs filed this action. (R. p. 2807, line 6-p. 2810, line 11.) Although Appellants have argued against this documented fact in their Brief, it is one to which they stipulated during this case. (R. p. 2807, line 6-p. 2810, line 11.) In addition to having obtained each of the three July 21 Note versions within months of the MMA's filing, Appellants papered their files with at least six copies of Note A, at least five copies of Note B, and at least three copies of Note C, and worked with the July 21 Note versions in various ways. (*See* R. pp. 868-870, at line 3.) Appellants also regularly discussed the existence of the various July 21 Note versions with their counsel during the MMA. Feldman directly asked King about the discrepancies he noted between versions of the document, and Feldman frequently addressed with King his belief that Thompson and Fogarty were "hiding records." (R. p. 2818, line 25-p. 2820, line 17; p. 5048.)

Feldman and Mann's focus on the various versions of the July 21 Note during the MMA

included their forming the belief during that case that Respondents were actively concealing Note B and Note C to hide the fact that Respondents had manipulated the language of Fogarty's operative July 21 Note, and to hide Respondents' true, malicious intent in bringing the MMA against Appellants. For example, on February 16, 2008, Feldman emailed King and Mann a block quote from the "Comments" section of Note B, noting that it differed from another version of the July 21 Note that King's paralegal had provided Feldman, and asking whether King had given him "all Fogarty records." (R. p. 5048.) Likewise, one of the many copies of Note B in Mann's file bears a sticky note handwritten by Feldman, commenting that this record did not contain the Bates stamping that Thompson had included on Note A. (R. pp. 5071-5074.)

Initially during the MMA, Feldman and Mann planned to conduct discovery regarding the fact that only Note A was included in the Lung and Chest documents Thompson produced to Plaintiffs' counsel. (*See* R. p. 5064.) On June 9, 2008, Feldman emailed Mann, asking, "Do you still want to retrieve non-produced (hidden) Fogarty records before his deposition[?]" (R. p. 5064.) Feldman and Mann ultimately chose not to engage in discovery on the issue of the July 21 Note versions during the MMA, and instead decided to wait to use this "evidence" against Respondents in the lawsuit they intended to file against Respondents after the MMA concluded. (*See* R. p. 5063.) On June 15, 2008, Feldman wrote Mann regarding "cmf," stating, "I just do not think we need to give CMF any chance to explain-away anything...We no longer want him to incriminate Thompson before lawsuit, we do not need his testimony before the lawsuit..just interrogatories. . . ." (R. p. 5063.) In reply to another email by Feldman on that same topic, Mann reiterated Appellants' plan to avoid using this evidence in the MMA, and instead to use it in the case Appellants intended to file – and did file – against Respondents after the MMA concluded. (R. p. 5055.) Mann stated: "Not really. More punch in the abuse of process and

civil conspiracy." (R. p. 5055.) Per this plan, when Fogarty was deposed in the MMA in 2008, he was not questioned regarding Thompson's document production in the MMA, or any version of the July 21 Note other than Note A. (R. p. 2818, line 25-p, 2820, line 17.)

These facts prevent Appellants from arguing legitimately that they lacked possession or awareness during the MMA of any July 21 Note version other than Note A. Since Appellants possessed and were aware of the July 21 Note versions during the MMA more than three years before they filed this suit, no grounds actually or arguably relating to those documents can support the application of equitable tolling to spare Appellants' abuse of process claim from being time-barred.

D. Equity Weighs Against the Application of Equitable Tolling in This Case.

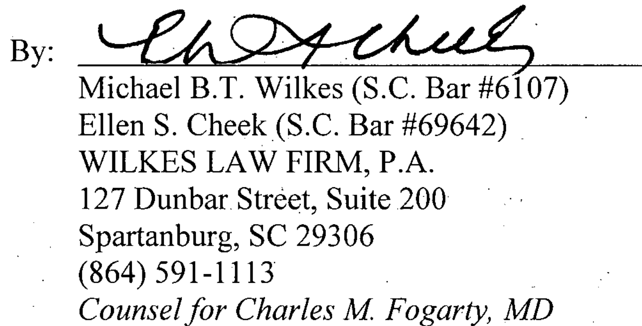
Equitable tolling also should not be applied to extend the limitations period on Appellants' claim in this case, because it would not serve the interests of justice, and because "[h]e who seeks equity must do equity." *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (Ct. App. 1994). Appellants have not done equity, because they have advanced in this case the unsupported and illegitimate claim that they did not possess Note A, Note B, and Note C until April 2016, when the record reflects that Appellants have had those documents for over a decade. In addition, the evidence shows that Appellants intentionally avoided engaging in discovery on the July 21 Note versions during the MMA, to prevent Fogarty from "explain[ing] away" that matter in advance of this lawsuit, and to afford Appellants "[m]ore punch" in this current action for abuse of process. (R. pp. 5055, 5063.)

Appellants have not done equity, so they should not be able to invoke its aid. For this additional reason, equitable tolling should not be applied to spare Appellants' abuse of process claim from dismissal under the statute of limitations.

Conclusion

The circuit court properly found that Appellants failed to sue Respondents for abuse of process within three years of having actual knowledge of and belief in the existence of that claim, and that Appellants' claim is therefore barred by the statute of limitations. Further, the circuit court correctly held that equity does not support the application of equitable tolling in this case. The circuit court's order granting summary judgment in Respondents' favor therefore should be upheld.

October 18, 2018

By: 

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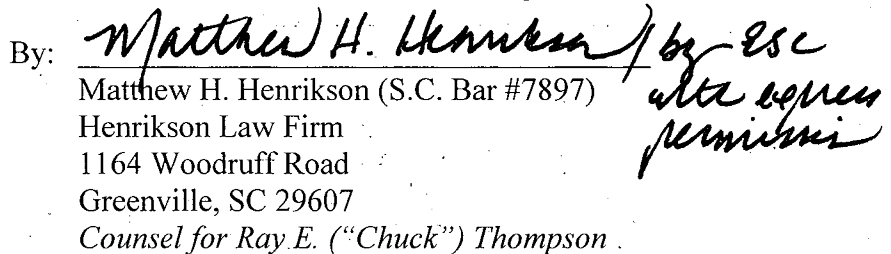
By: 

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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
R. Keith Kelly, Circuit Court Judge

Trial Court Case No. 2010-CP-42-05743

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SC Court of Appeals

Appellate Case No. 2017-002522

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

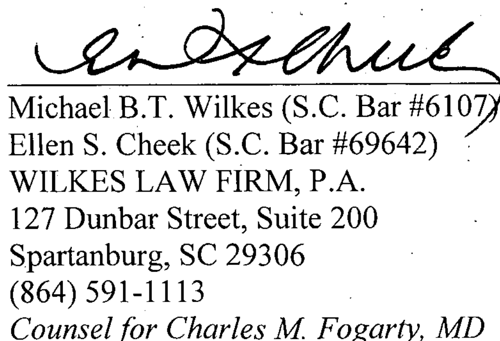
v.

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

CERTIFICATE OF COMPLIANCE WITH RULE 211(b), SCACR

The undersigned counsel for Respondents hereby certify that Respondents' Final Brief complies with Rule 221(b), SCACR.

October 18, 2018

By: 

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