THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

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

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

v.

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

REPLY BRIEF OF APPELLANTS

October 17, 2018

F. Milton Mann, Jr., Esquire
151 Harold Fleming Court
Spartanburg, SC 29303
(864) 680-5079
Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

SECONDARY AUTHORITIES

ARGUMENTS IN REPLY

I. The Circuit Court Erred In Granting Respondents' Motion For Summary By Finding That Appellants' Abuse Of Process Claim Is Barred By The Statute Of Limitations.

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

Appellants assert now and in their Plaintiffs' Reply to Defendants' Brief Opposing Plaintiffs' Motion For Reconsideration (R. pp. 994-997, Pls.' Reply 1-2), that the Respondents have continually mischaracterize the stipulation concerning the three (3) fraudulent July 21 "medical notes" by stating "Plaintiffs stipulated that no later than August 2006, they possessed facts and evidence reflecting the alleged improper and willful acts that Feldman testified were committed by Fogarty prior to the MMA's being filed and directly caused the MMA to be filed against Plaintiffs." (R. p. 988, Defs.' Br. Opp. Pls.' Mot. Rec. 6) This is a complete misstatement of the stipulated fact. Appellants only stipulated that from a number of different sources, they had received production from the Respondents and third-parties that contained all the various fraudulent notes. (R. pp. 2808-2810, King Depo. p. 95, ln. 19 through p. 97, ln. 7) However, that is the only stipulation Appellants made concerning the three (3) July 21, 2005 fraudulent notes. Appellants vehemently deny that they "possessed facts and evidence reflecting the improper and willful acts" of Respondents until December 22, 2008.

Respondents continue to misstate the nature and intent of Appellants' stipulation regarding the receipt of the three (3) fraudulent July 21, 2005 office visit notes. Respondent Thompson is an Officer of the Court and he did not produce all three (3) July 21, 2005 "medical notes" within his possession, communications with Respondent

Fogarty respecting said notes or their requested selected version destruction, and other discoverable information within his file pursuant to Mr. Gunn's subpoena. Attachment "A" of the subpoena specifically requests,

> "If any record as described above has been destroyed, please provide documents with the dates of destruction, the name of the person who destroyed them, the basis for their destruction, and the reason for their destruction." (R. pp. 2833-2835, THOMPSON 052287-052288).

Nothing in the Appellants' stipulation waived the Respondents' responsibility to truthfully comply with discovery. Neither Respondent produced all three notes together. Appellants' merely acknowledged that they existed in various locations in non-party discovery but at no time were they ever produced to or received by the Appellants together.

The fact there were three (3) fraudulent July 21, 2005 office notes was not discovered by Appellants until the April 1, 2016 discovery production by Respondents in this case. Further, it was not until the April 1, 2016 discovery production by Respondents in this case that Appellants were provided with a copy of a fax from Maria Kimbrell dated August 24, 2005, on behalf of Respondent Fogarty, telling Respondent Thompson to destroy one of the previously provided July 21, 2005 office visit notes and replace it with the one attached therewith. (R. pp. 3451-3454, THOMPSON 000536-539) Interesting to note, this was not the final Thompson/Fogarty note, nor the actual fraudulent note over which the case was tried.

The Respondents' Brief represents the three (3) fraudulent July 21, 2005 office notes differences as follows:

Note A

"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. 5075, Thorn. 3170.) Note A shows a cc: to Dr. Gonda. (R. p. 5075, Thorn. 3170.)"

Note B

"In slight contrast, Note B is signed by Fogarty, and lacks the "undoubtedly had air emboli" language contained in Note A. (R. p. 5111, Dep. Ex. 6 (Thorn. 59623.) 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. 5155, Thorn. 59623 (emphasis added).)"

Note C

"Again in slight contrast, Note C is signed by Fogarty, and shows a cc: to Dr. Gonda and to Dr. Grace. (R. p. 5154, Thorn. 36483.) 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. 5154, Thorn. 36483 (emphasis added).)" (Int. Resp. Br. 7-8)

The underlying case was tried upon what Respondents have referred to as "Note A." Appellants assert that the Respondents' naming of the notes as Note A, Note B, and Note C is a further attempt to misrepresent the order in which the notes were originally produced.

In Respondent Fogarty's Deposition he states under direct examination by Mr. King:

16 Q. Have you rendered any other written reports in this
17 case?'
18 A. I did not render a written report, but I did render
19 a list of findings, conclusions, questions. As I
20 mentioned, that's a two-page list that I failed to
21 produce. I can produce it. I think -- I don't
22 know if it's two pages or three pages. But ---

(R. p. 2904, Fogarty Depo. 67, Lines 16-22.)

When specifically asked by Mr. King in Respondent Fogarty's 2008 Deposition, he did not disclose the writing of multiple July 21, 2005 notes.

Appellants' Second Amended Complaint forwards the cause of action, Abuse of Process. The elements of abuse of process are an ulterior purpose and a willful act in the use of the process not proper in the conduct of the proceeding. Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1967). As stated within the Second Amended Complaint, Respondent Fogarty actively sought to prevent discovery efforts respecting the level, purpose and his involvement in the litigation and was successful until his deposition on December 22, 2008. (R. p. 85, 2nd Amend. Comp. ¶¶ 39, 40, 41.)

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

Respondents have continually misrepresented Appellant Feldman's knowledge of the three (3) fraudulent July 21, 2005 office notes, as well as misconstrued statements made by Appellant Feldman regarding his knowledge of the notes and his belief that Respondent Fogarty leaked news to the Spartanburg Herold Journal. For the purpose of

clarifying what Appellant Feldman testified to in his deposition, Appellants submit the following excerpts under examination by Ms. Cheek:

Regarding the news leak:

12 Q. You also told your counsel in the medical malpractice
13 action early on that you believed Dr. Fogarty had
14 leaked news of the lawsuit to the Spartanburg Herald-
15 Journal. Correct?
16 A. I did not. Did not know that.
17 Q. You told your lawyers that you thought he had.
18 Correct?
19 A. Yeah, I was suspicious of that.

(R. p. 1396, Feldman Depo. 292, Lines 12-19.)

Regarding 2008 discovery:

23 Q. And you also told me that you believe Dr. Fogarty was
24 working on a brain injury theory during 2004, 2005.
25 Correct?

(R. p. 1417, Feldman Depo. 313, Lines 23-25.)

1 A. Yeah. We have discovered that much, much later. We
2 have discovered that from Grace reports. That was
3 discovered much, much later. I knew about that
4 personally in 2009, but it was discovered in 2008. But
5 I read them, I read them in 2009. That's when the
6 revelation was made that Dr. Fogarty was conducting

7 tests, that Dr. Fogarty was seeing Casey and Carole
8 regularly. Those revelations contained in Dr. Grace
9 production which I read in 2009 in preparation to the
10 trial. The trial was scheduled to be in September of
11 2009 until Honorable Judge Hayes has postponed it.

(R. p. 1418, Feldman Depo. 314, Lines 1-11.)

Regarding Feldman's knowledge of notes:

25 Q. So in the medical malpractice case, you were aware that

(R. p. 1365, Feldman Depo. 261, Line 25.)

1 experts were quoting Fogarty records --
2 A. I wasn't.
3 Q. -- and the language was different than --
4 MR. MANN:
5 Wait.
6 EXAMINATION RESUMED BY MS. CHEEK:
7 Q. -- what you had in Exhibit 5 here.
8 MR. MANN:
9 Objection.
10 EXAMINATION RESUMED BY MS. CHEEK:
11 A. This is partially false and partially correct.
12 Q. What's the correct part?
13 A. The correct part is that I saw Waid note that was not
14 supported by medical records. The false part is that

15 somehow what you're insinuating that I knew about those

16 notes in existence. I did not.

(R. p. 1366, Feldman Depo. 262, Lines 1-16.)

In the Motion for Reconsideration hearing, Appellants argue:

1 These excerpts for Dr. Feldman's deposition are

2 taken out of context. They're not related to any point in time

3 whatsoever. They're inconsistent with what he believes and

4 should be rejected on that basis. Thank you, Judge.

(R. p. 1100, Mot. for Recon. Hearing Trans. 19 , Line 1-4)

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

Respondents assert the statute of limitation was triggered based on one (1) email from Appellant Feldman to Appellant Boscia dated August 11, 2007, before any depositions were taken. At the Summary Judgment hearing, Respondents based their entire assertion on that one (1) email dated August 11, 2007, regarding a newspaper article and based upon said newspaper article's publication, stated an abuse of process had occurred. Appellants have a clear showing that a multitude of material facts exist beyond this misconstrued email.

Further, both Casey and Respondent Fogarty deny speaking with the reporter. Respondent Thompson had an unfettered right to speak with and disseminate information to the reporter consistent with the complaint subject to South Carolina Rules of

Professional Responsibility, Rule 3.6, Trial Publicity. Therefore, it is uncontroverted that the newspaper article is not a **willful act** and cannot serve as a basis for the Court's granting of Defendants' Motion for Summary Judgment. Appellant Feldman's affidavit is clear evidence, pursuant to South Carolina Rules of Civil Procedure, Rule 11 pleading requirements, that he investigated his mere suspicion and rejected the newspaper article as a willful act. (R. p. 5027-5030, Affidavit of Gregory J. Feldman, filed June 16, 2017)

While Appellant Feldman did express a concern in his email, he has the right to rely upon the statements and representation made by the Respondents. Appellants have made a clear showing of negligent misrepresentation by the Respondents. To maintain a claim for negligent misrepresentation, a plaintiff must show by a preponderance of the evidence:

> (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation. Hendricks v. Hicks, 374 S.C. 616, 620, 649 S.E.2d 151, 152-53 (Ct. App. 2007).

Additionally, The Supreme Court of Indiana held that they decline to require attorneys to burden unnecessarily the courts and litigation process with discovery to verify the truthfulness of material representations made by opposing counsel. The reliability of lawyers' representations is an integral component of the fair and efficient administration of justice. The law should promote lawyers' care in making statements that are accurate and trustworthy and should foster the reliance upon such statements by others. The Court added that "Bell's attorney's right to rely upon any material

misrepresentations that may have been made by opposing counsel is established as a matter of law." Fire Insurance Exchange v. Bell by Bell, 643 N.E.2d 310 (Ind. 1994).

Further, the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another. Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005).

It was not until after the April 1, 2016, exchange of discovery materials that Appellants understood the lengths Respondents went to in order to fraudulently conceal their willful acts and to prevent Appellants from knowing there was a potential cause of action. Appellants argue it is unsupportable for Respondents to put forth an argument which, in essence, that they were so open and obvious with their hidden conduct, despite working together surreptitiously, intentionally preventing Appellants from discovering their willful deeds, that Appellants were placed on notice that a cause of action existed. (R. pp. 5027-5032, Feldman, Upstate Lung and Critical Care Services, P.C. and Boscia Affidavits, filed June 16, 2017)

As stated in the Appellants' Initial Brief, a willful act and concealment of the act was discovered during Respondent Fogarty's deposition on December 22, 2008, when he lied under oath as to the inception date of his involvement with Defendant Casey, which was learned during the Grace deposition. Defendant Thompson was in attendance and made no effort to correct Defendant Fogarty's statements.

If the Appellants' establishes that they were not (and should not have been) aware of facts that should have excited further inquiry on their part, then there is nothing to provoke inquiry. Taylor v. Meirick, 712 F.2d 1112, 1118 (7th Cir.1983)

Appellants contend that the willful act of concealment performed by Fogarty and Thompson at the time of Fogarty's deposition on December 22, 2008, starts the clock for the statue of limitations. In preparation for that deposition, defense attorney Spencer King (who was then defending Feldman in the Casey litigation) issued a subpoena to Fogarty to produce his entire record on Casey. The subpoena required Fogarty to produce at his deposition (in the Casey litigation) all records of treatment generated by Fogarty for Casey and "any reports that he has rendered" as well as "any memorandums that you generated, any communication, whatever that you received from any third party." Fogarty did not do so as evidenced by Mr. King's Deposition (R. pp. 893-896, 945-956, EXHIBIT 2; EXHIBIT 17; EXHIBIT 18, King Deposition, March 28, 2017, pp. 28-31, 34, 48-51).

At Respondent Fogarty's deposition, only one version of the three notes was attached as Exhibit 20 to Fogarty's deposition and was the final amended version, in which Fogarty concluded that Casey had "undoubtedly" sustained "neurological impairment" during the surgery by Feldman. (R. p. 932-933, EXHIBIT 15 at pp. 85-86, THOMPSON 017772-017773) This final amended version of the note is misleadingly represented in Respondents' brief as "Note A" as opposed to "Note C" indicating it to be the last note in the series.

Respondent Thompson was present at the Fogarty deposition and remained silent, not revealing his knowledge that Fogarty's production to King's subpoena was incomplete. Respondent Fogarty owned the "undoubtedly" version of the July 21, 2005 note, read it into the record, and never indicated that this was a "draft" or the existence of

previous notes. (R. pp. 932-933, EXHIBIT 15 at pp. 85-86, THOMPSON 017772-017773)

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

The following **willful acts** and concealment of the acts were discovered on December 22, 2008.

1. When Respondent Fogarty lied under oath as to the inception date of his involvement with Defendant Casey, which was learned during the Grace deposition. (R. pp. 925-944, Charles M. Fogarty Deposition Excerpt, December 22, 2008, pp. 25-26, 67, 80-82, 85-87, 116-117, 219-220, THOMPSON 017687, 017711-017712, 017754, 017767-017769, 017772-017774, 017803—017804, 017906-017907; Joseph Glover Grace, III Deposition Excerpt, April 2, 2008, pp. 55-56, Notes, THOMPSON 062140, 062194-062195, 062451-062453) Respondent Thompson was in attendance and made no effort to correct Respondent Fogarty's statements.
2. When concealment was performed by Fogarty and Thompson at the time of Fogarty's deposition on December 22, 2008. In preparation for that

deposition, defense attorney Spencer King (who was then defending Feldman in the Casey litigation) issued a subpoena to Fogarty to produce his entire record on Casey. (R. pp. 945-947, King Deposition, March 28, 2017, p. 15, Lines 15 – 24, p. 18, lines 20-22). The subpoena, identified as Exhibit 93 in King's deposition, required Fogarty to produce at his deposition (in the Casey litigation) all records of treatment generated by Fogarty for Casey and "any reports that he has rendered" as well as "any memorandums that you generated, any communication, whatever that you received from any third party." Fogarty did not do so as evidenced by Mr. King's Deposition (King Deposition, March 28, 2017, p. 32, line 18 through p. 33, line 9; King Deposition, March 28, 2017, p. 15, Lines 15 – 24, p. 18, lines 20-22; King Deposition, March 28, 2017, pp. 28-31, 34, 48-51)

3. It was not until Drs. Grace and Fogarty's depositions that Appellants understood the lengths Defendants went to in order to fraudulently conceal their **willful acts** and to prevent Appellants from knowing there was a potential cause of action.

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

There is obviously a conflict as to when the parties feel Appellants knew or should have known they had a claim against Respondents based upon willful acts within the process. Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual

issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App. 2004)

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

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

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

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

Appellants adamantly assert this case is subject to equitable tolling as such tolling is necessary to prevent unfairness to a diligent plaintiff. The Appellants were prevented in extraordinary ways as previously described, from exercising his or her rights and relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine.

In this action, the Respondents went beyond fraud or deception and persisted in a course of conduct that included acts of perjury, suborning perjury, material misrepresentations and discovery abuses in their efforts to conceal essential elements of Appellants' claims. Respondent Fogarty actively sought to prevent discovery efforts respecting the level, purpose and his involvement in the litigation and was successful until his deposition on December 22, 2008. (R. p. 85, 2nd Amend. Comp. ¶¶ 39, 40, 41)

"Under South Carolina law, a defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute ha[s] been induced by the defendant's conduct." Kleckley v. N.W. Nat. Cas. Co., 338 S.C. 131, 136, 526 S.E.2d 218, 220 (2000) (internal quotation omitted). Appellants have overwhelmingly proven that is was the Respondents who induced conduct which caused the delay in discovering the described willful acts.

As the court stated in Starkey v. Bell, "Issues of reliance and its reasonableness, going as they do to subjective states of mind and applications of objective standards of reasonableness, are preeminently factual issues for the triers of the facts." in Starkey v. Bell, 281 S.C. 308, 313, 315 *530 S.E. (2d) 153, 156 (Ct. App. 1984).

A court invokes judicial estoppel to prevent a party from changing its position over the course of judicial proceedings. 31 C.J.S. Estoppel and Waiver § 139 (1996).

The most suiting depiction of the application of judicial estoppel as it applies to the case at hand can be found in Hayne Federal Credit Union v. Bailey et al. The Court declares,

> "We now explicitly adopt the doctrine of judicial estoppel as it relates to matters of fact (not law). In order for the judicial process to function properly, litigants must approach it in a truthful manner. Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. The doctrine thus punishes those who take the truth-seeking function of the system lightly. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him. It is certainly conceivable that parties may want to present novel legal theories, which may require changing one's previous legal theory.[1] However, the truth-seeking function of the judicial process is undermined if parties are allowed to change positions as to the facts of the case, unless compelled by newly-discovered evidence...
>
> [1] The discussion here is not intended to suggest an alteration of our rules of

preservation." Hayne Federal Credit Union v. Bailey et al., Opinion No. 24678 (S.C. Sup. Ct. Filed August 11, 1997) (Davis Adv. Sh. No. 24 S.E. 2d at 73)."

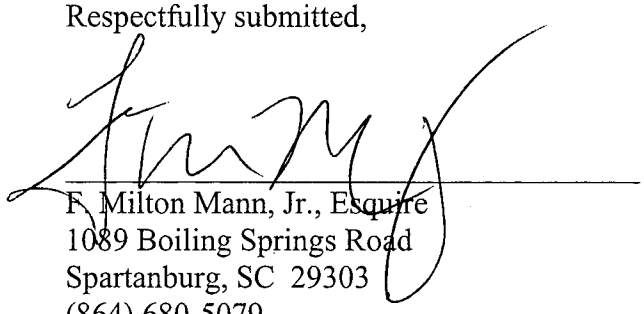
CONCLUSION

Public policy and the interests of justice are in favor of a reversal and remand of this matter. The Court of Common Pleas erred when it determined that the Respondents' acts of perjury, suborning perjury, material misrepresentations and discovery abuses did not result in Appellants' delays in bringing their claims as a result of essential elements of Appellants' claims being actively concealed by the Respondents. The Court of Common Pleas erred when it determined that the 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 Appellant's claim is barred by the statue of limitation. Appellants adamantly contend that the statute of limitation should begin on December 22, 2008 or in the alternative be equitably tolled or apply judicial estoppel.

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

mechanical approach of the limitations period would be manifestly unfair to justice and that "active concealment" by the Respondents has been continually present in this case. The Court's order granting summary judgment in Respondents' favor therefore should be reversed and remanded.

Respectfully submitted,



October 17, 2018

F. Milton Mann, Jr., Esquire
1089 Boiling Springs Road
Spartanburg, SC 29303
(864) 680-5079
Attorney for the Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

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

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

v.

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

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief of Appellants complies with Rule 211(b), SCACR.

October 18, 2018

F. Milton Mann, Jr., Esquire
151 Harold Fleming Court
Spartanburg, SC 29303
(864) 680-5079
Attorney for Appellants