STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Letitia H. Verdin, Circuit Court Judge

Case No. 2010-CP-5743

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

v.

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

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STATEMENT OF THE ISSUES ON APPEAL

I. Whether The Circuit Court Correctly Held That Appellants' Abuse Of Process Claim Is Time-Barred And Dismissed That Claim With Prejudice.

II. Whether the Circuit Court Correctly Refused To Equitably Toll The Statute Of Limitations As To Appellants' Abuse Of Process Claim.

III. Whether The Circuit Court Properly Dismissed Appellants' Civil Conspiracy Claim With Prejudice On Grounds That It Is Time-Barred.

IV. Whether The Circuit Court Properly Denied Appellants' Request For Leave To File A Third Amended Complaint.

STATEMENT OF THE CASE

Appellants commenced this matter on October 27, 2010, claiming Respondents engaged in abuse of process and civil conspiracy with respect to an underlying medical malpractice suit that was filed against Appellants in 2006, *William Mark Casey v. Gregory J. Feldman, M.D., Joseph A. Boscia, III, M.D., Devendra Shantha, M.D. and Upstate Lung and Critical Care Specialists, PC*, in the Court of Common Pleas for Spartanburg County, Seventh Judicial Circuit, Case No. 2006-CP-42-1728 (the "Medical Malpractice Action").[1] (Second Am. Compl. ¶ 4.) Appellants contend the plaintiff in the Medical Malpractice Action, Respondent William Mark Casey ("Casey"), and his lawyer, Respondent Ray E. ("Chuck") Thompson ("Thompson"), conspired with pulmonologist Respondent Charles M. Fogarty ("Fogarty") to injure Appellants by instituting the Medical Malpractice Action and maintaining therein claims that Appellants breached their applicable standard of medical care in treating Casey, and caused Casey to suffer permanent brain injury. (Second Am. Compl.) In an order dated March 21, 2012, and

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[1] Plaintiffs' Second Amended Complaint does not specify the date the Medical Malpractice Action was filed; but the action's case number (2006-CP-42-1728) indicates the suit was filed in 2006. (Second Am. Compl. ¶ 4.)

filed on March 23, 2012, the Circuit Court granted Respondents' motions to dismiss Appellants' Second Amended Complaint, ruling that Appellants' claims for abuse of process and civil conspiracy are time-barred. (Order Granting Defs.' Mots. to Dismiss Second Am. Compl (the "Dismissal Order").) Appellants have appealed the Circuit Court's order. (Appellants' Notice of Appeal.)

The facts as alleged by Appellants, in the light most favorable to them, are as follows.[2, 3] Casey filed the Medical Malpractice Action in 2006, in relation to medical services and treatment Appellants provided him after Casey experienced chest pain at work on May 28, 2004. (Second Am. Compl. ¶¶ 6-13.) Upon Casey's admission to the hospital that day, he received a chest x-ray that showed a small metallic foreign body in the x-ray field. (Second Am. Compl. ¶ 8.)[4] To "clinical[ly] correlate" (or investigate) the foreign body shown on the x-ray, Appellant Boscia, a pulmonologist who practices with Appellant Upstate Lung and Critical Care Specialists, PC ("Upstate Lung"), performed on Casey a flexible bronchoscopy,[5] which did not reveal a foreign object in Casey's

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[2] When reviewing a motion to dismiss, the appellate court applies the same standard of review as the lower court; so the facts alleged and inferences reasonably deducible therefrom must be viewed in the light most favorable to the plaintiff. *Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 6, 732 S.E.2d 876, 878 (2012).

[3] Respondents unqualifiedly deny Appellants' claims that they engaged in any wrongdoing as to Appellants. The factual recitations set forth herein are drawn directly from Appellants' Second Amended Complaint for the exclusive purpose of this Court's consideration under the applicable standard of review, which requires the pleadings to be construed in the light most favorable to Appellants.

[4] The foreign object was a screw that was not located inside Casey's chest, but instead had fallen out of the x-ray's slide casing into the x-ray screen.

[5] Bronchoscopy is the "[i]nspection of the interior of the tracheobronchial tree through a bronchoscope." STEDMAN'S MEDICAL DICTIONARY 271 (28th ed. 2006). A bronchoscope is "[a]n endoscope for inspecting the interior of the tracheobronchial tree, either for diagnostic purposes (including biopsy) or for the removal of foreign bodies.

lungs. (Second Am. Compl. ¶ 9.) Several days later, Boscia's medical partner at Upstate Lung, Appellant Feldman, and the attending anesthesiologist, Appellant Shantha, performed a rigid bronchoscopy on Casey. (Second Am. Compl. ¶¶ 10, 12.) During that procedure, Casey suffered a pneumothorax,[6] for which he was hospitalized. (Second Am. Compl. ¶ 13.)

After Casey was discharged from the hospital in June 2004, he complained to Appellants Feldman and Boscia that he suffered from forgetfulness, short-term memory loss, personality changes and permanent disability caused by the rigid bronchoscopy and resulting pneumothorax. (Second Am. Compl. ¶¶ 14-16.) Casey, who allegedly had abused prescription drugs and was facing "significant stressors" in his life at that time, including financial difficulties and a divorce, also asked Feldman and Boscia to increase his pain medications and support a disability claim. (Second Am. Compl. ¶¶ 54-56.) Feldman and Boscia believed Casey's complaints and requests were not medically supported; so they rejected Casey's complaints, and refused to support his effort to obtain disability benefits and narcotics. (Second Am. Compl. ¶ 56.)

In 2004, after Feldman and Boscia refused to continue treating Casey, Casey began treating with a psychologist and therapist in Spartanburg. (Second Am. Compl. ¶¶ 58-59.) Casey also became a patient of Respondent Fogarty, a pulmonologist and medical researcher who previously had been medical partners with Feldman, and who

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There are two types: flexible and rigid." *Id.*

[6] A pneumothorax is "[t]he presence of free air or gas in the pleural cavity." STEDMAN'S MEDICAL DICTIONARY 1526 (28th ed. 2006). An "iatrogenic pneumothorax" is one "caused by a medical procedure, most often central venous catheter insertion, thoracentesis, or transbronchial and transthoracic lung biopsy." *Id.*

operates a medical research business in competition with Feldman and Boscia's own medical research business. (Second Am. Compl. ¶¶ 18-22.) Upon assuming Casey's treatment, Fogarty reviewed Casey's medical records, including those relating to Casey's bronchoscopies and pneumothorax, and saw Casey at Fogarty's medical office and Fogarty's medical research facility. (Second Am. Compl. ¶ 18, 40, 48.) Based thereon, Fogarty began developing in 2004 the opinion that during Casey's rigid bronchoscopy, he suffered a cerebral air embolism[7] that resulted in permanent brain injury; and that Appellants deviated from the applicable standard of medical care in treating Casey. (Second Am. Compl. ¶¶ 28, 31.)

In early 2005, Feldman and Boscia sued Fogarty through their medical research company, S. Carolina Pharmaceutical Research ("S. Carolina"), alleging that Fogarty was interfering with S. Carolina's business efforts. (Second Am. Compl. ¶¶ 23-26.) Appellants claim that during the course of that litigation, Fogarty determined to use his position as Casey's treating physician to retaliate against Feldman and Boscia for suing him. (Second Am. Compl. ¶ 26.) Specifically, Fogarty continued to develop his theory that Casey had suffered a permanent brain injury because Feldman, Boscia, and Shantha had deviated from the applicable standard of medical care in treating Casey. (Second Am. Compl. ¶¶ 26-29, 33-36.) Fogarty did not refer Casey to an neurologist or order an

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[7] An embolism is an "[o]bstruction or occlusion of a vessel by an embolus," *i.e.*, "a plug, composed of a detached thrombus or vegetation, mass of bacteria, or other foreign body, occluding a vessel." STEDMAN'S MEDICAL DICTIONARY 626, 627 (28th ed. 2006). An air embolism is an embolism "caused by air bubbles in the vascular system[.]" *Id.* at 626.

MRI of Casey's brain in relation to this opinion.[8,9] (Second Am. Compl. ¶ 34.) On July 21, 2005, Fogarty "prominently" noted his opinion that Casey had suffered a "permanent brain injury" in Casey's medical records. (Second Am. Compl. ¶¶ 28, 36.) According to Appellants, Fogarty intended for this brain injury theory to be the basis for Casey to claim and receive disability benefits, and to be the "cornerstone of orchestrated 'expert' testimony" against Appellants in the Medical Malpractice Action. (Second Am. Compl. ¶¶ 37-38.)[10]

In 2005 and 2006, Respondent Thompson, a Spartanburg lawyer who went to high school with Casey, provided Casey legal assistance in relation to Casey's applications for disability benefits. (Second Am. Compl. ¶¶ 49, 75, 77.) Because Fogarty was Casey's treating's physician, Thompson consulted Fogarty and included Fogarty's opinion regarding Casey's medical condition and Fogarty's office notes regarding same in Casey's applications for private and Social Security disability benefits. (Second Am. Compl. ¶¶ 37, 74-76.)

Also in 2006, Thompson filed the Medical Malpractice Action on Casey's behalf, alleging that Appellants breached the standard of care with respect to Casey's medical

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[8] MRI is an "[a]bbreviation for magnetic resonance imaging. STEDMAN'S MEDICAL DICTIONARY 1232 (28th ed. 2006). Magnetic resonance imaging "is a nonionizing (non-x-ray) technique using magnetic fields and radio frequency waves to visualize anatomic structures." *Id.* at B13.

[9] Fogarty did not believe an MRI would indicate whether Casey had, in fact, suffered an air embolism and/or permanent brain injury. He did not order an MRI, because Fogarty understands that unless an MRI is taken contemporaneously with an air embolism's occurrence, the MRI may not detect whether an air embolism occurred; and that an MRI may not be a reliable indicator of whether a patient suffered a brain injury from an air embolism.

[10] The Medical Malpractice Action was not filed until 2006. *See supra* note 1.

treatment, causing him damage that include neurological injury and permanent disability. (Second Am. Compl. ¶¶ 4-6.) Appellants claim that this suit lacked any legitimate medical basis, and that Casey filed the Medical Malpractice Action in order to obtain narcotics and disability benefits; Thompson filed the suit to obtain disability benefits for Casey; and Fogarty intended the suit to damage his business competitors and induce them to dismiss the S. Carolina lawsuit against Fogarty. (Second Am. Compl. ¶¶ 27, 29, 37-38, 105-108, 110-111.) Thompson identified Fogarty as a fact witness and later as an expert witness in the Medical Malpractice Action, and also consulted Fogarty on occasions with respect to medical matters relating to that case.[11] (Second Am. Compl. ¶¶ 42, 46, 76.)

In February 2007, during the course of discovery in the Medical Malpractice Action, Thompson arranged for Casey to obtain from Thompson's brother-in-law in North Carolina an MRI of Casey's brain under a fictitious name and date of birth. (Second Am. Compl. ¶¶ 86-90.) Thompson and Casey did not reveal the MRI, which a radiologist reported was negative for indicia of brain injury, to Appellants. (Second Am. Compl. ¶¶ 88-91, 126.) Fogarty was not involved in, nor did he know about, Casey's having the MRI; and Fogarty was not involved in, nor did he know about, Thompson's and Casey's discovery-related efforts with respect to the MRI. (Second Am. Compl.) Appellants and Fogarty learned of the MRI after one of Appellants' lawyers in the Medical Malpractice Action received an anonymous letter regarding it. [12] (Second Am.

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[11] Although Fogarty was deposed in the Medical Malpractice Action (Second Am. Compl. ¶ 41), he did not testify at the trial of that case.

[12] According to Appellants' Brief, Appellants' trial counsel received this anonymous

Compl. ¶ 92.)

The Medical Malpractice Action was tried before a Spartanburg County jury beginning on May 11, 2010. (Second Am. Compl. ¶ 99.)[13] On May 28, 2010, after a 14-day trial, the jury returned a defense verdict in favor of Appellants. (Second Am. Compl. ¶ 100.)

On October 27, 2010, Appellants filed their initial Complaint in this case, claiming Respondents engaged in abuse of process and civil conspiracy in relation to the Medical Malpractice Action. (Complaint.) Respondents timely filed respective motions to dismiss the Complaint, arguing that Appellants' claims for abuse of process and civil conspiracy are time-barred, and that Appellants' Complaint failed to state facts sufficient to maintain those claims. (Def. Casey's Mot. to Dismiss Complaint; Def. Thompson's Mot. to Dismiss; and Def. Fogarty's Mot. to Dismiss Complaint.) The Circuit Court heard these motions on May 19, 2011, and took them under advisement.

On June 16, 2011, before the Circuit Court issued its ruling, Appellants filed their Amended Complaint without leave of court. (Am. Complaint.) Casey and Fogarty moved to dismiss that amended pleading, again on grounds that Appellants' abuse of process and civil conspiracy claims are time-barred, and that the amended pleading failed to state facts sufficient to constitute a cause of action against Respondents. (Def. Casey's

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letter in August 2008. (Appellants' Br. at 19.)

[13] Although Appellants claim Fogarty's opinion that Casey suffered a brain injury is "unfounded" and not medically supported (Second Am. Compl. ¶¶ 27, 31-35), other medical experts in the Medical Malpractice Action testified that Casey had suffered a permanent brain injury as a result of Appellants' treatment of Casey. This issue was disputed to the extent that the case was tried for two weeks. (Second Am. Compl. ¶¶ 99-100.)

Mot. to Dismiss Am. Complaint; Def. Fogarty's Mot. to Dismiss Am. Complaint.)

On August 29, 2011, before the Circuit Court ruled on Casey's and Fogarty's motions, Appellant filed a Motion to Amend Complaint, seeking leave to file a second amended pleading. (Pls.' Motion to Am. Complaint.) After the Circuit Court heard arguments on Appellants' and Respondents' motions and took them under advisement,[14] the court's law clerk sent the parties an email advising that the court planned to allow Appellants to amend their pleading a second time, and directing Appellants to "specifically plead the existence of special damages in the civil conspiracy cause of action as well as allege facts tying Defendant Casey to the alleged civil conspiracy." (Email from Law Clerk Nowell to Attorneys Mann, Mooneyham, and Henrikson, and Fogarty, of 9/30/11.) The law clerk subsequently advised that while his prior email did not indicate any deficiencies in Appellants' abuse of process cause of action, the Circuit Court was not denying Respondents' motions to dismiss that claim, but was granting Appellants leave to amend their pleading "for a second time in order to fix all shortcomings in their Complaint," and was continuing Respondents' motions to dismiss until after the service of the Second Amended Complaint. (Email from Law Clerk Nowell to Attorneys Mann, Mooneyham, and Henrikson, and Fogarty, of 10/5/11.) On October 6, 2011, the Circuit Court issued an order, which was filed on October 7, 2011, reserving ruling on Respondents' motions to dismiss, and granting Appellants leave to amend their pleading a second time. (Order Granting Pls.' Leave to Serve a Second Am. Complaint.)

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[14] This hearing occurred on September 8, 2011.

On October 11, 2011, Appellants filed their Second Amended Complaint. (Second Am. Compl.) Again in lieu of filing an answer, Fogarty moved to dismiss Appellants' pleading. (Def. Fogarty's Mot. to Dismiss Second Am. Compl.) Casey and Thompson rested on their prior motions to dismiss, which the Circuit Court had continued. (Order Granting Pls.' Leave to Serve a Second Am. Complaint.)

On January 18, 2012, the Circuit Court held a hearing on Fogarty's Motion to Dismiss Appellants' Second Amended Complaint, and Casey's and Thompson's previously-filed motions to dismiss Appellants' pleadings. (Hearing Transcript ("Hr'g Tr.") at 1:5-6, 5:12-13.)[15] At the beginning of that hearing, with the agreement of Respondents' counsel, Appellants' counsel dismissed Appellants' civil conspiracy claim without prejudice. (Hr'g Tr. at 5:12-24.) The hearing proceeded as to Appellants' abuse of process claim. (Hr'g Tr. at 5:25 – 6:1-3.)

On March 21, 2012, the Circuit Court issued an order, filed on March 23, 2012, granting Respondents' Motions to Dismiss Plaintiffs' Second Amended Complaint. (Dismissal Order.) The Circuit Court held the applicable three-year statute of limitations on Appellants' abuse of process claim expired before Appellants filed this action in October 2010, because Appellants had notice of a potential claim for abuse of process in 2006, when the Medical Malpractice Action was filed against them. (Dismissal Order at 8-11.) The Circuit Court also held that the three-year statute of limitations on Appellants' civil conspiracy claim began to run when the Medical Malpractice Action was instituted in 2006, and that Appellants therefore are time-barred from reasserting that

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[15] Although this hearing was held on January 18, 2012, the hearing transcript erroneously indicates that the hearing was held on February 18, 2012.

claim against Respondents at any time in the future. (Dismissal Order at 11-13.) The Circuit Court did not reach or rule on Respondents' arguments that Appellants failed to plead actionable claims for abuse of process and civil conspiracy. (Dismissal Order at 13.)

Appellants subsequently moved for reconsideration and for leave to amend their Second Amended Complaint. (Appellants' Mot. for Recons. and to Amend.) On May 14, 2012, the Circuit Court issued an order denying Appellants' motion for reconsideration and to amend. (Order Denying Appellants' Mot. for Recons. and to Amend.)

ARGUMENT

I. The Circuit Court Correctly Held That Appellants' Abuse Of Process Claim Is Time-Barred And Dismissed That Claim With Prejudice.

The Circuit Court properly found that Appellants' abuse of process claim is time-barred and dismissed that claim, because the facts alleged in Appellants' Second Amended Complaint clearly show that the three-year statute of limitations on that claim began to run in 2006, when Appellants were served with the Medical Malpractice Action.

A. Standard of Review.

In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review used by the trial court. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001). The appellate court is required to view the evidence and inferences that reasonably can be drawn from the evidence in the light most favorable to the non-moving party. *Id.* The appellate court properly sustains the circuit court's grant of a motion to dismiss if the facts alleged in the

complaint do not support relief under any theory of law. *Id.*

B. Abuse of Process.

1. Legal elements.

"An abuse of process is the employment of legal process for some purpose other than that which it was intended by the law to effect." *Food Lion, Inc. v. United Food & Commercial Workers Intern. Union*, 351 S.C. 65, 69, 567 S.E.2d 251, 253 (Ct. App. 2002) (citation and internal punctuation omitted). To maintain an abuse of process claim, a plaintiff must prove (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the conduct of the proceeding. *D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 550, 730 S.E.2d 340, 351-52 (Ct. App. 2012). "The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 403, 697 S.E.2d 551, 556 (2010).

2. Statute of limitations.

Abuse of process claims are governed by a three-year statute of limitations period. S.C. Code Ann. § 15–3–530 (2005); *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). Significantly, South Carolina courts recognize that "[s]tatutes of limitations are not simply technicalities." *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). "Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote

repose by giving security and stability to human affairs." *Id.* Statutes of limitations relieve courts of the burden of trying stale claims of those who have slept on their rights, and are intended to "ensure litigation is brought within a reasonable time in order that evidence be reasonably available and there be some end to litigation." *Transportation Ins. Co. and Flagstar Corp. v. South Carolina 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 (2005) 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 (2005). Therefore, in determining when a cause of action arose under an applicable statute of limitations, South Carolina courts apply the "discovery rule." *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004). Under the discovery rule, the statute of limitations 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 simply 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. American Cancer Soc., South Carolina*

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 America, N.A.*, 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009) (citations omitted). "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).

The date on which discovery of the cause of action should have been made is an objective question. *Estate of Livingston v. Livingston*, 2013 WL 342675, *4 (Ct. App. 2013); *Joubert v. S.C. Dep't of Soc. Servs.*, 341 S.C. 176, 191, 534 S.E.2d 1, 9 (Ct. App. 2000). "In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case 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." *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999).

C. The Statute Of Limitations Began to Run On Appellants' Abuse of Process Claim When the Medical Malpractice Action was Served in 2006.

Appellants' abuse of process claim is time-barred because the facts alleged in the Second Amended Complaint, when taken in the light most favorable to Appellants, show that such claim arose at least when Appellants were served with the Medical Malpractice Action in 2006, over three years before Appellants filed the current action in 2010.

1. Appellants' claim is time-barred because they knew they possessed an abuse of process claim when the Medical Malpractice Action was instituted.

Appellants knew or should have known that they possessed an abuse of process claim when they were served with the Medical Malpractice Action, because it is an abuse of process for a plaintiff to file a medical malpractice lawsuit against his treating physician not for the purpose of seeking redress for injuries resulting from substandard care, but instead for the purpose of obtaining narcotics and disability benefits; and because this is precisely what Appellants believed Casey was doing when Thompson and he instituted the Medical Malpractice Action. Specifically:

- In 2004, before the Medical Malpractice Action was filed, Appellants knew Casey claimed he had suffered brain injury and permanent disability as a result of the pneumothorax Casey experienced during the rigid bronchoscopy. Casey also had asked Appellants Feldman and Boscia to increase his prescription drugs and support his disability claim. Appellants believed Casey's claims of injury and permanent disability, and his request for increased prescription drugs, were illegitimate and lacked medical support, and Appellants ceased treating Casey as a patient. (Second Am. Compl. ¶¶ 13-18, 56.)

- In 2006, when the Medical Malpractice Action was served against them, Appellants knew Casey and Thompson had filed legal process against them, and were claiming that Appellants had breached their standard of care in treating Casey. Appellants did not believe they had committed malpractice in treating Casey, nor did they believe Casey had suffered physical harm as a result of that treatment. (Second Am. Compl. ¶¶ 4-5.)

- Appellants believed Casey and Thompson filed the Medical Malpractice Action for a purpose other than to redress legitimate medical injuries sustained by Casey. Appellants believed Casey's motivation for filing the Medical Malpractice Action was to obtain prescription pain medication and disability benefits, and that Thompson filed that suit to obtain disability benefits for Casey. (Second Am. Compl. ¶¶ 106-107, 110-111.)

In sum, when Appellants were served with the Medical Malpractice Action in 2006, they possessed facts supporting both elements of an abuse of process claim: Appellants knew (1) Casey and Thompson had alleged, ulterior purposes in filing the Medical Malpractice Action against Appellants, and (2) Casey and Thompson allegedly sought to use that lawsuit in a manner in which it was not intended to be used. *See Food Lion,* 351 S.C. at 69-70, 567 S.E.2d at 253. Appellants believed the suit was an abuse of process, because Appellants already had determined that Casey had not sustained any permanent injury, and because they believed Casey was seeking to obtain prescription narcotics and disability benefits. *See Huggins v. Winn–Dixie Greenville, Inc.*, 249 S.C. 206, 209, 153 S.E.2d 693, 694 (1967) (explaining improper purpose element of abuse of process claim); Second Am. Compl. ¶¶ 106-107, 110-111 (specifying

Respondents' alleged ulterior motives); Hr'g Tr. at 36:23 – 37:5 (summarizing Appellants' contentions regarding Respondents' alleged "ulterior motives"). Appellants also believed the actual filing of the Medical Malpractice Action was a willful act committed with the intent of achieving Respondents' alleged ulterior motives. *See Food Lion*, 351 S.C. at 71, 567 S.E.2d at 253 (explaining willful act element of abuse of process claim); Second Am. Compl. ¶¶ 106-111, 113-114 (specifying Respondents' alleged willful acts of using suit to advance improper motives); and Hr'g Tr. at 37:6-14 ("[W]ithin the four corners of the [Second Amended] Complaint, the willful acts as to what these individuals were trying to do and trying to accomplish as best as we know today prior to discovery are alleged in [paragraphs] 106, 107 and 108, 109, 110, 111, 113, 114. And the term "willfully" and "willingly" is used repeatedly. Why? Because that's the requirement of the pleading at this juncture.") The statute of limitations on Appellants' abuse of process claim thus began to run at least from the date the Medical Malpractice Action was filed in 2006, and prevents Appellants from maintaining that claim in this case, which was filed in 2010. *See Gibson*, 383 S.C. at 406, 680 S.E.2d at 782.

2. The discovery rule bars Appellants' claim even if they did not fully learn Fogarty's role in the Medical Malpractice Claim until 2008.

Significantly, the discovery rule bars Appellants' abuse of process claim regardless of the fact that Appellants claim they were unaware of Fogarty's involvement in and motivations with respect to the Medical Malpractice Action until Fogarty was deposed on December 22, 2008. (Appellants' Br. at 18.) As explained above, the discovery rule focuses on the date a plaintiff discovers an injury – in this case, the fact

that the Medical Malpractice Action was filed against Appellants on grounds and for purposes they believe were illegitimate – "not the date of the discovery of the wrongdoer." *Wiggins*, 314 S.C. at 128, 442 S.E.2d at 170. "[U]nder South Carolina law, the date when a plaintiff learns of a potential new defendant has absolutely no bearing on the timing of the statute of limitations." *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 371, 597 S.E.2d 27, 29 (Ct. App. 2004). Although Appellants allege Fogarty's "involvement" in the Medical Malpractice Action was concealed from Appellants until the "11th hour" of that case (Second Am. Compl. ¶ 42), the claimed fact that Appellants did not know the identity of all alleged wrongdoers in that suit or their particular alleged motivations regarding it did not prevent the statute of limitations from running when the action was instituted. *See Wiggins*, 314 S.C. at 128, 442 S.E.2d at 170. This is because the service of the Medical Malpractice Action reasonably put Appellants – who believed the suit to be meritless and only interposed to harm them (Second Am. Compl. ¶¶ 18, 30, 56) – on notice that some right of theirs may have been invaded, regardless of whether Appellants knew the identity of the alleged wrongdoer(s) other than Casey and Thompson, whose identities and roles were evident from the pleading. *See Young*, 333 S.C. at 719, 511 S.E.2d at 416. Because Appellants had notice in 2006 that they possessed an abuse of process claim, the alleged fact that Appellants did not comprehend the full extent of their damage and/or Fogarty's involvement in or with respect to that action is immaterial. *Grillo v. Speedrite Products, Inc.*, 340 S.C. 498, 503, 532 S.E.2d 1, 3 (Ct. App. 2000).

3. Fogarty's alleged role in the Medical Malpractice Action was easily determinable through the exercise of reasonable diligence.

That the statute of limitations began to run when Appellants were served with the Medical Malpractice Action also is clear because that suit gave Appellants sufficient information which, through the exercise of reasonable diligence, they could have developed to disclose Fogarty's alleged wrongful involvement in that lawsuit. *See Snell*, 276 S.C. at 303, 278 S.E.2d at 334. "[T]he requirement of presenting expert testimony to meet the burden of proof on subjects beyond the knowledge and understanding of lay jurors is by no means new," especially in medical malpractice cases. *5 Star, Inc. v. Ford Motor Co.*, 395 S.C. 392, 399 n.3, 718 S.E.2d 220, 224 n.3 (Ct. App. 2011). In fact, "the general rule is that expert testimony is required in a [medical] malpractice case to show that the defendant failed to conform to the required standard, which is, such reasonable and ordinary knowledge, skill and diligence as physicians in similar neighborhoods and surroundings ordinarily use under like circumstances." *Green v. Lilliewood*, 272 S.C. 186, 192, 249 S.E.2d 910, 913 (1978) (citation omitted).

Whether a patient experiencing a pneumothorax has suffered an air embolism resulting in a brain injury falls outside the knowledge and experience of laypersons. A reasonable person in Appellants' position therefore would have known Casey and Thompson had consulted with and/or were working with a medical expert in relation to the Medical Malpractice Action prior to and upon its filing; and because Appellants believed the suit to be baseless, Appellants knew or should have known that some alleged claim against that medical expert might exist.

Further, Appellants knew in 2004 that Fogarty had assumed Casey's medical care; so when the Medical Malpractice Action was filed in 2006, Appellants could have quickly subpoenaed Casey's medical records from Fogarty and/or noticed Fogarty's

deposition in order to determine his opinion regarding Casey's alleged medical condition. In fact, Appellants did subpoena Casey's medical records from Fogarty, and later deposed Fogarty. (Second Am. Compl. ¶¶ 18, 41.) While Appellants claim Fogarty sought to "evade his deposition," Appellants also admit that Casey's medical records "prominently and categorically reflected [Fogarty's] baseless injury assertions." (Second Am. Compl. ¶¶ 36, 41.) These allegations prove that Fogarty's identity as a potential wrongdoer, and his alleged involvement in the claimed abuse of process, were easily determinable to Appellants through the exercise of reasonable diligence. Because Fogarty's identity and alleged "role" in the Medical Malpractice Action were facts and circumstances Appellants could have developed through the exercise of ordinary care and reasonable diligence when they were served with the Medical Malpractice Action was filed in 2006, Appellants' claim for abuse of process is time-barred.

D. Appellants' Claim That Respondents Concealed Facts During Discovery in the Medical Malpractice Action Does Not Toll the Statute of Limitations' Running on Appellants' Abuse of Process Claim.

Appellants argue that the statute of limitations on their abuse of process claim did not begin running when they were served with the Medical Malpractice Action in 2006, because Respondents actively concealed "essential facts in establishing the necessary elements of their causes of action" until 2008. (Appellants' Br. at 19-20.) According to Appellants, these essential facts were (1) Fogarty's alleged role and level of involvement in the Medical Malpractice Action, which Appellants claim they learned during Fogarty's deposition on December 20, 2008; and (2) that Thompson and Casey had secretly obtained an MRI and concealed the results thereof, which Appellants learned in August 2008. (Appellants' Br. at 19-20.)

1. **The statute of limitations began running when the Medical Malpractice Action was filed in 2006, and not when Fogarty was deposed in December 2008.**

Appellants cannot avoid application of the statute of limitations to their abuse of process claim by arguing that they did not discover the extent of Fogarty's alleged purpose and role in the Medical Malpractice Action until Fogarty's deposition in that case in 2008. (Second Am. Compl. ¶¶ 31-42, 108-09; Appellants' Br. at 18.) As discussed above, South Carolina law clearly holds that the statute of limitations runs on a party's cause of action even if that party claims ignorance of existing facts and circumstances, if the party could have known those facts and circumstances those the exercise of ordinary care and reasonable diligence. *Burgess*, 300 S.C. at 186-87, 386 S.E.2d at 800. Appellants' abuse of process claim is time-barred because they admit knowing in 2006 that Casey and Thompson filed a medical claim Appellants believed was interposed for wrongful purposes, and that Fogarty had been Casey's treating physician since 2004. (Second Am. Compl. ¶¶ 18, 42.) Because these known facts were sufficient to put Appellants on notice in 2006 that they possessed an abuse of process claim at least against Casey and Thompson, Appellants' argument that they did not know the *extent* of Fogarty's role and involvement in the Medical Malpractice Action until December 2008 is wholly irrelevant. (Appellants' Br. at 18.)

Specifically, Appellants allege that in 2004, Fogarty began to develop a theory that Casey suffered a cerebral air embolism during the rigid bronchoscopy, and that Fogarty noted this in Casey's medical records on July 21, 2005, all with the purpose of injuring Appellants. (Second Am. Compl. ¶¶ 27-28, 31-36.) Appellants claim Fogarty then "initiated" the Medical Malpractice Action and "orchestrated 'expert' testimony" in

that suit in an attempt to damage Feldman's and Boscia's reputations and businesses. (Second Am. Compl. ¶¶ 23-27, 108.) Appellants claim Fogarty and Thompson attempted to conceal Fogarty's "role as a mastermind of the lawsuit" and his "involvement in the execution of the 'permanent brain injury' scheme" by making material misrepresentations; by Fogarty's seeing Casey at Fogarty's medical research facility instead of Fogarty's medical practice; and by attempting to "obstruct and evade his deposition." (Second Am. Compl. ¶¶ 38-42, 108.)[16] According to Appellants, Respondents succeeded in shielding these alleged matters from Appellants until Fogarty's deposition in the Medical Malpractice Action on December 22, 2008. *See id.*, ¶ 41.

Appellants' contentions and arguments do not alter the fact that the three-year statute of limitations began running on Appellants' abuse of process claim when Appellants were served with the Medical Malpractice Action in 2006. Whether Appellants subjectively were unaware of Fogarty's alleged motivations and involvement until December 2008 has "absolutely no bearing on the timing of the statute of limitations." *Cline*, 359 S.C. at 371, 597 S.E.2d at 29; *Wiggins*, 314 S.C. at 128-29, 442 S.E.2d at 170. This is because Appellants objectively knew of their alleged injury in 2006 – *i.e.*, that Casey and Thompson had filed a medical malpractice claim that Appellants believed was imposed for an improper purpose – and because they knew or should have known then that "some claim against another party might exist." *Id.* Although Appellants claim to have only later fully discovered Fogarty's role as an

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[16] The Second Amended Complaint does not detail Fogarty's alleged material misrepresentations, nor does it explain how Fogarty allegedly attempted to evade his deposition. (Second Am. Compl.) Again, Respondents deny Appellants' claims.

alleged "wrongdoer" with respect to that case, Appellants knew or should have known that they might have some claim against Fogarty and/or some other party with the medical background necessary to provide the information and opinions necessary to support Casey's malpractice suit. Appellants' claim they remained unaware until 2008 of the alleged extent of and motivations behind Fogarty's involvement in the Medical Malpractice Action is thus irrelevant, and does not prevent the statute of limitations from barring their abuse of process claim.

2. The statute of limitations began running when the Medical Malpractice Action was filed in 2006, and not when Appellants became aware in August 2008 of alleged discovery abuse regarding Casey's MRI.

Also insufficient to defeat the statute of limitations' barring of Appellants' abuse of process claim is Appellants' argument that the limitations period began running on that claim in 2008, when Appellants discovered that Casey and Thompson had failed to reveal during discovery in the Medical Malpractice Action that Casey had obtained an MRI that revealed no brain injury. (Second Am. Compl. ¶¶ 86-94; Appellants' Br. at 18-19.) According to Appellants, Casey and Thompson's concealing this fact prevented Appellants from learning information necessary to establish their abuse of process (and conspiracy) causes of action. (Appellants' Br. at 20.) Fogarty was not involved in, nor did he know about, Casey's having the MRI; and Fogarty was not involved in, nor did he know about, Thompson's and Casey's discovery-related efforts with respect to the MRI. (Second Am. Compl.) Still, Appellants cannot properly evade the statute of limitations' bar on Appellants' abuse of process claim on the basis that Casey and Thompson allegedly violated discovery rules during the Medical Malpractice Action.

As discussed above, a statute of limitations is a procedural device that ensures

litigation is brought within a reasonable period of time. *Capco*, 368 S.C. at 142, 628 S.E.2d at 41. One purpose of a statute of limitations is to ensure evidence is reasonably available to the litigants during discovery in an action. *Transportation Ins. Co. and Flagstar Corp.*, 389 S.C. at 428, 699 S.E.2d at 690. However, the statute of limitations itself is not affected by the discovery process. Instead, and wholly apart from applying statutes of limitations, South Carolina's courts govern parties' discovery rights and obligations by enacting and enforcing the South Carolina Rules of Civil Procedure. Courts may address and punish discovery abuses under these rules – and not by altering the application of statutes of limitations established by the Legislature. Specifically, pursuant to Rule 37(b)(2)(C), SCRCP, when a party fails to obey an order to provide or permit discovery, the court may "make such orders in regard to the failure as are just," including an order dismissing the action or proceeding, or any part thereof. *Jamison v. Ford Motor Co.*, 373 S.C. 248, 270, 644 S.E.2d 755, 766 (Ct. App. 2007). The court may not, as Appellants argue, rule that the statutory limitations period began to run from the date one party learns of alleged discovery abuses by the opposing party.

Likewise, through their contempt authority, "courts have the inherent power to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice." *Ex parte Cannon*, 385 S.C. 643, 661, 685 S.E.2d 814, 824 (Ct. App. 2009); S.C. Code Ann. § 14-5-320. The statutorily authorized punishment for contempt of court includes fines or imprisonment, but it does not include alteration of the applicable limitations period. S.C. Code Ann. § 14-5-320.

As discussed above, Appellants' cause of action for abuse of process accrued when they were served with the Medical Malpractice Action, because Appellants – who

believed at that time that the suit was meritless and only interposed to harm them (Second Am. Compl. ¶¶ 18, 30, 56) – received notice that some right of theirs had been or may have been invaded. *See Young*, 333 S.C. at 719, 511 S.E.2d at 416. That Casey and Thompson subsequently engaged in conduct Appellants believe violated certain discovery and/or ethical rules and obstructed the administration of justice in the Medical Malpractice Action does not and cannot change the fact that the statute of limitations expired as to Appellants' abuse of process claim before Appellants filed this suit. Appellants' allegations regarding Casey's MRI, even if taken as true, have no bearing on Appellants' alleged knowledge and belief concerning their legal rights in 2006, when the Medical Malpractice Action was filed. Allegedly, the MRI was negative; but since Appellants believed in 2006 that Casey had not suffered a brain injury, their 2008 "discovery" of a negative MRI did not impede or prevent them from timely filing a complaint for abuse of process after being served with the Medical Malpractice Action in 2006. In sum, while Casey and Thompson's alleged conduct during discovery arguably could have subjected them to sanctions by the trial court for discovery abuse and/or contempt of court, *see* Rule 37, SCRCP, and *Cannon*, 385 S.C. at 661, 685 S.E.2d at 824, such alleged conduct does not change the date Appellants' abuse of process claim accrued, or alter the fact that such claim is time-barred by the applicable three-year limitations period.

E. The South Carolina Frivolous Proceedings Act did not Prevent Appellants From Filing their Abuse of Process Claim within the Applicable Limitations Period.

Also legally deficient is Appellants' argument that their abuse of process claim is not time-barred because the South Carolina Frivolous Proceedings Sanctions Act, S.C.

Code Ann. §§ 15-36-10, *et seq.* (the "Frivolous Proceedings Act"), prevented them from filing that claim when the Medical Malpractice Action was instituted in 2006. (Appellants' Br. at 20.) Appellants assert that until they discovered Casey's MRI and deposed Fogarty in 2008, they lacked "essential facts required in establishing the necessary elements of their causes of action" for abuse of process and civil conspiracy; and that filing those claims in 2006 would have been "bad faith" that subjected them to judicial sanctions under the Frivolous Proceedings Act. (Appellants' Br. at 20.)

The Frivolous Proceedings Act provides that an attorney or pro se litigant may be sanctioned for filing a frivolous pleading if "a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law[.]" S.C. Code Ann. § 15-36-10(A)(4)(a)(ii). As explained fully above, when Appellants were served with the Medical Malpractice Action in 2006, they and their counsel possessed facts supporting both the issuance of process and the ulterior purpose elements of an abuse of process claim, because they knew Casey and Thompson had filed suit against Appellants for what Appellants believed were ulterior purposes. (Second Am. Compl. ¶¶ 4-5, 13-18, 106-07.) Because the alleged facts known to Appellants and their counsel in 2006 fully supported their filing an abuse of process claim at least as to Casey and Thompson, *see Wiggins*, 314 S.C. at 128, 4442 S.E.2d at 170, the Frivolous Proceedings Act would not have been implicated had Appellants' counsel filed an action asserting that cause of action.

Further, the Frivolous Proceedings Act expressly states that it "shall not alter the South Carolina Rules of Civil Procedure or the South Carolina Appellate Court Rules."

S.C. Code Ann. § 15-36-10(I). It follows even more clearly that the Frivolous Proceedings Act's provisions also shall not alter the statutory limitations period established by S.C. Code Ann. § 15–3–530 (2005), or South Carolina law applying that statute. *See generally State ex rel. McLeod v. Mills*, 256 S.C. 21, 26, 180 S.E.2d 638, 641 (1971) (explaining that if two statutes can stand together "by any reasonable construction . . . they must so stand").

For this additional reason, the Circuit Court's finding that Appellants' abuse of process claim is time-barred should be upheld.

II. The Circuit Court Correctly Refused To Equitably Toll The Statute Of Limitations As To Appellants' Abuse Of Process Claim.

The Circuit Court's dismissal of Appellants' abuse of process claim also was proper because the Second Amended Complaint contains no facts justifying the application of equitable tolling to delay the statute of limitation's running on that claim.

A. Relevant Procedural History.

At the January 18, 2012, hearing on Respondents' motions to dismiss Appellants' Second Amended Complaint, Appellants' counsel asked the Circuit Court to deny Respondents' motions, or in the alternative, to advise Appellants how to amend their pleading to correct any deficiency therein. (Hr'g Tr. at 38:18-21.) In its Dismissal Order, the Circuit Court dismissed Appellants' abuse of process claim as being time-barred. (Dismissal Order.) Appellants then filed a Motion for Reconsideration and to Amend, in which Appellants moved the Circuit Court for leave to amend "on grounds that justice requires Equitable Tolling" of the statute of limitations' running on their abuse of process claim, because Appellants "could not have discovered essential

information bearing on their claims" by exercising reasonable diligence. (Mot. for Recons. and to Amend at 2.) The Circuit Court denied Appellants' motion. (Order Denying Appellants' Mot. for Recons. and to Amend.)

B. Equitable Tolling.

Equitable tolling is a judicially-created device 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). The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify equitable tolling's use. *Id.* Generally, equitable tolling applies in cases in which a defendant engages in some conduct that prevents the plaintiff in some extraordinary way from filing suit or discovering the facts essential for filing suit. *See id.*, 386 S.C. at 116-18, 687 S.E.2d at 32-34 (applying equitable tolling when a defendant failed to list its registered agent for service with the Secretary of State, thus hindering the plaintiff's pursuit of timely service); *Ross v. Ross*, 394 S.C. 261, 266, 715 S.E.2d 359, 361-62 (Ct. App. 2011) (extending the statute of limitations period by equitable tolling when a husband abused and threatened his wife with physical violence to prevent her from bringing an alimony action); *Skipper v. Marlowe Mfg. Co.*, 242 S.C. 486, 488, 131 S.E.2d 524, 525 (1963) (applying equitable tolling when an employer induced an employee to believe a worker's compensation claim would be resolved without the employee's filing a claim). Still, "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." *Hooper*, 386 S.C. at 117, 687 S.E.2d at 33. This 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." *Id.*

C. Appellants' Argument as to Equitable Tolling.

Appellants contend that per the doctrine of equitable tolling, the statute of limitations on their abuse of process claim began running in 2008, because (1) Fogarty allegedly sought to prevent discovery efforts respecting the level and purpose of his involvement in the Medical Malpractice Action, and succeeded in doing so until his deposition on December 22, 2008; and (2) Casey and Thompson secretly obtained an MRI of Casey's brain in February 2007, determined for Casey to lie about the test during his deposition, and concealed the MRI from Appellants until August 2008. (Appellants' Br. at 22-23.) Appellants claim these alleged acts prevented Appellants from discovering "essential elements of Appellants' claims," and caused Appellants delay in asserting those claims. (Appellants' Br. at 23.) According to Appellants, the doctrine of equitable tolling therefore should apply to prevent the statute of limitations' running "until at least August or December 2008." (Appellants' Br. at 23.)

D. Equitable Tolling Does Not Properly Apply to Suspend the Statute of Limitations' Running on Appellants' Abuse of Process Claims.

The Circuit Court properly refused to apply the doctrine of equitable tolling in this case, because Respondents' alleged malfeasance did not hinder or prevent Appellants from filing an abuse of process claim within three years of being served with the Medical Malpractice Action. As discussed fully above, the statute of limitations began to run on Appellants' abuse of process claim when Appellants were served with the Medical Malpractice Action, because such suit would put a reasonable person of common knowledge and experience on notice that an abuse of process claim against another party

might exist. *See Epstein v. Brown*, 363 S.C. 372, 381, 610 S.E.2d 816, 821 (2005). Specifically, Appellants' Second Amended Complaint demonstrates clearly that when Appellants were served with the Medical Malpractice Action in 2006, they did not believe Casey had a valid medical malpractice claim against them, and believed Casey and Thompson interposed that lawsuit for improper purposes. (Second Am. Compl. ¶¶ 4-5, 13-18, 106-07.) Appellants thus possessed in 2006 facts supporting both the issuance of process and ulterior purpose elements of an abuse of process claim; and the statute of limitations began to run on that claim, regardless of whether Appellants then knew of Fogarty's alleged involvement with the Medical Malpractice Action. *See Wiggins*, 314 S.C. at 128, 4442 S.E.2d at 170.

Significantly, and as discussed above, neither Fogarty's alleged motives with respect to and/or his degree of involvement in the Medical Malpractice Action, nor Casey and Thompson's alleged concealment of Casey's MRI, justify the equitable tolling of the statute of limitations on Appellants' abuse of process claim. This is because neither circumstance prevented Appellants from realizing in 2006 that they possessed an abuse of process claim, or from filing that suit within the three-year limitations period. It is well-settled under South Carolina law that under the discovery rule, it is immaterial that the injured party may not comprehend the full extent of its damage, may not have sought advice of counsel, and/or may not have developed a full-blown theory of recovery. *See Gibson*, 383 S.C. at 406, 680 S.E.2d at 782. Likewise, under the discovery rule, the statute of limitations' running is not delayed until the plaintiff subjectively believes it is able to investigate its case, discover a cause of action existed, or determine who or what caused its injury; even the fact that a plaintiff does not know the identity of a wrongdoer

does not toll the statute of limitations. *See Wiggins*, 314 S.C. at 128, 442 S.E.2d at 170. It follows that the statute of limitations also is not tolled when a party knows an alleged wrongdoer's identity, but has not discovered the extent of that wrongdoer's alleged acts or involvement with the claimed injury. Because this is exactly what Appellants claim with respect to Fogarty, the Circuit Court properly refused to equitably toll the statute of limitations as to Appellants' abuse of process claim until Appellants deposed Fogarty in December 2008.

The Circuit Court also properly refused to toll the statute of limitations in light of Appellants' allegations that Casey and Thompson concealed Casey's February 2007 MRI from Appellants until August 2008. That Casey and Thompson allegedly engaged in discovery abuse during the Medical Malpractice Action does not change the operative fact that when Appellants were served with that suit in 2006, they knew they had an abuse of process claim. Appellants "discovery" of the MRI in 2008 did not hinder or impede Appellants' filing suit when they were served with the Medical Malpractice Action in 2006, because Appellants already believed Casey's brain injury as alleged in that suit was non-existent, and that the malpractice case was being used improperly to obtain narcotics and disability benefits. Because Casey and Thompson's alleged acts regarding the MRI did not prevent or impede Appellants' filing suit against them, the Circuit Court properly refused to apply equitable tolling to Appellants' abuse of process claim.

III. The Circuit Court Properly Held That Appellants' Civil Conspiracy Claim Is Time-Barred And Should Be Dismissed.

This Court also should affirm the Circuit Court's dismissal of Appellants' civil conspiracy claim, despite the fact that Appellants had previously dismissed that claim

without prejudice at the beginning of the hearing on Respondents' motions to dismiss. This is because the Circuit Court did not violate Appellants' due process rights in dismissing their civil conspiracy claim; because the ruling did not prejudice Appellants; and because affirming the dismissal of that claim promotes judicial economy.

A. Relevant Procedural History.

Appellants filed their initial Complaint in this case on October 27, 2010, asserting claims for abuse of process and civil conspiracy. (Complaint.) Appellants included amended versions of both of these claims in their Amended Complaint and Second Amended Complaint. (Am Compl. and Second Am. Complaint.) Fogarty's motions to dismiss each of Appellants' three pleadings asserted and detailed Fogarty's position that Appellants' abuse of process and civil conspiracy claims are barred by the applicable statute of limitations, and that Appellants' pleadings failed to state actionable claims for abuse of process and civil conspiracy. (Fogarty's Mot. to Dismiss Compl.; Fogarty's Mot. to Dismiss Am. Compl.; Fogarty's Mot. to Dismiss Second Am. Compl.; Fogarty's Brief in Support of Mot. to Dismiss Second Am. Compl.)

At the hearing on Respondents' motions to dismiss Appellants' Second Amended Complaint, Appellants' counsel advised the Circuit Court that Appellants wished to dismiss their civil conspiracy claim without prejudice, and to reserve the ability to re-file that claim in the future. (Hr'g Tr. at 5:12-6:2.) The Circuit Court stated, "All right." (Hr'g Tr. at 6:3.) Still, in its order granting Respondents' motions to dismiss the Second Amended Complaint, the Circuit Court held that the three-year statute of limitations on Appellants' civil conspiracy claim expired before Appellants filed this case, and that Appellants are therefore time-barred from re-asserting that claim against Respondents at

any time in the future. (Dismissal Order at 11-13.)

On appeal, Appellants argue that the Circuit Court deprived them of due process by dismissing their civil conspiracy claim, because "the matter was not before the Court, hence Appellants made no arguments respecting this claim." (Apps.' Brief at 24.)

B. The Circuit Court did not Violate Appellants' Due Process Rights in Dismissing Appellants' Civil Conspiracy Claim.

The Circuit Court did not deprive Appellants of due process by dismissing their civil conspiracy claim in the Dismissal Order, because Appellants had sufficient notice and the opportunity to be heard on that issue, and because the Circuit Court properly reviewed and considered the applicable facts and law governing its determination.

"The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). Regarding the due process elements of notice and an opportunity to be heard, a court can dismiss a non-moving party's pleading on grounds not specified in the motion before it, if that party has received notice that the issue is before the court, and has had the opportunity to argue the merits of that issue. *See Financial Federal Credit Inc. v. Brown*, 384 S.C. 555, 683 S.E.2d 486 (2009) (finding circuit court did not err in dismissing action on 12(b)(6) jurisdictional ground not raised in defendant's motion). Regarding judicial review, a circuit court considering a Rule 12(6)(6) motion meets that due process element if it views the facts alleged in the complaint and inferences arising therefrom in the light most favorable to the plaintiff, and dismisses the pleading only if those facts and inferences do not entitle the plaintiff to relief on any theory. *See Hambrick v. GMAC Mortg. Corp.*,

370 S.C. 118, 121, 634 S.E.2d 5, 7 (Ct. App. 2006); *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995).

All of the elements of due process were met with respect to the Circuit Court's dismissal of Appellants' civil conspiracy claim, because Appellants had notice of and the repeated opportunity to argue the merits of that issue before the Circuit Court issued its reasoned decision on it. Specifically, the issue of whether the statute of limitations bars Appellants' abuse of process and civil conspiracy claims was well-known to all of the parties and well-briefed by Respondents before the Circuit Court entered its Dismissal Order in March 2012. (Fogarty's Mot. to Dismiss Compl.; Fogarty's Mot. to Dismiss Am. Compl.; Fogarty's Mot. to Dismiss Second Am. Compl.; Fogarty's Brief in Support of Mot. to Dismiss Second Am. Compl.) Fogarty's motions gave Appellants abundant and repeated notice that the statute of limitations issue was before the court as to Appellants' abuse of process and civil conspiracy claims, and Appellants had multiple opportunities to present memoranda and oral arguments on that issue.[17] Appellants twice amended their pleading in an attempt to resolve deficiencies therein, some of which were specifically noted to Appellants by the Circuit Court's law clerk. (Emails from Law Clerk Nowell to Mann, Mooneyham, Henrikson, and Fogarty of 9/30/11 and 10/5/11.) Further, at the hearing on Respondents' motions to dismiss, Appellants' counsel presented a statute of limitations argument as to Appellants' abuse of process claim, the court's decision on which is governed by the very same facts and discovery rule trigger that time-bar Appellants' civil conspiracy claim. (Hr'g Tr. at 37:15 – 38:7.) In sum,

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[17] Appellants did not file a brief in response to any Respondent's motion to dismiss any of Appellants' three complaints.

Appellants had substantial notice that Respondents sought to dismiss Appellants' civil conspiracy claim on statute of limitations grounds, and had multiple opportunities to argue the merits of that issue.

Further, the Circuit Court engaged in a thorough judicial review of Appellants' pleadings and applicable law before dismissing Appellants' civil conspiracy claim. The Circuit Court's Dismissal Order reflects that the court properly assessed that the three-year statute of limitations on Appellants' civil conspiracy claim began to run when the Medical Malpractice Action was filed in 2006, and that Appellants are therefore time-barred from re-asserting that claim against Respondents at any time in the future. (Dismissal Order at 8-13.)

Specifically, the Circuit Court correctly recognized that civil conspiracy claims are governed by a three-year statute of limitations; and that a civil conspiracy becomes actionable only "once overt acts occur which proximately cause damage to the plaintiff." (Dismissal Order at 11-12, *citing Burgess,* 300 S.C. at 187, 386 S.E.2d at 800-01 and *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009).) The Circuit Court determined that the statute of limitations for conspiracy claims is governed by the discovery rule, and therefore begins to run upon discovery of the conspiracy itself or of "such facts as would have led to the knowledge thereof, if pursued with reasonable diligence." (Dismissal Order at 12, *citing Burgess*, 300 S.C. at 187, 386 S.E.2d at 800-01.) A party cannot escape the application of this rule by claiming ignorance of existing facts and circumstances, or ignorance of the identity of an alleged tortfeasor. (Dismissal Order at 12, *citing Wiggins*, 314 S.C. at 128, 442 S.E.2d at 170.)

Applying this law to Appellants' Second Amended Complaint, the Circuit Court found that Appellants' civil conspiracy is time-barred, because Appellants failed to file this action within three years after the Medical Malpractice Action was instituted, at which time Appellants knew or could have known pertinent facts sufficient to apprise themselves of their claim's alleged existence. (Dismissal Order at 12.) The Circuit Court explained that according to the Second Amended Complaint, Fogarty was the author of the "permanent brain injury scheme" and indispensable for Thompson in "their common scheme to manufacture a pretext for the lawsuit and disability claim." (Dismissal Order at 12, *citing* Second Am. Compl. ¶¶ 199-121.) Based on these pleadings, the Circuit Court determined that Respondents' alleged conspiracy was to manufacture a pretext to sue Appellants for malpractice; and the overt "act" in furtherance of the conspiracy was the filing of the Medical Malpractice Action. (Dismissal Order at 12.) Accordingly, the Circuit Court found that once Appellants were sued for malpractice, they were damaged by the alleged conspiracy, and the statute of limitations on that claim began to run, regardless of whether Appellants claim that they only later learned of Fogarty's "involvement" in the alleged scheme. (Dismissal Order at 12, *citing Hackworth*, 385 S.C. at 115, 682 S.E.2d at 874.) The Circuit Court also found that when the Medical Malpractice Action was instituted in 2006, Appellants knew the identity of two of the alleged conspirators, Casey and Thompson; and because medical malpractice claims require expert medical testimony, the suit's existence also put Appellants on notice that some other physician was involved in the alleged case-filing conspiracy, thus triggering the statute of limitations. (Dismissal Order at 12-13.) Based on this thorough and proper judicial review and analysis, the Circuit Court found that the three-year statute of

limitations on Appellants' civil conspiracy claim expired in 2009, and that such claim was and would remain time-barred. (Dismissal Order at 13.)

Because the Circuit Court did not deprive Appellants of due process by dismissing Appellants' civil conspiracy claim with prejudice, it committed no error warranting reversal in that regard.

C. Even if the Circuit Court Erred in Dismissing Appellants' Civil Conspiracy Claim, the Ruling Should be Upheld Because it Did Not Prejudice Appellants.

Even if the Circuit Court erred in dismissing Appellants' civil conspiracy claim, this Court should uphold that ruling, because Appellants cannot show they were prejudiced by that decision. "To warrant reversal, an appellant must show not only error, but also prejudice." *Ketterman v. South Carolina Farm Bureau Mut. Ins. Co.*, 302 S.C. 276, 279, 395 S.E.2d 187, 189 (Ct. App. 1990), *quoting Dibble v. Thomas*, 391 S.E.2d 729, 730, 391 S.E.2d 729, 730 (Ct. App. 1990). "Where a party shows no prejudice, the error, if any, is harmless." *Wright v. Trask*, 329 S.C. 170, 185, 495 S.E.2d 222, 230 (Ct. App. 1997), *quoting GTE Sprint Communications Corp. v. Public Service Comm'n of South Carolina*, 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986).

Appellants cannot show prejudice from the Circuit Court's dismissing their civil conspiracy with prejudice after Appellants dismissed that claim without prejudice, because the statute of limitations on that claim expired before Appellants dismissed it. As discussed above, the three-year limitations period on Appellants' civil conspiracy claim began to run when the Medical Malpractice Action was served in 2006, and expired in 2009. Therefore, when Appellants voluntarily dismissed their civil conspiracy claim with prejudice at the motion to dismiss hearing held on January 18, 2012,

Appellants could not properly re-file that claim at any time in the future, regardless of Appellants' having reserved the right to do so. This is the case even assuming, exclusively for the sake of argument, that Appellants could succeed in claiming that the three-year limitations period on their conspiracy claim was equitably tolled until August or December 2008 (which, as discussed fully above, Appellants cannot properly do). In that hypothetical instance, the statute of limitations on Appellants' civil conspiracy claim expired in 2011; so Appellants still could never properly re-file that claim after dismissing it in January 2012.

Because Appellants can show no prejudice from the Circuit Court's ruling, the Circuit Court did not commit reversible error in dismissing Appellants' civil conspiracy claim with prejudice.

D. Judicial Economy Supports this Court's Affirming the Circuit Court's Dismissal with Prejudice of Appellants' Civil Conspiracy Claim.

Finally, even if the Circuit Court arguably abused its discretion in dismissing Appellants' civil conspiracy claim, it would be proper for this Court to consider the issue of whether the statute of limitations expired on that claim, and to uphold the Circuit Court's dismissal of that claim with prejudice. South Carolina's appellate courts may properly consider issues in the interest of judicial economy. *See Southern Bell Tel. & Tel. Co. v. Hamm*, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) (holding that the appellate court properly decided a "purely advisory" matter in the interest of judicial economy, because both parties had fully briefed the issue, and because the issue would be raised to the court at some future time); *Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 441 n.6, 633 S.E.2d 143, 147 n.6 (2006) (noting that, regardless of any preservation problems,

the appellate court would address an issue in the interest of judicial economy). Since the issue of whether Appellants' civil conspiracy claim is time-barred would be raised to the court at some future time, and since the parties have had numerous opportunities to brief and argue the issue, judicial economy clearly would support this Court's deciding the matter now. *See Southern Bell*, 306 S.C. at 75, 409 S.E.2d at 778. Based on the facts and legal authority discussed above, in Fogarty's Brief in Support of Motion to Dismiss Second Amended Complaint, and in the Circuit Court's Dismissal Order, this Court should hold that Appellants' civil conspiracy claim is barred by the statute of limitations, and is dismissed with prejudice.

IV. The Circuit Court Properly Denied Appellants' Request For Leave To File A Third Amended Complaint.

This Court also should affirm the Circuit Court's decision to dismiss Appellants' Second Amended Complaint with prejudice and deny Appellants' request to amend their pleading for a third time, because Appellants have not asserted and cannot plead any new factual allegations that would change the time-barred nature of Appellants' claims.

A. A Trial Court May Properly Deny a Plaintiff's Request to Amend its Pleadings.

Trial courts possess the authority to dismiss a plaintiff's complaint with prejudice and deny the plaintiff the opportunity to amend its pleading. *See Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 153-54, 723 S.E.2d 835, 840-41 (Ct. App. 2012) (affirming trial court's dismissal of plaintiff's complaint with prejudice and its denial of plaintiff's motion to amend his complaint for a second time). Trial courts have wide latitude in deciding whether to allow an amendment; these decisions "will rarely be disturbed on appeal." *Id.*, *quoting Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794,

802 (Ct. App. 1997). Generally, when a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal is without prejudice. *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006). However, a complaint is subject to dismissal with prejudice if it appears "to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations." *Id.* (citation omitted). If the plaintiff fails to cite any additional factual allegations that would convert the deficient pleadings into claims on which relief may be granted, the appellate court properly affirms the dismissal of the complaint with prejudice. *Id.*; *Sullivan*, 397 S.C. at 153-54, 723 S.E.2d at 840-41.

B. The Circuit Court Properly Denied Appellants' Motion for Leave to Amend Their Second Amended Complaint.

The Circuit Court's dismissal of Appellants' Second Amended Complaint with prejudice should be affirmed, because Appellants have failed repeatedly to plead or cite any new factual allegations that would change the time-barred nature of their claims for abuse of process or civil conspiracy. Before the Circuit Court dismissed Appellants' abuse of process and civil conspiracy claims with prejudice, Appellants twice amended their initial Complaint in an attempt to overcome Respondents' assertions that Appellants' causes of action are time-barred and fail to state an actionable claim. (Fogarty's Mot. to Dismiss Compl.; Am. Complaint; Fogarty's Mot. to Dismiss Am. Compl; Second Am. Compl.) Appellants filed their Second Amended Complaint after the Circuit Court's clerk issued specific directions regarding Appellants' civil conspiracy claim, and indicated deficiencies also existed in Appellants' abuse of process claim. (Emails from Law Clerk Nowell to Mann, Mooneyham, Henrikson, and Fogarty of

9/30/11 and 10/5/11.) Still, in both of their amended pleadings, Appellants alleged facts which clearly demonstrate that their claims for abuse of process and civil conspiracy arose upon their being served with the Medical Malpractice Action in 2006. Appellants have not presented, and cannot present, any supplemental factual allegations which prevent the discovery rule's being triggered when the Medical Malpractice Action was served.

Appellants' claims remain time-barred despite the fact that Appellants' brief to this Court itemizes three proposed allegations they seek to assert in a third amended pleading, as follows:

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

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

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

(Appellants' Br. at 27.) These allegations are insufficient to convert Appellants' time-barred causes of action into actionable claims, because they are subjective statements that do not alter or change the date on which Appellants' claims objectively arose.

As discussed fully above, the date on which a cause of action arises is an objective question that is answered by application of the discovery rule. *Livingston*, 2013 WL 342675, *4; *Joubert*, 341 S.C. at 191, 534 S.E.2d at 9. It is well settled that "whether

the particular plaintiff actually knew he had a claim is not the test." *See Young*, 333 S.C. at 719, 511 S.E.2d at 416. Because service of the Medical Malpractice Action put Appellants on notice that they possessed claims for abuse of process and civil conspiracy against at least Casey and Thompson, it triggered the statute of limitations' running as to those claims. *See Burgess*, 300 S.C. at 186-87, 386 S.E.2d at 800. Proper application of the discovery rule achieves this result regardless of when Appellants claim they fully discovered Fogarty's alleged motives and role in the Medical Malpractice Action, and regardless of whether Casey and Thompson allegedly concealed Casey's MRI from Appellants. *See Gibson*, 383 S.C. at 406, 680 S.E.2d at 782; *Wiggins*, 314 S.C. at 128, 442 S.E.2d at 170. Because Appellants' proposed allegations contain subjective assertions regarding when Appellants actually knew they had claims against Respondents, those allegations do not affect the running of the statute of limitations on those claims. *See Joubert*, 341 S.C. at 191, 534 S.E.2d at 9. The Circuit Court thus properly dismissed Appellants' claims with prejudice and denied their motion to amend, and this Court should affirm the Circuit Court's ruling.

CONCLUSION

The Circuit Court properly held that Appellants' abuse of process claim is time-barred, because application of the discovery rule to the facts alleged in Appellants' Second Amended Complaint clearly shows that the statute of limitations began to run on that cause of action when Appellants were served the Medical Malpractice Action in 2006. When that suit was served, Appellants had notice that they possessed an abuse of process claim against Casey, Thompson, and possible third parties, because Appellants' pleading states that Appellants believed the malpractice claim lacked merit and had been

imposed for a wrongful purpose. Appellants' claim that Fogarty concealed the scope and purpose of his involvement in that case, and that Casey and Thompson failed to comply with applicable discovery rules during that litigation, do not alter the underlying facts triggering the running of the limitations period. Similarly, these alleged acts by Respondents do not justify the equitable tolling of the statute of limitations as to Appellants' abuse of process claim, because the claimed wrongful acts do not alter the facts alleged in Appellants' pleading that triggered the statute's running when Appellants were served with the Medical Malpractice Action.

The Circuit Court also properly dismissed Appellants' civil conspiracy claim with prejudice after Appellants voluntarily dismissed that claim without prejudice at the hearing on Respondents' motions to dismiss Appellants' Second Amended Complaint. This ruling did not violate Appellants' due process rights, because Appellants had multiple opportunities to brief and argue this issue, and because the Circuit Court properly considered the facts and applicable law supporting its ruling. Further, even if the Circuit Court arguably erred in dismissing Appellants' civil conspiracy claim, that ruling does not justify reversal, because Appellants voluntarily dismissed their claim outside the limitations period; so the Circuit Court's holding that Appellants are time-barred from reasserting that claim did not prejudice Appellants. Similarly, even if the Circuit Court arguably erred in dismissing Appellants' civil conspiracy claim, this Court would properly uphold that ruling in the interest of judicial economy.

Finally, the Circuit Court did not err in dismissing Appellants' Second Amended Complaint and refusing to allow Appellants to amend that pleading for a third time. Neither the draft allegations Appellants now propose to add to a fourth pleading, nor any

other allegations regarding when Appellants subjectively realized they possessed such claims, can alter the fact that the statute of limitations on Appellants' abuse of process and civil conspiracy claims began to run when Appellants were served with the Medical Malpractice Action in 2006. Accordingly, the Circuit Court properly denied Appellants' motion to amend their pleadings.

For all of the above reasons, Respondents respectfully request that this Court uphold the Circuit Court's dismissal with prejudice of Appellants' abuse of process and civil conspiracy claims.

Respectfully Submitted,

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