THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2010-CP-5743

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

Appellants,

v.

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

Respondents.

FINAL REPLY BRIEF OF APPELLANTS

March 28, 2013

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Without restating the issues or making redundant arguments which have been thoroughly set forth in their Initial Brief, the Appellants offer the following points of clarification and rebuttal to the arguments raised by Respondents.

I. The Trial Court's Order and Respondents' arguments impermissibly rely upon findings and statements of fact beyond the four corners of Appellants' Second Amended Complaint, along with inferences not within the light most favorable to the Appellants.

It is a well-settled principle that in resolving a Rule 12(b)(6) motion to dismiss, the court is limited to a consideration of the allegations contained within the four corners of the complaint. *See Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). In considering a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, the circuit court must base its ruling solely upon the allegations set forth on the face of the complaint. *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 66-67, 651 S.E.2d 305, 307 (2007).

The Trial Court's Order and Respondents' arguments impermissibly rely upon findings and statements of fact beyond the four corners of Appellants' Second Amended Complaint, along with inferences not within the light most favorable to the Appellants. For example, the Trial Court's Order at issue found: "Fogarty was identified and deposed in the Medical Malpractice Action as an expert witness, and was consulted by Thompson on occasions with respect to medical matters relating to the Medical Malpractice Action, and with respect to Casey's independent applications for disability coverage. *See* Second Amended Complaint at pp. 41-42, 48, 76. (Verdin March 21, 2012 Order p. 4.) This statement is used as one of the cornerstones in the Trial Court's finding

that Dr. Fogarty was not involved in the actions alleged by the Appellants in the assertions of the Second Amended Complaint and that the Appellants were on notice of their rights being infringed upon as early as 2006. However, a reading of the cited paragraphs establishes that facts outside of the four corners of the Second Amended Complaint were inserted in this finding and inferences were developed against the clear allegations of the Appellants that Dr. Fogarty went to great lengths to hide his involvement. From the Second Amended Complaint:

> 41. Until his deposition on December 22, 2008, Dr. Fogarty was very successful in shielding his role in the "permanent brain injury" scheme by his active efforts to obstruct and evade his deposition.
>
> 42. Dr. Fogarty and Mr. Thompson went to great lengths to ensure that Dr. Fogarty's role as an "expert" witness was concealed until the 11th hour from the doctors and their attorneys to further frustrate discovery efforts and to hide his level of involvement in the execution of the "permanent brain injury" scheme.
>
> 48. It was a simple matter in 2004, when Dr. Fogarty got wind of Mr. Casey's procedure, for him to convince Mr. Casey's sister to allow him to review some of the medical records and offer his practice group's help, ensuring Dr. Fogarty the leadership role in the "permanent brain injury" scheme.
>
> 76. To "help" Mr. Casey and Mr. Thompson, as previously stated in the complaint, Dr. Fogarty ensured the development of the "permanent brain injury" scheme, which he infused into Mr. Casey's medical records for their use in the disability appeal and medical malpractice case.

Clearly the Second Amended Complaint asserts that Dr. Fogarty was acting well outside the scope of a treating physician and that he was doing many things to hide his involvement from the Appellants in an effort to ensure that he would not be held accountable for his actions. However, the Trial Court's Order and Respondents' argument take the previously quoted Order's statement respecting Dr. Fogarty, which weeds out the actual assertions against him and his efforts to conceal his involvement,

and uses it as the basis to find that the Appellants were on notice of a violation of their rights in 2006. Appellants contend this is well outside the principals envisioned by *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 651 S.E.2d 305 (2007) and *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007) and that the Second Amended Complaint speaks for itself.

A final example from the Trial Court's Order: "Fogarty was not involved in Casey's having the MRI or Thompson's and Casey's discovery-related efforts with respect to the MRI. *See* Second Amended Complaint." (Verdin March 21, 2012 Order p. 4.) Yet again, this finding is well outside of the four corners of the Second Amended Complaint and is an impermissible inference developed against the Appellants. A reading of the Second Amended Complaint's 19 pages and 137 paragraphs, which were cited as the support for this finding, clearly indicate the most probable inference is that Dr. Fogarty was involved and very well may have even recommended the MRI. Again, this benign finding/inference of the Trial Court, well outside the four corners of the Second Amended Complaint, is used as one of the cornerstone of asserting that the Appellants were aware of their rights being infringed upon in 2006. Clearly, that is not the intent of the allegations of the Second Amended Complaint.

Throughout Respondents' Brief, they repeatedly make inferences, not supported on the face of the Second Amended Complaint, as to what Appellants knew and when they knew it. Respondents' argue that Plaintiffs' Abuse of Process claim arose at least when the Medical Malpractice action was filed in 2006. (Respondents' Br. pp. 14-15, 18, 20-23, 28-29, 35-36, and 40-43.) They base their argument on allegations and make inferences not found within the four corners of Plaintiffs' Second Amended Complaint.

Respondents infer that "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." (Respondents' Br. p. 14.) Appellants respectfully disagree.

Respondents' argue that "Appellants ceased treating Casey as a patient", citing paragraphs 13-18, 56 of the Second Amended Complaint. (Respondents' Br. p. 14.) Nowhere in those paragraphs does it indicate Appellants ceased or refused to treat Casey. Further, despite Respondents inferences, nothing in those paragraphs show when the Appellants learned that Casey was eventually treat by Dr. Fogarty or when Appellants became aware of Casey's brain damage claims.

Respondents are correct that the underlying Medical Malpractice lawsuit did put Appellants on notice that Casey claimed they had breached their standard of care, but nothing in paragraphs 4 or 5 indicates what Appellants believed or that they in fact appreciated that they were being abused by the legal process or that a civil conspiracy against them existed. (Respondents' Br., p. 15.) Again, Respondents are correct in their statement that 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." (Respondents' Br. p. 15) However, nothing in the paragraphs cited (Second Am. Compl. ¶¶ 106-107,

110-111) indicates when Appellants came to hold this belief. Respondents infer that Appellants held this belief at least from the onset of the underlying Medical Malpractice lawsuit, which is an inference not in the light most favorable to the nonmoving party as required by *Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137 (1999) and is far from the actual truth.

Nowhere within the four corners of Plaintiffs' Second Amended Complaint does it show that Appellants' knew, at the filing of the underlying medical malpractice action, that they were victims of an abuse of process cause of action. Further, Respondents inferences are not cast in the light most favorable to Appellants. The inference most favorable to Appellants is that they did not know at the onset of the underlying medical malpractice lawsuit that Respondents were involved in an abuse of process and/or conspiracy and only learned of such illegal action during the course of the discovery process of the underlying Medical Malpractice lawsuit. Further, the clear language of the Second Amended Complaint states that the Respondents took active measure to ensure that Appellants did not realize their rights were being infringed upon

Respondents argue that "Appellants knew in 2004 that Fogarty had assumed Casey's medical care". (Respondents' Br. p. 18) Contrary to their assertions, nothing on the face of the Complaint indicates that Appellants knew in 2004 that Fogarty began treating Casey. Nothing on the face on the Complaint indicates when Appellants came to have that knowledge. Again, Respondents' inference is not in the light most favorable to Appellants and therefore must fail.

> "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid

claim for relief." Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999).

Drawing the inference, in the light most favorable to the Plaintiffs, that, in 2004, Drs. Feldman and Boscia did not support Mr. Casey's disability claim (¶ 18, Plaintiffs' Second Amended Complaint), nor his request for increased pain medications, because Mr. Casey's requests were not medically supported (¶ 56, Plaintiffs' Second Amended Complaint) does not show that "a reasonable person of common knowledge and experience would be on notice that a claim against" Appellants might exist. If it would put reasonable people of common knowledge on notice that a claim might exist, doctors would then be put on notice each and every time a patient or other physician disagreed with their medical opinion.

As such, Appellants respectfully assert that, based solely upon the allegations set forth on the face of the Complaint, the facts alleged therein, and inferences reasonably deducible therefrom, viewed in the light most favorable to Plaintiffs in this case, a valid claim for relief exists, and as such, dismissal under Rule 12 (b)(6) was improper.

II. Respondents' arguments clearly demonstrate that there are questions of fact respecting the application of the discovery rule within the alleged facts of Appellants' Second Amended Complaint.

In *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000), the South Carolina Supreme Court stated, "[T]he rule the Court of Appeals' opinion is not whether Moriarty herself was on notice by a certain date (a subjective standard), but whether a reasonable person in her circumstances would have been on notice by a certain date (an objective standard). The statute begins to run on the date that

the jury believed the repression ended and the resurfacing memories would have put a reasonable person on sufficient notice." Further, the *Moriarty* Court held that the "[A]pplication of the discovery rule contained in S.C. Code Ann. §15-3-535, as well as the determination of the date the statute began to run in a particular case, are questions of fact for the jury when the parties present conflicting evidence." See Johnston v. Bowen, 313 S.C. 61, 64 437 S.E.2d 45, 47 (1993) (whether a claimant knew or should have known that they had a cause of action is question for the jury); Manios v. Nelson, Mullins, Riley & Scarborough, LLP, 389 S.C. 126, 697 S.E.2d 644 (S.C. App 2010) (the date the statutes of limitations began to run involves questions for the jury ...). In reversing the lower court dismissal of Appellants' case, Appellants still bear the burden of proving their Abuse of Process and Civil Conspiracy claims and the jury must determine when the Appellants knew or should have known, "such that a person of common knowledge and experience would be on notice that some right of [theirs had] been invaded or that some claim against another party might exist. It is on that date the statute of limitations begins to run." *Moriarty,* 334 S.C. at 169.

In the instant case, there is obviously a conflict as to when the parties feel Appellants knew or should have known that they had a claim against Respondents. Respondents' inferences in their favor and assertions not based on the face of the Complaint are in clear opposition to the facts asserted in Appellants Second Amended Complaint. As such, the issue is one for the jury.

"It follows, therefore, that a motion to dismiss filed under Federal Rule of Procedure 12(b)(6), which tests the sufficiency of the complaint, generally cannot reach the merits of an affirmative defense, such as the defense that the plaintiff's claim is time-

barred. But in the relatively rare circumstances where facts sufficient to rule on an affirmative defense are alleged in the complaint, the defense may be reached by a motion to dismiss filed under Rule 12(b)(6). This principle only applies, however, if all facts necessary to the affirmative defense "clearly appear[] on the face of the complaint." *Richmond, Fredericksburg & Potomac R.R. v. Forst,* 4 F.3d 244, 250 (4th Cir.1993); *accord Desser v. Woods*, 266 Md. 696, 296 A.2d 586, 591 (1972)." "To require otherwise would require a plaintiff to plead affirmatively in his complain matters that might be responsive to affirmative defenses even before the affirmative defenses are raised." *Goodman v. Praxair, Inc.,* 494, F.3d 458, 466, (4th Cir. 2007).

Thus, based upon the principals advanced by *Goodman*, the Second Amended Complaint should not have been dismissed due to the totality of circumstances alleged within it, which allege that material facts were actively withheld from the Appellants and that they were placed on notice within 2008, which was within the statute of limitations window to bring their claims.

CONCLUSION

Based on the foregoing, in addition to arguments made in Appellants' Initial Brief, the Appellants respectfully submit that the lower court erred in finding that the statute of limitations began to run at the onset of the underlying medical malpractice lawsuit. Additionally, the Trial Court's Order and Respondents' arguments impermissibly rely upon findings and statements of fact beyond the four corners of Appellants' Second Amended Complaint, along with inferences not within the light most favorable to the Appellants. Respondents' arguments clearly demonstrate that there are questions of fact respecting the application of the discovery rule within the alleged facts

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

Respectfully submitted,

March 28, 2013

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