STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF UNION	)	C.A. No.: 2020-CP-44-00104
H.A., by and through her guardians, Jane and John Smith, and Jane Smith and John Smith, individually, Plaintiffs, vs. South Carolina Department of Social Services, South Carolina Department of Children's Advocacy, Tammy Gaye Causey Dalsing and Edward Anthony Dalsing, Defendants,	)	**ORDER GRANTING DEFENDANTS TAMMY GAYE CAUSEY DALSING AND EDWARD ANTHONY DALSING'S MOTION FOR SUMMARY JUDGMENT**

A hearing was held on May 25, 2023 on Defendants Tammy Gaye Causey Dalsing and Edward Anthony Dalsing's ("Dalsings") Motion for Summary Judgment. Based upon the evidence and arguments presented, I hereby GRANT the Motion for Summary Judgment and DISMISS the collective Plaintiffs' claims against Tammy Gaye Causey Dalsing and Edward Anthony Dalsing WITH PREJUDICE.

The Dalsings' Motion for Summary Judgment is granted based upon the following grounds:

(1) Plaintiffs' claims are barred by the legal doctrines of judicial estoppel, res judicata, collateral estoppel and the applicable statute of limitations;

(2) Any claim which Plaintiffs may have had against the Dalsings has been discharged by the Dalsings' Bankruptcy, which was filed in the United States Bankruptcy Court for the District of South Carolina on October 31, 2019, Case 19-05767-hb, in which the Dalsings received a Final Order of Discharge issued on February 20, 2020; and

(3) Construing the evidence in this case in the light most favorable to the Plaintiffs, there is no genuine issue of material fact and the Plaintiffs cannot establish the requisite elements to support a claim against the Dalsings.

BACKGROUND

Plaintiffs John Smith and Jane Smith ("Plaintiffs") filed their initial Complaint in the present action on March 11, 2020, serving the Dalsings on or about March 20, 2020, and then filed an Amended Complaint on March 25, 2020. In their Amended Complaint Plaintiffs asserted causes of action for: 1. Negligence, 2. Gross Negligence under the South Carolina Tort Claims Act (not applicable to the Dalsing Defendants), and 3. Negligence Per Se. The Plaintiffs' Negligence cause of action alleges that acts and/or omissions of the Defendants were negligent, grossly negligent, willful, wanton and reckless and were done knowingly and with total disregard for the child's protection. The Plaintiffs alleged that they and the child have suffered damages as a result. The Plaintiffs' Negligence Per Se cause of action alleged that the Defendants violated the provisions of the South Carolina Children's Code, South Carolina Code Ann. Section 63-1-10 et seq. The Plaintiffs alleged that violations by Defendants and each of them were the proximate cause of the abuse the child endured, along with the child's injuries and resulting damages.

UNDERLYING FAMILY COURT ACTION

The history between the parties to this action began many years ago. There has been extensive Family Court litigation involving the parties and voluminous evidence produced through the years. Some of that litigation resulted in appeals which ultimately resulted in the South Carolina

Supreme Court decision in favor of the Dalsings' position issued on January 3, 2018.

Issue Before Supreme Court and Ruling: The beginning paragraph of the Supreme Court's 2018 decision sets out the issue before the Court and the Court's ruling:

> "In this case, the Court must decide whether Petitioners Edward and Tammy Dalsing have standing to pursue a private action to adopt a child who has been placed in their foster care by the South Carolina Department of Social Services (DSS). The family court found Petitioners do not have standing, and the court of appeals affirmed. S.C. Dep't of Soc. Servs. v. Boulware, Op. No. 2016-UP-220, 2016 WL 2944266 (S.C. Ct. App. filed May 19, 2016). We reverse and remand to the family court, **as we conclude Petitioners have standing to pursue a private adoption under the facts of this case**." S.C. Dep't of Soc. Servs. v. Boulware, 422 S.C. 1, 3–4, 809 S.E.2d 223, 224 (2018). (Emphasis added.)

Factual and Procedural History from Supreme Court's Opinion: The Factual and Procedural History section of the Supreme Court's opinion is helpful to understanding the history between the parties. The opinion sets forth:

> "On August 27, 2013, (footnote omitted) law enforcement took the minor child (Child) into emergency protective custody after discovering an active methamphetamine lab outside the home where Child resided with Allyssa and Jonathan Boulware. Child was sunburned, had several insect bites, suffered from severe diaper rash, and tested positive for methamphetamine, cocaine, and marijuana. DSS placed Child in foster care with Petitioners on the same day and then commenced an abuse and neglect removal action. Child's biological parents are Allyssa Boulware and John Stafford (Parents), and Child's legal father by marriage is Jonathan Boulware.
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> After a hearing on October 9, 2013, the family court issued an order finding a permanent plan of reunification with Parents was in the best interest of Child and adopting a treatment plan requiring Parents to attend parenting classes and substance abuse counseling. In February 2014, the family court held the initial permanency planning hearing and discovered Parents were not attending substance abuse counseling, were not supporting Child, and had been arrested for possession of methamphetamine. The family court approved DSS's recommendation of a permanent plan of termination of parental rights (TPR) and adoption, with a concurrent plan of reunification with Parents. In the meantime, the Foster Care Review Board issued its report recommending TPR and adoption within six months.
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> The instant controversy began when DSS and Parents reached an agreement for Child to be placed with relatives [Plaintiffs] (Aunt and Uncle)[1] in order to give Parents more time to work on the treatment plan. The proposed placement with Aunt and Uncle was not an adoptive placement. DSS intended to close its case after Parents completed the treatment plan.

[1] The Plaintiffs are actually the Child's great aunt and great uncle.

On May 31, 2014, DSS notified Petitioners of its intent to remove Child from their home and place Child with Aunt and Uncle. Petitioners immediately moved to intervene in DSS's removal action and commenced a private TPR and adoption action. (Footnote omitted.) The family court held a second permanency planning hearing on June 4, 2014, but declined to rule on DSS's new permanent plan of relative placement with Aunt and Uncle until the court ruled on Petitioners' motion to intervene.[2]

In September 2014, the family court granted Petitioners' motion to intervene and granted their request for a full evidentiary hearing on DSS's motion to change the permanent plan to a plan of relative placement with Aunt and Uncle. Aunt and Uncle were added as parties to DSS's action. At a January 2015 permanency planning hearing, DSS changed its treatment plan recommendation to TPR and adoption. The family court approved that plan and scheduled a TPR hearing for March 2015. The family court also ordered Petitioners and Aunt and Uncle to be named parties in the DSS TPR action.

After the March 2015 hearing, the family court terminated the parental rights of Parents. The family court also dismissed Petitioners' adoption action on the basis Petitioners did not have standing to pursue a private action for adoption of a child in DSS custody, citing Michael P. v. Greenville County Department of Social Services, 385 S.C. 407, 684 S.E.2d 211 (Ct. App. 2009), and Youngblood v. South Carolina Department of Social Services, 402 S.C. 311, 741 S.E.2d 515 (2013). Relying upon Youngblood, the family court concluded "the entire legislative scheme should be allowed to work without interference from foster parents who are there to take care of the child, not to generate an adoption for themselves." The court noted Petitioners and Aunt and Uncle could present their case for adoption to the DSS adoption committee but ruled none had standing to pursue a separate adoption action in the family court. The family court continued:

[T]he terminology in S.C. Code Ann. § 63-9-60 (B), when read in context with the full law regarding child protective services actions, requires that the South Carolina Department of Social Services approve the placement of a child, over whom they have custody, for adoption by that particular family before that family will have standing to proceed to adopt the child.

The family court granted custody of Child to DSS "with all rights of guardianship, placement, care and supervision, including the sole authority to consent to any adoption." This appeal followed.

The court of appeals affirmed the family court in an unpublished *per curiam* opinion. S.C. Dep't of Soc. Servs. v. Boulware, Op. No. 2016-UP-220, 2016 WL 2944266 (S.C. Ct. App. filed May 19, 2016). Relying on Youngblood, the court of appeals held 'foster parents

[2] Footnote 3 of the opinion sets forth: "**The family court ruled at this hearing that Child should remain with Petitioners until further hearing but permitted Aunt and Uncle unsupervised weekend visitation with Child. The parties subsequently agreed Child would spend Monday through Thursday each week with Petitioners and visit Aunt and Uncle Friday through Sunday each week. These living arrangements are still in effect**." (Emphasis added.)

> do not have standing under section 63-9-60 to file an adoption petition, regardless of whether they are former or current foster parents or whether DSS has made an adoption placement decision.' Id. The court stated its decision was consistent 'with the overall policy of the Children's Code" and concluded the General Assembly did not intend 'to grant standing to foster parents who file adoption actions early in the process while foreclosing standing to foster parents who wait until after DSS has made an adoption placement decision.' Id. We granted Petitioners a writ of certiorari to review the court of appeals' decision." S.C. Dep't of Soc. Servs. v. Boulware, 422 S.C. 1, 4–6, 809 S.E.2d 223, 224–25 (2018).
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> "Petitioners contend they have standing under section 63-9-60 because they are residents of South Carolina and because they brought their adoption action (1) before DSS placed Child for adoption but while Child was placed in foster care with Petitioners and (2) before DSS was vested with authority to consent to an adoption. We agree. The reasoning employed by the court of appeals would undermine the broad grant of standing we recognized in Youngblood and would rewrite section 63-9-60(B) to (1) read that once DSS acquires custody of a child, that child has been "placed," and (2) require that DSS approve the adoptive placement of a child with a particular family before that family has standing to petition for adoption. Neither of these interpretations is supported by a plain reading of the statute." S.C. Dep't of Soc. Servs. v. Boulware, 422 S.C. 1, 10, 809 S.E.2d 223, 227 (2018).

Supreme Court Remanded Case to Family Court to Proceed with Dalsings' Action to Adopt the Child: The Supreme Court explained that the family court's termination of the parental rights of the biological parents had ended efforts for reunification of the child with them and that the South Carolina Children's Code clearly mandate adoption as the preferred permanent placement for the child. The Supreme Court then stated that instead of seeking adoption for the child as called for by the Children's Code, "**DSS seeks nonadoptive relative placement with Aunt and Uncle, which can hardly be considered the path to a permanent setting for Child** and is contrary to the clear mandate of section 63-1-20(D)." Id. (Emphasis added.) The Supreme Court remanded the case to the family court to proceed with the Petitioners' action for adoption. Id. at 14, 809 S.E.2d at 229-230.

The Supreme Court's decision was issued on January 3, 2018. Two days later, the Plaintiffs filed a Motion to Intervene in the Dalsings' Action, filed their own Family Court Action seeking adoption, and moved to Consolidate these cases. A pretrial conference was held on May 25, 2018 in the Family Court. A Consent Order was filed to consolidate the Dalsings' 2014 adoption action and the Plaintiffs' 2018 adoption action filed after the Supreme Court decision. That Consent Order contemplated a July 26, 2018 hearing regarding the testimony of the child and contemplated setting a 5-day trial where the ultimate decision would be made regarding who would get to adopt the child – the Dalsings or the Plaintiffs.

PLAINTIFFS' ALLEGATIONS OF CHILD ABUSE MADE AGAINST THE DALSINGS ESCALATED AFTER SUPREME COURT DECISION:

Throughout the four-year family court action, Plaintiffs made repeated reports to SCDSS alleging that the Dalsings were abusing and/or neglecting the child. Every report made by Plaintiffs was investigated by SCDSS/OHAN. All of these voluminous reports prior to the South Carolina Supreme Court's January 3, 2018 decision were deemed "unfounded" by OHAN. The Dalsings had 8 children living in the home, and no allegations of abuse were ever made suggesting that any of the other children were abused in the home. Photos of the alleged abuse demonstrate minor bruising and other minor injuries.

The adult Plaintiffs and the Dalsings were both added as intervening parties in the SCDSS Removal Action which brought the child into care ("Removal Action"). The Removal Action lasted until the child was adopted by Plaintiffs through a hearing on January 23, 2019 and subsequent Order signed by Judge Thomas H. White, IV, on January 25, 2019. As intervening parties, Plaintiffs had the opportunity to raise issues with the Family Court to the extent they felt that SCDSS was not sufficiently investigating the allegations of abuse and/or to the extent they felt that SCDSS and/or the Dalsings were not acting in the best interests of the child. Plaintiffs could have also requested

that the Family Court remove the child from the Dalsings' home and care for abuse and/or neglect. Plaintiffs failed to bring any of these matters to the attention of the Family Court. Further, throughout the Removal Action the Family Court was consistently charged with the responsibility to ensure that the placement of the child was safe and proper for the child. Throughout the time that the child was in the Dalsings' home and care, the Family Court consistently made findings that the child's present placement (in foster care with the Dalsings) was safe and appropriate, and in the best interests of the child.

After the Supreme Court's decision, Plaintiffs' allegations of child abuse against the Dalsings escalated. Plaintiffs' attorney sent SCDSS a letter on March 16, 2018 making numerous false and slanderous claims of abuse/neglect against the Dalsings and making significant misrepresentations of fact, and asking that SCDSS conduct a forensic interview of the child, who was then 5 years old. The letter falsely expressed that the child suffered three (3) broken arms in the Dalsings' home and that the child's therapist, Anna Reid, had stated the child was hit in the face by Mrs. Dalsing. The evidence clearly shows that the child first broke her arm at the home of Plaintiffs on December 25, 2015. The subsequent two breaks which occurred at the Dalsings' home had been investigated by SCDSS with no indications of abuse or neglect. In the first break in the Dalsings' home that occurred on May 20, 2016, the child fell when climbing over a baby gate. In the second, that occurred on February 9, 2018, she was dancing and tripped over the Dalsings' dog. Regarding the letter's representation about Therapist Anna Reid, Ms. Reid had already refuted in writing that the child had ever expressed that Mrs. Dalsing had hit her in the face.

First Forensic Evaluation: SCDSS secured the Children's Advocacy Center to conduct a forensic interview of the child on April 2, 2018. The first forensic interview was conducted by Investigator Heather Flassing. A report from the interview was issued on April 18, 2018.

Dr. Lamb Evaluation: Following the forensic investigation, SCDSS/OHAN referred the child to Dr. Susan Lamb for an evaluation on or about May 22, 2018 which occurred on June 4, 2018. Plaintiffs accompanied the child to Dr. Lamb's evaluation and provided false and defamatory information to Dr. Lamb in support of Plaintiffs' assertions against the Dalsings. Plaintiffs provided answers in the doctor's intake questionnaire claiming that the foster mom slapped the child in the face and hit her and that older male children took the child to the bathroom - raising the issue of possible sexual abuse). These actions demonstrate that this was not a neutral evaluation of the child.

Dr. Lamb conducted an invasive vaginal exam of the child and also reviewed numerous photographs of the child which had been made by Plaintiffs. Dr. Lamb identified 8 photos that could potentially be indicative of abuse, unless there was a refuting explanation. These photos demonstrate the extremely minimal evidence used by the Plaintiffs to repeatedly report the Dalsings to DSS which were ultimately used as part of the decision to remove the child from the Dalsings' home. Dr. Lamb also expressed concern about potential abuse in the Plaintiffs' home due to injuries noted in medical records where Mrs. Dalsing took the child for care. Those injuries were:

(1) York Pediatrics 6/9/14 – bruising to medial aspect of left upper arm noted on physical exam. Child was with aunt and uncle over the weekend. Was brought in to pediatrician for pulling at ears by foster mother.

(2) York Pediatrics 12/28/15 – (accompanied by foster mother) Right elbow fracture that reportedly occurred in custody of aunt and uncle on 12/25/15. Reported history was a fall onto an outstretched arm. Pediatrician notes concern for medical neglect as the child was not taken for care until 12/27/15. (Mrs. Plaintiff admitted this broken arm occurred in her home during her deposition.))

(3) York Pediatrics 5/20/16 – Foster mother reports that child was climbing on the baby gate and fell, breaking her left distal humerus the evening prior. Went to CMC Steel Creek after fall and was diagnosed with fracture. (This occurred in foster parents' home)

(4) York Pediatrics 10/11/16 – [ ] noted bruises to child's back and buttocks after returning from aunt and uncle's home. [ ] stated that the child reportedly said that aunt hit her bottom. [ ] reported concern to DSS. On examination child had bruising

to her right lower back and her left buttock. In office child stated to pediatrician that she fell.

(5) Carolinas Health Care Steel Creek ED 2-9-18 - Child noted to have an elbow fracture. Full medical record is not available for this visit. (This occurred in foster parents' home).

SCDSS Removed Child from Both Homes: Following Dr. Lamb's evaluation, SCDSS removed the child from both homes and placed her with a separate foster parent. The removal of the child from the Dalsings' home occurred on June 11, 2018. OHAN subsequently determined that there was no evidence of abuse by the Plaintiffs, but OHAN made an indicated finding of abuse against Mrs. Dalsing only.

Second Forensic Evaluation: While the child was out of both Plaintiffs home and the Dalsings' home, SCDSS had a second forensic evaluation performed on the child by the same forensic investigator, Heather Flassing, who conducted both the first forensic interview of child (April 2, 2018) and the second forensic interview on the child (August 15, 2018)). The child's forensic interview was played in its entirety as part of the deposition of Heather Flassing and the interview was transcribed.

Regarding the second forensic interview, when Ms. Flassing was asked "Q: So, from this forensic interview, did you get anything that would indicate that she has been abused or neglected by Tammy and Edward Dalsing?" She responded: "A: She did not make any disclosures about that." The transcription of the second forensic interview sets out the child's own statements that evidence that the Dalsings did not abuse or neglect her.

SCDSS Placed Child with Plaintiffs: On August 15, 2018, following the second forensic interview, SCDSS placed the child in the home of Plaintiffs. The child has remained with Plaintiffs since this placement date.

Dalsings Dismiss Their Action Seeking Adoption of the Child Provided Child is Adopted by Plaintiffs - Neither Party Met Court's Deadline to Pursue Attorney's Fees Claim: Upon the Dalsings' Motion seeking to end their action for adoption in favor of the Plaintiffs adopting the child, the Family Court issued an order on October 16, 2018 granting the Dalsings' Motion to Dismiss their adoption action. On the issue of awarding attorney's fees to either party, the Court provided by separate Order (Letter from Judge Tony Jones dated October 19, 2018, *"I have decided that the issue of attorney's fees will be handled by affidavits (including exhibits), as well as other submissions and briefs. Upon receipt of the respective submissions from each party... I will then make my decision regarding attorney's fees.* ***Each party shall have thirty days from the date of this letter, or November 19, 2018, to provide me with their submissions****."* (Emphasis added). Neither party filed any request for attorney's fees. Plaintiffs' adoption of the child was granted in or around January 2019.

OHAN Case/trial Against Dalsings Concluded with No Abuse or Neglect Found: Despite the OHAN case against Mrs. Dalsing, SCDSS at no time sought to remove any of the other children from the Dalsing home. Mrs. Dalsing appealed the OHAN finding against her. The OHAN Administrative Tribunal conducted a trial of the allegations against Mrs. Dalsing in November 2019. The hearing officer dismissed the action because SCDSS determined that the allegations were "unfounded," meaning it could not prove abuse had occurred by a preponderance of the evidence. Director Deanene P. Thornwell issued an Order specifically ruling that set forth, in part, that "…the Department [SCDSS] has concluded that the agency could not produce a preponderance of the evidence and the decision has been overturned. Further, Respondent [SCDSS] agreed that the facts do not support a determination that the minor child, H.S., was abused nor (sic) neglected by Petitioner [Tammy Dalsing] as defined by S.C. Code of Laws §63-7-20."

SUMMARY JUDGMENT STANDARD

Pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure, summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 557, 671 S.E.2d 79, 84 (Ct.App.2008). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." Gauld at 558, 671 S.E.2d at 85. "The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." Id. A party cannot rely upon mere allegations to overcome a motion for summary judgment. Instead, a party must present admissible evidence which establishes that questions of material fact exist. Strickland v. Madden, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct.App.1994).

DISCUSSION

- **Plaintiffs Cannot Seek Damages Against Dalsings for Pursuing Adoption of the Child**: When the Dalsings brought their action seeking termination of the parental rights ("TPR") of the biological parents and adoption of the child, the Family Court had already adopted a permanent plan for the child of TPR and adoption and the child had been in the Dalsings' home for over ten months. Mrs. Plaintiff testified that she understood that the Dalsings were seeking adoption of the child in 2014. She testified that once her family was identified and qualified as suitable blood relatives, the Dalsings should have surrendered the child to them.

In her deposition, Mrs. Plaintiff acknowledged that after the child was removed from the Dalsings' home for alleged abuse and neglect, the Dalsings gave up and the Plaintiffs proceeded

with adopting the child. Mrs. Plaintiff testified that the foster parent where the child was placed when she was removed from both the Dalsings and the Plaintiffs was a "true foster parent". When asked what she meant by that, Mrs. Plaintiff testified that "Well, she didn't file a private action to keep my baby from me."

That is the thrust of the Plaintiffs' claims in this case. The Plaintiffs do not believe that the Dalsings, as foster parents, should have pursued adoption of the child. They maintain this position despite the fact that the South Carolina Supreme Court ruled that the Dalsings' actions were proper. The South Carolina Supreme Court's ruling bars any claims the Plaintiffs may have regarding the placement of the child and the Dalsings' pursuit of adoption of the child.

- **Plaintiffs' Cannot Seek Damages for Court Authorized Foster Placement**:

The Plaintiffs acknowledge that the Court maintained the status quo at a hearing, meaning that the child's time would continue to be split between the Plaintiffs and the Dalsings. However, the Plaintiffs claim that SCDSS should have removed the child from the Dalsings and placed her with the Plaintiffs permanently anyway. This claim is barred by the Supreme Court's decision.

- **Plaintiffs Cannot Pursue Vague and Unsupported Claims for Damages**:

Mrs. Plaintiff testified that she wants someone to be held accountable for what was allegedly done to the child for 5 years, without specifying what that accountability would be. She claims that she never got to testify in the family court and she wants to tell her story, and wants somebody to hear the case. She was frustrated she did not get to testify in Mrs. Dalsing's OHAN hearing and was disappointed OHAN did not stand their ground, and was never told that there were concerns about the sufficiency of the evidence or the veracity of Dr. Lamb's report. She did not understand that the child had made statements that she was harmed in her house as well. She wanted to testify and wanted the hearing to play out to a conclusion. None of these desires form the basis of a viable

lawsuit.

Mrs. Plaintiff went so far as to suggest that the child should have been removed from the Dalsings' home because she cut her own hair in their house. She claimed the child could have been injured with the scissors by stabbing herself in the eye or neck, but conceded that did not happen.

Mrs. Plaintiff testified that this case was about 5 years of sleepless nights wondering if the child was okay. She testified that it was about SCDSS not locating them as suitable relatives. Mrs. Plaintiff's only testimony about monetary out-of-pocket damages were her attorney's fees. She claims she just wants the child "…to have some justice." She wants change in the foster care system. These are not viable claims.

Mrs. Plaintiff denied that her own conduct in insisting to adopt the child (after the child had developed a bond with the Dalsings for 8 months) and insisting that the child split time at her home had a negative effect on the child simply because she is biological family. This is despite the fact that the Plaintiffs had no relationship with the child whatsoever for approximately the first 18 months of her life, except for a chance run-in with the family in Wal-Mart when the child was about 6 months old.

Mrs. Plaintiff denied knowledge of the child's spatial awareness issues which caused unsteadiness on her feet and for which Mrs. Dalsing was taking the child to therapy. She also denied a difference in parenting styles between people with 1 child in the home and people with 8 children in the home. Once again, these claims are barred by the Supreme Court's decision.

● **Plaintiffs Cannot Pursue Claims Against the Dalsings for Time When Child in Custody of SCDSS - When SCDSS Made Legal Determination of No Abuse or Neglect Against Child**: The child was in the care and custody of SCDSS at the critical times at issue in this case. SCDSS did not file a civil action on the child's behalf to pursue alleged financial damages

for alleged abuse that had been ruled to be "unfounded". In fact, SCDSS was representing the child's interests when it litigated its position that there was a finding of abuse against Mrs. Dalsing pertaining to the child. The OHAN Administrative hearing resulted in a dismissal in Mrs. Dalsing's favor with a ruling that SCDSS concluded that the facts do not support a determination that the minor child was abused or neglected by Mrs. Dalsing.

After succeeding in having the child removed from the Dalsings' home and succeeding in adopting the child, the Plaintiffs elected to subsequently file the above-captioned case, which is allegedly filed on behalf of the child and is allegedly for the child's benefit. Yet, the superficial alleged bases for the Complaint (summarized above) surround the alleged abuse of the child, which was thoroughly investigated and deemed unfounded, meaning abuse was not proven. As is discussed in further detail below, these claims are barred.

In addition, the Plaintiffs' deposition testimony reveals that a motivator for this lawsuit is their belief that the Dalsings (as foster parents) were temporary housing for the child and that they should have surrendered the child to the Plaintiffs as soon as the Plaintiffs were identified as suitable blood relatives. On this issue, the Supreme Court's ruling directly contradicts this position and prevents it from going forward. Further, as discussed above, it should be noted that the child was in the Dalsings home for 8 months before the Plaintiffs were identified because the birth parents of the child did not disclose the Plaintiffs as suitable relatives, and even a relative who was a neighbor of the Plaintiffs who had attempted to obtain placement of the child but received an unfavorable home study from SCDSS did not disclose them as possible suitable relatives. The Plaintiffs, one of whom is a great uncle of the child, are largely basing this lawsuit upon anger and a belief that blood relatives (albeit blood relatives of a person who exposed the child to meth while apparently using it in her presence) should have a child surrendered to them by the foster parents, despite a South Carolina Supreme Court ruling to the contrary. The Supreme Court ruling and the

legal doctrines discussed below bar the Plaintiffs' claims in this case.

B. PLAINTIFFS' NEGLIGENCE CLAIM FAILS

"In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages." Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 135, 638 S.E.2d 650, 656 (2006). "If any of these elements is absent a negligence claim is not stated." See Summers v. Harrison Constr., 298 S.C. 451, 455, 381 S.E.2d 493, 495 (Ct. App. 1989).

On this issue, the Plaintiffs cannot demonstrate that the Dalsings owed the adult Plaintiffs any duties whatsoever, which is fatal to their claims. Regarding Plaintiffs' claims being made for the child, despite Plaintiffs making repeated claims that the child was harmed in the Dalsings' home from the date the child first came to stay at Plaintiffs' home on June 6, 2014, Plaintiffs did not take the child to a doctor for evaluation or treatment to have a professional, mandatory reporter, document whether abuse occurred. Further, the Plaintiffs did not appeal the dismissal of the finding of abuse against Mrs. Dalsing and never raised any issues with SCDSS's handling of the child or the Dalsings' treatment of the child with the Family Court. The Family Court was consistently charged with the responsibility to ensure that the placement of the child was safe and proper for the child. Plaintiffs, who were intervening parties in the SCDSS Removal Action which brought the child into care, could have brought to the attention of the Family Court the very allegations they are now attempting to bring against the Dalsings. Plaintiffs did not bring these allegations to the attention of the Family Court in the Removal Action and will not now be permitted to pursue the allegations in this Court. As a result, the Plaintiffs are unable to establish any breach of any duties owed to the child, any injuries or any damages in this case, which is fatal to their claims.

SCDSS was notified on each occasion of alleged injury and performed evaluations on

behalf of the state of South Carolina, and as agency *in loco parentis* for the child at all times pertinent to these matters, and evaluated and investigated every allegation and determined no abuse or neglect of the child (which would equate to no breach of the state required duty of care) and made no indicated findings against anyone from the first time the Plaintiffs made a complaint, June 6, 2014, until the time the child was removed from the Dalsings' foster care on June 11, 2018, with the exception of the one indicated finding against Mrs. Dalsing which was later withdrawn by SCDSS for lack of evidence which would meet the greater weight of evidence standard. As a result, the Plaintiffs' claims are barred.

C. PLAINTIFFS' PRIOR POSITIONS, COURT ORDERS AND COURT DECISIONS AND ADMINISTRATIVE DECISIONS BAR PLAINTIFFS' CLAIMS

The child came into SCDSS foster care in August 2013 based upon an Order of the family court. When Plaintiffs entered the case in June 2014, they consented to the custodial arrangement where the Court allowed the minor child to be allowed unsupervised weekend visits with Plaintiffs while the child remained in foster care in the Dalsings' home. This consent by Plaintiffs was acknowledged in the Supreme Court's Boulware decision referenced above. In addition, the South Carolina Supreme Court's January 3, 2018 ruling held that the Dalsings' pursuit of their action was proper and that they had standing to seek adoption of the minor child. See opinion, supra.

These rulings conclusively decide all issues pertaining to the Dalsings' continued pursuit of adoption and maintaining their foster care placement of the child during the pendency of the appeal. As a result, the Plaintiffs' claims on these issues are barred by the legal doctrines of judicial estoppel, res judicata and collateral estoppel.

- **Judicial estoppel** precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997); citing Colleton Reg. Hosp. v. MRS Med. Rev. Systs., 866 F.Supp.

896 (D.S.C.1994). The purpose or function of the doctrine is to protect the integrity of the judicial process or the integrity of courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries. Id.; citing 31 C.J.S. Estoppel & Waiver § 139, at 593 (1996). Judicial estoppel generally applies only to inconsistent statements of fact. Id.; citing Cannon v. H.K. Porter Co., 705 F.Supp. 288 (E.D.Va.1989). Although some courts have held to the contrary, the doctrine does not apply to conclusions of law or assertions of legal theories. Id.; citing United States v. Siegel, 472 F.Supp. 440 (N.D.Ill.1979).

Judicial estoppel applies because the Plaintiffs are taking a position different than the position they took in the Family Court. They consented to the custodial arrangement at issue as reflected in the South Carolina Supreme Court's decision cited above. Therefore, the Plaintiffs are barred from seeking damages for that same custody arrangement.

● **Res judicata** bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999); citing Sub–Zero Freezer Co. v. R.J. Clarkson Co., 308 S.C. 188, 417 S.E.2d 569 (1992). Under the doctrine of res judicata, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues **which might have been raised in the former suit**." Id. (Emphasis added); quoting Hilton Head Center of South Carolina, Inc. v. Public Service Comm'n of South Carolina, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Id.; citing Riedman Corp. v. Greenville Steel Structures, Inc., 308 S.C. 467, 419 S.E.2d 217 (1992); Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986).

Res judicata applies because the Plaintiffs are seeking monetary damages for the following:

For a custodial arrangement that was not only agreed upon by them in the Family Court, but was ruled upon and ordered by the Family Court; for attorney's fees they generated during the family court proceeding, which have been foreclosed by prior family court order; and for the Dalsings bringing and maintaining their family court action seeking adoption of the child, when the Supreme Court affirmed their right to do so. Each of these claims by the Plaintiffs is barred by the legal doctrine of res judicata.

● **Collateral estoppel**, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554–55, 684 S.E.2d 779, 782 (Ct. App. 2009); citing Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct.App.2009). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Id.; citing Beall v. Doe, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189–90 n. 1 (Ct.App.1984). "While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues." Id.; quoting Snavely v. AMISUB of S.C., Inc., 379 S.C. 386, 398, 665 S.E.2d 222, 228 (Ct.App.2008). The doctrine of collateral estoppel should not be rigidly or mechanically applied. Carrigg v. Cannon, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct.App.2001). Thus, even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it. State v. Bacote, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998).

(1) **Mutuality is no longer a requirement of collateral estoppel**: Regarding collateral estoppel, it is important to point out that in the Carolina Renewal case cited above, the

South Carolina Court of Appeals discussed that Carolina Renewal's absence from the previous slander lawsuit does not insulate it from issue preclusion. Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 555–56, 684 S.E.2d 779, 782–83 (Ct. App. 2009). As far back as 1982, our supreme court held the doctrine of collateral estoppel barred the plaintiff from relitigating an issue even though the defendant was not a party, or in privity with a party, to the initial action. Id.; citing Graham v. State Farm Fire & Cas. Ins. Co., 277 S.C. 389, 391, 287 S.E.2d 495, 496 (1982); Irby v. Richardson, 278 S.C. 484, 487, 298 S.E.2d 452, 454 (1982). In subsequent cases, our appellate courts have applied collateral estoppel against a defendant in actions in which the plaintiff was not a party, or in privity with a party, to the initial action. Id.; citing S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal–Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991); Beall, 281 S.C. at 372, 315 S.E.2d at 191. More recently, our supreme court has noted "**mutuality is no longer a requirement of collateral estoppel**." Id.; quoting Doe v. Doe, 346 S.C. 145, 149, 551 S.E.2d 257, 259 (2001) (Emphasis added). As these decisions make clear, the identity of the parties, and their relationships to one another, is simply not a concern when deciding whether to apply the doctrine of collateral estoppel. Id.

In dispensing with the mutuality requirement, our courts have applied collateral estoppel only when the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issue. Id.; citing S.C. Prop. & Cas. Ins. Guar. Ass'n, 304 S.C. at 213, 403 S.E.2d at 627 ("Nonmutual collateral estoppel may be asserted unless the party precluded lacked a full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him the opportunity to relitigate the issue.").

(2) **Collateral estoppel prevents relitigation of issues**: The doctrine of collateral estoppel prevents the relitigation of **issues**, not claims, necessarily determined in a former proceeding regardless of whether the identity of the causes of action in successive lawsuits

are the same. Id.; citing Judy, 383 S.C. at 7, 677 S.E.2d at 217 ("Collateral estoppel applies to specific issues, regardless of whether the claims in the first and subsequent suits are the same."); see also Doe v. Doe, 346 S.C. 145, 551 S.E.2d 257 (2001) (defendant was collaterally estopped from relitigating the issue of whether defendant had physically and sexually abused his children in children's civil action for assault and battery damages after guilty plea in related criminal action).

(3) Collateral estoppel prevents relitigation of determinations made by administrative tribunals: On this issue, our courts have applied the doctrine of issue preclusion to the factual determinations of **administrative tribunals**. Crosby v. Prysmian Commc'ns Cables & Sys. USA, LLC, 397 S.C. 101, 108–09, 723 S.E.2d 813, 817 (Ct. App. 2012); citing Bennett v. S.C. Dep't of Corr., 305 S.C. 310, 312, 408 S.E.2d 230, 231 (1991) ("This Court has repeatedly held that, under the doctrines of res judicata and collateral estoppel, the decision of an administrative tribunal precludes the relitigation of the issues addressed by that tribunal in a collateral action." (citing Earle v. Aycock, 276 S.C. 471, 475, 279 S.E.2d 614, 616 (1981))). (Emphasis added.) In order to determine whether an agency's factual finding is preclusive, the Court must first determine whether the particular finding meets the traditional elements of collateral estoppel. Id. The Court must then examine whether there is some countervailing consideration which necessitates relitigation. Id. A party claiming preclusive effect under collateral estoppel must demonstrate that the particular **issue** was "(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." Id.; quoting Carolina Renewal, 385 S.C. at 554, 684 S.E.2d at 782.

The Dalsings satisfy all of the elements for collateral estoppel. Further, there is no countervailing consideration which necessitates relitigation. Collateral Estoppel applies because the Plaintiffs are attempting to relitigate the custodial arrangement that was litigated and decided by the Family Court. They are also attempting to relitigate the decisions made by SCDSS (including OHAN) in the various investigations made and concluded unfounded.

In addition, as set out above, in the Removal Action in which Plaintiffs were intervening parties the Family Court was consistently charged with the responsibility to ensure that the placement of the child was safe and proper for the child. Plaintiffs could have brought to the attention of the Family Court the very allegations they are now attempting to bring against the Dalsings. Even though the wellbeing of the child and the safety and propriety of the child's placement were consistently issues before the Family Court, Plaintiffs did not bring to the Family Court the allegations which they are now seeking to bring before the Circuit Court. As a result, the Plaintiffs' claims are barred by the legal doctrine of collateral estoppel.

D. ADULT PLAINTIFFS HAVE NO ACTIONABLE DAMAGES

Plaintiffs have not identified any out-of-pocket damages in this action. Plaintiffs were not the parents of the child until January 2019, long after all of the events they complain of took place. Further, damages pertaining to Plaintiffs' alleged loss of companionship and/or emotional damages related to the child or to their relationship with the child are not recoverable in this action.

South Carolina "common law only allow[s] a parent to maintain an action for the loss of a child's services and earning capacity." Doe v. Greenville County Sch. Dist., 375 S.C. 63, 69 651 S.E.2d 305, 308 (2007) (ruling that South Carolina courts do not recognize a claim for filial consortium). "This right was based upon the concept that a father was entitled to compensation for the loss of services and earning capacity of his minor child." Id. at 68 (citing Hughey v. Auborn, 249 S.C. 470, 476, 154 S.E.2d 839, 841-42 (1967)). The damages that a parent can recover for an injury to this child do "not include the intangible losses of aid, companionship, and society." Doe, 375 S.C. at 69-70.

Here, the adult Plaintiffs are trying to seek emotional damages and damages for the loss of the child's companionship which are really loss of filial consortium claims barred under South Carolina law. Such damages are not recoverable under clearly established South Carolina

precedent. The adult Plaintiffs notably do not seek damages for the loss of the child's services or earning capacity, nor can they since she was not their legally adopted child until January 2019, and further, because she could have no earnings as a very young child.

Additionally, Plaintiffs' claims do not meet the requisite elements for a cause of action for negligent infliction of emotional distress, particularly since the alleged acts did not happen in their presence and they have no direct knowledge that the alleged acts even occurred. See Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 582, 336 S.E.2d 465, 467 (1985).

Since the adult Plaintiffs did not suffer and do not claim recoverable damages and, as discussed above, cannot demonstrate duties owed to them by the Dalsings, summary judgment is proper for all causes of action brought on behalf of the adult Plaintiffs.

E. ATTORNEY'S FEES CANNOT BE RECOVERED - WAIVED IN UNDERLYING CASE

Plaintiffs' deposition testimony reveals that a motivator for this lawsuit is an attempt to recover their attorney's fees from the years of family court litigation. Mrs. Plaintiff testified she was attempting to claim her attorney's fees from the underlying action as damages in this case. Mrs. Plaintiff denied that the fees were waived. She asked to see proof that they were waived. Proof was subsequently shown and Mrs. Plaintiff refused to believe it.

If Plaintiffs are seeking to be awarded attorney's fees generated during the family court litigation, that claim should have been made in the family court action. As part of the Family Court's order granting the Dalsings' Motion to Dismiss their action for adoption, Judge Tony Jones set out the following instructions on the issue of attorney's fees by his letter to the parties dated October 19, 2018:

> *"I have decided that the issue of attorney's fees will be handled by affidavits (including exhibits), as well as other submissions and briefs. Upon receipt of the respective submissions from each party, I will give the other side ten days within which to file a response or any objection to that which has been submitted. I will then make my decision*

regarding attorney's fees. ***Each party shall have thirty days from the date of this letter, or November 19, 2018, to provide me with their submissions****."* (Emphasis added).

Plaintiffs did not pursue their claim for attorney's fees and their attorney, Melinda Butler, specifically abandoned them as part of a mutual waiver with the Dalsings. Regarding any attempt by the Plaintiffs to recover attorney's fees generated in the present litigation, there is no statutory vehicle allowing for such award. As a result, any and all attempts by the Plaintiffs to recover attorney's fees, whether from the Family Court action or the present action, are barred. Therefore, the Dalsings are also granted summary judgment on this issue for these additional reasons.

F. NO COGNIZABLE DAMAGES

The South Carolina Supreme Court ruling bars many of the Plaintiffs' attempts at claims. As set forth above, the Plaintiffs are also barred from recovering their attorney's fees from the underlying actions in this case. In addition, the lack of actual abuse of the child and the wealth of evidence demonstrating there was no abuse of the child, including an Order by the OHAN Administrative Tribunal dismissing the one finding of abuse after hearing testimony and reviewing evidence, bars any superficial claims of abuse in this case. This determination was made during the time when SCDSS had legal custody of the child and had *in loco parentis* responsibility for the child. The lack of identifiable damages is an additional ground for granting summary judgment in this case.

G. PLAINTIFFS CANNOT PURSUE CLAIMS WHICH WERE PURSUED TO CONCLUSION BY SCDSS WHEN CHILD WAS IN LEGAL CUSTODY OF SCDSS

South Carolina's process regarding finding abuse is set forth in S.C. Code Ann. § 63-7-930. Reports of child abuse and neglect must be classified in the department's data system and recorded in one of three categories: Suspected, Unfounded, or Indicated. Id. Indicated findings must be based upon a finding of the facts available to the department that there is a preponderance of evidence supporting the finding.

SCDSS investigated all of the claims of abuse and neglect made against anyone in the Dalsings' household from June 6, 2014, when the child first went to Plaintiffs' home, until June 11, 2018, when the child was removed from the Dalsings' home. A "Finding" or "Indication" of abuse was made by SCDSS only against Mrs. Dalsing. Each of the claims of abuse and neglect were thoroughly investigated and were ultimately "unfounded," including the claim against Mrs. Dalsing.

The same law cited above pertaining to res judicata and collateral estoppel applies here to bar Plaintiffs' claims pertaining to alleged abuse. The issue of alleged abuse committed by Mrs. Dalsing was heavily litigated by SCDSS. The OHAN Administrative Tribunal Order states:

> "Respondent [SCDSS] has informed this Office that after a review of the evidence presented at the Fair Hearing on November 18 and 19 2019, the Department has concluded that the agency could not produce a preponderance of the evidence and the decision has been overturned. Further, Respondent agreed that the facts do not support a determination that the minor child, H.S., was abused nor neglected by Petitioner as defined by S.C. Code of Laws §63-7-20. Petitioner is the moving party and has the right to withdraw this request. Such a case is properly dismissed."

The dismissal of the indicated abuse finding which had initially been made against Mrs. Dalsing bars any claim of abuse against her in this case. At that time, SCDSS was the legal custodian of the child, *had in loco parentis* responsibility for the child and possessed the legal ability to protect the rights of the child for issues arising from her foster care placement. SCDSS (including OHAN) pursued to legal conclusion all statutorily required investigations, all administrative cases and action, and all family court cases and actions for all allegations being raised by Plaintiffs against the Dalsings in the present litigation. Therefore, the Dalsings' Motion for Summary Judgement is also granted on this ground.

H. PLAINTIFFS WERE PARTIES IN FAMILY COURT ACTION AND FAILED TO CHALLENGE UNFOUNDED INVESTIGATION DETERMINATIONS

As referenced above, Plaintiffs were intervening parties in the underlying SCDSS Family Court action ["Removal Action'] which brought the child into SCDSS foster care. In fact, the Plaintiffs were parties in all relevant underlying litigation in the Family Court. All allegations which Plaintiffs are now making against the Dalsings in the present litigation were made by Plaintiffs to SCDSS in the Family Court action, and were investigated by SCDSS and ultimately determined by SCDSS (including OHAN) to be unfounded. Plaintiffs had the legal ability to present these allegations to the attention of the Family Court, along with any allegations of deficiencies which Plaintiffs had in the investigations conducted by SCDSS, and seek a finding by the Family Court that the Dalsings had committed abuse and/or neglect of the subject child, and for the Family Court to remove the child from the Dalsings' care. For each and every allegation of abuse and/or neglect which Plaintiffs made against the Dalsings during the four-year Family Court action, Plaintiffs failed to request that the Family Court hold an evidentiary hearing and make a finding of abuse or neglect against the Dalsings, and failed to seek removal of the child from the Dalsings' care based upon these allegations of above and neglect. As a result, Plaintiffs are barred from pursuing any of the claims they are making regarding alleged abuse against the Dalsings in the present action.

I. THE SOUTH CAROLINA CHILDREN'S CODE DOES NOT CREATE A PRIVATE CAUSE OF ACTION

Plaintiffs' Third Cause of Action in their Amended Complaint alleging Negligence Per Se pursuant to alleged violations of the South Carolina Children's Code, 63-1-10 et seq, should be summarily dismissed against the Dalsings. South Carolina case law is clear that provisions of the South Carolina Children's Code do not create a private cause of action since the Code is concerned

with the protection of the public and not with the protection of an individual's private right. See generally Doe ex rel. Doe v. Wal-Mart Stores, Inc., 393 S.C. 240, 711 S.E.2d 908 (2011); citing Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007) (the Court found there could be no private right of action for failing to report suspected or known child abuse in accordance with § 63–7–310 and holding that the statute does not create a private (civil) cause of action). Further, to the extent any potential cause of action could exist under the South Carolina Children's Code, it appears such actions may apply to actors on behalf of governmental entities acting on behalf of the public rather than the Dalsings. Id. As such, the Plaintiffs' cause of action for Negligence Per Se is barred and must be summarily dismissed against the Dalsings without any further analysis.

J. ADULT PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

The claims made by the adult Plaintiffs in this case are barred by the three-year statute of limitations set forth in S.C. Code Ann. § 15-3-530. The Plaintiffs filed their Complaint on March 11, 2020. Therefore, any claims made by the adult Plaintiffs regarding their own alleged injuries and damages for actions occurring before March 11, 2017 are time-barred. As set forth above, the thrust of the adult Plaintiffs' claims surround the placement of the child with the Dalsings, which the Plaintiffs have known about since June 4, 2014, the date of the first family court hearing they attended in the underlying case. As a result, the statute of limitations bars these claims. This is an additional reason for granting the Dalsings summary judgment in this case.

K. THE DALSINGS' BANKRUPTCY DISCHARGED ALL DEBTS

The Dalsings filed Voluntary Petition for bankruptcy on October 31, 2019. The Dalsings' Chapter 7 "No Asset" Bankruptcy Order of Discharge was entered on February 20, 2020.

The Plaintiffs filed their original Complaint on March 11, 2020, only 20 days after the February 20, 2020 Bankruptcy Court Order Discharging Debtors. See Exhibit 20. They filed their Amended Complaint on March 25, 2020. See Exhibit 21. On May 20, 2020, the Dalsings filed their Answer to the Plaintiffs' Amended Complaint, specifically setting forth in Paragraph 75 that "The Dalsings assert that the plaintiffs' claims are, or may be, barred and/or discharged by the Dalsings' filing for bankruptcy, as reflected in case no. 7:2019-bk-05767 (scb)."

Applicable law makes it clear that once the Plaintiffs were placed on notice of the bankruptcy, they were precluded from pursuing or continuing any action against the Dalsings without first seeking relief from the Bankruptcy Court on whether their claim is viable following the Bankruptcy Court's Order of Discharge. Further, applicable law makes it clear that the Dalsings are entitled to attorney's fees for the continued pursuit of the above-captioned case once the Plaintiffs were put on notice of the bankruptcy and continued to pursue this case rather than proceeding to the Bankruptcy Court to address the issue. The Dalsings' claim for attorney's fees relating to Plaintiffs' pursuit and/or continuation of their action against the Dalsings is a matter for the Bankruptcy Court and not this Court.

- **Plaintiff Admitted to Knowing of Dalsings' Bankruptcy While It was Pending**: In the deposition of Mrs. Plaintiff, she testified that she knew about the Dalsings' bankruptcy while it was pending. However, she did not take any actions to make a claim during the pendency of the bankruptcy action, asked why should she, and conceded that she was making a claim in this case because she wants to go to court. To date, the Plaintiffs have not taken any action to address whether this lawsuit is barred by the Dalsings' bankruptcy discharge, despite having notice while the bankruptcy action was pending and despite the bankruptcy being pled as an affirmative defense in this case.

11 U.S.C. Section 727(b) states that:

> "Except as provided in section 523 of this title, a discharge under subsection (a) of this section **discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title**." (Emphasis added).
>
> 11 U.S.C. Section 523(a)(3) provides:
>
> "A debt is excepted from discharge if it was... neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, **unless such creditor had notice or actual knowledge of the case in time for such timely filing**; or (B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request." (Emphasis added).

The Dalsings never anticipated the Plaintiffs would file a lawsuit against them and, as such, did not know to list them as creditors in their bankruptcy action. Regardless, as admitted by Mrs. Plaintiff in her deposition, she had actual knowledge of the bankruptcy action while it was pending, which satisfies the Dalsings' burden of demonstrating the Plaintiffs' notice or actual knowledge. Id. Based on that actual knowledge and the failure to take action, the Plaintiffs' claims were discharged in the bankruptcy and there are no applicable exceptions to that discharge. See 11 U.S.C. § 727(b) and 11 U.S.C. § 523(a)(3), supra.

- **Process for Seeking Relief from Bankruptcy Discharge - *In re Bearden***: In the case of In re Bearden, the Creditor learned of the Debtor's bankruptcy after it was closed and after filing a lawsuit against the Debtor. See In re Bearden, 382 B.R. 911, 923 (Bankr. D.S.C. 2008). The Bankruptcy Court held that the **Creditor violated the discharge injunction by failing to dismiss the Debtor from the state court litigation after the Creditor were served with the answer** which indicated that Debtor had received a discharge. Id. The Bankruptcy Court stated that the **correct**

procedure would have been to dismiss Debtor from the state court litigation without prejudice and then file an adversary proceeding seeking a determination of nondischargeability pursuant to §523(a)(3)(B) and §523(a)(2), (4), or (6). Id.

The Bankruptcy Order of Discharge bars the Plaintiffs' claims in this case. As a result, this is an additional reason the Dalsings are entitled to summary judgment in their favor on the entirety of the Plaintiffs' claims in this case.

L. PLAINTIFFS PRESENT NO SUBSTANTIVE EVIDENCE OF ABUSE OF CHILD BY DALSINGS

Plaintiffs' own testimony acknowledges that they have no knowledge that the Dalsings abused the minor child. In their depositions, Plaintiffs specifically testified and admitted that they have no evidence that the Dalsings abused the minor child. However, they claim the Dalsings failed to properly supervise the minor child and that she was hurt by the other children in the home based upon that alleged insufficient supervision. The Plaintiffs produced no evidence of any specific act of failing to properly supervise the child, except to say that the child was injured in the home of the Dalsings and therefore the Dalsings are responsible. The Plaintiffs did not provide evidence to demonstrate that the Dalsings abused the child or failed to supervise the child. In addition, as set forth above, the Plaintiffs' claims are barred by the legal doctrines of res judicata, collateral estoppel and judicial estoppel since all of these issues were litigated and/or could have been raised in the Family Court and there are no ultimate findings of abuse by the Dalsings.

M. CHILD'S STATEMENTS DO NOT SUPPORT ABUSE OR NEGLECT BY DALSINGS

The child lived with the Dalsings from August 27, 2013 (when she was 8 months old) through June 11, 2018 (when she was 5 years, 6 months old). The last forensic interview of August 15, 2018, is critical because it occurred after the child had been out of both the homes of Plaintiffs

and the Dalsings for two months, and at a time when the child (then 5 years, 8 months old) could not be additionally manipulated, including having suggestive thoughts or comments made to her by the Plaintiffs prior to the interview. On this issue, it is important to note that the child stated that someone had talked to her about her prior April 2, 2018 forensic interview in advance of the interview, but would not say who that was. In the subsequent August 15, 2018 forensic interview, the child denied ever being harmed by anyone.

The interviews of the child show that the child was thriving and not appearing at all fearful or abused. She was happy and talkative. The interviews do not support allegations of abuse against anyone. A review of the video footage, which includes interviews on April 2, 2018; May 18, 2018; and August 15, 2018 reveals that the child consistently denies that anyone has ever touched her private areas. She also goes to the bathroom by herself, meaning the Dalsings' children did not take her to the bathroom.

Comments made by the child during the interviews demonstrate manipulation by the Plaintiffs. The child refers to the Dalsings' home as "the other kids' house," which is a term that developed after the child began spending weekends with the Plaintiffs. When asked what the Dalsings said about the Plaintiffs, the child could not provide examples. However, when asked what the Plaintiffs say about the Dalsings, the child stated that Mrs. Plaintiff stated, "I am going to get you next time."

There is no punishment at the Plaintiffs' home for anything. The Plaintiffs just give her toys and candy. In fact, in one of the Plaintiff's depositions, it is discussed that the Plaintiffs had purchased the child over 350 Barbie Dolls. It is important to note that the child is the only child living in the Plaintiffs' home, but she was 1 of 8 children living in the Dalsings' home, 2 adult children, one in high school and 5 children under the age of 10 at the time. Much of what the child complains about in the interviews appears to be conflict with some of the other children.

However, even those complaints are inconsistent. Regardless, they do not rise to the level of the abuse alleged by the Plaintiffs.

The child's complaints during the interviews include not liking an older child because the older child folds her arms when mad at the child, claiming that younger kids closer to her age punched, kicked and hit her, complaining about being put in timeout by an older adult child, being screamed at, being told "Shhhh," claiming that another child stole a cookie, and being hit by another child. However, she separately stated the younger siblings close to her age punched one another, but not her. Further, she claims that Mr. Dalsing witnessed an older child hit her and immediately took corrective action. Except for this episode, there was no evidence presented which indicated that either of the Dalsings ever knew of the child being harmed or mistreated by any of the other children in the Dalsings' home.

Interestingly, during the April 2, 2018 interview, the child discusses ripping mommy (a play dough arm of Mrs. Dalsing) to pieces because she hates her and loves the Plaintiffs. This narrative was stated toward the beginning of the interview, which took place just after the child had left her weekend visit with the Plaintiffs. The child also stated that Mrs. Dalsing puts her in timeout, spanks her on the bottom, and hits her all over, and that Mrs. Dalsing spanks all of the other kids in the same places on their bodies and that they get placed in timeout as well. As discussed above, there were 8 kids in the home, with 5 being under the age of 10. No allegations of abuse were made regarding any of the other children and no other children were removed from the home. The child is in an arm cast during the April 2, 2018 interview. The child explained that she broke her arm when she tripped over a dog in the Dalsings' home. She stated she did not like the dog because it kept tripping over her (actually meaning the child was tripping over the dog).

In the May 18, 2018 interview, the child denies that anyone has ever hit her in the face or mouth. In this interview, she states that mommy (Mrs. Dalsing) has a good side and no bad

side. She states that Mrs. Dalsing does all things good. In fact, she claims Mrs. Dalsing only says "shush it" and Mr. Dalsing says "Hurry up kids" when asked about their conduct.

As set out above, in her deposition testimony, Interviewer Flassing was asked the following question regarding the child's second forensic interview of August 15, 2018: "Q: So, from this forensic interview, did you get anything that would indicate that she has been abused or neglected by Tammy and Edward Dalsing?" Interviewer Flassing responded: "A: She did not make any disclosures about that." The transcription of the second forensic interview sets out the child's own statements that evidence that the Dalsings did not abuse or neglect her.

N. PLAINTIFFS' DEPOSITION TESTIMONY DOES NOT SUPPORT ABUSE OR NEGLECT BY DALSINGS

The collective testimony, when compared to the physical evidence in this case, demonstrates the lack of merit of the Plaintiffs' claims. The gist of the Plaintiffs' claims against the Dalsings is that the Plaintiffs believe the child was abused, they believe the abuse occurred in the Dalsings' home, and believe that the Dalsings are responsible for anything that happens in their home.

The testimony continues from there, detailing alleged incidents where children in the Dalsings' home allegedly hurt the child. The claims include the child being put in timeout, another child hitting her with a toy, and alleged emotional abuse due to being placed in a pull up at bedtime. Mrs. Plaintiff stated she could not provide specific instances, but she reported every incident to SCDSS as soon as she was aware of the incident.

Counsel for the Dalsings presented voluminous evidence that they expected the Plaintiffs to rely upon to suggest abuse occurred. Counsel for the Dalsings argued that none of the voluminous evidence presented demonstrated that actual abuse occurred. Further, they argued that none of the evidence specifically connects the Dalsings to any alleged abuse. On this issue, the Plaintiffs presented some duplicative evidence and additional evidence to argue that abuse

occurred. However, construed in the light most favorable to the Plaintiffs, the evidence did not establish that the Dalsings abused the child or that they negligently supervised the child while abuse occurred. The Plaintiffs' expert's deposition transcript was presented. However, the expert's testimony pertained to alleged damages associated with the child being transferred between the two households for years, which was a condition ordered by the Family Court.

All of the evidence presented (except for the expert's transcript) was evidence that was available to be presented to SCDSS and to the Family Court. As set forth above, all of this evidence (other than the expert's deposition transcript – where the expert simply analyzed the previously available evidence) was available when the Administrative Hearing went forward where it was determined that there was not a preponderance of the evidence to demonstrate that Mrs. Dalsing abused the child.

The Plaintiffs heavily relied upon Dr. Lamb's evaluations, which were presented during the Administrative Hearing through her testimony and considered by the Hearing Officer. The Plaintiffs did not present any relevant evidence not available during the Family Court actions. As set forth above, all of that information was available during the prior litigation, where no ultimate findings of abuse were made. As a result, the Plaintiffs' claims are barred by the legal doctrines of res judicata, collateral estoppel and judicial estoppel. Further, the Plaintiffs did not present any evidence demonstrating that Mr. or Mrs. Dalsing abused the child and/or allowed abuse to happen.

The Plaintiffs also did not present any legal arguments or case law to contradict the Dalsings' arguments pertaining to collateral estoppel, res judicata, judicial estoppel, bankruptcy, the statute of limitations, duty/negligence, and/or the Children's Code. The lack of evidence of abuse, combined with the lack of legal arguments to combat the Dalsings' arguments are additional grounds for granting their Motion for Summary Judgment in this case.

Based on the foregoing, the Dalsings' Motion for Summary Judgment is HEREBY GRANTED IN ITS ENTIRETY and the Plaintiffs' claims against the Dalsings are DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

_____
The Honorable Daniel Dewitt Hall
Presiding Judge

Date: _____
Union, South Carolina

Union Common Pleas

Case Caption: H. A. , plaintiff, et al VS South Carolina Department Of Social Services , defendant, et al

Case Number: 2020CP4400104

Type: Order/Summary Judgment

So Ordered

s/Daniel D. Hall 2753