STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
James Chaffin and Marietta Chaffin, Plaintiffs, v. Richland County Sheriff's Department, Deputy Brian Metz, Investigator Roy Livingston, Tallie and Devra Lackey, individually and as the Parents to Minor [redacted] Defendants.	)	Civil Action No. 2014-CP-400-2209 **ORDER GRANTING MOTION TO DISMISS ON BEHALF OF DEFENDANTS TALLIE AND DEVRA LACKEY, INDIVIDUALLY AND AS THE PARENTS TO MINOR [redacted]**

This matter comes before the Court on the Motion to Dismiss for Failure to State a Claim under Rule 12(b)(6) filed by Defendants Tallie Lackey ("Tal") and Devra Lackey ("Devra"), individually and as the Parents to Minor [redacted] (collectively the "Lackey Defendants") and the Response in Opposition filed by Plaintiffs James Chaffin ("Chaffin") and Marietta Chaffin ("Mrs. Chaffin") (collectively "Plaintiffs"). The Court held a hearing on the Lackey Defendants' Motion to Dismiss on July 21, 2014, in Columbia, South Carolina, where it heard from all parties regarding the Motion at issue.[1] John Simmons and Derek Shoemake, of the Simmons Law Firm, appeared for the Lackey Defendants, Robert D. Garfield, of Davidson & Lindemann, P.A., appeared for the remaining Defendants, and Aimee Zmroczek, of A.J.Z. Law Firm, appeared for Plaintiffs.

[1] By way of separate order, the Court has granted a motion to dismiss filed by Defendants Richland County Sheriff's Department, Deputy Brian Metz, and Investigator Roy Livingston.

For the reasons discussed below, the Court grants the Lackey Defendants' Motion and all claims against the Lackey Defendants are dismissed.[2]

FACTUAL ALLEGATIONS

On January 8, 2007, the Lackey Defendants' daughter – who at the time was a minor – revealed to a therapist that Chaffin had sexually abused her. Pls.' Compl. at ¶ 7. After the daughter's therapist notified police, members of the Richland County Sheriff's Department ("RCSD") interviewed the daughter and her mother, Devra. *Id.* at ¶¶ 8–9. In the course of the interviews, the daughter revealed the details of her sexual assault allegations. *Id.* at ¶¶ 11–15, 23. Investigators also interviewed the daughter's therapist. *Id.* at ¶ 10.

On February 15, 2007, RCSD investigators obtained a warrant charging Chaffin with Criminal Sexual Conduct with a Minor, and on March 9, 2007, investigators did in fact arrest him. *Id.* at ¶¶ 16–17. Chaffin was ultimately released from custody on March 13, 2007. *Id.* at ¶ 20. According to Plaintiffs' Complaint, the Richland County Solicitor's Office ultimately dismissed the charges against Chaffin on September 5, 2012. *Id.* at ¶ 24.

STANDARD OF REVIEW

A complaint is subject to dismissal under South Carolina Rule of Civil Procedure 12(b)(6) when the complaint "fail[s] to state facts sufficient to constitute a cause of

[2] Plaintiffs alleged nine causes of action against all Defendants, though Plaintiffs skipped from "Third" to "Fifth" in identifying their causes of action. Only the Third, Fifth, Sixth, Seventh, Ninth and Tenth Causes of Action were brought against the Lackey Defendants. Plaintiffs' Complaint does not name the Lackeys' daughter, who is now of majority age, as a Defendant. However, the arguments herein would apply equally to her.

action." Rule 12(b)(6), SCRCP. According to the South Carolina Supreme Court, dismissal under Rule 12(b)(6) is thus appropriate if the facts alleged and inferences reasonably deducible from them, viewed in the light most favorable to the plaintiff, do not entitle the plaintiff to relief on any theory or show that the claim is outside the applicable statute of limitations. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007); *Brown v. Leverette*, 291 S.C. 364, 367, 353 S.E.2d 697, 699 (1987). Generally, in considering a Rule 12(b)(6) motion, the trial court must base its ruling upon allegations set forth on the face of the complaint. *Flateau v. Harrelson*, 355 S.C. 197, 201–02, 584 S.E.2d 413, 415 (Ct. App. 2003).

DISCUSSION

The Court dismisses each of Plaintiffs' claims against the Lackey Defendants, and thus the Lackey Defendants are dismissed from this action.[3]

[3] The Court notes that in their Response in Opposition and during oral argument Plaintiffs did little to address the merits of the arguments made by the Lackey Defendants. It appears Plaintiffs' primary argument in opposition was to allege that Tal Lackey, the only Lackey Defendant to have been served, untimely filed the Motion to Dismiss. However, by Plaintiffs' own concession, Tal received the Complaint by mail on April 15, 2014, and filed and served his response on May 16, 2014, thirty-one days later. Although Rule 12 sets the typical time to respond to a civil complaint at thirty days, Rule 6(e) specially affords that "[w]henever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or upon a person designated by statute to accept service, five days shall be added to the prescribed period." Rule 12(b)(6), SCRCP. Thus, the Motion to Dismiss was filed well within the thirty-five day window Tal had to respond. *See, e.g., Moran v. Guardian Auto. Products, Inc.*, 3:05 CV 7184, 2005 WL 1308879 (N.D. Ohio June 1, 2005) (noting that under the comparable federal rule defendant was afforded the additional days provided by Rule 6 when complaint was served by certified mail); *Tanner v. Pizatella*, 89 F.3d 846 (9th Cir. 1996) (same).

I. False Imprisonment

Plaintiffs' Third Cause of Action for false imprisonment is time-barred and, alternatively, fails to state facts sufficient to constitute a cause of action.

To prevail on a claim for false imprisonment, a plaintiff must establish the following: (1) the defendant restrained the plaintiff, (2) the restraint was intentional, and (3) the restraint was unlawful. *Gist v. Berkeley County Sheriff's Dep't*, 336 S.C. 611, 618, 521 S.E.2d 163, 167 (Ct. App. 1999).

The statute of limitations for false imprisonment in South Carolina is two years. S.C. Code Ann. § 15-3-550 (Supp. 2002). According to at least one South Carolina Supreme Court case, the limitations period begins to run at the time of the false imprisonment. *Miller v. Dickert*, 259 S.C. 1, 3, 190 S.E.2d 459, 460 (1972). However, in a more recent albeit unpublished case from the South Carolina Court of Appeals, the court stated that "[w]e embrace the rule adopted by other jurisdictions that the statute of limitations for false imprisonment begins to run when the plaintiff is released following an arrest." *Canzater v. City of Columbia*, Op. No. 2004-UP-054 (S.C. Ct. App. Filed Jan. 22, 2004). Certainly, the rule in *Canzater* embodies the majority approach. *See* 8 S.C. Jur. False Imprisonment § 17 (noting that it is generally held that accrual commences upon release from confinement); *Campbell v. Hyatt Regency*, 388 S.E.2d 341, 342 (Ga. Ct. App. 1989) ("An action for false imprisonment 'must be brought within two years of its accrual . . . which is from the release from imprisonment.' "); M.C. Dransfield, *When Statute of Limitations Begins to Run Against Action for False Imprisonment or False Arrest*, 49 A.L.R.2d 922 (1956) (stating the general rule is that the statute of limitations for false imprisonment "begins to run from the termination of the imprisonment and not

from the time when the proceedings under which the plaintiff's arrest occurred ended . . .").

Here, Plaintiffs ran afoul of the statute of limitations under either approach. As Plaintiffs themselves state, Chaffin was arrested on March 9, 2007, and released from custody on March 13, 2007. Pls.' Compl. at ¶¶ 17, 20. Applying either the statute of limitations invoked in *Miller* or the majority rule explained in *Canzater,* when Plaintiffs filed their Complaint on April 4, 2014, it is was more than seven years after Plaintiffs cause of action began to accrue and more than five years after the statute of limitations had run.

Even if Plaintiffs' false imprisonment claim was not time-barred, it would fail on its face. By the Complaint's own factual allegations, the Lackey Defendants did not imprison Chaffin. The daughter went to a therapist, and it was the therapist who reported the crime to police. The Complaint merely alleges Devra (and her daughter) provided statements and potential evidence to law enforcement officers after being contacted by those law enforcement officers. Pls.' Compl. at ¶¶ 8, 14–15. While a party need not physically restrain a defendant to be liable for false imprisonment, South Carolina law makes clear that a defendant must create the false imprisonment. *See Jones by Robinson v. Winn-Dixie Greenville, Inc.*, 318 S.C. 171, 175, 456 S.E.2d 429, 432 (Ct. App. 1995). There is simply no support under South Carolina law for the proposition that responding to a police officer constitutes false imprisonment.

II. Malicious Prosecution

Plaintiffs' Fifth Cause of Action fails to allege sufficient facts to constitute a cognizable malicious prosecution claim against the Lackey Defendants.

"[T]o maintain an action for malicious prosecution, a plaintiff must establish: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." *Parrott v. Plowden Motor Co.*, 246 S.C. 318, 321, 143 S.E.2d 607, 608 (1965); *see also Eaves v. Broad River Elec. Co-op., Inc.*, 277 S.C. 475, 477, 289 S.E.2d 414, 415 (1982).

When viewing the facts alleged in the Complaint, Plaintiffs fail to make any showing of the second element for malicious prosecution. It appears undisputed that the Lackey Defendants themselves did not institute criminal proceedings, as they are private citizens. Further, when looking at the scant factual allegations against the Lackey Defendants regarding this claim, there is no allegation that criminal proceedings were instituted at their insistence. By Plaintiffs' own admissions, after the daughter discussed Chaffin's abuse with her therapist, the therapist reported the crime to police and Devra simply responded to interview questions from investigators and provided possible evidence she had in her possession. Pls.' Compl. at ¶¶ 7–8, 11–14. At no point does the Complaint allege, nor can it be inferred, that the Lackey Defendants insisted on criminal charges. As the South Carolina Supreme Court has explained, in order to maintain an action for malicious prosecution, "it must be shown that [a defendant] was affirmatively active in instigating or participating in the prosecution." *Gibson v. Brown*, 245 S.C. 547, 550, 141 S.E.2d 653, 654 (1965).

III. Defamation

Plaintiffs' Sixth and Seventh Causes of Action allege defamation and defamation *per se* against the Lackey Defendants. Both of these defamation claims are outside of the statute of limitations and, alternatively, fail to state facts sufficient to constitute a cause of action.

In bringing a claim of defamation or defamation *per se*, a Plaintiff must prove the following core elements: (1) a false and defamatory statement by the defendant concerning the plaintiff; (2) an unprivileged communication; (3) fault on the defendant's part in publishing the statement; and (4) either actionability of the statement irrespective of special harm or the existence of special harm to the plaintiff caused by the publication. *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002); *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 518, 506 S.E.2d 497, 506 (1998). Both defamation and defamation *per se* have two-year statutes of limitation that begin to run when the defamatory statement is made. S.C. Code Ann. § 15-3-550 (Supp. 2002); *Jones v. City of Folly Beach*, 326 S.C. 360, 367, 483 S.E.2d 770, 774–75 (Ct. App. 1997) (finding that the "date of utterance rule" and not the "discovery rule" applies in defamation actions).

Plaintiffs' defamation causes of action are untimely. The only statements referenced in the Complaint were made in 2007, more than seven years before the Complaint was filed. *See* Pls.' Compl. at ¶¶ 7–8, 10–15, 54. No reading of Plaintiffs' Complaint would make the defamation causes of action timely.

In the alternative, the defamation causes of action also fail to state facts sufficient to constitute causes of action. The Complaint fails to show that the Lackey Defendants

did anything more than respond to police officers investigating the daughter's statements to her therapist. *See Bell v. Bank of Abbeville*, 208 S.C. 490, 494, 38 S.E.2d 641, 643 (1946) (holding that communications and statements made by citizens to police officers or other law enforcement personnel regarding crimes that may have been committed did not constitute defamation).

IV. Abuse of Process

The factual allegations of Plaintiffs' Ninth Cause of Action fail to constitute a claim for abuse of process.

A plaintiff alleging abuse of process in South Carolina must assert two essential elements: 1) an "ulterior purpose," and 2) a "willful act in the use of the process not proper in the conduct of the proceeding." *Hainer v. Am. Med. Int'l, Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997). As to the second element, the South Carolina Supreme Court has stated that "[s]ome definite act . . . not authorized by the process or aimed at an object not legitimate in the use of the process is required." *Hainer*, 328 S.C. at 136, 492 S.E.2d at 107 (quoting *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 209, 153 S.E.2d 693, 694 (1967)). Thus, the element comprises three components: 1) a "willful" or overt act 2) *"in the use of the process"* 3) that is improper because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective. *Id.* (emphasis added).

Put simply, by any reading of Plaintiffs' Complaint, the Lackey Defendants did not use process. Devra and her daughter simply responded to interview questions from investigators and provided possible evidence Devra had in her possession. Pls.' Compl. at ¶¶ 7–8, 11–14. As the South Carolina Supreme Court has explained, "an allegation that a party had a 'bad motive' or an 'ulterior purpose' in bringing an action, standing alone, is

insufficient to sustain an abuse of process claim." *Pallares v. Seinar*, 407 S.C. 359, 371, 756 S.E.2d 128, 133 (2014) (quoting *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 551, 730 S.E.2d 340, 352 (Ct. App. 2012)). Further, even assuming process was used, the Complaint is bereft of any supposed overt act committed by the Lackey Defendants *in the use* of process.

V. Loss of Consortium

Plaintiffs' Tenth Cause of Action – loss of consortium on behalf of Mrs. Chaffin – fails to state facts sufficient to constitute that cause of action and, in the alternative, is untimely.

Under South Carolina law, unlike that of some other states, loss of consortium is an independent action, not derivative. *Preer v. Mims*, 323 S.C. 516, 521, 476 S.E.2d 472, 475 (1996). However, wrongful conduct is still required on the part of a defendant. In fact, as the South Carolina Supreme Court has explained, "[g]enerally, a plaintiff spouse's claim for loss of consortium fails if the impaired spouse's claim fails, whether the claim is considered separate and independent from the impaired spouse's claim or derivative in nature." *Lee v. Bunch*, 373 S.C. 654, 663, 647 S.E.2d 197, 202 (2007) (quoting 41 Am.Jur.2d Husband and Wife § 227 (2007)).

As discussed herein, Plaintiffs have failed to adequately allege any legal wrongdoing by - or a viable cause of action against - the Lackey Defendants. Further, the loss of consortium claim states no factual allegations apart from the conduct complained of previously in the Complaint. Pls.' Compl. at ¶¶ 74–77. Therefore, because Plaintiffs have failed to show any wrongdoing on behalf of the Lackey Defendants, Mrs. Chaffin's loss of consortium claim fails. *See Lee*, 373 S.C. at 663, 647 S.E.2d at 202 (explaining

that while not derivative, a loss of consortium claim fails if the impaired spouse's claim fails).

Loss of consortium claims are also subject to a three-year statute of limitations. *See* S.C. Code Ann. § 15–3–530(5) (2009) (limiting to three years "action[s] for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law, and those provided for in Section 15–3–545 [medical malpractice]"); *Jones v. Wesby*, No. 5:09-CV-2204-MBS, 2010 WL 3420026 (D.S.C. Aug. 26, 2010) (applying South Carolina law and holding that a loss of consortium claim is subject to a three-year statute of limitations); *Anderson v. Short*, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (applying a three-year statute of limitations to loss of consortium claim). Although loss of consortium is an independent action, the right of action begins to accrue when the spouse first sustains the loss of the services, society and companionship of the spouse. *Preer*, 323 S.C. at 521, 476 S.E.2d at 475.

Here, Mrs. Chaffin's claim falls well outside the applicable statute of limitations. Plaintiffs' Complaint makes clear that the injuries to Mrs. Chaffin began upon Chaffin's arrest on March 9, 2007. Thus, more than seven years have passed since her cause of action began to accrue and her claim against the Lackey Defendants is time-barred.

CONCLUSION

Based upon the foregoing, Plaintiffs' Third, Sixth, Seventh and Tenth causes of action are untimely and, alternatively, fail to allege cognizable causes of action against the Lackey Defendants. Moreover, Plaintiffs failed to properly plead or state cognizable claims for their Fifth and Ninth Causes of action against the Lackey Defendants.

Therefore, the Lackey Defendants' Motion to Dismiss is **GRANTED**, all claims against the Lackey Defendants are **DISMISSED**, and the Lackey Defendants are **DISMISSED** from this action.

It is so **ORDERED** this 8 day of September, 2014.

The Honorable Robert E. Hood
Columbia, South Carolina