

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Hon. S. Jackson Kimball, III
Special Circuit Court Judge
York County Master in Equity

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SC Court of Appeals

Trial Case No. 2017-CP-46-00867
Appellant Case No. 2017-002024

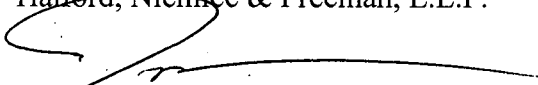
Michael Frank, individually, and as the parent of a minor.....Appellant

vs.

South Carolina Department of Social Services.....Respondents

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Master in Equity engage in abuse of discretion and err at law by ruling that Plaintiff's injury and causes of action were time-barred?
- II. Was it abuse of discretion and error of law for the trial judge to find that Plaintiff failed to allege facts sufficient to support *any* cause of action against defendant under *any* theory of liability where Plaintiff alleged gross negligence?
- III. Did the trial court err under McCormick and the standard of review by failing to find the alleged facts in the complaint and inferences reasonably deducible therefrom most favorably to the Plaintiff?

PROCEDURAL STATEMENT OF THE CASE

This is a York County action filed by Michael Frank March 23, 2017. By its Complaint, Plaintiff alleged (1) gross negligence, (2) defamation, and (3) outrage as against the South Carolina Department of Social Services ("DSS"). Plaintiff's claims arose out of DSS investigations of the plaintiff in a Family Court case, ultimately dismissed for failure to prosecute on March 24, 2015 by Family Court Judge Thomas White, IV.

In this case, on June 23, 2017 the master in equity entered an Order dismissing all of plaintiff's causes of action pursuant to Rule 12(b)(6) and the Tort Claims Act. Plaintiff timely filed a Rule 59(e) motion for reconsideration. By Order dated August 30, 2017 the Master in Equity court denied plaintiff's motion to reconsider, alter or amend. Plaintiff now appeals to this court alleging that the master in equity erred in application of S.C. Code Ann. 15-78-10, et. seq. by ruling as a matter of law that plaintiff's complaint failed to allege facts sufficient under *any* theory of liability against DSS under the master's application of the Tort Claims Act under Rule 12(b)(6) SCRPC.

STATEMENT OF THE FACTS

Michael Frank temporarily lost custody of his minor child while under DSS investigation that commenced against him on or about October 31, 2013. (Complaint, p. 1). Allegations were made as against Frank and *re-asserted* as the South Carolina Department of Social Services performed an investigation over the course of several weeks, ultimately ending March 24, 2015. On this date Family Court Judge Thomas H. White, IV dismissed all of DSS claims. DSS alleged in York County Family Court that Frank was an alcoholic who drank excessively and was physically abusive to his minor son. A temporary hearing occurred in York County Family Court on December 10, 2013 in the private custody case between Frank and his ex-wife.

DSS agents attended the hearing where on December 10, 2013 hearing DSS *re-asserted* allegations against Frank arising from DSS investigation, including asserting that Frank “was an alcoholic who drank excessively and was physically abusive to his son”. (May 15, 2017 Transcript p. 5). (Complaint, p. 1) Until the December 10, 2013 hearing Michael Frank equally shared custody of his minor son with his ex-wife. The allegations made by DSS resulted in Frank being stripped of custody and imposed with supervised visitation. Plaintiff alleged in its complaint DSS gross negligence that directly caused Plaintiff and his son substantial and grave emotional, physical, financial and psychological harm. (Complaint, p. 2).

Plaintiff's complaint also alleged gross negligence against DSS in failing to perform any substantive investigative work throughout the case. Instead of performing substantive investigation, Frank alleges DSS instead engaged in gross negligence in becoming a body of advocacy against him after failing to perform substantive

investigation and fact finding. (Complaint, p. 2). Predicated on DSS failures, Frank alleges that DSS engaged in false witness by re-asserting testimony against him on December 10, 2013. (Complaint, p. 3). On March 24, 2015 the Defendant DSS had their investigation closed and their legal filings dismissed. Judge Thomas H. White, IV dismissed the action *sua sponte* citing DSS failure to prosecute. (March 24, 2015 Order, p. 2). Plaintiff then filed the case sub justice in circuit court. This appeal follows two orders of the master in equity in York County applying the Tort Claims Act and dismissing Plaintiff's claims under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. The court applied the Tort Claims Act (S.C. Code Ann. §15-78-10 et. seq. (1976, as amended) finding the act governs all tort claims against government entities and "...is the exclusive civil remedy available in an action against a governmental entity or its employees." (June 22, 2017 Order, p. 3). Flateau v. Harrelson, 355 S.C. 197, 203, 584 S.E.2d 413, 416 (Ct. App. 2003) (citing Murphy v. Richland Mem'l Hosp., 317 S.C. 560, 455 S.E.2d 688 (1995)). The issue on appeal is whether it was abuse of discretion and error of law for the court to find, pursuant to Rule 12(b)(6) and the Tort Claims Act that plaintiff's injury arose effective December 10, 2013 thus being-barred.

STANDARD OF REVIEW

A dismissal of an action pursuant to Rule 12(b)(6) is directly appealable. Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). "A trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law." McEachern v. Black, 329 S.C. 642, 647, 496 S.E.2d 659, 661 (Ct. App. 1998). When reviewing a dismissal pursuant to Rule 12(b)(6), SCRCF, we apply the same standard of review as the trial court. Doe v. Marion, 361

S.C. 463, 470, 605 S.E.2d 556, 560 (Ct. App. 2004), cert. granted, Apr. 19, 2006. The trial court's ruling on a 12(b)(6) motion must be based solely on the allegations in the complaint. Williams v. Condon, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). The pleadings must be construed in the light most favorable to the plaintiff. Id. The motion will not be sustained if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case. Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995).). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Spence v. Spence, 368 S.C. 116, 628 S.E.2d at 874 (2006). "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." Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007).

"An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law." Maybank v. BB&T Corp., 416 S.C. 541, 567, 787 S.E.2d 498, 511 (2016). Generally, the interpretation of a statute of a matter of law. Eldridge v. City of Greenwood, 331 S.C. 398, 503 S.E.2d 191 (Ct. App. 1998).

ARGUMENT

- I. The master in equity engaged in abuse of discretion and erred as a matter of law by ruling Plaintiff's injury and all causes of action were time barred.

The court ruled as a matter of law that Plaintiff would have been required to file his lawsuit on or before December 10, 2015 and that Plaintiff commenced suit "well over a year after expiration of the applicable statute of limitations (sic)". (June 22, 2017 Order, p. 3). Appellant respectfully asserts the court engaged in abuse of discretion and error of

law by finding as law that Plaintiff would have been required to file suit on or before December 10, 2015. (June 22, 2017 Order, p. 3). Plaintiff's causes of action under any theory, and Plaintiff's injury, could not be actionable before March 24, 2015. In the motion to reconsider, the court reasons "*In my judgment, Rule 59(e) will not permit a plaintiff to resurrect a time-barred complaint by amending the pleading....*" (August 29, 2017 Order, p. 2). Plaintiff filed suit March 23, 2017. In applying the Act while failing to view gross negligence allegations in a light most favorable to Frank, the court found that Plaintiff was time-barred for filing nearly fifteen months after the statute expired. (June 22, 2017 Order, p. 3). The court noted the limitations of the Act §15-78-110; "It provides that "...any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date of loss was or should have been discovered." (June 22, 2017 Order, p. 3).

Until the *sua sponte* dismissal by Family Court occurring March 24, 2015 the DSS investigation was open, active and, as pending, beyond reproach by Plaintiff. Plaintiff alleges he was stripped of custody after December 10, 2013 through the March 24, 2015 dismissal and that DSS was grossly negligent in performing its duties. (Complaint, p. 2). Plaintiff's complaint alleged that DSS and its employees falsely accused Plaintiff of things he did not do (drinking excessively and abusing his son). (June 22, 2017 Order, p. 3). Until March 24, 2015, DSS would enjoy tort immunity generally under the Tort Claims Act. Due to judicial immunity, plaintiff could not have challenged DSS. It is not until after family court dismissal of the action *sua sponte*, did Plaintiff's injury, causes of action, or right to file suit arise. Until said time, the DSS investigation could have resulted in exoneration.

Conversely, the Master in Equity found all claims time barred by the Tort Claims Act analyzing the time of Plaintiff's injury as known to Plaintiff and due to acts or omissions occurring between October 31 and December 10, of year 2013. (June 22, 2017 Order, p. 3). The court found that Plaintiff knew of the allegedly actionable conduct of DSS and resulting injury at least by December 10, 2013. (June 22, 2017 Order, p. 3). The court, failing to view the motion most favorably to Frank ignores that a DSS investigation beyond control of the Plaintiff remained pending through March 24, 2015. The master's view of facts of gross negligence most favorably to DSS, as a matter of policy, encourages DSS failures to timely perform substantive investigation thus insulating DSS by the Tort Claims Act. The DSS action was ultimately dismissed by the family court on March 24, 2015 for failure to prosecute. (May 15, 2017 Transcript, p. 6, line 5). Appellant further asserts the trial court engaged in abuse of discretion by viewing most favorably to Defendant, not Plaintiff, that as of March 24, 2015 "there was no adjudication of the claims in that action either in favor of, or against, DSS or Plaintiff in that action." "For all of these reasons, the dismissal for failure to prosecute offers no extension of the time within which Plaintiff's lawsuit had to be commenced." (June 22, 2017 Order, p. 4). Appellant respectfully seeks redress from the Court of Appeals predicated on the date of injury March 24, 2015. Had the family court heard DSS case on March 24, 2015 and ruled against Plaintiff, the Plaintiff would have been entitled to direct appeal, at minimum. Appellant avers that the date of the family court dismissal began the effective time for commencement of any action by Plaintiff. Had the court viewed the date of injury under gross negligence claims most favorably to the non-

moving Plaintiff, the suit by Plaintiff would not be time-barred, expiring March 24, 2017.

The action was filed in circuit court timely, March 23, 2017.

- II. It was abuse of discretion and error of law for the master to find that plaintiff failed to allege facts sufficient to support any claim for relief under any theory of liability where Plaintiff alleged gross negligence.

The Master found that the dismissal of DSS's Family Court action and investigation decided "nothing" (sic), hence the failure to prosecute by DSS offered no extension of the time in which Plaintiff's lawsuit in circuit court would have to have been commenced. "Even if Plaintiff's claims were not time-barred, the facts alleged in Plaintiff's Complaint would not support his claims for defamation or outrage. (June 22, 2017 Order, p. 5). In reference to the dismissal order, "I went through it and edited it substantially". (August 24, 2017 Transcript, p. 2, line 17). "Well, let me say this. There is more than one basis for the order. One was the expiration of the Statute of Limitations. I then discussed and tried to express (sic) why the Complaint did not state the facts sufficient to support the causes of action which were alleged; namely defamation of some sort, outrage." (August 24, 2017 Transcript, p. 12, line 9). "So in any event, even if the statute of limitations it has not run, which I believe it has - - had - - at that time that the lawsuit was brought, the complaint nevertheless did not state facts sufficient to state a cause of action for defamation and outrage" (Id. at. 15).

The trial court erroneously views gross negligence allegations in favor of the moving party, and not Plaintiff. The trial court effectively forecloses any theory of liability alleged by Plaintiff in the complaint, including gross negligence, by imposing the court's view of the date of actionable injury - - December 10, 2013 - - upon Plaintiff's causes of action. The Master in Equity views all facts and inference most favorably to

Defendant. (June 22, 2017 Order, p. 2 at lines 24-26). Moreover, the Master erred in substituting the court's view of the weight and sufficiency of any and all of the Plaintiff's claims under the Rule 12(b)(6) standard. (June 22, 2017 Order, p. 1).

III. The Master erred under *McCormick* applying the standard of review by failing to view all inferences and facts most favorably to the Plaintiff?

The Master in equity applied the bright line time bar of S.C. Code Ann. §15-78-10, *et. seq.* retroactively in dismissing Plaintiff's action. "*In my judgment, Rule 59(e) will not permit a plaintiff to resurrect a time-barred complaint.....That is particularly true where, as here, any claim based on those later events is now, also, time-barred.*" (August 29, 2017 Order, p. 2). The court first utilizes the doctrine of judicial immunity in review of DSS employee testimony which "cannot give rise to a claim of defamation. It is protected by the doctrine of judicial immunity". (June 22, 2017 Order, p. 4). The United States Supreme Court has expressly held that, because the testimony of trial witness is "indispensable" in "bringing litigation to a just – or possibly unjust conclusion," that those witnesses enjoy absolute immunity – the court citing Briscoe v. LaHue, 460 U.S. 325 (1983). (June 22, 2017 Order, p. 4). Plaintiff would have no ability to challenge, and no reason to know, whether the DSS investigation would result in exoneration, however, prior to March 24, 2015.

Failing to view facts and inferences in a light most favorable to Plaintiff, the court misconstrued DSS court *witness testimony* without failure to examine pleaded facts of false and wanton DSS failures to properly do a substantive investigation. DSS conduct transcends investigatory purpose beginning false advocacy on December 10, 2013. It is

here that DSS re-asserts false allegations against Frank in Family Court marred by the same failures to substantively investigate claims.

By its Complaint, Plaintiff alleged gross negligence, citing in paragraph (8)(a) through (i) a total of nine instances of willful and wanton misconduct. (Complaint, p. 2). The Complaint also alleged publication by DSS whereby DSS re-asserted false claims, a second time, before the court on December 10, 2013. (Id. at p. 1, ¶ 5). Plaintiff alleged due process violations where DSS without proper substantive investigation inflicted emotional distress and anguish. (Complaint, p. 4). If the facts and inferences drawn from the facts alleged on the complaint would entitle the Plaintiff to relief on any theory, then the grant of the motion to dismiss for failure to state a claim is improper. Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). The court failed to view gross negligence allegations and inferences therefrom in a light most favorable to the Defendant, inferring ordinary negligence, erroneously viewed as time barred by the Statute of Limitations and the Tort Claims Act. Appellant respectfully asserts the court's review was predicated on abuse of discretion where the court erroneously imposed as law the date of plaintiff's injury and causes of action arise prior to March 24, 2015. (June 22, 2017 Order, p. 3). Until this date, Plaintiff would in fact have been subject to on-going DSS investigation without recourse. Under the master's reasoning, Plaintiff would have been required to commence and engage in two (2) suits. Plaintiff would, under the court's analysis, have to file its civil lawsuit against DSS while an investigation remained pending, without awaiting adjudication. Viewing all facts and inferences pleaded on the face of the Complaint in a light most favorable to Defendant, the court opines "further, in the absence of specific allegations that would be outside the scope of privilege, it is

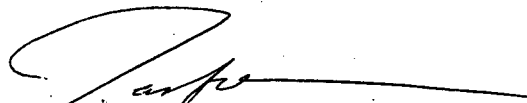
reasonably inferable that the alleged defamation occurred with DSS employees testified or presented evidence at the Plaintiff's December 10, 2013 custody hearing." (June 22, 2017 Order, p. 4). The Master ignores gross negligence allegations and false witnessing by DSS by viewing judicial immunity of testimonial acts (whether false or not) most favorable to Defendant, insulated from the inference of gross negligence allegations which should have been viewed most favorably to Plaintiff.

CONCLUSION

Appellant respectfully asserts that it was error of law and abuse of discretion where the Master in Equity dismissed Plaintiff's action pursuant to Rule 12(b)(6) SCRPC and the South Carolina Tort Claims Act as time-barred where alleged gross negligence and facts deducible therefrom would entitle plaintiff to relief under causes of action filed in the Complaint.

Appellant respectfully seeks that the trial court dismissal be reversed and this matter be remanded for trial in the Court of Common Pleas.

Respectfully submitted,



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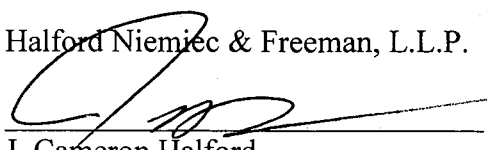
South Carolina Department of Social Services..... Respondents

PROOF OF SERVICE

I Certify that I have served Appellant's Initial Brief and Appellant Designation of Matter To Be Included in Appeal and SCACR 209(c) Certification on counsel identified below by depositing a copy of the same in the United States mail, postage prepaid, and addressed as follows, on the 3rd day of January, 2018:

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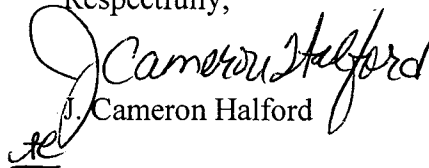
Re: Michael Frank, individually and as the parent of a minor vs.
South Carolina Department of Social Services
Case No. 2017-CP-46-00867
Appellate Case No.: 2017-002024

Dear Ms. Kitchings:

Enclosed please find for filing the Initial Brief of the Appellant and Appellant's Designation of Matter To Be Included in the Record on Appeal, and Appellant Counsel SCACR 209(C) Certification along with our certificate of service to opposing counsel. Please file the original and return a clocked copy to our offices in the envelope provided. If you have any questions regarding the enclosed or this matter, please feel free to contact my office.

With kind regards, I remain

Respectfully,


J. Cameron Halford

JCH:tml

Enclosures

cc: Mr. Michael Frank
w/enclosures
W. Keith Martens, Esquire
w/enclosures

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