THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable S. Jackson Kimball
Special Circuit Court Judge

Case No.: 2017-CP-46-00867
Appellate Case No.: 2017-002024

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

vs

South Carolina Department of Social Services ..... Respondent.

RESPONDENT'S INITIAL BRIEF

March 5, 2018.

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court properly determine that a plaintiff's complaint was subject to dismissal pursuant to Rule 12(b)(6) where each of the plaintiff's claims was subject to a two-year statute of limitations, where the plaintiff alleged that the acts and omissions giving rise to his claims occurred prior to December 2013, where the plaintiff alleged that he suffered actionable injuries in or about December 2013, but where the plaintiff did not file his complaint until March 2017?

II. Where a plaintiff made no attempt to amend his pleadings in the trial court, should this court consider his argument that he was "erroneously" deprived of that opportunity?

III. Is the trial court's dismissal of a plaintiff's claims for defamation and outrage conclusive and final, where the trial court determined that the facts alleged by plaintiff would not support either cause of action, and where the plaintiff did not appeal the trial court's determination of those issues?

STATEMENT OF THE CASE

Appellant, Michael Frank ("Frank"), filed this action on March 23, 2017 asserting three causes of action against Respondent, South Carolina Department of Social Services ("SCDSS" or "DSS"). Frank's complaint was based upon SCDSS' involvement in a private custody case between Frank and his ex-wife, and the alleged acts or omissions of SCDSS employees in connection with that case. Complaint ¶¶ 1-9. In particular, Frank alleged that SCDSS employees made "false allegations" against Frank during a December 10, 2013 custody hearing, which resulted in Frank being "stripped of custody" of his minor son. Complaint ¶¶ 5, 7. Frank's complaint included three causes of action: (1) gross negligence; (2) defamation; and (3) intentional infliction of emotional distress. Complaint.

Rather than answer Frank's complaint, SCDSS filed a motion to dismiss pursuant to Rule 12(b)(6) S.C.R. Civ. P. Motion to Dismiss, filed May 8, 2017. In support of its motion, SCDSS' raised several, distinct, arguments. First, SCDSS argued that, accepting the factual

allegations of Frank's complaint as true, the entire complaint was barred by the two year statute of limitations codified at § 15-78-100 of the South Carolina Tort Claims Act ("TCA"). Id. at 2. Next, DSS argued that the alleged testimony of SCDSS' employees during Frank's private custody hearing could not give rise to liability because the employees who testified at that hearing were entitled to absolute immunity. Id. at 3. Finally, SCDSS asserted that the allegations of Frank's complaint did not support any cognizable claims for outrage or defamation under South Carolina law. Id.

Even after DSS filed its motion to dismiss, Frank did not amend his complaint despite his right do so "as a matter of course." *See* S.C. Rule 15(a) S.C.R. Civ. P. ("A party may amend his pleading once as a matter of course. . . ."). Nor did Frank ever file any motion seeking "leave of court" to amend his complaint. *See* Id. ("Otherwise a party may amend . . . only by leave of court or by written consent of the adverse party.").

On June 15, 2017, the parties appeared before S. Jackson Kimball, III, Special Circuit Court Judge, for a hearing on SCDSS' motion to dismiss. Frank's Counsel appeared at that hearing "to kind of explain where I think we've met our burden as far as this hearing and pleading properly,"[1] but Frank did not seek, and the trial court did not consider, any motion by Frank to amend his pleadings during the June 15, 2017 hearing. *See* Transcript of May 15, 2017 hearing. Following that hearing, Judge Kimball issued an order granting SCDSS' motion and dismissing Frank's complaint in its entirety. Order of Dismissal, filed June 22, 2017.

In dismissing Frank's complaint, the trial court first determined that Frank's claims were barred by expiration of the TCA's two-year statute of limitations. Id. at 3-4. The court also

[1] May 15, 2017 hearing transcript at 12.

concluded that, even if Frank's claims were not time-barred, the complaint did not allege facts that would support Frank's claims for defamation or outrage. Id. at 4-5.

Frank moved for reconsideration of the trial court's order on July 3, 2017. Motion for Reconsideration, filed July 3, 2017. On August 29, 2017, Judge Kimball issued an order denying Frank's motion. Order Denying Plaintiff's Motion for Reconsideration. This appeal followed.

STATEMENT OF ALLEGED FACTS

Because Frank's complaint was dismissed pursuant to Rule 12(b)(6) S.C. R. Civ. P., this court's review is constrained to the factual allegations of the complaint. Williams v. Condon, 347 S.C. 379, 533 S.E.2d 496 (Ct. App. 2001). For that reason, SCDSS takes issue with some portions of Appellant's Statement of Facts. Notably, in his Statement of Facts and elsewhere in his appeal brief, Frank contends (without any citation to the record) that "Plaintiff's complaint also alleged gross negligence against DSS in failing to perform any substantive investigative work throughout the [DSS Child Protective Services] case." Appellant's Brief at 2, 5. However, no such allegation actually appears in Frank's now-dismissed complaint.

Only the factual allegations of Frank's complaint were considered by the trial court, and only those factual allegations may be considered by this court on appeal. They are limited to the following:

Frank and his minor son are residents of York County, South Carolina. Complaint ¶ 1. On or about October 31, 2013, SCDSS opened an investigation, based upon reports that Frank "was an alcoholic who drank excessively and was physically abusive to his son." Id. ¶ 3.

During this same period of time, Frank was also involved in a private custody dispute with his ex-wife. Id. ¶4. On December 10, 2013, a hearing was held in Frank's private custody case. Id. "[A]gents/representatives" of DSS attended that hearing and "reasserted their

allegations regarding [Frank's] use of alcohol and physical abuse toward [his son]." Id. ¶ 5. DSS and its "agents, representatives, assignees and employees" had not done "any substantive investigatory work" to determine the veracity of the statements they provided at the December 10, 2013 custody hearing, and they gave "false, misleading and inaccurate testimony and documentary evidence to the court." Id. ¶ 8. "As a result of the allegations" made by DSS at that hearing, Frank was "stripped of custody and was only allowed supervised visitation with his son." Id. ¶ 7. The actions of DSS and its employees, "*as set forth above*," caused Frank and his son to suffer "substantial and grave emotional, physical, financial and psychological harm." Id. ¶ 9.

STANDARD OF REVIEW

An appellant bears the burden of providing the court with a record sufficient to allow appellate review. Hundley ex rel. Hundley v. Rite Aid of South Carolina, Inc., 339 S.C. 285, 306, 529 S.E.2d 45, 57 (Ct. App. 2000)(citing Medlock v. One 1985 Jeep Cherokee, 322 S.C. 127, 470 S.E.2d 373 (1996). An issue is not preserved for review where it has not been raised to or ruled upon by the trial court. Id. (citing Hotltzcheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 506 S.E.2d 497 (1998).

When reviewing a trial court's dismissal of a complaint pursuant to Rule 12(b)(6), "the appellate tribunal applies the same standard of review that was implemented by the trial court." Williams v. Condon, 347 S.C. 379, 533 S.E.2d 496 (Ct. App. 2001) (citing O'Laughlin v. Windham, 330 S.C. 379, 498 S.E.2d 689 (Ct. App. 1998)). As such, an appellate court's review is limited solely to the allegations set forth on the face of the complaint. Id. (citations omitted). "The question to be considered is whether, in the light most favorable to the plaintiff, the pleadings articulate any valid claim for relief." Id. (citations omitted). "The 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." Id. (citing Stiles v. Onorator, 318 S.C. 297, 457 S.E.2d 601 (1995)).

ARGUMENTS

I. The trial court properly dismissed Frank's complaint pursuant to Rule 12(b)(6) because, accepting the factual allegations of the Complaint as true, Frank's claims for relief accrued in December 2013 but Frank did not commence this action until March 2017, well after expiration of the applicable statute of limitations.

The trial court properly determined that Frank's claims against SCDSS were barred by the two-year statute of limitations contained in the South Carolina Tort Claims Act. Order of Dismissal at 3. Any action under the Tort Claims Act is "forever barred" unless it is brought "within two years after the date the loss was or should have been discovered." S.C. Code Ann. § 15-78-110 (2017). As the trial court recognized, Frank's entire complaint was premised upon his assertion that DSS employees failed to properly investigate claims against Plaintiff and then "falsely accused Plaintiff of things he did not do" at a Family Court hearing on December 10, 2013. Order of Dismissal at 3. So too, Frank's primary alleged loss (being "stripped of custody" of his son[2]) also occurred on December 10, 2013, "or very soon thereafter." Id. For that reason, the trial court concluded that, in order for Frank to pursue a claim based upon those allegations, he "would have been required to file his lawsuit on or before December 10, 2015." Id.

On appeal, Frank does not dispute that his claims are subject to a two-year statute of limitations. Instead, he contends that his alleged "loss" did not occur until March 2015, when DSS' child-protective services case was dismissed. Appellant's Brief at 5. There are several fallacies with this position.

[2] Complaint ¶ 7.

As an initial matter, Frank appears to conflate his private custody case with the DSS child-protective services case (the "CPS Case"). The alleged harm for which Frank seeks redress was allegedly a "direct and proximate result" of DSS' involvement in has private custody action and, in particular, DSS' conduct at a December 10, 2013 hearing in that case. Frank's claims, as set forth in his complaint, have nothing to do with DSS' handling of the CPS Case.[3] *See* Complaint ¶ 4, 5, 7 & 9. It is implausible that Frank's causes of action against DSS did not accrue until the CPS Case was dismissed, when the claims asserted in his complaint do not even touch upon that case.

Frank also erroneously contends that his "injury, causes of action, or right to file suit" against DSS did not arise until the CPS Case was finally concluded. However, none of Frank's claims against DSS was dependent upon dismissal of the CPS Case, and nothing would have precluded Frank from commencing his lawsuit as soon as he was aware of DSS' alleged actionable conduct and his resulting injuries. As the trial court recognized, Frank discovered DSS' alleged wrongs and his alleged injuries "on or about December 10, 2013, and that is when his claims accrued." Order of Dismissal at 3; *see also* Gillman v. City of Beaufort, 368 S.C. 24, 27, 627 S.E.2d 746, 748 (Ct. App. 2006)("Under the discovery rule, the statutory limitations period begins to run from the date when the injury resulting from the wrongful conduct is discovered or may be discovered by the exercise of reasonable diligence."). Contrary to Frank's assertion, dismissal of DSS' CPS Case in March 2015 was not a "triggering event" causing his

[3] Even if Frank had claims arising from DSS' handling of his CPS Case, those are not claims that he asserted in his complaint. *See* Aug. 24, 2015 Trans. at 9 (Frank's Counsel: "[At the hearing on DSS' motion to dismiss] the court said that malicious prosecution might apply. We would certainly like the opportunity to explore that.").

claims to accrue on that date. Nor did the ongoing CPS Case toll the statute of limitations on Frank's claims.[4]

Most importantly, Frank's position on appeal cannot be reconciled with the allegations of his own complaint. While Frank argues on appeal that his complaint could be construed (or amended) to allege some other wrongdoing that went undiscovered until March 24, 2015, no such allegations actually appear in Frank's complaint. The trial court was, and this court is, required only to determine whether "the facts alleged *in the complaint* . . . support relief under any theory of law." Williams v. Condon, 347 S.C. 379, 533 S.E.2d 496 (Ct. App. 2001) (emphasis added). The facts alleged in Frank's complaint do not, because they all occurred more than two years before Frank filed his lawsuit and Frank suffered alleged damages when he was "stripped of custody" of his son following the family court's December 2013 private custody hearing. Complaint ¶ 7. The trial court properly concluded that Frank's claims, based upon the facts alleged in *his* complaint, were time-barred and, therefore, subject to dismissal pursuant to Rule 12(b)(6) S.C. R. Civ. P. This court should affirm.

II. This court should not consider Frank's argument that a "more appropriate remedy" would have been to permit Frank to amend his complaint, because Frank never attempted to amend and, therefore, he did not preserve the issue for appeal.

On appeal, Frank contends that he should have been allowed to amend his complaint to assert additional claims that, presumably, would relate back to the date he initially filed his complaint and allow him to avoid dismissal. It is not clear what additional claims Frank *might* have asserted in an amended complaint because he never filed or served any amended pleadings,

[4] Frank contends, without authority, that he could *not* file this action until the CPS Case was dismissed. Appellant's Brief at 5. Even if the pending CPS Case somehow precluded Frank from filing this action, Frank cannot ignore that approximately seven months elapsed between dismissal of the CPS Case (allegedly, March 24, 2015) and expiration of the statute of limitations on his claims (December 10, 2015).

even though he had that opportunity "as a matter of course at any time before or within 30 days after a responsive pleading is served." Rule 15(a) S.C.R. Civ. P. Nor did Frank file any motion or make any written request to amend his pleadings. *See* id. ("Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party."). Frank took no action whatsoever to amend his pleadings before his complaint was dismissed. Only following dismissal, when Frank filed his Rule 59(e) motion, did he assert (for the first time) that "the appropriate remedy would be to allow the Plaintiff to amend his pleadings to provide a more specific factual basis for timeliness and to allow the Plaintiff to add or subtract appropriate claims." Motion to Reconsider, filed July 3, 2017.

It is a fundamental principle of civil litigation that "an application to the court for an order shall be by motion which, unless made during a hearing or in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief sought." Rule 7(b)(1) S.C.R. Civ. P. "Normally, motions must be made on the record to be preserved." Hundley ex rel. Hundley v. Rite Aid of South Carolina, Inc., 339 S.C. 285, 306, 529 S.E.2d 45, 56 (Ct. App. 2000). It is also a fundamental principle of civil litigation that "an issue may not be raised for the first time in a motion to reconsider." Johnson v. Sonoco Products Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009). In this case, the record is devoid of any evidence that Frank attempted to amend his defective pleadings, either as a "matter of right" or by motion filed with the court, prior to dismissal of his complaint.

Although Frank now argues that he "should" have been permitted to amend his complaint, rather than suffer dismissal, he never raised that issue until he moved for reconsideration of the trial court's order of dismissal. *See* Motion for Reconsideration, filed July 3, 2017. Frank has not preserved that issue for appeal, and it would be entirely improper for this

court to consider whether the trial court "should" have granted a motion that Frank never made. Hundley ex rel. Hundley v. Rite Aid of South Carolina, Inc., 339 S.C. 285, 306, 529 S.E.2d 45, 56 (Ct. App. 2000)(an issue "is not preserved for appellate review where it has not been raised to or ruled upon by the trial court."); Johnson, 381 S.C. at 177, 672 S.E.2d at 570 (an issue that "first appears in [a] motion seeking reconsideration of the circuit court's . . . order" is not preserved).

Even if Frank had preserved the issue for appeal, the trial court correctly ruled that Rule 59(e) "will not permit a plaintiff to resurrect a time-barred complaint by amending the pleading to assert 'alternative' theories of liability premised upon different alleged acts or omissions." Order Denying Plaintiff's Motion for Reconsideration, at 2. As the trial court recognized, "While Rule 12(b)(6) generally affords a plaintiff an opportunity to remedy a defective pleading through amendment, the plaintiff must first demonstrate that 'the allegations *set forth on the face of the complaint* . . . and inferences reasonably deducible therefrom would entitle the plaintiff to relief on [some] theory of the case.'" Id. at 1-2 (emphasis in court's order)(quoting Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987)). The factual allegations set forth on the face of Frank's complaint could not clear this hurdle. It was proper for the trial court to dismiss the complaint pursuant to Rule 12(b)(6), and the trial court's order should be affirmed.

III. Because Frank has not appealed the trial court's alternative grounds dismissing his claims for outrage and defamation, the trial court's dismissal of those claims is determinative, even if Frank's complaint were not time barred.

While not entirely clear, it appears that Frank's appeal primarily challenges the trial court's dismissal of his claim for gross negligence. *See* Appellant's Brief at 7-9. Frank's brief emphasizes that his first cause of action was for gross negligence, as opposed to "regular" negligence, but that distinction is inconsequential. The applicable statute of limitations would

bar either cause of action "unless an action is commenced within two years after the date the loss was or should have been discovered." S.C. Code Ann. § 15-78-110 (Law. Co-op. 2005).

Frank has not made any argument that the trial court improperly dismissed his claims for defamation and outrage, based upon his failure to allege sufficient facts to supporting those claims. *See* Order of Dismissal at 4-5. Frank's brief only makes passing reference to those rulings, without contending that they were wrong. Appellant's Brief at 7. Those determinations are not before this court. *See* Rule 208(b)(1)(B) S.C. App. Ct. R. ("Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal."). Even if this court were to determine that Frank's claims did not accrue until March 24, 2015, that determination cannot restore his causes of action for defamation or outrage.

CONCLUSION

The trial court's order of dismissal should be affirmed in its entirety. The factual allegations of Frank's complaint pertain to events that occurred entirely in the fall of 2013, and the complaint alleges that those events caused Frank to suffer harm in December of that year. Frank did not commence this action until March 2017, more than three years after his loss "was or should have been discovered" – well after expiration of the applicable statute of limitations. The trial court properly determined that Frank's claims were time-barred and subject to dismissal. That determination should be affirmed on appeal.

This court should refuse to consider Frank's remaining arguments because those arguments were not properly preserved for appellate review. Frank never attempted to amend his complaint in the circuit court, so he cannot argue on appeal that he was somehow "deprived" of that opportunity. Nor can Frank challenge the trial court's alternative grounds for dismissing his claims for defamation and outrage, because he did not make those arguments in his brief.

Rule 208(b)(1)(B) S.C. App. Ct. R.; 15 S.C. JUR. APPEAL AND ERROR § 83 (Revised Dec. 2017)("Appellate parties must argue the issues in the preliminary briefs and cannot make any new arguments in the final briefs. A failure to argue is an abandonment of the issue and precludes consideration on appeal.").

DSS was entitled to dismissal of Frank's entire complaint, because the complaint failed to articulate any valid claim for relief under South Carolina law. Williams v. Condon, 347 S.C. 379, 533 S.E.2d 496 (Ct. App. 2001). On appeal, this court should affirm.

Respectfully Submitted,

March 5, 2018

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4832-1083-5291, v. 2

THE STATE OF SOUTH CAROLINA
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Michael Frank, individually, and as the parent of a minor, ...Appellant,

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CERTIFICATE OF SERVICE

The undersigned, an employee of Hamilton Martens, LLC certifies that the Respondent's Initial Brief and Designation of Matter to Be Included in Record on Appeal were served upon Appellant by depositing same in the United States Mail, with sufficient postage affixed and addressed as follows:

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This the 5th day of March, 2018

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March 5, 2018

The Honorable Jenny Abbott Kitchings
Clerk of Court of Appeals
Post Office Box 11629
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RE: *Michael Frank vs. South Carolina Department of Social Services*
Appellate Case No.: 2017-002024

Dear Ms. Kitchings:

Enclosed for filing in the above-named matter are the original and one copy each of the following:

1) Respondent's Initial Appellate Brief, including Proof of Service;
2) Respondent's Designation of Matter to be Included in the Record on Appeal, including Proof of Service;

Please file the original documents and return clocked copies of each to me in the envelope that I have provided.

By copy of this letter to counsel for Appellant, I am forwarding copies of Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal.

Please call me if you have any questions or concerns. Thank you for your assistance in this matter.

Sincerely,

/lms
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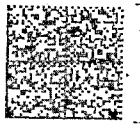

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