THE STATE OF SOUTH CAROLINA
In The South Carolina Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

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

Trial Court 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.....Respondent

APPELLANT'S REPLY BRIEF

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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?

STATEMENT OF THE CASE

Appellant Michael Frank ("Frank") filed this action on March 23, 2017 asserting three causes of action as against Respondent, South Carolina Department of Social Services ("SCDSS"). The allegations of Frank's complaint are based upon SCDSS' involvement in a private custody case in Family Court between Frank and his ex-wife, and the alleged acts or omissions of SCDSS employees in connection with that case. Specifically, Frank alleged failure to properly investigate after false accusations against him. (R. at 2, ¶8(a)-(i)). In particular, Frank alleged that SCDSS made "false allegations" in a December 10, 2013 custody hearing in York County Family Court, resulting in Frank being "stripped of custody" of his minor son. (R. p. 2 at ¶ 5, 7). Frank's complaint in circuit court included three (3) primary causes of action : (1) gross negligence; (2) defamation; and (3) intentional infliction of emotional distress. (R. p. 6-9).

SCDSS filed a motion to dismiss the complaint rather than an Answer. (R. p. 11). The Rule 12(b)(6) motion is filed May 8, 2017. SCDSS raised several, distinct arguments including that viewing the allegations of Frank's complaint as *true*, the entire complaint was barred by the two year statute of limitations under the Tort Claims Act ("TCA") codified at S.C. Code Ann. §15-78-10. SCDSS also argued immunity related to SCDSS employee testimony at Frank's Family Court hearing, and that the

allegations of Frank's complaint did not support any cognizable claims for outrage or defamation.

Respondent alleges fault in that Frank did not amend the complaint even after SDSSS filed its motion to dismiss, and despite his right to do so "*as a matter of course*" under Rule 15(a) S.C.R.Civ.P. Respondent further faults Frank for failing to file for leave to amend, ignoring that the Rule 12(b)(6) filing was dispositive in nature and further implying that as such, consent would be granted. A fact not in the record before this court. A hearing on the motion to dismiss occurred May 15, 2017. (R.p. 16).

Respondent quotes Frank's legal counsel to the court "*to kind of explain where I think we've met our burden as far as this hearing and pleading properly*". (R. p. 27 at 17). But, that Frank did not seek - nor did the trial court consider- any motion by Frank to amend his pleadings during the June 15, 2017 dismissal hearing. The contention evades the defendant's dismissal motion was dispositive, and that no such motion to amend was before the court. On June 22, 2017 the master in equity issued an order granting SCDSS' motion and dismissed Frank's complaint in its entirety under Rule 12(b)(6). (R. p. 46). The court later opines in view of the TCA that – *even if Frank's claims were not time-barred* - the complaint did not allege facts that would support Frank's other claims of defamation and outrage. (R. at 65, line 9-17). The court failed to view as *admitted* and true the complaint allegations. Frank timely filed a Rule 59(e) motion to have the court reconsider, alter or amend on July 3, 2017. Judge Kimball issued an Order denying the motion on August 29, 2017. This appeal followed.

STATEMENT OF ALLEGED FACTS

This court should reverse and remand the decision of the trial court. Acknowledging that this court's review is constrained to the factual allegations of the complaint, the trial judge failed to view as admitted the date of injury and facts alleged by Frank on the face of the complaint. Contra to the position of Respondent, Frank's complaint fielded gross negligence allegations, specifically. (R. at p. 7). The allegations appear at paragraph (8) at sub paragraphs (a) through (i) specifically. (Id. at 8). The complaint and record further evidence that Frank's cause of action arose as March 24, 2015. (Id. At 8 ¶(10). This is

where the allegations appear in the complaint (R.p. 8), and record (R. p. 65), contrary to the position asserted by Respondent in its initial brief arguments.

The complaint expressly pleaded and set forth March 24, 2015 as the date Frank's actionable claims arise. (R. p. 8 at (10); R. p. 60 line (1); R. p. 61 at 1-3). The face of the complaint contained the following allegations : (1) Frank and his minor son are residents of York County; (2) On or about October 31, 2013 SCDSS opened an investigation (*emphasis) based on reports that Frank "*was an alcoholic who drank excessively and was physically abusive to his son.*" (R.p.7 ¶(8). Frank's well pleaded complaint further details that the DSS investigation ended by family court order for failure to prosecute on March 24, 2015. (R p. 8 at ¶10). Respondent artfully attempts to place improper emphasis on amendment arguments, and the interim of time wherein on December 10, 2013 a hearing occurs in Frank's private custody case and whether Frank should have commenced a court action on two (2) distinct fronts, at that time. It is at the December 10, 2013 hearing that Frank alleged that SCDSS agents of attended the hearing and *re-assert* false allegations. They include allegations of Frank's use of alcohol. They include allegations of physical abuse against his own son. (R. at p. 8, 8(b)). The complaint face alleged SCDSS failure to do substantive work or investigation prior to court testimony. (Id.) The complaint expressly pleaded "*false, misleading and inaccurate testimony and documentary evidence to the court.*" Ultimately Frank loses shared custody of his minor son, alleged in the complaint to have caused "*substantial and grave emotional, physical, financial and psychological harm.*" Id. at 9. Respondent's contentions ignore that until March 24, 2015 the Family Court would have had exclusive jurisdiction, and that Frank would have had no alternative but to await resolution and dispositive order in Family Court. The untenable assertion is that Frank should more properly have pitted Family Court vs. Circuit Court. The position is not supportable given Family Court had *exclusive* jurisdiction through March 24, 2015.

STANDARD OF REVIEW

Respondent and Appellant differ on the standard of review to be employed by this court. This was a dismissal on the merits. In an action in equity, tried by a judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E. 2 d 773 (1976). The Order of the master in equity was a dismissal on the merits. It was predicated on the facts pleaded in the face of the complaint viewed as not stating any valid claim for relief, whatsoever. The trial court must dispose of a motion for failure to state a cause of action based solely upon the allegations set forth on the face of the complaint. Brown v. Leverette, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987). All properly pleaded factual allegations are deemed *admitted* for the purposes of considering a motion for judgment on the pleadings. Russell v. Columbia, 305 S.C. 86, 406 S.E.2d 338, 339 (1991). The question that the trial court was to consider, but failed to properly view most favorably to plaintiff with every doubt resolve in plaintiff's favor was "*[w]hether, in the light most favorable to the plaintiff, the pleadings articulate any valid claim for relief.*" 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. 1988). "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). "The motion cannot be sustained if facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to relief on any theory of the case." Brown v. Leverette, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987).

REPLY ARGUMENTS

In rebuttal to Respondents Initial Brief arguments, Appellant would respectfully show lower court error where facts were viewed as true, *but not admitted.* It occurs where the trial court, in bringing the Tort Claims Act ("TCA") to bear, fails to view the pleaded facts and inference most favorably to the non-moving party. The two year statute is brought to bear where the complaint alleged date of March 24,

2015 as family court dismissal of investigation of Frank. Yet, the trial court imposed its own view of the facts and inferences most favorably to SCDSS, super-imposing a view that Frank's injury arose in year 2013. The finding is against the weight of the evidence, viewed erroneously in favor of SCDSS.

Abuse of discretion occurred where the trial judge retrofits and superimposed the date of injury retroactively to October 31, 2013, neatly fitting within the confines of the TCA which would act to bar ordinary claims of negligence. The trial court ignores as *not admitted* the pleaded date, March 24, 2015 and the claims of gross negligence alleged on the face of the complaint. Applying the TCA, the court resolved all doubt in favor of the movant SCDSS.

I. The trial judge failed to view as *admitted*, and true, Frank's date of injury viewing facts and inferences raised by complaint erroneously viewed in favor of the movant under S.C. Code Ann. §15-78-10.

When did Michael Frank's claims officially accrue and become actionable in this case? It is a question based on the face of the pleaded facts. But, the pleadings must be construed by the trial court as both true, and admitted. The trial court errs the latter requirement in its review, opting for the Tort Claims Act bar of ordinary negligence claims. As noted by the trial court, the question is "*governed by whatever statute of limitations you adopt*" (sic) in viewing the facts pleaded in the complaint. (R. p. 65). This is the scope of review applied by the trial judge, resulting in both the June 22, 2017 order and the August 29, 2017 order, following plaintiff's Rule 59(e) motion. Viewing the pleaded facts of gross negligence erroneously weighted most favorably to the defendant, but failing to view the same as true and *admitted* (*emphasis), is respectfully where error enters the trial court analysis. The Tort Claims Act is easily brought to bear, irrespective of the pleaded facts of date of injury and claims which are not barred by the TCA, inclusive of gross negligence.

In trial court and in briefing before this court Respondent interposes the discovery rule to cover the already erroneous trial court-imposed date of injury, contra to the complaint allegations. The court's imposition of the trial judge's own view of the date of injury falling within the confines of the Tort Claims

Act ("TCA") weighted, improperly, the review most favorably to SCDSS. The consequence is obvious, an easy out by bringing to bear the bright line two (2) year time bar under the Act. This occurred where the date of injury is improperly defined as law of the case by the trial judge, not viewing all inferences in favor of Plaintiff. Further, the court likewise improperly interposes doubt as to plaintiff's ability to prevail, ultimately, in view of the TCA. In addressing the once-pending family court investigation of Michael Frank, facts and inference as to the date of the pleaded March 24, 2015 date of injury require retrofit by the trial judge, or at minimum viewing facts and inferences erroneously in favor of the incorrect party. There is no evidence to support the trial court's finding. Unless, that is, one ignores the exclusive jurisdiction of the Family Court below that terminate on March 24, 2015.

Gross Negligence is pleaded by the complaint, articulated as SCDSS transforming from investigatory role to improper adversary and advocacy; defamation and outrage. Frank alleges it results in the harm claimed (being stripped of custody) and consequential emotional harm. The Respondent would have the Court of Appeals defer to doubt in deference to the TCA, also, that Frank was not bound by having to await DSS results, or final Family Court order. The untenable contention by Respondent is that Frank should have been required to pit circuit court against family court, fighting two battles simultaneously.

Viewed most favorably to the plaintiff, it does not change the complaint face allegations of interim time and emotional trauma in which Frank endures loss of custody of his child through false allegation or worse, failure to do proper investigation. It does nothing to change emotional harm pleaded under DSS failure to properly investigate atop false DSS testimony, whether immunity applies or not. The defense would have this court view Frank as required to commence a court battle on two (2) different and distinct fronts, ignoring the exclusive jurisdiction of the Family Court. The convenience of the time barring effect of the TCA easily comes to application where the court has already foreclosed claims under the wrongly imposed date of injury; even those claims raised *sua sponte* by the trial judge. Any theories of the case

under which doubts should have been resolved most favorably to the plaintiff are foreclosed under Rule 59(e) review August 24, 2017. The dismissal motion was viewed erroneously in favor of SCDSS, and the court failed to view the pleaded facts as admitted in both hearings.

II. The August 24, 2017 transcript evidences that any amendment seeking review of the date of injury imposed by the court was foreclosed by trial court's Order on the Rule 59(e) motion properly raising the issues by oral argument before the court.

It is an evasion, and distraction, raised by Respondent argument; Respondent first asserts that Frank did not amend the complaint, whether by matter of course or by motion seeking leave to amend. SCRCP 15(a). While true, the trial court order dated August 29, 2017 foreclosed any ability to amend as to complaint-pleaded gross negligence, defamation, or outrage claims. Consideration of *Sua Sponte* identified claims occurs in concert with the trial judge viewing the TCA most favorably to the movant, construing Plaintiff's claims as time-barred. (R. p. 65 at 19-22). Any such claim are foreclosed by court ordered dismissal June 22, 2017. A Rule 12(b)(6) motion will not be sustained if the facts alleged 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). Error enters the court analysis improperly as *doubtfulness* of plaintiff's odds of prevailing on any theory whatsoever. Abuse of discretion occurs where the trial judge superimposed his own view of the date of injury in year 2013. Error occurs where the trial judge opts for the TCA in doubting that plaintiff, ultimately, cannot prevail under any theory whatsoever. All doubts should have been properly resolved in favor of the Plaintiff, but this did not occur.

III. The court failed to view facts and inferences reasonably deducible from gross negligence, outrage and defamation by erroneously imposing doubtfulness as to plaintiff's ability to prevail or not prevail in the action as part of the court's erroneously weighing most favorably to the movant SCDSS, with every doubt not resolved in favor of the Plaintiff.

The inconsequential distinction raised by Respondent as to "regular" negligence vs. gross negligence as pleaded in the complaint seeks to disguise lower court error, that being failure to view any

claim for relief as true, *admitted*, and in a light most favorable to the non-movant, Frank. This would include, but not limited to, failing to view as admitted the accrual of Plaintiff's claims as March 24, 2015. The issue is distinctly preserved in the record, raised before the trial judge by written motion and argument. (R. at p. 65, lines 6-8). It was pleaded on the face of the complaint. (R. p. 7 at 8(a) – (I)). The reason for the contention is clear; the ease at which the Tort Claims Act entered the trial court analysis to bar ordinary negligence, but not gross negligence. This occurs irrespective of potential application of elements of either defamation or outrage pleaded in the complaint.

Error occurred where the court interposed *doubt*. Doubt, ultimately, as to the plaintiff prevailing or not prevailing on the merits in light of the TCA; doubt viewed most favorable to the movant, where doubts were not resolved in favor of Plaintiff as to any and all facts and theories pleaded. The South Carolina Supreme Court has established authority that the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 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). It is legally impossible to follow this standard where the trial court imposed its own view of the date of injury, where complaint allegations were not viewed as *admitted* even if viewed as *true*. Brown, supra.

CONCLUSION

The court of appeals should reverse the ruling of the trial court. The trial judge erroneously imposed its own view of the date of injury in this case as occurring year 2013. Well pleaded complaint facts evidence the date of injury as March 24, 2015 which should properly have been viewed as true and admitted. The trial court review is weighted by doubt of the plaintiff as to ability to prevail, or not prevail, ultimately, on the merits in view of the prospective application of the TCA. The doubt is viewed, in error,

most favorably to the movant on June 15, 2017. Respectfully, the trial court should properly have viewed and resolved any and all doubts in favor of the plaintiff, but erred in not doing so.

Appellant respectfully seeks that this court reverse and remand the decision to trial court for trial.

Respectfully submitted, March 16, 2018.

Respectfully submitted,

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