

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

**RECEIVED**  
MAR 19 2018  
SC Court of Appeals

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

---

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

vs.

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

---

RECORD ON APPEAL

---

March 16, 2018

J. Cameron Halford  
Halford, Niemiec & Freeman, LLP  
238 Rockmont Drive  
Fort Mill, South Carolina 29708  
803-547-6618  
803-547-6638 (fax)

ATTORNEY FOR APPELLANT

Micahel E. Hirsch

W. Keith Martens, Esquire  
Hamilton Martens Law Firm  
Post Office Box 10940  
Rock Hill, South Carolina 29731

ATTORNEY FOR RESPONDENT

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 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

---

CERTIFICATION OF APPELLANT COUNSEL

---

Pursuant to SCACR 201(g), the undersigned here certifies that the Record on Appeal contains all material proposed to be included by any of the parties and no other materials.

March 16, 2018

J. Cameron Halford  
Halford, Niemiec & Freeman, LLP  
238 Rockmont Drive  
Fort Mill, South Carolina 29708  
803-547-6618  
803-547-6638 (fax)

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STATE OF SOUTH CAROLINA )

COUNTY OF YORK )

Michael Frank, individually and as the parent and guardian of Samuel Frank, a minor, )

Plaintiff(s) )

vs. )

South Carolina Department of Social Services, )

Defendant(s) )

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2017-CP- 46

COPY  
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MAR 23 PM 4:29  
DAVID H. HARRISON  
CLERK OF COURT  
CIVIL DIVISION  
COURT COUNTY, SC

(Please Print)

Submitted By: Matthew R. Niemiec/P. John Freeman

Address: 238 Rockmont Drive

Fort Mill, South Carolina 29708

SC Bar #: 64178

Telephone #: 803-548-6618

Fax #: 803-547-6638

Other: 803-517-4320 cell-

E-mail: matt@fortmilllaw.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

\*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint. NON-JURY TRIAL demanded in complaint.
This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- Contracts: Constructions (100), Debt Collection (110), Employment (120), General (130), Breach of Contract (140), Other (199)
Torts - Professional Malpractice: Dental Malpractice (200), Legal Malpractice (210), Medical Malpractice (220), Notice/ File Med Mal (230), Other (299)
Torts - Personal Injury: Assault/Slander/Libel (300), Conversion (310), Motor Vehicle Accident (320), Premises Liability (330), Products Liability (340), Personal Injury (350), Wrongful Death (360), Other (399)
Real Property: Claim & Delivery (400), Condemnation (410), Foreclosure (420), Mechanic's Lien (430), Partition (440), Possession (450), Building Code Violation (460), Other (499)
Inmate Petitions: PCR (500), Sexual Predator (510), Mandamus (520), Habeas Corpus (530), Other (599)
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Special/Complex /Other: Environmental (600), Automobile Arb. (610), Medical (620), Other (699), Pharmaceuticals (630), Unfair Trade Practices (640), Out-of State Depositions (650)

Submitting Party Signature: P John Freeman

Date: March 23, 2017

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

**FOR MANDATED ADR COUNTIES ONLY**

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

**You are required to take the following action(s):**

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210<sup>th</sup> day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
  - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
  - b. Requests for temporary relief;
  - c. Appeals
  - d. Post Conviction relief matters;
  - e. Contempt of Court proceedings;
  - f. Forfeiture proceedings brought by governmental entities;
  - g. Mortgage foreclosures; and
  - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

Michael Frank, individually and as the )  
Parent and guardian of Samuel Frank, )  
A minor, )  
 )  
 )  
Plaintiff, )

CASE NO. 2017-CP-46-00867

v. )


**CERTIFICATE OF EXEMPTION  
FROM ADR**

South Carolina Department of Social )  
Services, )  
 )  
Defendant, )

FILED-RECEIVED  
2017 MAR 23 PM 4:29  
DAVID HAMILTON  
C.C.S. & S.  
YORK COUNTY, SC

I certify that this action [  is ] /or/ [  is not ] exempt from ADR because:

- This action is subject to ADR.
- This is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus of prohibition;
- This action is appellate in nature;
- This is a post-conviction relief matter;
- This is a contempt of court proceeding;
- This is a forfeiture proceeding brought by the state;
- This is a case involving a mortgage foreclosure; or
- The parties submitted this case to voluntary mediation with a certified mediator prior to the filing of this action.

  
\_\_\_\_\_  
P. John Freeman  
Matthew R. Niemiec  
Halford, Niemiec & Freeman, LLP  
238 Rockmont Drive  
Fort Mill, South Carolina 29708  
803-547-6618  
803-547-6638 fax  
March 23, 2017

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

Civil Action No. 2017-CP-46-00867

Michael Frank, individually and as the )  
Parent and guardian of Samuel Frank, )  
A Minor, )

Plaintiff, )

vs. )

South Carolina Department of Social )  
Services, )

Defendant. )

SUMMONS

(Jury Trial Demanded)

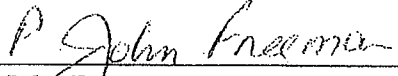
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2017 MAR 23 PM 4:29  
DAVID HAMILTON  
C.C.P.S.S.  
YORK COUNTY, SC

**TO: DEFENDANT ABOVE NAMED:**

YOU ARE HEREBY SUMMONED and REQUIRED to Answer the lawsuit and motions in this case, a copy of which are hereby served upon you, and provide your Answer within thirty (30) days of service of these documents upon you with the court and by providing a copy to the undersigned attorney for the Plaintiff.

YOU WILL TAKE NOTICE that should you fail to Plead, Answer or otherwise respond the Plaintiff will, by and through its counsel, petition the court for award of judgment against you in your absence, by default, and for all relief being demanded in the Complaint.

HALFORD, NIEMIEC & FREEMAN, L.L.P.

  
\_\_\_\_\_  
P. John Freeman  
Matthew R. Niemiec  
238 Rockmont Drive  
Fort Mill, South Carolina 29708  
803-547-6618  
803-547-6638 fax  
Email: [matt@fortmilllaw.com](mailto:matt@fortmilllaw.com)

March 23, 2017

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF YORK )  
 )  
 MICHAEL FRANK, individually and as )  
 the parent and guardian of SAMUEL )  
 FRANK, a minor, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 SOUTH CAROLINA DEPARTMENT OF )  
 SOCIAL SERVICES, )  
 )  
 Defendant. )

IN THE COURT OF COMMON PLEAS  
 SIXTEENTH JUDICIAL CIRCUIT

**COMPLAINT**  
 (JURY TRIAL DEMANDED)

Civil Action: 2017-CP-46-0086

FILED-RECEIVED  
 2017 MAR 23 PM 4:29  
 DAVID MANNING  
 C.C. P. & G.S.  
 YORK COUNTY, SC

**COMES NOW** the Plaintiff, Michael Frank, individually and as the parent and guardian of Samuel Frank, a minor, and alleges as follows, *to wit*:

- 1) The Plaintiff, and his minor son, are residents of York County, South Carolina.
- 2) The Defendant, South Carolina Department of Social Services (hereinafter referred to as "DSS") is a South Carolina governmental agency that performs its services in York County, South Carolina and is subject to suit pursuant to the South Carolina Tort Claims Act.
- 3) On or about October 31, 2013, DSS began an investigation on the Plaintiff; and further, Defendant DSS alleged the Plaintiff was an alcoholic who drank excessively and was physically abusive to his son, the minor child herein.
- 4) On December 10, 2013, a temporary hearing was held in a private custody case between the Plaintiff herein and his ex-wife, Jolene Frank, the mother of Samuel; and further, agents and/or representatives of Defendant DSS attended the hearing.
- 5) At said hearing on December 10, 2013, Defendant DSS and its agents / representatives reasserted their allegations regarding the Plaintiff's use of alcohol and physical abuse towards Sam.

6) At the time of the December 10, 2013, the Plaintiff was equally sharing custody of his son with Jolene Frank.

7) As a result of the allegations made by Defendant DSS, the Plaintiff was stripped of custody and was only allowed supervised visitation with his son; and further, this caused both the Plaintiff, and his son, substantial and grave emotional, physical, financial and psychological harm.

8) Prior to publishing its allegations against the Plaintiff, Defendant DSS and its agents, representatives, assignees and employees were grossly negligent in that they failed to do any substantive investigatory work; and further, the injuries and damages suffered by the Plaintiffs were proximately caused by the grossly negligent, reckless, willful and wanton acts of the Defendant DSS in the following particulars, *to wit*:

- a. In failing to properly investigate the claims and allegations raised;
- b. In providing false, misleading and inaccurate testimony and documentary evidence to the Court;
- c. In failing to follow standard protocols with regard to the investigation of the claims, more specifically but not limited to the claims made against the Plaintiff;
- d. In failing to properly hire qualified personnel;
- e. In failing to properly train its personnel;
- f. In conspiring with Jolene Frank so as to deprive the Plaintiff of the custody of his son and to take his son from the Plaintiff;
- g. In acting with bias and depriving the Plaintiff of his due process rights under South Carolina laws;
- h. In failing to act in a reasonably prudent manner; and
- i. In such other particulars as may be shown through discovery and evidence.

9) As a direct and proximate result of the Defendant's behavior and acts, as set forth above, the Plaintiff suffered actual damages as well as consequential and collateral damages in that the Plaintiff and his son suffered substantial and grave emotional, physical, financial and psychological harm.

10) On March 24, 2015, the Defendant DSS had their investigation closed and their legal filing dismissed by the Sixteenth Judicial Circuit Family Court for York County on the Court's own motion due to the Defendant's failure to properly prosecute their claims.

**FOR A SECOND CAUSE OF ACTION**  
**(Defamation)**

11) The above allegations are incorporated as if rewritten verbatim.

12) The Defendant DSS, its employees, officers, representatives and/or agents defamed the Plaintiff by publishing to others false statements that the Plaintiff had a substance abuse problem and was physically abusive to his son.

13) The defamatory statements made by Defendant DSS, its employees, officers, and/or agents were made with implied and/or actual malice.

14) The Defendant DSS knew, or should have known, the statements about the Plaintiff were false.

15) The false statements, which were made by Defendant DSS, its employees, officers, and/or agents were damaging to the Plaintiff's personal, community and professional reputations because the statements accused the Plaintiff of harming his child.

16) The false statements, which were made by Defendant DSS, its employees, officers, and/or agents caused the Plaintiff substantial financial loss.

17) The conduct of the Defendant DSS was undertaken with a conscious disregard of the Plaintiff's rights.

18) As a direct and proximate result of Defendant's acts and behavior, the Plaintiff has suffered actual damages as well as consequential and collateral damages in that the Plaintiff and his son suffered substantial and grave emotional, physical, financial and psychological harm.

**FOR A THIRD CAUSE OF ACTION**  
**(Outrage)**

19) The above allegations are incorporated as if rewritten verbatim.

20) The actions of the Defendant DSS without due process and proper investigation recklessly inflicted emotional distress onto the Plaintiff and his son by causing the removal of the Plaintiff's time, care, and custody.

21) The Defendant's conduct was extreme and outrageous and exceeded all bounds of decency in that the Defendant DSS recklessly exercised its authority over the Plaintiff and his son.

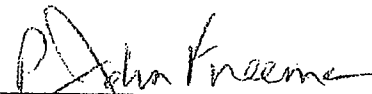
22) The Defendant DSS acted with knowledge that under the circumstances then existing it knew the Plaintiff was susceptible to emotional distress.

23) By reason of and in consequence of the aforesaid negligence, carelessness, recklessness, willfulness, wantonness and grossly negligent conduct of the Defendant DSS, the Plaintiff and his son sustained serious, severe and premanent injuries; severe emotional distress, and will continue to suffer great humiliation and mental anquish.

**WHEREFORE**, the Plaintiff, individually and as the parent and guardian of Samuel Frank, a minor, prays for actual damages in an amount to be determined by the trier of fact, for special damages, consequential damages, collateral damages, for the costs and expenses of this action, attorney's fees, and for such other and further relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED,

**HALFORD, NIEMIEC & FREEMAN, LLP**



---

P. John Freeman  
Matthew R. Niemiec  
238 Rockmont Drive  
Fort Mill, South Carolina 29708  
Telephone: 803-547-6618  
Facsimile: 803-547-6638  
Email: [jfreeman@fortmilllaw.com](mailto:jfreeman@fortmilllaw.com)

**ATTORNEYS FOR THE PLAINTIFF**

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

FILED-RECEIVED

Michael Frank, individually and as the parent and guardian of Samuel Frank, a minor,

CASE NUMBER: 2017-CP-46-0867

Plaintiff,

DAVID HAMILTON  
C.C.C.P. & G.S.  
YORK COUNTY, SC

Vs

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

South Carolina Department of Social Services,

Defendant.

Plaintiff's Attorney: P. John Freeman, 238  
Rockmont Dr, Fort Mill, SC 29708  
Phone:  
e-mail:

Defendant's Attorney: W. Keith Martens  
Address: PO Box 10940, Rock Hill, SC 29731  
Phone: 803.329.7672 fax: 803.329.7678  
e-mail: keith.martens@hamiltonmartens.com

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

**SECTION I: Hearing Information**

Nature of Motion: Motion to Dismiss

Estimated Time Needed: 10 min Court reporter needed:  YES /  NO

**SECTION II: Motion/Order Type**

- Written motion attached
- Form Motion/Order

*W. Keith Martens*

Signature of Attorney for  Plaintiff /  Defendant

May 5, 2017  
Date submitted

**SECTION III: Motion Fee**

- PAID - AMOUNT: \$25.00
- EXEMPT:
  - Rule to Show Cause in Child or Spousal Support (check reason)
  - Domestic Abuse or Abuse and Neglect
  - Indigent Status  State Agency v. Indigent Party
  - Sexually Violent Predator Act  Post-Conviction Relief
  - Motion for Stay in Bankruptcy
  - Motion for Publication  Motion for Execution (Rule 69, SCRPC)
  - Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
- Name of Court Reporter:
  - Other:

**JUDGE'S SECTION**

- Motion Fee to be paid upon filing of the attached order.
- Other:

JUDGE

CODE:

Date:

**CLERK'S VERIFICATION**

Collected by: DMD

Date Filed: 5/18/17

- MOTION FEE COLLECTED: 25
- CONTESTED - AMOUNT DUE: \_\_\_\_\_

DAVID HAMILTON  
C.C.P. & G.S.  
YORK COUNTY, SC  
Michael Frank, individually and as the  
parent and guardian of Samuel Frank, a  
minor,

C/A No. 2017-CP-46-00867

Plaintiff,

v.

MOTION TO DISMISS

South Carolina Department of Social  
Services,

Defendant.

Defendant, South Carolina Department of Social Services (SCDSS), moves to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) S.C. R. Civ. P. In support of this motion, SCDSS would allege and show as follows:

**A. Plaintiff's claims are barred by the Statute of Limitations.**

1. Plaintiff's entire complaint is based upon the alleged acts or omissions of SCDSS that occurred on or before December 10, 2013. Specifically, Plaintiff makes the following factual allegations in support of his complaint:

a. On or about October 31, 2013, SCDSS opened an investigation concerning Plaintiff, alleging that Plaintiff was an alcoholic who drank excessively and abused his minor son. (Complaint ¶ 3).

b. On December 10, 2013, agents or employees of SCDSS attended a family court hearing in a private custody case between Plaintiff and his ex-wife. (Complaint ¶ 4).

c. At the hearing on December 10, 2013, SCDSS “reasserted their allegations regarding Plaintiff’s use of alcohol and physical abuse” toward his minor son. (Complaint ¶ 5).

d. “As a result of the allegations made by Defendant DSS [at the December 10, 2013 hearing] the Plaintiff was stripped of custody and was only allowed supervised visitation with his son; and further, this caused both the Plaintiff and his son substantial and grave emotional, physical, financial and psychological harm.” (Complaint ¶ 7).

e. “As a direct and proximate result of the Defendant’s behavior and acts, as set forth above, the Plaintiff suffered damages.” (Complaint ¶ 9).

f. On March 24, 2015, the family court dismissed DSS’ case against Plaintiff dismissed “due to the Defendant’s failure to properly prosecute their [sic] claims.” (Complaint ¶ 10).

2. Plaintiff’s complaint includes three causes of action: (1) negligence; (2) defamation; and (3) outrage.

3. Each of Plaintiff’s causes of action is based upon the same factual allegations, which are “incorporated [into each cause of action] as if rewritten verbatim.”

4. Plaintiff’s complaint is governed by the South Carolina Tort Claims Act. That Act provides that an action for damages “may be instituted at any time within two years after the loss was or should have been discovered.” S.C. Code Ann. §15-78-100.

5. Accepting Plaintiff’s factual allegations as true, Plaintiff’s loss “was or should have been discovered” on or about December 10, 2013, when he alleges that he was “stripped of custody” of his son.

6. Plaintiff did not commence this action until March 23, 2017, more than three years after Plaintiff's alleged loss "was or should have been discovered." Consequently, Plaintiff's entire claim is barred by the applicable statute of limitations.

**B. Plaintiff's claims are barred by the doctrine of judicial immunity.**

1. Plaintiff's claims are based entirely upon the alleged testimony of DSS' employees at a hearing before the South Carolina Family Court. (Complaint ¶¶ 5 and 7).

2. The United States Supreme Court has unequivocally held that trial witnesses, "whose participation in bringing . . . litigation to a just – or possibly unjust - conclusion is . . . indispensable" are entitled to absolute immunity from civil suit. Briscoe v. LaHue, 460 U.S. 325, 345-46 (1983). This is true even where a witness has maliciously or intentionally provided false testimony at trial.

3. Even if DSS' employees *knowingly* provided false testimony against Plaintiff, they cannot be subject to civil liability.

4. The facts alleged by Plaintiff, accepted as true, cannot give rise to liability. Consequently, Plaintiff has failed to allege facts sufficient to state a cause of action against SCDSS.

**C. Plaintiff has failed to allege facts supporting any claim on behalf of the minor child.**

**D. Plaintiff has failed to allege facts supporting a claim for outrage.**

**E. Plaintiff has failed to allege facts supporting a claim for defamation.**

This motion will be based upon the allegations of Plaintiff's complaint, the applicable statutory and case law, and the South Carolina Rules of Civil Procedure. Counsel certifies, pursuant to Rule 11 S.C. R. Civ. P., that he had no obligation to consult with opposing counsel prior to filing this motion.

May 5, 2017

*W. Keith Martens*

---

W. Keith Martens  
HAMILTON MARTENS, LLC  
P.O. Box 10940  
Rock Hill, South Carolina 29731  
(803) 329-7672  
[keith.martens@hiltonmartens.com](mailto:keith.martens@hiltonmartens.com)

ATTORNEYS FOR DEFENDANT

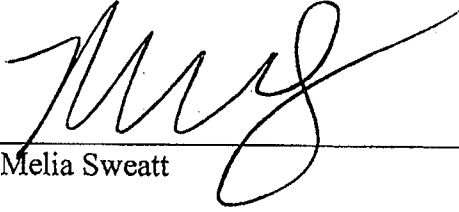
4827-1173-2807, v. 1

**CERTIFICATE OF SERVICE**

The undersigned, an employee of Hamilton Martens, LLC, certifies that the within Notice of Deposition was served on the all parties of record by placing the same in regular United State mail addressed as follows:

P. John Freeman  
238 Rockmont Drive  
Fort Mill, SC 29708

This the 5<sup>th</sup> day of May, 2017.

  
\_\_\_\_\_  
L. Melia Sweatt

FILED-RECEIVED  
2017MAY -8 PM 4: 15  
DAVID HAMILTON  
C.C.C.P. & G.S.  
YORK COUNTY, SC

State of South Carolina., )  
 )  
 )  
County of York. )

In the Common Pleas  
Court of York

Case No.: 2017-CP-46-00861

Michael Frank, individually., )  
and as the Parent and )  
Guardian of Samuel )  
Frank, a Minor., )  
 )  
Plaintiff., )

Transcript of Record

-vs- )

South Carolina Department., )  
of Social Services., )  
 )  
Defendant. )

May 15, 2017  
York, South Carolina

B E F O R E:

The Honorable S. Jackson Kimball, III, judge.

A P P E A R A N C E S:

Mr. Matthew Niemiec  
Halford, Niemiec & Freeman, L.L.P.  
238 Rockmont Dr.  
Fort Mill, South Carolina 29708  
matt@fortmilllaw.com  
(803) 547-6618  
Attorney for the Plaintiff.

**ORIGINAL**

Mr. Walter Keith Martens  
Hamilton Martens, LLC  
PO Box 10940  
Rock Hill, South Carolina 29731  
keith.martens@hamiltonmartens.com  
(803) 329-7662  
Attorney for the Defendant

Wanda S. Nelson, CVR-M  
Official Court Reporter  
To the Honorable John C. Hayes, III  
Sixteenth Judicial Circuit  
Union and York Counties

I-N-D-E-X

E-X-A-N-I-N-A-T-I-O-N

WITNESS

BY:

PAGE NO.

No witnesses were called.

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<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
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No exhibits were received into the record.

1 (COURT IN SESSION IN THE MATTER OF MICHAEL FRANK,  
2 INDIVIDUALLY, AND AS THE PARENT AND GUARDIAN OF SAMUEL  
3 FRANK, A MINOR, VERSUS SOUTH CAROLINA DEPARTMENT OF SOCIAL  
4 SERVICES AT 11:37 AM.)

5 THE COURT: Okay. Next and apparently last for eleven  
6 o'clock I have Michael Frank and others against DSS.

7 Mr. Niemiec and Mr. Martens.

8 MR. NIEMIEC: Good morning, your Honor.

9 THE COURT: Good morning. All right. This is the  
10 Defendant's motion to dismiss based on the statute of  
11 limitations. Mr. Martens.

12 MR. MARTENS: Thank you, your Honor, may it please the  
13 Court. Keith Martens on behalf of the defendant DSS.

14 Your Honor, this is a motion to dismiss based upon the  
15 statute of limitations but there are also other grounds  
16 which we have -- we've already -- the case should be  
17 dismissed at this stage.

18 THE COURT: Right.

19 MR. MARTENS: Your Honor, we have moved to dismiss  
20 this complaint pursuant to Rule 12(b)(6) and as the Court  
21 is well aware when considering a 12(b)(6) motion the court  
22 must accept the factual allegations of the complaint as  
23 true. And if the Plaintiff's allegations accepted as true  
24 would entitle the Plaintiff to any relief on any theory of  
25 his case the motion should be denied.

1           The factual allegations of this complaint are the  
2 following: That DSS opened an investigation into the  
3 Plaintiff alleging that he was an alcoholic who drank  
4 excessively and abused his minor son. That allegation is  
5 found at paragraph 3 of the complaint. That on December  
6 10th of 2013 in a private action between the Plaintiff and  
7 his now ex-wife concerning custody of their minor son,  
8 agents or employees of DSS appeared at that hearing and  
9 testified concerning their open investigation into his  
10 alleged alcohol abuse and abuse of his son. That  
11 allegation appears at paragraph 4. At that hearing they  
12 gave that testimony which is paragraph 5 of the complaint.

13           As a result of DSS's allegations slash testimony at  
14 that hearing the Family Court issued an order which  
15 deprived the Plaintiff of custody of his minor son.

16           Those are the factual allegations of the complaint and  
17 the following -- the next allegation is that in March of  
18 2015 the Family Court issued an order dismissing the DSS  
19 case based on failure to prosecute and allegedly failure to  
20 follow proper procedures of the prosecution of the case.

21           Now based on those factual --

22           THE COURT: I don't remember anything about a  
23 dismissal for not following proper procedure.

24           MR. MARTENS: I believe its at paragraph 10 of the  
25 complaint. Your Honor, they allege on March 24th, 2015 -

1 THE COURT: Right.

2 MR. MARTENS: --- DSS had their investigation closed  
3 and their legal filing dismissed by the Judicial Circuit  
4 Family --

5 THE COURT: Failure to properly prosecute.

6 MR. MARTENS: Yes, sir.

7 THE COURT: Not failure to do something they were  
8 supposed to do other than prosecute. In other words it  
9 doesn't go to what they did in terms of following their  
10 procedure.

11 MR. MARTENS: You are correct.

12 THE COURT: Just --

13 MR. MARTENS: The allegation is they failed to  
14 properly prosecute.

15 THE COURT: Okay.

16 MR. MARTENS: You're absolutely correct on that.

17 Based entirely upon those factual allegations the  
18 plaintiff asserted three causes of action. Negligence,  
19 defamation and outrage.

20 The statute of limitation clearly bars each of the  
21 Plaintiff's claims. If you accept everything that the  
22 Plaintiff has alleged is true the damaging event, the Court  
23 taking his son away from him, occurred as a result of this  
24 hearing on December 10th of 2013. The Plaintiff did not  
25 file this action until March 23rd of 2017, three and a half

1 years after that hearing where he lost -- supposedly lost  
2 custody of his son.

3 Now, those claims would be barred under the general  
4 statute of limitations of this state. Three are statute of  
5 limitations. We're talking about claims under the *Tort*  
6 *Claims Act*. The *Tort Claims Act* provides expressly -

7 THE COURT: Two years.

8 MR. MARTENS: --- two years after a loss was or should  
9 have been discovered. Construing all facts as true giving  
10 every inference in the light most favorable to the  
11 plaintiff, Mr. Frank knew he had suffered this loss that he  
12 now complains, which is the basis of his suit, he knew he  
13 had that loss on December 10th, 2013.

14 The claim is clearly time barred and it ought to be  
15 dismissed pursuant to Rule 12(b)(6). The claims are also  
16 barred by reason of the *Doctrine of Judicial Immunity*.  
17 We're basing claims based on testimony that witnesses' gave  
18 at trial.

19 THE COURT: That produced a result.

20 MR. MARTENS: That's correct. And the allegation is  
21 that based on the witnesses' testimony the Court did  
22 something that hurt me or did something I didn't like.

23 The U.S. Supreme Court has held that witnesses  
24 testifying at trial are entitled to absolute immunity from  
25 suit and liability for the testimony that they give at

1 trial. And the Supreme Court has said it doesn't matter if  
2 they're negligent in their testimony. It doesn't matter  
3 if they're untruthful in their testimony. It doesn't  
4 matter if they intentionally lie, they are entitled to  
5 immunity because they are an important part of the  
6 juridical process and if we had people being sued for  
7 testimony they gave at court the process would break down.

8 THE COURT: Suppose they were convicted of perjury?

9 MR. MARTENS: That's the remedy. If someone lies at  
10 court --

11 THE COURT: Well is there a civil action for perjury?

12 MR. MARTENS: I don't think there is. I think the  
13 Supreme Court has spoken to that and said its judicial  
14 immunity. It's the same immunity that you enjoy, it's the  
15 same immunity that as a lawyer pursuing or defending a case  
16 that I enjoy, or the actions that are taken in that  
17 courtroom related to the prosecution of the defense of that  
18 claim there is immunity. So we believe again statute of  
19 limitations bars the claim; we believe there is absolute  
20 immunity for anything those folks said at that hearing  
21 regardless of the outcome of the hearing.

22 The third reason we believe that we're entitled to  
23 dismissal pursuant to Rule 12(b)(6) this has to do with the  
24 claims on behalf of the minor child. There is not a single  
25 factual allegation in this complaint --

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THE COURT: Was both, is Mr. Frank and the minor child.

MR. MARTENS: That's right. And my point is, your Honor, there is not a single allegation of anything that anybody did with regard to the minor child and then there's just sort of this gratuitous these actions caused damage to the plaintiff and to his minor child.

And we don't think that that conclusory gratuitous statement is sufficient to state a cause of action to withstand a 12(b)(6) motion on behalf of the minor child.

The fourth reason we believe dismissal is appropriate at this stage this has to do with the Plaintiff's outrage claim. Accepting everything the Plaintiff has alleged is true again, that DSS was negligent, that they gave testimony without a reasonable foundation, that they didn't follow their procedures, that they're case was thrown out, those facts do not give rise to outrage in this state as a matter of law.

*South Carolina's Court of Appeals* has held that a claim for outrage must allege that the Defendant acted in a way that was so atrocious and utterly intolerable in civilized society. That the activities were so extreme and outrageous that they exceed all possible bounds of decency; that they acted with the intent to inflict emotional distress, or with such recklessness that it was certain

1 that the actions would cause distress. And, that the  
2 Plaintiff's distress was so severe that no reasonable  
3 person could expect to endure.

4 We don't think the Plaintiff has alleged that they  
5 acted with intent. We don't think the Plaintiff has alleged  
6 facts that are atrocious and utterly intolerable in  
7 civilized society. Accepting everything the Plaintiff has  
8 said is true, DSS failed to properly investigate and they  
9 went into court and they gave testimony based on a bad  
10 investigation, we believe as a matter of law based on the  
11 allegations that have been pled this court can rule that  
12 does not state a claim for outrage.

13 THE COURT: How old is the child now?

14 MR. MARTENS: I believe seventeen.

15 MR. NIEMIEC: Fifteen, your Honor.

16 MR. MARTENS: Fifteen.

17 THE COURT: Fifteen. Thank you.

18 MR. MARTENS: The next reason, your Honor, this has to  
19 do with the Plaintiff's claim for defamation. And we  
20 believe that the Plaintiff has not factually alleged -- has  
21 not alleged facts that would properly constitute a claim  
22 for defamation. Defamation requires a false and defamatory  
23 statement; that it was published in an unprivileged  
24 communication to a third party, the publisher was at fault,  
25 and either the statement was actually in respect of it's

1 harm or that it caused special harm to the Plaintiff.

2 There is a federal court case from Judge Anderson.

3 THE COURT: Which one?

4 MR. MARTENS: Its actually -- The name of the case is  
5 *Campbell versus International Paper*. And it is not a  
6 reported opinion; it's reported on WestLaw. It's a 2013  
7 decision. And in that case Judge Anderson was considering  
8 a motion to dismiss a defamation claim filed by a worker,  
9 who was terminated, and the allegation was that the reasons  
10 for his termination were known, generally known to the  
11 public. And the basis of the defendant's motion was you  
12 have to allege a specific publication to a specific person  
13 at a specific time.

14 And there are actually two cases as I mentioned the  
15 *Campbell* case where Judge Anderson considered that issue.  
16 And then there's the case *Alford versus Wang* which is a  
17 reported opinion at 11 F.Supp.3d 584 where Judge Seymour  
18 considered the same issue. And in the *Alford versus Wang*  
19 case the allegation was that the defendant told other  
20 employees why the person was fired. And Judge Seymour  
21 considered the difference between we told employees, you're  
22 not to say who those employees were, that's sufficient  
23 versus they told somebody something bad about my client  
24 therefore we have a claim for defamation.

25 I think all we have in this case is an allegation that

1 we told third parties bad things about Mr. Frank. And I  
2 don't think that's sufficient as a matter of law to state a  
3 claim for defamation under South Carolina law.

4 So for all the reasons that I've discussed we believe  
5 that a dismissal pursuant to 12(b)(6) is appropriate and  
6 would ask that the Court to dismiss the case.

7 THE COURT: All right. Mr. Niemiec.

8 MR. NIEMIEC: Thank you, your Honor, may it please the  
9 Court. As far as standard overview and that goes I think  
10 we're all in agreement as far as the inferences should be  
11 given in light most favorable to my client.

12 THE COURT: Except that its true.

13 MR. NIEMIEC: Certainly this is -- this is a motion  
14 that's done just by the pleadings, and I think what you got  
15 was a very good narrow reading of my pleading, and I'm here  
16 to kind of explain where I think we've met our burden as  
17 far as this hearing and pleading properly.

18 Specifically we allege that on March 24th, 2015 the  
19 Court sua sponte dismissed the DSS's action.

20 THE COURT: When did the injury occur?

21 MR. NIEMIEC: That day. And the reason we say it  
22 occurred that day is because there's nothing wrong on it's  
23 face.

24 THE COURT: When was the injury?

25 MR. NIEMIEC: The injury occurred that day as well.

1 THE COURT: What was the injury?

2 MR. NIEMIEC: The injury was my client's attorney's  
3 fees, his relationship with his son that was affected.

4 THE COURT: When did he first suffer that?

5 MR. NIEMIEC: I suppose it -- I understand what you're  
6 saying which is the minute he paid an attorney fees he  
7 suffered --

8 THE COURT: No, that's not what I'm saying.

9 MR. NIEMIEC: Well I guess that's what I was thinking  
10 you were getting at. He suffered --

11 THE COURT: Let me stop you. I understand you to be  
12 telling me that this cause of action did not accrue until  
13 DSS dismissed or that until DSS -- the Court, some court,  
14 Family Court, dismissed DSS's claim against the Plaintiff.

15 MR. NIEMIEC: Yes. Now I didn't allege it in the  
16 pleading because --

17 THE COURT: Well why is that when the injury occurred?

18 MR. NIEMIEC: Because what we're alleging is, what  
19 we're stating, and this is a hard case for me to  
20 articulate, even harder to put in pleadings. The  
21 investigation is not what gave rise to my client's  
22 knowledge that he had been harmed. An investigation in and  
23 of itself is not necessarily harming to somebody.

24 The fact that the investigation was using -- the  
25 investigators were using false information wouldn't

1 necessarily give rise to a cause of action because they  
2 have a right to rely on that false information as they are  
3 investigating the claims. If somebody comes to them and  
4 tells them a lie and for whatever reason they believe that  
5 person they're entitled to act on that lie.

6 THE COURT: What happened on December the 10th, 2013?

7 MR. NIEMIEC: Well, DSS went into -- provided a  
8 written report --

9 THE COURT: What happened to Mr. Frank on December  
10 10th, 2013?

11 MR. NIEMIEC: We had a temporary hearing.

12 THE COURT: What happened?

13 MR. NIEMIEC: DSS had provided a report --

14 THE COURT: What happened? What was the ruling?

15 MR. NIEMIEC: My client lost custody for two weeks.  
16 He regained it two weeks later.

17 THE COURT: Okay.

18 MR. NIEMIEC: So. I guess to distill it down, DSS  
19 knowingly continued an investigation when they knew the  
20 information they were relying on was false and they  
21 concealed that from us. So it's one thing to have an  
22 investigation and rely on false information while you're  
23 doing that investigation --

24 THE COURT: Well what -- If he got custody back in two  
25 weeks what was his loss after that? What were his damages

1 after that?

2 MR. NIEMIEC: Eighteen more months of litigation with  
3 DSS. It wasn't two weeks, your Honor. We got -- He had  
4 two supervised visits and then we returned to custody so it  
5 was essentially two weekends where he was supervised with  
6 his visitation. And then sometime subsequent to that we  
7 were able to resume his normal visitation and then we also  
8 were able to get custody back for him.

9 So that's not our underlying -- That's not what we say  
10 is the underlying claim. So here's what happened.

11 March 24, 2015 they show up in court without one  
12 single corroborating witness to their entire report. They  
13 tell the judge we can't present this witness.

14 MR. MARTENS: Your Honor, if I'm bound by the  
15 pleadings so is Mr. Niemiec. Your Honor, that's in the  
16 complaint.

17 MR. NIEMIEC: Well I mean, again, in the complaint we  
18 state that the Court on it's own motion due to their  
19 failure to properly prosecute the claim. And I think they  
20 want to take or the defense would like to take -- I'm not  
21 sure what meaning they're giving that. What we're saying  
22 is they failed to prosecute their claim. And that was the  
23 day, that's what triggered to my client wait a minute.

24 THE COURT: Well there's a cause of action for that.  
25 Abuse of process or malicious prosecution either one.

1 That has nothing to do with a negligent investigation.

2 MR. NIEMIEC: Well what we're stating is that they  
3 purposely -- they knowingly engaged in an investigation  
4 when they knew the information was false.

5 THE COURT: Did not the injury occur when DSS's  
6 employees, case workers, whatever they were, testified at  
7 the hearing on December the 10th and the result was that  
8 Mr. Walters -- Frank, I'm sorry. I got another case in my  
9 mind.

10 MR. NIEMIEC: I understand why --

11 THE COURT: Listen to me.

12 MR. NIEMIEC: Yes, sir.

13 THE COURT: That Mr. Franks' damage occurred then?

14 MR. NIEMIEC: Some damage occurred then but not all.

15 THE COURT: A continued prosecution of an action  
16 is not a claim for negligence. Furthermore, under the *Tort*  
17 *Claims Act* which this falls under, simple negligence would  
18 not -- You've alleged grossly negligent but there are no  
19 facts of gross negligence alleged in this complaint.

20 MR. NIEMIEC: Sure there are. As far as gross  
21 negligence of allegations. I mean A through H alleges  
22 gross willful conduct, grossly negligent willful and  
23 reckless conduct.

24 THE COURT: Well for example it's talking about false,  
25 misleading and inaccurate testimony and documentary

1 evidence to the court. When?

2 MR. NIEMIEC: For the eighteen months that they were  
3 providing information to the court.

4 THE COURT: Suppose there had never been a hearing on  
5 December the 10th. And suppose the custody relationship  
6 was never changed from when the DSS investigation started,  
7 in other words, Mr. Frank had never lost custody of his  
8 son, and the matter had just sat idle for years, what would  
9 be the injury?

10 MR. NIEMIEC: The cloud of an investigation that could  
11 potentially remove --

12 THE COURT: They have a right to file a lawsuit and  
13 commence an investigation.

14 MR. NIEMIEC: I agree with that. But in this case  
15 what we're alleging --

16 THE COURT: Suppose I rule in the defendant's favor,  
17 do they have a claim for him filing a claim against them?

18 MR. NIEMIEC: Again, your Honor, just to finish my  
19 thought. When they --

20 THE COURT: Do they?

21 MR. NIEMIEC: Does he have -- No.

22 THE COURT: Okay.

23 MR. NIEMIEC: So when he finds out -- And that's what  
24 the standard is. This is a despite the fact that his *Tort*  
25 *Claims* in two years this is the discovery rule when my

1 client knew or should have known. And again, being  
2 investigated is not known or should have known. You have a  
3 right to assume the investigation is going to clear your  
4 name for instance. You have a presumption of innocence in  
5 a criminal or a quasi criminal matter. So just the mere  
6 fact that somebody's investigating you isn't necessarily  
7 gonna trigger to you that you know or should know that  
8 you're being harmed in some way. The investigation could  
9 have good results for you.

10 So just the fact that an investigation was open or  
11 just the fact that they came to court and repeated in  
12 writing information that they had gathered as part of their  
13 investigation wouldn't again trigger my client's knowledge  
14 that they were pursuing an active investigation which they  
15 knew was providing false information. And that's what  
16 we've alleged. That they knew they were providing false  
17 information during the entire course of their  
18 investigation.

19 THE COURT: When was he aware of the false  
20 information?

21 MR. NIEMIEC: Pardon me?

22 THE COURT: When was he aware of the false  
23 information?

24 MR. NIEMIEC: After the hearing was dismissed. Once  
25 his restraining order preventing him from talking to his

1 son --

2 THE COURT: Did they not present any false information  
3 on December the 10th?

4 MR. NIEMIEC: No, sir. What specifically --

5 THE COURT: Was --

6 MR. NIEMIEC: What specifically was alleged in this  
7 case is that his son was making allegations against him.  
8 He then gets hit with a restraining order by the Family  
9 Court which says do not talk to your son about the  
10 allegations that are being made about you. He can assume  
11 that his son is making those allegations and he has a right  
12 to defend them and he doesn't necessarily even fault a  
13 minor for making statements.

14 What he does say is DSS knew they were false at some  
15 point, conspired -- They turned from an investigatory body  
16 into an advocacy body and they started to conspire with his  
17 ex-wife, Jolene Frank, and when they finally were called to  
18 court and told --

19 THE COURT: That's all out of these pleadings. Let's  
20 talk about your pleadings.

21 MR. NIEMIEC: That's in my pleadings. Its paragraph 8  
22 of paragraph 8 F in conspiring with Jolene Frank.

23 THE COURT: Hold on. Is that all you want to argue  
24 about the statute of limitations?

25 MR. NIEMIEC: I mean that's what I --

1 THE COURT: That the cause didn't arise until March  
2 the 24th?

3 MR. NIEMIEC: Yes.

4 THE COURT: Okay. Now let's move on to the outrage  
5 cause of action.

6 MR. NIEMIEC: Again, if DSS knowingly investigates  
7 somebody when they are doing it under false pretenses  
8 that's outrageous.

9 THE COURT: Utterly intolerable in a civilized  
10 society?

11 MR. NIEMIEC: I think if you went to many mother or  
12 father and said DSS is gonna knowingly --

13 THE COURT: And intending --

14 MR. NIEMIEC: Knowingly --

15 THE COURT: Intended to injure the individual?

16 MR. NIEMIEC: Yes, sir, I do believe that we could  
17 meet that burden. And I think we have alleged it and I  
18 think we're entitled to at least discovery to attempt to  
19 meet that burden.

20 THE COURT: All right, now let's talk about the  
21 immunity issue.

22 MR. NIEMIEC: No one ever testified, your Honor. And  
23 we didn't allege that anybody did testify.

24 THE COURT: I must have misread something.

25 MR. NIEMIEC: The court dismissed the DSS case because

1- they failed --

2 THE COURT: No, I'm talking about the testimony in the  
3 custody hearing which was apparently a law suit between  
4 this Plaintiff, Mr. Frank, and what I assume was Ms. Frank.

5 MR. NIEMIEC: Again, we're not, A there was no  
6 testimony given that was --

7 THE COURT: In that testimony -- In that case?

8 MR. NIEMIEC: There was information provided through a  
9 report. Is that considered testimony?

10 THE COURT: I get to ask the questions.

11 MR. NIEMIEC: I'm sorry, I'm asking that rhetorically.  
12 I don't believe that that's testimony. I believe that  
13 Jolene Franks attorney took the report that DSS was created  
14 and used that in the Family Court as part of the basis for  
15 their claims. This is a private action. They made other  
16 claims as well.

17 THE COURT: Okay.

18 MR. NIEMIEC: So I don't believe there's any testimony  
19 that would be subject to that qualified immunity. But I  
20 would also say to answer your other question --

21 THE COURT: Well then to whom -- You haven't alleged  
22 to whom any defamation was published.

23 MR. NIEMIEC: Of the Guardian Ad Litem. I did not  
24 specifically allege so I would state that if that case does  
25 set that bar we did not specifically allege who it was

1 published to. But there were many instances where a  
2 guardian ad litem in the private action had a conversation  
3 with the Department of Social Services.

4 THE COURT: All right.

5 MR. NIEMIEC: If --

6 THE COURT: Anything else?

7 MR. NIEMIEC: I would just state that the remedy there  
8 would be to allow us to state a more definite statement in  
9 our pleadings. Again, this is a motion on our pleadings.

10 So no. I'm sorry, you ask me if there was anything  
11 else. If you would give me one minute to look over my  
12 notes.

13 (PAUSE.)

14 MR. NIEMIEC: I guess what I'd like to say just to  
15 summarize is, our pleadings attempt and we believe at least  
16 meet the initial burden that we're required to meet to  
17 state that DSS knowingly concealed the false nature of  
18 their investigation.

19 THE COURT: How do you do that?

20 MR. NIEMIEC: You know that something is false yet you  
21 report that it isn't.

22 THE COURT: So they didn't publish it to anybody?

23 MR. NIEMIEC: They published it to the guardian ad  
24 litem; they published it to us through written reports.

25 THE COURT: Well that wouldn't be defamation to report

1 it to you.

2 MR. NIEMIEC: Well, the guardian ad litem.

3 THE COURT: The guardian ad litem is an officer of the  
4 court.

5 MR. NIEMIEC: Still a third party.

6 THE COURT: All right. Have a seat.

7 Mr. Martens.

8 MR. MARTENS: Your Honor, the only factual allegations  
9 that form the basis of this complaint are contained in  
10 paragraphs one through eight. And if you look at paragraph  
11 nine of the complaint Plaintiff alleges as a direct and  
12 proximate result of the Defendant's behavior and acts, as  
13 set forth above, the Plaintiff suffered actual damages as  
14 well as collateral -- consequential and collateral damages.

15 I'm not sure what collateral damages are. But in that  
16 the plaintiff and his son suffered substantial grave  
17 emotional, physical, financial and psychological harm.

18 So everything that they're talking about as the  
19 factual basis of this complaint led up to this hearing on  
20 December 10th, 2013. That's the loss that they're talking  
21 about is the deprivation of custody rights of his son.

22 That occurred as a result of this hearing on December  
23 10th, 2013. Paragraph 5 they say that the DSS agents and  
24 employees reasserted their allegations regarding the  
25 Plaintiff's use of alcohol and physical abuse at that

1 hearing. And as a result of -- and this is in paragraph 7  
2 -- as a result of the allegations made by DSS, the  
3 Plaintiff was stripped of custody and was only allowed  
4 supervised visitation; and further, this caused both the  
5 Plaintiff, and his son, substantial and grave emotional,  
6 physical, financial and psychological harm.

7 There is not a single allegation in this complaint  
8 about attorney's fees; there's not a single allegation in  
9 this complaint about a continued prosecution after they  
10 knew or should have known; there was no basis for it.

11 They're entire claim is based upon information that  
12 apparently was provided to the court on December 10th, 2013  
13 that resulted in the issuance of an order that deprived the  
14 Plaintiff of some custody rights of his son. And that's  
15 the entire basis of this complaint and we believe it's time  
16 barred and it ought to be dismissed.

17 THE COURT: All right. Based on the allegations of  
18 the complaint this business about a cause of action arising  
19 only when the DSS action was eventually dismissed is simply  
20 a fact. There is no allegation in the complaint that I  
21 ever construed to apply to anything after Mr. Frank was  
22 temporarily deprived of custody of his son. All of that  
23 occurred on December the 10th, 2013.

24 So I find -- I grant the motion as to the statute of  
25 limitations, the statute of limitations is two years.

1           On the negligence claim which is -- it's not  
2           denominated, the first cause of action, but it is treated  
3           as a first cause of action because the next thing says for  
4           a second cause of action defamation.

5           So I dismiss the first cause of action as beyond the  
6           statute of limitations.

7           I grant the motion as to the cause of action for  
8           outrage. Nothing in the complaint nearly alleges that  
9           level of misconduct, or intent, that would support a claim  
10          of outrage, or injury for that matter. If I understand  
11          there were two weekends, or two weeks, when the Plaintiff  
12          was deprived of custody.

13          Now as to the defamation cause of action. I conclude  
14          as a matter of law that the -- that any submission to the  
15          Court by DSS in the context of it's action, or in the  
16          context of the private action between the parties, is  
17          immune from liability. There is complete immunity.

18          Now as to the defamation cause of action, I'm not sure  
19          of the -- I'm not sure that looking at the complaint, in  
20          the manner in which I'm required, does it raise some  
21          question about the context of that claim. Obviously a  
22          defamation cause of action has a three-year statute of  
23          limitations. I don't know how that works into the *Tort*  
24          *Claims Act*.

25          MR. MARTENS: I think it's -- it's Two.

1 THE COURT: Same thing? Two, you think.

2 MR. MARTENS: Yes.

3 THE COURT: If there was some defamation that occurred  
4 by, let's say a case worker talking to somebody in a bar  
5 let's say, something like that, about this individual,  
6 wouldn't that be outside the scope of -- Certainly DSS  
7 wouldn't be liable for it if it was outside the scope.  
8 They would only be liable if it was inside the scope and  
9 DSS is the only defendant so I grant the motion as to  
10 defamation -- Two years has passed. At the very least to  
11 fit within the statute -- two year statute the defamation  
12 complained of would have had to have occurred on March the  
13 23rd of 2017 which is one day before the statute expired.

14 Well -- Yeah, March 23rd of 20 --

15 MR. MARTENS: '15.

16 THE COURT: 2015 is when the case was dismissed.  
17 March 24. And this case was filed March 23rd 2017.

18 MR. MARTENS: 2017.

19 THE COURT: That's what I'm saying. Any action with  
20 defamation would have had to occurred on that day or before  
21 that day would be barred. All right.

22 You need to prepare me an order. Email it to me and  
23 do it in Word format so that I can adjust it as I think  
24 necessary. Anything else?

25 MR. NIEMIEC: Thank you, your Honor.

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THE COURT: All right. That'll conclude the hearing.

(END OF TRANSCRIPT OF RECORD.)

(COURT IN RECESS AT 12:15 PM.)



IN THE COURT OF COMMON PLEAS

CASE NO. 2017- CP-46-000867

Michael Frank, et al,

SC Department of Social Services

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: W. Keith Martens

Attorney for :  Plaintiff  Defendant  
or  
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 40(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

FILED-RECEIVED  
2017 JUN 23 AM 9:35  
DAVID HAMILTON  
S.C. C.P. & S.S.  
YORK COUNTY, S.C.

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.  
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
SCDSS	Defendant	N/A (motion to dismiss)

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

  
Special Circuit Court Judge

3063  
Judge Code

6/22/17  
Date

**For Clerk of Court Office Use Only**

This judgment was entered on the 23<sup>rd</sup> day of June, 2017 and a copy mailed first class or placed in the appropriate attorney's box on this 23<sup>rd</sup> day of June, 2017 to attorneys of record or to parties (when appearing pro se) as follows:

Matthew Niemiec  
238 Rockmont  
Fort Mill, SC 29708  
ATTORNEY(S) FOR THE PLAINTIFF(S)

W. Keith Martens; Hamilton Martens, LLC  
PO Box 10940  
Rock Hill, SC 29731  
ATTORNEY(S) FOR THE DEFENDANT(S)  
Daniel Hamilton  
CLERK OF COURT

**Court Reporter:**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

Michael Frank, individually and as the )  
parent and guardian of Samuel Frank, a )  
minor, )  
 )  
 )  
Plaintiff, )

Case No. 2017-CP-46-00867

v. )

ORDER OF DISMISSAL

South Carolina Department of Social )  
Services, )  
 )  
 )  
Defendant. )

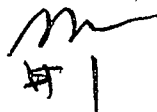
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2017 JUN 23 AM 9:35  
DAVID HAMILTON  
S.C. C.P. & GS  
YORK COUNTY, SC

This matter came before the court on June 15, 2017, upon Defendant's motion to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6), SCRCP. Plaintiff was represented by Matthew Niemiec, and Defendant was represented by W. Keith Martens. Based upon the record presented, and the arguments and submissions of the parties, I make the following findings and conclusions.

**STANDARD OF REVIEW**

A trial court may dismiss a claim pursuant to Rule 12(b)(6) only when a defendant demonstrates that the plaintiff has failed to state facts in his complaint sufficient to constitute a cause of action. *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct.App. 2001). Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995); *Bergstrom v. Palmetto Health Alliance*, 352 S.C. 221, 233, 573 S.E.2d 805, 811 (Ct.App.2002); *see also Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987) (trial court must dispose of motion for failure to state cause of action based solely upon allegations set forth on face of complaint).

A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged, and inferences reasonably deducible therefrom, would entitle the plaintiff to relief on any theory of the case. *See Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137 (1999); *Stiles*, 318 S.C. at 300, 457 S.E.2d at 602-03; *see also Baird v. Charleston County*, 333 S.C. 519, 527, 511 S.E.2d 69, 73



(1999) (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 a motion to dismiss for failure to state a claim is improper); *McCormick v. England*, 328 S.C. 627, 494 S.E.2d 431 (Ct.App. 1997) (motion to dismiss cannot be sustained if facts alleged in complaint and inferences reasonably deducible therefrom would entitle plaintiff to relief on any theory of the case).

### FACTUAL/PROCEDURAL BACKGROUND

Plaintiff commenced this action alleging multiple causes of action against Defendant ("DSS") arising out of an action commenced by DSS, and its investigation of allegations of abuse by Plaintiff of his son, as well as alcoholism. Per the Complaint, employees of DSS also testified and submitted documentary evidence as to these allegations at a separate Family Court hearing in an action between Plaintiff and his ex-wife concerning custody of the parties' minor son. (Complaint, ¶ 8b.) The causes of action asserted in the Complaint are gross negligence, defamation, and "outrage."

The claims are founded on the allegations of DSS in its case against Plaintiff, as well as the information presented by DSS in the separate Family Court action. As a result of the hearing in the private action, which occurred on December 13, 2013, "... Plaintiff was stripped of custody and was only allowed supervised visitation with his son; ..." (Complaint ¶ 7.)

The DSS action was ultimately dismissed by the Family Court on March 24, 2015, for failure to prosecute. There was no adjudication of the claims in that action either in favor of, or against, DSS or Plaintiff in that action.

### DISCUSSION

Applying the applicable standard of review to Plaintiff's Complaint, I find and conclude that the allegations of the Complaint do not allege facts entitling Plaintiff to relief in this action.

The allegations of the Complaint are premised on acts or omissions of DSS, which occurred between October 31 and December 10, 2013. These acts or omissions resulted in damage to Plaintiff at least by December 10, 2013, when he was "... stripped of custody ..." Thus, Plaintiff knew of the allegedly actionable conduct of DSS, and resulting injury, at least by December 10, 2013. Specifically, Plaintiff alleges that, on October 31, 2013, DSS began investigating Plaintiff based upon a report that Plaintiff was "... an alcoholic who drank excessively and was physically abusive to his son ..." Complaint ¶ 3. On December 10, 2013, DSS personnel attended a hearing in the private custody case between Plaintiff and his ex-wife.

  
# 2

Id. ¶ 4. At that hearing, DSS' employees “. . . reasserted their allegations regarding the Plaintiff's use of alcohol and physical abuse toward [his son].” Id. ¶ 5. “As a result of the allegations made by Defendant DSS [at the December 10, 2013 hearing], the Plaintiff was stripped of custody and was only allowed supervised visitation with his son.” Id. ¶ 7. Plaintiff alleges that he suffered actual, consequential and “collateral” damages, all “as a direct and proximate result” of DSS' actions. Id. ¶ 9.

**1. Statute of Limitations.**

As an initial matter, DSS asserts that, based on the allegations of the Complaint, each of Plaintiff's claims is barred by the statute of limitations. The South Carolina Tort Claims Act (S.C. Code Ann. §15-78-10 *et seq.* (1976, as amended)) governs all tort claims against governmental entities and “. . . is the exclusive civil remedy available in an action against a governmental entity or its employees.” *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)). § 15-78-110 specifies the Act's statute of limitations. 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.”

Plaintiff's claims in the Complaint are premised upon the alleged activities of DSS between October, 2013, and December 10, 2013. If, as Plaintiff alleges, DSS and its employees falsely accused Plaintiff of things he did not do (drinking excessively and abusing his son), Plaintiff became aware that DSS was making those allegations on or before December 10, 2013. Similarly, Plaintiff's alleged primary injury, being “stripped of custody” of his son, occurred on December 10, 2013, or very soon thereafter. Complaint ¶ 7. Thus, DSS's alleged wrong, and Plaintiff's alleged injury or loss, “[were] or should have been discovered” (§ 15-78-110.) by Plaintiff on or about December 10, 2013. To pursue a claim based upon those events, Plaintiff would have been required to file his lawsuit on or before December 10, 2015. Plaintiff did not file this action until March, 2017, nearly fifteen months after the applicable statute of limitations expired. Therefore, Plaintiff's entire complaint is time-barred.

In response, Plaintiff asserts that the statute of limitations did not begin to run until the Family Court dismissed DSS's action against him for failure to prosecute. I disagree.

First of all, Plaintiff had already had knowledge of the acts of DSS that he considered actionable, and upon which this action is based. Secondly, he alleges in the Complaint that he

*DOM*  
*#3*

suffered injury from those acts immediately as a result of the December 10, 2013, Family Court hearing. Thirdly, the dismissal of DSS's action decided nothing. There was no adjudication concerning the actions of either party. It was dismissed without any adjudication of the facts and claims presented.

For all of these reasons, the dismissal for failure to prosecute offers no extension of the time within which Plaintiff's law suit had to be commenced.

## **2. Defamation.**

"In order to prove defamation, the plaintiff must show (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Argoe v. Three Rivers Behavioral Health, LLC*, 392 S.C. 462, 474, 710 S.E.2d 67, 74 (2001). Plaintiff's complaint does not specify where, when, or to whom, DSS employees allegedly published defamatory statements. Nor is there any allegation of publication outside the scope of DSS's performance of its statutory duties, which would be required in order not to be protected by a qualified privilege. *See Argoe*, 392 S.C. at 474-475, 710 S.E.2d at 74.

Further, in the absence of specific allegations that would be outside the scope of privilege, it is reasonably inferable that the alleged defamation occurred when DSS employees testified or presented evidence at Plaintiff's December 10, 2013, custody hearing. *See Complaint* ¶ 5 ("At said hearing on December 10, 2013, Defendant DSS and its agents/representatives reasserted their [sic] allegations regarding the Plaintiff's use of alcohol and physical abuse towards [his son]."). However, any testimony of DSS' employees cannot give rise to a claim for defamation. It is protected by the doctrine of judicial immunity. The United States Supreme Court has expressly held that, because the testimony of trial witnesses is "indispensable" in "bringing litigation to a just – or possibly unjust – conclusion," those witnesses enjoy absolute immunity from civil liability for their testimony at trial. *Briscoe v. LaHue*, 460 U.S. 325 (1983).

Thus, Plaintiff's Complaint fails to state a cause of action for defamation.

## **3. Outrage.**

Finally, I find and conclude that Plaintiff's complaint fails to allege any facts supporting his claim for intentional infliction of emotional distress ("outrage"). To state a valid claim for outrage, a plaintiff must allege:

*DM*  
*4*

(1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain or substantially certain such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community; (3) the actions of defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it." *Williams v. Lancaster County School District*, 369 S.C. 293, 305, 631 S.E.2d 286, 293 (Ct.App. 2006).

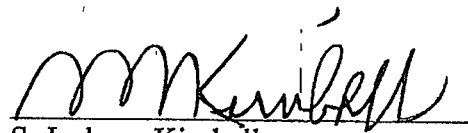
Plaintiff's Complaint lacks the factual allegations necessary to support these essential elements of Plaintiff's claim. At worst, Plaintiff alleges that DSS employees testified in a court hearing that Plaintiff was "... an alcoholic who drank excessively and [who] was physically abusive to his son." Complaint ¶¶ 3, 5. As a matter of law, the alleged actions and statements of DSS, as set forth in Plaintiff's complaint, are not "atrocious and utterly intolerable" activities that "exceed all possible bounds of decency." Plaintiff has failed to allege facts giving rise to a claim for outrage.

**ORDER**

Accepting the factual allegations of Plaintiff's complaint as true, I find and conclude that Plaintiff has failed to allege facts supporting either of his claims. Plaintiff commenced this action more than three years after the events upon which the complaint is based, and well over a year after expiration of the applicable statute of limitations. 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. Accordingly, Defendant's motion to dismiss is granted, and Plaintiff's complaint is dismissed with prejudice.

AND IT IS SO ORDERED.

June 21, 2017

  
S. Jackson Kimball  
Special Circuit Court Judge  
York County

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STATE OF SOUTH CAROLINA )  
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 COUNTY OF YORK )  
 )  
 Michael Frank, individually and as the parent )  
 and guardian of Samuel Frank, a minor, )  
 Plaintiff, )  
 vs. )  
 South Carolina Department of Social )  
 Services, )  
 Defendant. )

IN THE COURT OF COMMON PLEAS  
 SIXTEENTH JUDICIAL CIRCUIT  
 CASE NO.: 2017-CP-46-00867  
**MOTION AND ORDER INFORMATION**  
**FORM AND COVERSHEET**

Plaintiff's Attorney: Matthew R. Niemiec, Bar No. 16955 Address: 238 Rockmont Drive, Fort Mill, South Carolina 29708 Phone: 803-547-6618 Fax 803-547-6638 E-mail: matt@fortmilllaw.com Other: _____	Defendant's Attorney: W. Keith Martens, Bar No. _____ Address: Post Office Box 10940 Rock Hill, South Carolina 29731 Phone: 803-329-7672 Fax _____ E-mail: _____ Other: _____
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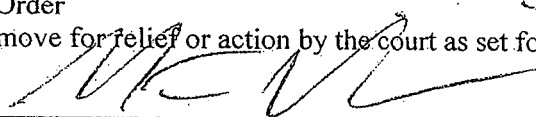
**MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)  
 **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)  
 **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

**SECTION I: Hearing Information**

Nature of Motion: Motion to Reconsider  
 Estimated Time Needed: 30 min Court Reporter Needed:  YES /  NO

**SECTION II: Motion/Order Type**

Written motion attached  
 Form Motion/Order  
 I hereby move for relief or action by the court as set forth in the attached proposed order.

  
 Signature of Attorney for  Plaintiff /  Defendant Date submitted 7/3/17

**SECTION III: Motion Fee**

PAID - AMOUNT: \$ \_\_\_\_\_  
 EXEMPT: (check reason)

- Rule to Show Cause in Child or Spousal Support
- Domestic Abuse or Abuse and Neglect
- Indigent Status  State Agency v. Indigent Party
- Sexually Violent Predator Act  Post-Conviction Relief
- Motion for Stay in Bankruptcy
- Motion for Publication  Motion for Execution (Rule 69, SCRPC)
- Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: \_\_\_\_\_  
 Other: \_\_\_\_\_

**JUDGE'S SECTION**

Motion Fee to be paid upon filing of the attached order.  
 Other: \_\_\_\_\_

JUDGE CODE \_\_\_\_\_  
 Date: \_\_\_\_\_

**CLERK'S VERIFICATION**

Collected by: \_\_\_\_\_ Date Filed: \_\_\_\_\_  
 MOTION FEE COLLECTED: \$ \_\_\_\_\_  
 CONTESTED - AMOUNT DUE: \$ \_\_\_\_\_

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 DAVID HAMILTON  
 C.C.C.P. & G.S.  
 YORK COUNTY, SC

STATE OF SOUTH CAROLINA )  
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 COUNTY OF YORK )  
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 Michael Frank, individually and as the )  
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 Plaintiff, )  
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 vs. )  
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 South Carolina Department of Social )  
 Services, )  
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 Defendant. )  
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IN THE COURT OF COMMON PLEAS  
 SIXTEENTH JUDICIAL CIRCUIT

DAVID H. SPILLITON  
 C.C.P. & G.S.  
 YORK COUNTY, SC

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**PLAINTIFF'S MOTION TO  
 RECONSIDER PURSUANT TO  
 RULES 52 AND 59 OF THE  
 SCRCP**

File Book No.: 2017-CP-46-00867

**PLEASE TAKE NOTICE**, the Plaintiff, David Dawson, by and through his undersigned counsel, hereby files this Motion to Reconsider the Order of Dismissal in the above-captioned matter. Said Order of Dismissal being filed on June 23, 2017 and received by Plaintiff's attorney on June 26, 2017. This motion is brought pursuant to Rule 52(b) and Rule 59(e) of the South Carolina Rules of Civil Procedure (SCRCP). The grounds for this motion are as follows, *to wit*:

1. The Court should reconsider and/or clarify its reasons for ruling on the issue of alimony. In so doing, the Court should consider, but not be limited to, the following, *to wit*:
  - A. The Plaintiff should be given every reasonable inference as it concerns the facts as alleged in his complaint;
  - B. The Court should consider the totality of the factual allegations set forth in the Complaint when giving the Plaintiff every reasonable inference;
  - C. Had the Court so considered the totality of the allegations when deciding this matter in a light most favorable to the Plaintiff after giving due consideration to every reasonable inference, the appropriate remedy would be to allow the Plaintiff to amend his pleadings to provide a more specific factual basis for

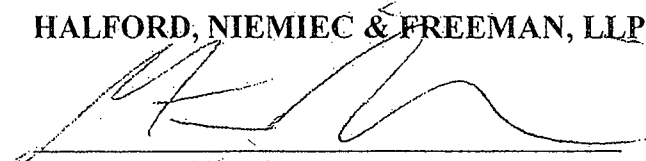
timeliness and to allow the Plaintiff to add or subtract appropriate claims; and

- D. Given the truncated statute of limitations prescribed for actions related to the State of South Carolina, and its political subdivisions, the ability to amend his pleadings is an even more appropriate remedy for a Plaintiff, rather than the dismissal as Ordered.

**PLAINTIFF SO MOVES.**

Respectfully Submitted,

**HALFORD, NIEMIEC & FREEMAN, LLP**



Matthew R. Niemiec  
238 Rockmont Drive  
Fort Mill, South Carolina 29708  
Telephone: (803) 547-6618  
Facsimile: (803) 547-6638

**ATTORNEY FOR THE PLAINTIFF**

July 3, 2017

Fort Mill, South Carolina.

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STATE OF SOUTH CAROLINA

-----x

MICHAEL FRANK,

Plaintiff,

Case No.

-against-

2017-CP-46-00867

DSS,

Defendant.

-----x

August 24, 2017

York, S.C.

B E F O R E:

HONORABLE S. JACKSON KIMBALL, III

A P P E A R A N C E S:

JOHN FREEMAN, Esquire

Attorney for the Plaintiff

MICHAEL FRANK, Esquire

Attorney for the Defendant

Aileen Butler

Official Court Reporter

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THE COURT: All right, Michael Frank against DSS.  
Mr. Freeman.

MR. FREEMAN: Good morning Your Honor.

THE COURT: And this is for reconsider, right?

MR. FREEMAN: Yes, sir.

THE COURT: Okay, Mr. Freeman, it's your motion.

MR. FREEMAN: Thank you, very much. Your Honor,  
good morning.

Your Honor, Mr. Frank is present to my left. Your  
Honor, this matter came before you May 15, 2017. At  
that time you ruled from the bench and I believe Mr.  
Martens subsequently prepared an Order. We then file  
--

THE COURT: He prepared an Order but I made it  
mine.

MR. FREEMAN: Yes, sir.

THE COURT: I went through it and edited it  
substantially.

MR. FREEMAN: Yes, sir. You had indicated that at  
the end of the transcript which I just received on  
Tuesday that you were going to make changes to it. We  
then filed a motion to reconsider. Without going  
through all the factual allegations and everything in  
the complaint again, it would be our position that  
rather than dismiss the plaintiff's complaint outright

1 the appropriate remedy would be to allow us an  
2 opportunity to either amend our pleadings and/or make  
3 a more definite statement of the facts. I think  
4 dismissal under the rules is the harshest remedy  
5 available and should only be used sparingly in these  
6 type of motions.

7 I'm glad to revisit some of the specifics.

8 THE COURT: Well, tell me, it's a motion to  
9 reconsider. Tell me the errors or omissions you think  
10 are in the Order.

11 MR. FREEMAN: For example, Your Honor, in the --  
12 and I did not flag the pages. I apologize. Your  
13 Honor made mention that you thought it might be more  
14 appropriate to add a cause of action for malicious  
15 prosecution. Obviously we allege gross negligence and  
16 some other things but we did not allege that in the  
17 initial pleading. We would certainly like the  
18 opportunity to amend our pleadings to add that if the  
19 Court thinks that is an appropriate cause of action.  
20 We do think questions about when the harm arose, that  
21 is when the right existed, would, at the very least be  
22 questions of fact.

23 THE COURT: When does the -- when does the  
24 plaintiff think the cause of action arose?

25 MR. FREEMAN: Your Honor --

1 THE COURT: Well, he says -- I remember now. He  
2 says when the DSS action against him was dismissed.

3 MR. FREEMAN: Correct, Your Honor.

4 THE COURT: Because he relies upon what he  
5 characterizes as defamation by DSS in a hearing that  
6 took place in December of -- -

7 MR. FREEMAN: The initial was December 2013.

8 THE COURT: Thirteen.

9 MR. FREEMAN: The Dismissal was March 24, 2015.

10 THE COURT: Correct.

11 MR. FREEMAN: The Court sui sponte on its own  
12 motion dismissed the case outright. I don't even  
13 recall if it made it here.

14 THE COURT: This is a DSS case.

15 MR. FREEMAN: Correct, the Family Court.

16 THE COURT: Family Court case.

17 MR. FREEMAN: Yes, sir. And I was actually  
18 present for that. We were prepared to vigorously  
19 defend that. Under that, every person who has a child  
20 taken by DSS would have to run to Common Pleas from  
21 the day the child was taken not when the action was  
22 over. Why DSS took 16 months to resolve their own  
23 issue is an endemic problem for DSS that I don't want  
24 to address today.

25 THE COURT: Yeah, but except the problem is that

1 the action that took place and was carried out and  
2 completed and resolved was in the private action  
3 between the plaintiff and his wife, not the DSS  
4 action.

5 MR. FREEMAN: DSS intervened in that action based  
6 on what we believe were ultimately grossly mishandled  
7 allegations, extraordinarily poor investigation and  
8 that's where we get the gross negligence standard, we  
9 believe. But again, I think those are questions of  
10 fact. I have no problem with them arguing a different  
11 date for question of fact, but as a question of law I  
12 think you would take if a Court does something --  
13 excuse me, undoes something that is the point at which  
14 you realize what was done was improper. Had for  
15 example, Judge White elected to go forward on March  
16 24, 2015 and ruled against Mr. Frank his remedy would  
17 have been to appeal directly from that.

18 THE COURT: We're talking about the DSS case now?

19 MR. FREEMAN: Correct. DSS intervened in the  
20 private action and based on what we ultimately  
21 determined to be --

22 THE COURT: Let me stop you a second.

23 MR. FREEMAN: All right.

24 THE COURT: I never have understood that they  
25 intervened and became a party rather than they simply

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offered testimony and evidence in connection with that action.

MR. FREEMAN: They fully investigated it.

THE COURT: Right. That's nothing to do with intervene. Intervene is a technical term.

MR. FREEMAN: Yes, sir, Your Honor, but they then brought the action which which was dismissed on March --

THE COURT: March 26th of 2015.

MR. FREEMAN: 2015. There were numerous actions between Mr. Frank and his now ex-wife at least four that I can think of. They would go back and forth to the Court without re-trying six years of his life. DSS would get called. And allegation would be made and remade and remade against Mr. Frank over and over and over. This was simply the last time we went to Court about these things.

THE COURT: Which one? The December?

MR. FREEMAN: The one on 13th to 15th. The issue that we are here before Your Honor today was the last time that DSS was involved in his life as a result of allegations from his now ex-wife.

THE COURT: Let me be sure I understand this right. As I understood the facts when we heard this before a hearing was held and a judge ruled and issued

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an Order in a private action between the plaintiff and his then wife. That Order is a Final Order of that Court and that occurred in -- and it was at that time as alleged in the complaint that Mr. Frank says that DSS did the things that it did in terms of defamation. When it effected him. When he was injured as a result of that hearing which was a final decision of a Court.

MR. FREEMAN: Yes, Your Honor.

THE COURT: More than three years prior to the commencement of this action. More than two years prior.

MR. FREEMAN: Yes, sir. I was present in the courtroom on December 2013 but I am going from memory. DSS was present in the courtroom. They were not a listed party but they were present in the courtroom. Testimony was elicited from them by the judge. Not testimony but --

THE COURT: Police officers testify in cases all the time but they are not parties to the action.

MR. FREEMAN: But then DSS subsequently as a result of that sought a finding against Mr. Frank. That is, it became their action for a finding against Mr. Frank of abuse and neglect.

THE COURT: In December.

MR. FREEMAN: That's when it began. It did not

1 conclude until March 24, 2015 when Judge White --  
2 again, I don't if he even made a record -- on his own  
3 motion said I am going to dismiss your action to DSS.

4 THE COURT: Okay.

5 MR. FREEMAN: He called us all into the courtroom  
6 and again, I don't recall if the court reporter was  
7 there so I don't want to speak out of turn, but he  
8 said I am dismissing this action on my own motion.

9 THE COURT: All right.

10 MR. FREEMAN: And so it's our position that's the  
11 moment in which Mr. Frank realized that I have been  
12 wronged. The system has now -- the judge has now said  
13 wait a minute, the system has treated you improperly  
14 and that's our point, is that's when that cause of  
15 action began.

16 So in terms of a factual -- Family Court is some  
17 times archaic at best. DSS has the right literally to  
18 intervene any time they think appropriate based on  
19 allegations from the parties, external sources. So  
20 it's not uncommon for them jump into a case where they  
21 are not in the caption. That's unfortunate but any  
22 time there's minor children that's always a specter  
23 that looms out there. That's what happened in this  
24 case. So that's our position.

25 From the legal point that's the day at which the

1 statute begin to toll and obviously they're a state  
2 agency so it's two years instead of three. But my  
3 original argument was again, simply taking the Court's  
4 motion on its face from back in May that dismissal  
5 would have been the harshest remedy and the more  
6 appropriate remedy would have been for us to allow us  
7 the right to amend our pleadings and/or make a more  
8 definite statement.

9 I cited the one example where the Court said that  
10 malicious prosecution might apply. We would certainly  
11 like the opportunity to explore that. DSS is a quasi  
12 police agency. They are not specifically police but  
13 they have extraordinary powers and they occasionally  
14 refer things over to solicitors. As well as make  
15 findings which are not criminal in nature but have  
16 similar impact.

17 THE COURT: All right.

18 MR. FREEMAN: Thank you, Your Honor.

19 THE COURT: Mr. Martens.

20 MR. MARTENS: Your Honor, the motion that the  
21 Court considered and granted was a 12-B (6) motion. A  
22 12-B (6) motion is based solely on the allegation set  
23 forth on the face of the complaint. Rule eight,  
24 general rules of pleadings says that a short and plain  
25 statement of the facts showing that plaintiff is

1 entitled to relief is what is included in the  
2 complaint.

3 The facts as forth in there complaint were all  
4 based on activities that lead up to that hearing on  
5 December 10, 2013. And as the Court ruled Mr. Frank  
6 was on notice on December 10, 2013 that the alleged  
7 acts or omissions of DSS had resulted in his child  
8 being taken from him in terms of a custody order.

9 THE COURT: Which was his damage.

10 MR. MARTENS: Which is what he has alleged to be  
11 the damage in this lawsuit.

12 Now the cases that talk about allowing amendments  
13 of pleadings to assert alternative theories of  
14 recovery don't say you get to go back and allege  
15 entirely different facts and entirely different set of  
16 circumstances in order to survive a motion to dismiss.  
17 Absolutely had Mr. Frank timely filed he could have  
18 pursued a malicious prosecution action, abuse of  
19 process, whatever he wanted to pursue the statute of  
20 limitation based on a different set of events. That's  
21 not what this case is about and the cases that have  
22 talked about allowing the amendment to assert a  
23 different theory of recovery have talked about based  
24 on the facts set forth in the complaint and certainly  
25 they would have had an opportunity to pursue another

1 claim for relief based on another set of facts. But  
2 the reality is those claims are time barred too now.  
3 And if the allegation -- if the theory is based on the  
4 dismissal of the DSS action in December of 2015 the  
5 Statute of Limitations has run on that as well and  
6 they shouldn't be allowed to come back and amend this  
7 complaint to assert an entirely different case based  
8 on a entirely different set of facts simply to avoid  
9 the statute of limitations.

10 THE COURT: Okay. Briefly.

11 MR. FREEMAN: Very briefly. I understand Mr.  
12 Martens's position. With all due respect under that  
13 logic again, the moment someone's child is taken their  
14 statute begins to toll. If DSS through extraordinary  
15 whatever means takes more than two years to complete  
16 an investigation you're suppose to go sue them  
17 parallel while that is going on, and I just think  
18 that's completely untenable.

19 I believe on March 24, 2015 is when Mr. Frank knew  
20 he had been wronged.

21 THE COURT: Well, you've said that.

22 MR. FREEMAN: Yes, sir. Between December -- one  
23 thing that has not been touched on is between December  
24 2013 and March of 2015 DSS continued to investigate.  
25 They'll were involved. There was a guardian ad litem.

1 There was a pending case against him for a finding.  
2 So, the idea that on -- that they didn't do anything  
3 from December of 2013 forward is simply incorrect.

4 THE COURT: That's simply not what the plaintiff  
5 claimed in his complaint.

6 MR. FREEMAN: Your Honor, we indicated in our  
7 complaint, paragraph ten on March 24, 2015 the  
8 defendant, DSS, had their investigation closed.

9 THE COURT: Well, let me say this. There is more  
10 than one basis for the Order. One was the expiration  
11 of the Statute of Limitations. I then discussed and  
12 tried to express why the complaint did not state the  
13 facts sufficient to support the causes of action which  
14 were alleged; namely defamation of some sort, outrage.  
15 So in any event, even if the statute of limitations it  
16 has not run, which I believe it has -- had -- at that  
17 time that the lawsuit was brought, the complaint  
18 nevertheless did not state facts sufficient to state a  
19 cause of action for defamation and outrage. And my  
20 reference malicious prosecution was simply an offhand  
21 reference. Just almost off the cuff. You could have  
22 sued for malicious prosecution but you didn't. I  
23 think that's the crux of that matter. That action  
24 likewise was governed by whatever statute of  
25 limitations you adopt. So I deny the motion.

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Mr. Martens, if you'll e-mail me an Order with those findings in it like the usual process in word format and I will tweak as I need to, file -- sign it and file it.

MR. MARTENS: Yes, sir.

MR. FREEMAN: Thank you, Your Honor.

THE COURT: Yes, sir. Thank you.

(END OF TRANSCRIPT)

C E R T I F I C A T E

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I, the undersigned Aileen Butler, Official Court Reporter for the 16TH Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings in the captioned case, in the Civil Court for York County, South Carolina, on the 24th day of August, 2017.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

October 28, 2017

Aileen Butler

FORM 4

STATE OF SOUTH CAROLINA  
 COUNTY OF YORK  
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
 CASE NUMBER 2017CP4600867

Michael Frank		Department Of Social Services South Carolina	
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PLAINTIFF(S)	DEFENDANT(S)
Submitted by: The Court	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order; (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order: \_\_\_\_\_

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

*S/S. Jackson Kimball*

Master In Equity

3063

Judge Code

08/29/2017

Date

**For Clerk of Court Office Use Only**

This judgment was entered on **August 30, 2017**, and a copy mailed first class or placed in the appropriate attorney's box or **August 30, 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

**P. John Freeman** 238 Rockmont Drive Fort Mill, SC 29708

**Walter Keith Martens** PO Box 10940 Rock Hill, SC 29731

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**ATTORNEY(S) FOR THE PLAINTIFF(S)**

---

**ATTORNEY(S) FOR THE DEFENDANT(S)**

*David Hamilton*

---

**Court Reporter**

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**David Hamilton - Clerk of Court**

**Court Reporter:**

**E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRPC.**

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**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

Michael Frank, individually and as the )  
parent and guardian of Samuel Frank, a )  
minor, )

Case No. 2017-CP-46-00867

Plaintiff, )

v. )

South Carolina Department of Social )  
Services, )

Defendant. )

**ORDER DENYING PLAINTIFF'S  
MOTION FOR RECONSIDERATION**

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AUG 30 AM 8:42  
VID. HAMILTON  
C.C.P. & G.S.  
YORK COUNTY, SC

This matter came before the court on August 24, 2017, for a hearing on Plaintiff's motion pursuant to Rule 59(e), SCRCP, to alter or amend the court's order of June 23, 2017. P. John Freeman appeared on behalf of Plaintiff. W. Keith Martens appeared on behalf of Defendant.

The purpose of a motion under Rule 59(e) S.C.R. Civ. P., to alter or amend a judgment, is to request that the trial judge "... reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992)(internal citations omitted). A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to judgment, but was not. *See Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009); *Johnson v. Sonoco Products Co.*, 381 S.C. 172, 672 S.E.2d 567 (2009).

I find no matter presented in Plaintiff's motion that was not addressed expressly or by clear implication in my prior order. Plaintiff's complaint does not allege facts sufficient to support a cause of action against Defendant under any theory of liability. Therefore, dismissal pursuant to Rule 12(b)(6), SCRCP, was appropriate.

In seeking reconsideration of the prior order, Plaintiff contends that the "more appropriate" remedy would have been for this court to permit Plaintiff to amend his complaint, rather than for the court to dismiss the complaint entirely. 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."

*Handwritten initials/signature*

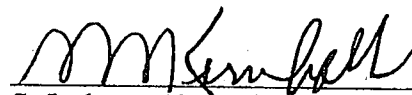
*Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). Here, Plaintiff has failed to meet that standard. Instead, Plaintiff seeks an opportunity to amend his complaint to assert new theories of liability based upon entirely different factual allegations and events, all of which would be outside the statute of limitations.

In my judgment, 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. That is particularly true where, as here, any claim based on those later events is now, also, time-barred.

After careful consideration of the arguments of both parties, and a review of the pleadings of record, I find and conclude that Plaintiff's motion for reconsideration must be denied.

AND IT IS SO ORDERED.

August 29, 2017



S. Jackson Kimball  
Special Circuit Court Judge  
York County

DZ

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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

OCT 02 2017  
SC 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

DAVID M. MILTON  
C.C.C.P. & G.S.  
YORK COUNTY, SC

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Case no. 2017-CP-46-00867

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

vs.

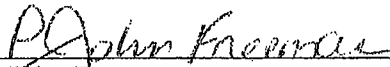
South Carolina Department of Social Services.....Respondents

NOTICE OF APPEAL

Michael Frank here gives notice of appeal of the August 29, 2017 Order of Special Circuit Court Judge S. Jackson Kimball, III, entered of record August 30, 2017, pursuant to SCACR 203.

Counsel for Appellant here certifies that the Order was received via e-mail delivery on August 29, 2017. Appellant received written notice of the entry of this Order on September 5, 2017.

Halford Niemiec & Freeman, L.L.P.

  
P. John Freeman  
238 Rockmont Drive  
Fort Mill, South Carolina 29708  
803-547-6618  
803-547-6638 fax  
[jfreeman@fortmilllaw.com](mailto:jfreeman@fortmilllaw.com)

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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YORK COUNTY, SC

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OCT 02 2017

Court of Appeals

Case no. 2017-CP-46-00867

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

vs.


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

PROOF OF SERVICE

I hereby certify that I am the attorney for the Appellant in the above case and that I did on September 28, 2017 serve a copy of the foregoing NOTICE OF APPEAL on counsel for the Defendant by fax and by depositing a copy of the same in the United States mail, postage prepaid, and addressed as follows:

Walter Keith Martens, Esquire  
Hamilton Martens, LLC  
Post Office Box 10940  
Rock Hill, SC 29731  
Attorney for Defendant

Halford Niemiec & Freeman, L.L.P.

  
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