

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE RICHLAND COUNTY
Court of Common Pleas

Joseph M Strickland, Special Circuit Court Judge

Case No 07-CP-40-3365

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SC Court of Appeals

Edward Mims,
Appellant,

vs

Babcock Center, Judy Johnson, SCDDSN, Kathi Lacy, Stanley Butkus,
Appellee

BRIEF OF APPELLANT

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I Introduction

This is an appeal of the dismissal of an action brought by Edward Mims in the Court of Common Pleas in Richland County alleging violation of his rights to be protected from harm while he was involuntarily committed to the care of the South Carolina Department of Disabilities and Special Needs and the Babcock Center and the failure to provide services he is now entitled to receive in the community. Edward asks this Court to reverse the decision of the lower court and to remand his case for trial.

II Statement of Issues on Appeal

- 1 Was the intent of the South Carolina General Assembly in passing South Carolina Code of Laws § 15-3-20 to extend the time for service of a complaint by 120 days past the end of the statute of limitations, or did the General Assembly intend to impose additional, more restrictive requirements for service of process?**
- 2 Does statutory or equitable tolling prevent the lower court from dismissing the claim of a person who has profound disabilities when the record includes evidence of reprisal for his guardian making complaints about care in the facility, where the delay resulted from fear of reprisal and an amended complaint was filed and served within the statute of limitations before the case was dismissed by the Clerk of Court?**
- 3 Did the lower court err in dismissing plaintiff's complaint under SCRCP Rule 41(b) in November 2009 when the record shows that between the filing of the amended complaint in May 2008 and the dismissal of this action, plaintiff timely responded to every motion, participated in every hearing, filed briefs and motions, was prepared for trial of the case and zealously represented Edward's interest in these proceedings without unreasonable delay?**
- 4 Does SCRCP Rule 15 require plaintiff to serve the original complaint on the defendants when an amended complaint was subsequently filed and served on the defendants before an answer to the original complaint was served by the defendants?**

III Statement of the Case

This case was initiated by the filing of a summons and complaint on May 27, 2007 by Edward Mims, who has severe mental and physical severe disabilities, through his guardian, Margaret Mims R at ____ Neither the Babcock Center nor its employees filed an answer to the original complaint, which was not served before it was amended The record shows that defendants were not prejudiced, because they were on notice of the complaint On July 5, 2007, Counsel for Babcock Center and its employees wrote to Edward's counsel "We will be defending Babcock Center, Dr Johnson, Ms Bradford, Mr Stoxen and Ms Slater in this action " R at ____ He asked counsel for plaintiff to inform him once the complaint was served
Id

Indeed, plaintiff filed an amended complaint on May 9, 2008, before the expiration of the statute of limitations and before defendants filed a responsive pleading to the original complaint R at ____ The amended summons and complaint was timely served on the defendants on or about May 12, 2008 R at ____

The original complaint alleged that Babcock Center, Judy Johnson, Craig Stoxen, Sue Slater, Tonya Bradford and the South Carolina Department of Health and Human Services were negligent in protecting Edward from mental, physical and sexual injury, including, but not limited to a sexual assault which occurred on May 27, 2005, while Edward was involuntarily committed to the care of the South Carolina Department of Disabilities and Special Needs (DDSN) and placed in a facility operated by the Babcock Center The complaint also alleged defendants failed, both before and subsequent to that assault, to provide Edward with necessary services with reasonable promptness in the community, as is required by the Medicaid Act and

that defendants violated Edwards' due process rights and his rights under the South Carolina Bill of Rights of Long Term Care Residents

The amended complaint added Stanley Butkus, Kathi Lacy and the South Carolina Department of Disabilities and Special Needs as defendants and did not include some of the original defendants. The amended complaint alleged that in violating its duty of care to Edward and his rights under the integration mandate of the Americans with Disabilities Act and the Rehabilitation Act, defendants also violated 42 U.S.C. §§ 1983, 1985 and 1988.

Defendants claimed that Edward's amended complaint should be dismissed under SCRCR Rule 12(b)(1) and Rule 12(b)(2), because the original complaint was not served on the defendants within 120 days of filing and that his complaint should be dismissed under SCRCR 41(b) for failure to prosecute.

Defendants filed a motion to dismiss under SCRCR Rule 12 on June 9, 2008. R. at ____
Motions to Dismiss dated June 9, 2008. On September 18, 2008, the circuit court sent a notice of hearing on that motion and scheduled a hearing for October 9, 2008. R. at ____
Notice of hearing dated September 18, 2008. On October 3, 2008, Plaintiff filed a motion requesting the recusal of a circuit court judge who had formerly worked for the Babcock Center from any matter related to this case. R. at ____
Motion to Request Recusal dated March 25, 2009. The afternoon of October 8, 2008, defendants' attorneys notified the Court for the first time that they were both scheduled to appear at oral argument in the South Carolina Court of Appeals on October 9, 2008. They requested a continuance of the hearing they had requested on their motion to dismiss Edward's lawsuit which had been scheduled for weeks for the next day. R. at ____

The hearing on defendants' motion to dismiss was eventually continued until March 9, 2009 R at ____ Transcript of hearing on March 9, 2009 Other hearings were held in this action in the circuit court on defendants' motions for continuances and protective orders The Court was reminded of the motion for recusal, but did not schedule a hearing on Edward's Rule 59(e) Motion dated March 25, 2009 R at ____

At the hearing on March 9, 2009, Plaintiff again requested to be heard on the motion for recusal before the defendants' motion to dismiss was heard by the judge, who formerly worked for the Babcock Center R at ____ Transcript of hearing dated March 9, 2009 The trial judge recused himself in open court R at ____ Transcript dated March 9, 2009 A written order was issued which originally stated "Plaintiff's Motion for recusal granted " However, when the order was returned to the Clerk of Court's Office, the word "recusal" was whited out and substituted with the word "continuance " R at ____ Order dated March 10, 2009 Plaintiff had not requested a continuance No other order was issued on Plaintiff's request for recusal

A hearing was held before a master in equity, sitting by designation as a special circuit court judge, on March 30, 2009, on defendants' motion to dismiss and that judge denied defendants' motion from the bench Transcript dated March 30, 2009 A written order denying defendants' motion to dismiss was filed by that judge on March 31, 2009 R at ____ Order dated March 31, 2009

Defendants filed a Motion to Alter or Amend or for Reconsideration on April 10, 2009 and filed an answer to the amended complaint on April 17, 2009 R at ____ Motion to Alter or Amend or for Reconsideration dated April 10, 2009 A second hearing was held on September 4, 2009 before the same judge who had issued the order denying defendants' motion to dismiss At

that hearing defendants argued that plaintiff's amended complaint should be dismissed under SCRCF 12(b), South Carolina Code of Laws § 15-3-20 and SCRCF Rule 41(b) for failure to prosecute R at ____

The master in equity, again sitting as a special circuit court judge, granted defendants' motion to dismiss under SCRCF 12(b)(1) and (2) and SCRCF Rule 41(b) on November 23, 2009 R at ____ Order dated November 23, 2009 Plaintiff filed a motion to reconsider which was denied on February 8, 2010, and was received by plaintiff's counsel on February 11, 2010 R at ____ Motion to Reconsider and Order dated February 8, 2010 The notice of appeal to this Court was timely filed on March 10, 2010 R at ____ This is an appeal of the Order dated November 23, 2009 and the Order denying plaintiff's motion to reconsider dated February 11, 2010 R at ____

IV Factual Background

Edward Mims is a 39 year old individual who has profound mental retardation and multiple physical disabilities R at ____ Rule 59(e) Motion dated March 25, 2009, Exhibits 6, 7, 10, 12, 23 and 31 He functions at a mental age of a twenty month old infant Id Edward's mother voluntarily admitted him to the Babcock Center when she was hospitalized in 1999 R at ____ Affidavits of Margaret Mims and M Leigh Flynn, Esq After she was discharged from the hospital, Edward would spend the weekends with his mother, while continuing to live at Clusters ICF/MR operated by the Babcock Center¹ Id While under the care of the Babcock Center at Clusters, Edward suffered many "unexplained injuries" R at ____ Edward Mims Chronology

¹ ICF/MR stands for "Intermediate Care Facility/Mental Retardation" An ICF/MR is a nursing facility that is operated specifically to provide care and supervision for persons who have mental retardation or a related disability It is the most restrictive and expensive placement in the SCDDSN system

and Emergency Room records Rule 59(e) Motion dated March 25, 2009, Exhibit 2, 12 and 21 His mother's repeated requests to DDSN and the Babcock Center that Edward return home to her care were denied R at ____ Rule 59(e) Motion dated March 25, 2009, Exhibit 10, Affidavit of Margaret Mims Mrs Mims reported to the Office of the South Carolina Attorney General that Edward was being abused after the Babcock Center refused to act on her complaints R at ____ Rule 59(e) Motion dated March 25, 2009, Exhibit 8 Edward was beaten by an employee of the Babcock Center and this beating was witnessed by other employees, but his mother was not informed about the assault R at ____ Affidavit of Margaret Mims, warrant for arrest of Carl Anthony and SLED report of Carl Anthony More than a year after Babcock Center records showed that this beating was witnessed by other employees, the Attorney General finally obtained an arrest warrant and the employee was convicted of beating Edward Rule 59(e) Motion dated March 25, 2009, Exhibit 2 and 9

After Edward's guardian made these complaints to the Attorney General and pursued prosecution of this offense against the Babcock Center employee who had beaten him, SCDDSN officials joined together with Babcock Center employees to accuse Edward's mother of neglecting him R at ____ Affidavits of M Leigh Flynn and Margaret Mims, Rule 59(e) Motion dated March 25, 2009, Exhibit 5 and 7 The probate court appointed attorney M Leigh Flynn as Edward's guardian ad litem R at ____ Affidavit of M Leigh Flynn Ms Flynn met with Babcock Center employees and asked to review Edward's records R at ____ Affidavit of M Leigh Flynn But information showing that Edward was beaten at Clusters and that he continued to receive "unexplained" injuries at the Babcock Center was intentionally withheld from her R at ____ Affidavit of M Leigh Flynn Ms Flynn was not informed that Edward was subjected to multiple beatings at Clusters or that one of these beatings by a Babcock Center employee had actually been witnessed by other employees R at ____ Affidavit of M Leigh Flynn She was not informed of the arrest and conviction of Carl Anthony, the Babcock Center employee who beat

Edward R at ____ Arrest records, SLED conviction, incident report and Affidavit of M Leigh Flynn The guardian ad litem later learned that there had been ongoing systemic abuse and neglect of residents of the Babcock Center while later representing other clients who received services from the Babcock Center R at ____ Affidavit of M Leigh Flynn DDSN and the Babcock Center together secured an order from the probate court involuntarily committing Edward to the custody of DDSN based on this false and misleading information provided to the guardian ad litem R at ____ Affidavit of M Leigh Flynn Edward continued to be abused at the Babcock Center and his mother was powerless to protect him from harm by bringing him home due to the involuntary commitment order the Babcock Center and DDSN has obtained R at ____ Affidavit of M Leigh Flynn, Motion for Recusal, Exhibits 5, 6 and 7, 12 and 21

Ms Flynn did ask the Court to restore Edward's weekend visits home, which had been terminated by the Babcock Center and/or DDSN when these charges of neglect were brought against his mother R at ____ Affidavits of Leigh Flynn and Margaret Mims However, the Babcock Center continued to ignore his mother's complaints about unexplained injuries and behavior that indicated, along with medical records, that he continued to be abused at Clusters R at ____ Affidavit of Margaret Mims

Edward's mother begged DDSN to discharge Edward from Clusters so that she could take care of him at home, but DDSN refused to release him from involuntary commitment R at ____ Rule 59(e) Motion dated March 25, 2009, Exhibit 4, 10 and Affidavit of Margaret Mims, Letter of Margaret Mims dated April 3, 2001, letter from Lois Park Mole In January 2002, Edward was repeatedly beaten with a belt at Clusters, leaving welts across his face and his body R Photograph of Edward Mims after beating, July 28, 2003 letter of Ombudsman and incident reports After Edward was beaten with a belt at Clusters, he was moved by the Babcock Center to

Kensington ICF/MR R at ____ Motion for Recusal, Exhibit 1, 12, and Affidavit of Margaret Mims Clusters was later closed after CMS (the federal Medicaid agency) and the South Carolina Department of Health and Human Services determined that the Babcock Center had failed to protect residents there from abuse and neglect R at ____ Rule 59(e) Motion dated March 25, 2009, Exhibits 13 and 14

The abuse and neglect continued unabated at Kensington after Babcock Center management moved Edward there from Clusters R at ____ Affidavit of Margaret Mims, Rule 59(e) Motion dated March 25, 2009, Exhibits 1, 12 and 21 Surveys of Kensington conducted by CMS, the South Carolina Department of Health and Human Services and the South Carolina Department of Health and Human Services documented that life-threatening violations of Life and Safety Codes regular occurrences at Kensington R at ____ Rule 59(e) Motion dated March 25, 2009, Exhibits 15, 16, 19 and 20 A survey conducted by an independent quality assurance organization hired by DHHS, Carolina Medical Review, determined that Babcock Center ICF/MR facilities were not in compliance with federal Medicaid statutes and regulations R at ____ Rule 59(e) Motion dated March 25, 2009, Exhibit 17

According to Babcock Center records, Edward was found to have ant bites all over his body at Kensington and his bed was infested with ants in July 2004 R at ____ Rule 59(e) Motion dated March 25, 2009, Exhibit 1 and 12, Chronology of Edward Mims Edward's roommate choked to death at Kensington in September 2004 R at ____ Wall Street Journal article dated September 13, 2005 CMS (the federal Medicaid agency) investigated this death and determined that staff did not properly prepare food and supervise residents while they ate and that staff was not properly trained R at ____ Rule 59(e) Motion dated March 25, 2009, Exhibit 15 and 16, Brief of Appellant, Exhibit 12, Affidavit of Margaret Mims at 80 and 186 to 191

CMS determined in that the death of Edward's roommate was not thoroughly investigated by the Babcock Center or DDSN R at ____ Brief of Appellant, Exhibit 13 Subsequently, after the Babcock Center failed to correct problems identified DHEC in late 2004 and early 2005, that agency recommended termination of Kensington's certification as a Medicaid provider due to Babcock Center management failing to correct these deficiencies R at ____ Affidavit of Margaret Mims at 98 HHS sent a notice informing Dr Johnson, the Director of the Babcock Center, who is a defendant in this case, that Kensington was being decertified for Medicaid R at ____ Affidavit of Margaret Mims at 95 and 98

DHHS required Dr Johnson to provide notice to all families of residents at Kensington informing them that the Babcock Center failed to meet federally mandated Medicaid participation requirements R at ____ Id DHHS instructed Dr Johnson to provide DHHS with plans for resident relocations by May 2, 2005 Id Dr Johnson sent notices to families of residents informing them that DHEC had determined that Kensington was being decertified On May 3, 2005, Dr Johnson notified all family members that DHEC determined that the Babcock Center had failed to correct deficiencies at Kensington and that termination of Kensington's Medicaid certification had been recommended R at ____ Affidavit of Margaret Mims at 99 Edward's mother received this this notice, but she had no authority to remove him from the custody of DDSN because of the involuntary commitment order DDSN and Babcock had obtained from the probate court Dr Johnson notified families that "We have been directed to begin planning for relocating the residents Id Yet, except for weekend visits that had been arranged by the GAL, the Babcock Center and DDSN refused to allow Mrs Mims to discharge Edward from Kensington so that she could take him home where he would be safe from harm

On May 27, 2005, Edward Mims was found in his room at Kensington to have a 4 cm “gaping laceration” on his penis which was not self-inflicted and required surgical repair R at ____ Affidavit of Margaret Mims and Exhibits 12 and 21 When Mrs Mims attempted to remove Edward from Kensington after this injury, however, DDSN objected and then attempted to keep her from being appointed as his legal guardian when she turned to the probate court for help R at ____ Affidavit of Margaret Mims and Exhibit 26 When the court-appointed visitor arrived at Kensington, Babcock Center staff would not allow her to see Edward R at ____ Id at Exhibit 24 The Richland County Probate Court issued an emergency order authorizing Edward’s mother to remove him from Kensington, but DDSN continued in its efforts to defeat her attempts to become his guardian R at ____ Id at Exhibits 27, 28, 29 and 30 DDSN actually filed a report titled “Objections” with the probate court objecting to Mrs Mims being appointed as Edward’s guardian R at ____ Affidavit at Exhibit 28

Leigh Flynn, the attorney who had recommended involuntary commitment based on false information provided to her by the Babcock Center, recommended in 2004 that the probate court appoint Mrs Mims as Edward’s guardian and informed the court that Edward was not safe at Kensington R at ____ Affidavit of Leigh Flynn By this time, Ms Flynn had represented many victims of abuse and neglect living at the Babcock Center and she learned that information had been withheld from her by Babcock Center staff in order to commit Edward to the custody of DDSN The probate court issued an order appointing Mrs Mims as his permanent guardian over the objections of DDSN R at ____ December 19, 2005 order of Richland County Probate Court As a reprisal for the problems Mrs Mims inquiries were causing, Defendant Lacy determined that Edward was not qualified for Adult Day Care services and his guardian was required to file a lengthy appeal with DHHS to have these services provided so that she could return to her job cleaning other people’s houses R at ____ Affidavit of Margaret Mims This court may take judicial notice that after many months, through an appeal to HHS, Mrs Mims was finally able to

require DDSN to pay for adult day health services R at ___ Order of HHS Hearing Officer dated March 7 2006, Case No 05-misc-034

Subsequently, the Babcock Center informed the Richland Lexington Disabilities and Special Needs Board that someone in the Governor's Office reported that Edward's respite caregiver was using drugs Because of this anonymous and fabricated report, Edward's respite services were immediately terminated during the Babcock Center's "investigation " Mrs Mims was again required to obtain legal services to have Edward's community based services restored R at ___ Letter from Patricia Harrison to Dorothy Moore dated March 19, 2007, Affidavit of Margaret Mims

Edward's guardian stated in a sworn affidavit that "Like a lot of other parents, I have been fearful of reprisals and have experienced reprisals when I have attempted to enforce the rights of my son, Edward Mims " R at ___ Affidavit of Margaret Mims She stated that "I am always afraid of what Judy Johnson and the officials at the Babcock Center will do to me and to Edward to get back at me for getting Edward out of an abusive situation and reporting them to law enforcement and other regulatory agencies " Id According to Mrs Mims "Other families and employees have experienced similar reprisals for reporting abuse and have reported these fears to me and to legislators "

When Edward returned home, DDSN reduced his budget so that he was unable to obtain the services he needs to remain at home in order for his mother to work outside of the home R at ___ Budget of Edward Mims

When a hearing to dismiss Edward's case was scheduled before a judge who formerly worked for the Babcock Center, Plaintiff filed a motion requesting his recusal because this judge had dismissed a similar case against the Babcock Center and DDSN, where sexual assault was alleged. Not only had this judge dismissed that and at least one other case that had been filed by disabled persons challenging the agency's claim that they have no duty of care to protect clients from abuse, this judge had openly made remarks in front of the plaintiffs and counsel saying that the South Carolina Supreme Court was wrong in reversing his decision in *Madison v Babcock Center and the South Carolina Department of Disabilities and Special Needs*, 371 S C 123, 638 S E 2d 650 (2006). R at __ Affidavits of Orin Briggs and Amy Davenport. The judge had also openly expressed a fondness for the Babcock Center and his time working there in proceedings where plaintiffs' claims were dismissed. *Id*

V Arguments

- 1 **Was the intent of the South Carolina General Assembly in passing South Carolina Code of Laws § 15-3-20 to extend the time for service of a complaint by 120 days past the end of the statute of limitations, or did the General Assembly intend to impose additional and more restrictive requirements for service of process?**

The clear intent of the South Carolina General Assembly when South Carolina Code § 15-3-20(b) was passed in 2002 was to extend the time to serve a complaint by 120 days, not to limit the time to effect service. In *Hooper v Ebenezer*, the South Carolina Supreme Court repeatedly states that service must be accomplished within 120 days "If the defendant is 'not served within the statute of limitations'" 377 S C 217, 219, 659 S E 2d 213 (2009). In Edward's case, he served the defendant with the amended complaint and a summons within the statute of limitations. The Court found in *Hooper* that Rule 3(a), SCRPC, is consistent with South Carolina Code § 15-3-20(b). Rule 3(a) states

A civil action is commenced when the summons and complaint are filed with the clerk of court if

(1) the summons and complaint are served within the statute of limitations in any manner prescribed by law, or

(2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing

The language of Rule 3(a) is clear on its face that the first paragraph applies when the summons and complaint are filed within the statute of limitations. The second paragraph, which requires service within 120 days, applies when service occurs after the statute of limitations expires. That statute is clear on its face that either (1) the summons and complaint must be served within the statute of limitations in any manner prescribed by law (including the extended statute of limitations allowed by South Carolina Code of Laws § 15-3-50 where a disability is present), or (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing. The lower court imposed a requirement not contained in the rule or intended by the General Assembly when it required that the summons and complaint be filed within the statute of limitations and that the summons and complaint be served within 120 days of filing, whether or not the statute of limitations had expired 120 days after filing. The lower court exceeded its authority by placing demands on plaintiff not imposed or intended by the General Assembly.

In *Roche v. Young Bros. Inc. of Florence*, the South Carolina Supreme Court clearly instructed the lower courts that “exacting compliance with rules of civil procedure is not required to effect service of process.” 318 S.C. 207, 210, 456 S.E.2d 897 (1995). In that case, the Court held that the lower courts should examine instead “whether plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings.” *Id.* The purpose of Rule 3(a) and South Carolina Code § 15-3-20(b)

is to confer personal jurisdiction on the court and to assure that the defendant has “reasonable notice of the action ” The service of the amended complaint and summons conferred personal jurisdiction of the court over the defendants in this case Indeed, the defendants already were on notice of the original complaint even sooner, within six weeks of its filing, as is evidenced by the July 5, 2007 letter from counsel for the defendants Since the statute of limitations had not expired in 2007 or 2008, due to the extension provided by South Carolina Code of Laws § 15-3-50 because of Edward’s profound mental retardation, the defendants received notice earlier than was necessary by plaintiff filing the original complaint in 2007, instead of waiting until 2008, when the amended complaint was filed, to learn of the intent of Edward’s guardian to file a lawsuit Thus, defendants were not prejudiced by the delay in Edward amending his complaint and filing the amended complaint with the summons

2 Does statutory or equitable tolling prevent the lower court from dismissing the claim of a person who has profound disabilities when the record includes evidence of reprisal for his guardian making complaints about care in the facility, where the delay resulted from fear of reprisal and an amended complaint was filed and served within the statute of limitations before the case was dismissed by the Clerk of Court?

The issue of whether a complaint must be served in all circumstances within 120 days of filing was recently addressed by the South Carolina Supreme Court in *Hoover v Ebenezer*, with the Court reversing on grounds of equitable tolling of the statute of limitations 386 S C 108, 687 S E 2d 29, 31 (2009) In that case, the Supreme Court clearly held that the 120 day rule does not require service within 120 days of filing where the statute of limitations is tolled This case is distinguished from *Hoover* in that the statute of limitations had not expired when the defendants were served with the amended complaint Just as the bad acts of the defendants in *Hoover* extended the time for the statute of limitations, Edward’s disability extends the statute of limitations in this case Plaintiff also argues that equitable tolling provides a second reason for

tolling the time for filing because it is not equitable to dismiss Edward's complaint due to the bad acts by the defendants

South Carolina Code of Laws § 15-3-20 is titled "General rule as to time for commencement " As discussed by the Supreme Court in *Hooper*, this "general rule" does not apply when one of the tolling exceptions contained in Chapter 3 of Title 15 applies or when equitable tolling exists *Id* In *Hooper*, as in this case, the defendants argued that service was not effected unless the complaint was served within 120 days of filing the complaint *Id* The Supreme Court disagreed, clearly holding that where the statute of limitations is tolled, it is not necessary to serve the complaint within 120 days of filing *Id* The Court explained that this is because

"Tolling" refers to suspending or stopping the running of a statute of limitations, it is analogous to a clock stopping, then restarting

51 Am Jur 2d *Limitation of Actions* § 169 (2000) According to the *Hooper* decision "Tolling may either temporarily suspend the running of the limitations period or delay the start of the limitations period " *Id* When tolling exists, the "clock" for serving the complaint stops, until the statute of limitations expires Tolling applies not only to the filing of the complaint, but to the 120 day requirement, which is suspended during the disability

In addition to the tolling of the statute for persons under a disability which applies to Edward, the Supreme Court held in *Hooper* that "the statute of limitations should be tolled '[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits '" *Id* Not only should the statute of limitations prevent dismissal of Edward's complaint because of his disabilities, the doctrine of equitable tolling should be applied by this

Court to toll the running of the statute of limitations, so as to suspend the limitations period 54
C J S *Limitations of Actions* § 115 (2005) and *Ocana v Am Furniture Co* 135 N M 539, 91
P 3d 58, 66 (2004)

The Supreme Court held in *Hoover* that “Equitable tolling is judicially created, it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it ” Citing *Rodriguez v Superior Court* 176 Cal App 4th 1461, 98 Cal Rptr 3d 728 (2009) Tolling should be applied where necessary to “ensure fundamental practicality and fairness ” *Hooper* at 32 The facts contained in the record show that fairness requires that the statute of limitations be tolled in this case Defendants acted in bad faith trying to prevent Edward’s mother from being appointed as his legal guardian, in an attempt to prevent her from having the authority to exercise his legal rights She had good reason to be fearful Because she complained, Edward was subjected to physical, psychological and sexual atrocities when he was involuntarily committed to DDSN and his mother was left powerless to protect him For years, Edward and his guardian have suffered reprisals for exercising those rights The record contains an affidavit signed by Edward’s guardian stating that she was fearful of reprisal when the lawsuit was filed and his services were terminated for a while when a false report was made to the Department of Social Services by the Office of Governor Sanford, reporting that Edward’s guardian was allowing him to be cared for by a person who abused drugs R at ____ The allegations were not substantiated In any event, the amended complaint was filed within the statute of limitations, which is extended by South Carolina Code of Laws § 15-3-50 because of Edward’s disabilities and therefore the defendants have not been prejudiced thereby

A third justification for tolling the statute lies in the fact that Edward was unsuccessfully attempting to seek remedies during this time through administrative proceedings In *Hoover*, the

Supreme Court discussed that tolling should be applied where a party “has more than one legal remedy available while the party pursues one of the possible remedies ” *Abbott v State*, 979 P 2d 994, 998 (Alaska 1999) The State dismissed Edward’s parallel administrative appeal without ever providing him an evidentiary hearing, which is a requirement of 42 U S C § 1396a(a)(3) of the Medicaid Act This Court may take judicial notice of the brief filed in this Court by DHHS in Edward’s administrative appeal from the Administrative Law Court on March 21, 2008 R at ____ *Edward Mims v SCDHHS*, Case No 07- ALJ - 08 -0082 - AP In that brief, DHHS argued that Edward could not pursue administrative remedies for its violation of due process (the failure to provide an evidentiary hearing) Edward then elected to file this claim in the circuit court against DDSN, the Babcock Center and individual defendants for violations of the duty of care which state actors owed him and for violations of the Americans with Disabilities Act and the Rehabilitation Act, rather than continuing the futile attempts of pursuing administrative remedies against DHHS (Which, if successful in 2008, would have only sent him back to a hearing officer who is an employee of DHHS) He filed the amended complaint which is the subject of this action in the circuit court before (1) defendants answered the original complaint filed in 2007 and (2) before the statute of limitations on the claims brought in the circuit court expired

The United States Supreme Court has held that it is not necessary to exhaust administrative appeals in an action alleging violations of § 1983 and Edward should be allowed to pursue remedies in this Court *Patsy v Regents*, 457 U S 496, 500-501, 102 S Ct 2557, 72 L Ed 2d 172 (1982)

Equitable tolling also applies “where the plaintiff has timely raised the same claim in the wrong forum See *Machules v Dep’t of Admin* 523 So 2d 1132, 1134 (Fla 1988) (stating the

doctrine of equitable tolling, unlike equitable estoppel, does not require deception or misrepresentation by the defendant, rather, it serves to ameliorate the harsh results that sometimes flow from a strict, literalistic application of administrative time limits) In 2008, DHHS argued to this Court that Edward had no right to an evidentiary hearing in the administrative proceedings, despite the fact that the Medicaid Act requires a “fair hearing” when requested services are denied or terminated That is when he filed the amended complaint in this case, exercising his option of pursuing a different remedy The equitable power of this Court is not bound by cast-iron rules but it exists “to do fairness” *Hooper* at 33 This Court should exercise its power so that “relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other” *Hausman v Hausman* 199 S W 3d 38, 42 (Tex App 2006) The record is clear that Edward has suffered many “gross wrongs” at the hands of defendants and this Court should exercise its power to “do fairness”

Finally, public policy and the interests of justice weigh heavily in favor of allowing Edward’s claim to proceed on the merits The statute of limitations’ purpose of protecting defendants from stale claims must give way to the public’s interest in being able to rely on public records required by law, especially in a case such as this where Edward’s amended complaint was filed and served within the statute of limitations

- 3 **Did the lower court err in dismissing plaintiff’s complaint under SCRCP Rule 41(b) in November 2009 when the record shows that between the filing of the amended complaint in May 2008 and the dismissal of this action, plaintiff timely responded to every motion, participated in every hearing, timely filed motions and briefs, was prepared for trial of the case and zealously represented Edward’s interest in these proceedings without unreasonable delay?**

The lower court order dismissing Edward's lawsuit states that the circuit judge relies upon Rule 41(b), which allows the court to dismiss an action for failure to prosecute. That rule, however, requires the court to state findings of fact and conclusions of law sufficient to allow a reviewing court to ensure that the law "has been faithfully executed." *Clegg v Lambrecht* __ S C ___, 678 S C 2d 260, 261. In considering a motion under Rule 41(b), the court must consider (1) the plaintiff's degree of personal responsibility, (2) the amount of prejudice caused the defendant, (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion and (4) the effectiveness of sanctions less drastic. There is no evidence in the lower court's order to suggest that these factors were considered. Delays in this case, after Edward's amended complaint was filed and served within the statute of limitations, were caused largely by the games defendants have played in this case. The day before the first hearing scheduled on their motion to dismiss, defendants informed the court and the plaintiff that both attorneys for the defendant had a conflict due to oral arguments in the South Carolina Court of Appeals. Counsel knew about this scheduling conflict for weeks. The record shows that any dilatory tactics in this case have come from the defendants, not the plaintiff.

Defendants' counsel has filed many motions for continuance and protective orders, several requiring that plaintiff's counsel argue their motion that same day, without opportunity for preparation. R. at ___. The record documents that delays in this case have been caused by defendants' attempts to avoid depositions. R. at ___. Motions for protective orders. There is simply no evidence of intentional delaying tactics on the part of the plaintiff, and, indeed, plaintiff was attempting to prosecute her case through the administrative appeals process even before filing the amended complaint. The sanction of dismissal is drastic and it is not justified by the facts of this

case nor is there any indication in the lower court's order that any less drastic remedy was considered. The order does not meet the requirements to support a finding for dismissal under Rule 41(b).

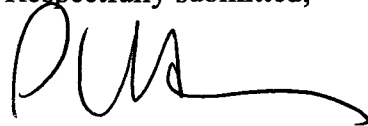
4 Does SCRCF Rule 15 require plaintiff to serve the original complaint on the defendants when an amended complaint was subsequently filed and served on the defendants before an answer to the original complaint was served?

The South Carolina Rules of Civil Procedure allow a party to amend his pleadings once as a matter of course at any time before a responsive pleading is served. SCRCF Rule 15(a). Within the statute of limitations, plaintiff exercised that right. Leave of court is not required when a complaint is amended before an answer is served by the defendants. *Id.* Defendants fail to cite any law, regulation or rule which would require the service of an original complaint once that complaint has been amended. The purpose of serving a summons and complaint is to confer jurisdiction on the court and to provide the defendants with notice of the action. No purpose is served by serving defendants with a complaint that has been amended.

VI Conclusion

For the reasons set forth herein, plaintiff respectfully asks this court to reverse the decision of the lower court and to remand this case for trial before a judge who has no employment history with the Babcock Center or the South Carolina Department of Disabilities and Special Needs.

Respectfully submitted,



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August 12, 2010
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M Strickland, Special Circuit Court Judge

Case No 07-CP-40-3365

RECEIVED

SEP 03 2010

SC Court of Appeals

Edward Mims,

Appellant,

v

Babcock Center, Inc , Judy Johnson, the South Carolina Department
of Disabilities and Special Needs,
Kathi Lacy and Stanley Butkus,

Respondents

INITIAL BRIEF OF RESPONDENTS DDSN, LACY AND BUTKUS

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COUNTERSTATEMENT OF ISSUES ON APPEAL

- 1 Whether this action, which indisputably was not served on any defendant until almost a year after its original filing, was properly dismissed pursuant to *SC Code Ann* § 15-3-20(B), which provides that a civil action is commenced “if actual service [of the summons and complaint] is accomplished within one hundred twenty days after filing ”
- 2 Whether equitable tolling should be considered in the absence of the commencement of a civil action by the filing of a Summons and Complaint and service thereof within 120 days, and whether Plaintiff’s equitable tolling arguments are without merit in any event
- 3 Whether this action was also properly dismissed under Rule 41(b), *SC R C P* , for failure to prosecute
- 4 Whether a Complaint can be amended as of right in an action which has not previously been served and which is subject to dismissal for non-service of the Summons and Complaint within one hundred twenty days after filing

STATEMENT OF THE CASE

This action was filed on May 29, 2007, but the original Summons and Complaint were never served. The Complaint alleged injuries to the plaintiff, a mentally retarded person, on several unrelated occasions between 2002 and May 2005. R __ Plaintiff's representatives also claimed that he had been denied certain Medicaid services. R ____¹

Plaintiff's representatives took no action regarding this case, other than the filing of the Summons and Complaint, until almost a year later. On May 7, 2008, plaintiff's representatives filed, and shortly thereafter served, a purported amended Summons and Complaint. That pleading deleted some of the original defendants and added several new defendants. The original 2007 Summons and Complaint have never been served at all.²

All defendants moved to dismiss. R __ The motion of defendants DDSN, Lacy and Butkus was based primarily on the late service that failed to comply with § 15-3-20(B), or in the case of the original Complaint, the non-service by plaintiff's representatives. R __

The motions to dismiss were originally denied by Judge Strickland following a hearing on March 30, 2009. R __ A written order was filed on June 4, 2009. R __ At

¹ While the Court will probably not need to address the issue of Medicaid services, it should be noted that matters pertaining to eligibility for Medicaid assistance are not properly brought in original civil actions such as the present case, but through a state administrative appeals process. *Doe v Kidd*, 501 F.3d 348, 352 (4th Cir. 2007) ("Appeals from DDSN decisions about the services, if any, it will provide are taken to a DHHS hearing officer and, after that, to the state of South Carolina's Administrative Law Judge Division").

² Plaintiff notes that "defendants were on notice of the [2007] complaint," Br. of Appellant at 2. While this may be true for some or all of the Babcock Center Defendants, there is no evidence in the record to suggest that the two state government Defendants named in the original Complaint were aware of its existence until almost a year after its filing. The Brief of Appellant, p. 3, incorrectly states that Defendant Butkus was added by the purported Amended Complaint. In fact, he was listed in the original Complaint.

the hearing, Judge Strickland had indicated that the basis for his decision was “judicial economy,” R ___, apparently based on a belief that the case could be re-filed without changing the rights of any parties, although in fact any re-filed action would need to comply with the statute of limitations as of the date of its filing *See e g Frasca v US* 921 F 2d 450, 453 (2d Cir 1990)(under analogous federal procedure, if service is not complete by the end of the 120 days, the governing statute of limitations again becomes applicable, and plaintiff must refile prior to the termination of the statute of limitations period)

All defendants filed a Rule 59(e) motion for reconsideration, R ___, which was heard by Judge Strickland on September 4, 2009 By Order dated November 23, 2009, Judge Strickland determined that the action should be dismissed because of Plaintiff’s representatives’ failure to serve the Summons and Complaint within 120 days, and also for nonprosecution based on the failure to serve R ___

Plaintiff’s representatives filed a motion to reconsider the November 23, 2009, order, R ___, which was denied by order dated February 8, 2010 R ___ This appeal followed

STATEMENT OF FACTS

The facts pertinent to the limited issue presented by this appeal are largely limited to those set forth above in the Statement of the Case. Plaintiff alleges that several unrelated personal injuries occurred while he was a resident at the Babcock Center. Most of the alleged injuries occurred more than three years prior to the original filing of the unserved Complaint in May 2007, and all but one of them occurred more than three years prior to the service of the purported Amended Complaint in May 2008. R. ___ (Amended Complaint, pp. 4-8) ³

The last-referenced injury was a tear on the bottom of the Plaintiff's penis that occurred on May 27, 2005, just short of three years prior to the service of the purported Amended Complaint. R. ___ (Mims Affidavit Attachments, p. 88). This incident, as far as can be told, occurred while Plaintiff was by himself for a moment while his caregiver went to get clothing for him prior to his going home for the weekend. *Id.* The tear lengthened somewhat as it was examined by a nurse, and lengthened still further upon examination by a doctor. *Id.* Eventually, it was 4 centimeters long and required seven stitches. *Id.* The clinicians at Lexington did not believe that the injury was the result of abuse or neglect, and as a result, they permitted Plaintiff to return to Babcock that same evening. *Id.* A medical consultant from DDSN, Dr. Graeme Johnson, examined Plaintiff several days later. He concluded that the cause for the laceration was unknown, but that it did not appear to have resulted from abuse or neglect. R. ___ (*Id.*, p. 93). The injury apparently healed quickly and without incident. *Id.*

³ No subsequent lawsuit has ever been filed with respect to these alleged injuries.

The remaining events set forth below do not directly involve the issue on appeal, but in light of the many irrelevant details set forth in Plaintiff's Statement of Facts, these Defendants feel constrained to make mention of the facts below. Plaintiff had been committed to the care of DDSN by the Probate Court in 2001. R __ (Id. at 32-34). The Probate Court at the time issued a Consent Order, agreed to by counsel for Plaintiff's mother, counsel for Petitioner, and Petitioner's guardian ad litem, to the effect that it was agreed by all concerned "that Mrs. Mims will be unable to care for her son in her home." R __ (Id.)⁴ As a result, Plaintiff was committed to the care of DDSN, but with provision for weekend visits with his mother. R __ (Id.)

Plaintiff now argues that the guardian ad litem, Leigh Flynn (an attorney) was given false information by DDSN prior to her consenting to the 2001 Consent Order. Brief of Appellant 7, citing Flynn Affidavit. R __. Plaintiff's counsel does not mention, however, that when Ms. Flynn's deposition was taken in the present case, she testified that she did "not recall any information provided to me that was false by the Department of Disabilities and Special Needs," and that she "probably" would recall if anyone at DDSN had provided her with false information. R __, Deposition of Leigh Flynn at 52-53. In other words, Plaintiff's counsel's allegations that DDSN provided "false" information in 2001 have been disclaimed by the source of the allegations.⁵

⁴ In view of the consensual nature of this Order, which Plaintiff's mother and his guardian both agreed to, Plaintiff's counsel's repeated characterization of this commitment as "involuntarily" is essentially inaccurate.

⁵ The Brief of Appellant misstates or exaggerates other matters of fact as well, but in view of the very limited nature of the issues on appeal, as well as the fact that the factual record is essentially not developed, these Respondents will not undertake to address all of the factual details about which the Brief of Appellant is in error.

There was no change in Plaintiff's situation for almost four years. Then, several weeks after the May 2005 laceration incident referenced above, Plaintiff's counsel obtained an *ex parte* Probate Court Order appointing Plaintiff's mother as his temporary guardian, which effectively permitted her to ask for Plaintiff to be returned home on a permanent basis if she so desired. R. __ (Id. at 107-108)

In failure of communication that could easily have been prevented by Plaintiff's counsel, she advised Babcock and DDSN's counsel, Jim Hill, by e-mail late in the afternoon on Friday, June 10, 2005, that Plaintiff "would not be returning to [Babcock]" on the following Sunday, that is, after his weekend visit. R. __ (Id. at 110). Reference was made to the "Court's Order," but the e-mail did not describe what that Order was, nor was the Order attached to the e-mail or even summarized in it.⁶ This led to concern on the part of DDSN's counsel that if DDSN were to permit Plaintiff to go home for the weekend when his mother had no intention of returning him to Babcock at the end of the weekend, then DDSN would be effectively facilitating a violation of the 2001 Probate Court Order. R. __ (Id. at 109). Eventually, Plaintiff's counsel did make the contents of the *ex parte* Order known, as should have occurred at the outset, and Plaintiff was permitted to go home later that same evening. Additional hearings were held on June 24, 2005, and on September 29, 2005, *see* R. __ (Id. at 112, 118-121), and the Probate Court issued an Order dated December 19, 2005, which held that Plaintiff's mother would be his permanent guardian. Id. DDSN expressed concern about whether Plaintiff's mother could adequately care for him, R. __ (Id. at 111-116), but the Probate Court held that

⁶ This Order, which apparently was issued the previous day, June 9, 2005, is the one erroneously referenced in Paragraph 46 of the purported Amended Complaint as being dated June 9, 2007.

DDSN was not a party, and did not consider the concerns expressed by DDSN R __ (*Id* at 119)

Finally, Plaintiff has raised claims pertaining to the nature of the Medicaid services provided to him. Similar, if not identical claims had earlier been made in the appropriate forum of a DHHS administrative appeal, but were dismissed as a result of Plaintiff's counsel not submitting certain information to the DHHS Hearing Officer until approximately three weeks after it was due. The Administrative Law Court affirmed the dismissal. *See Mims v DHHS* <http://www.scalc.net/decisions.aspx?q=4&id=10465> (S C A L C 2007). An appeal to this Court was subsequently dismissed for procedural reasons on April 28, 2008. The Amended Summons and Complaint in the present case were filed only a few days later.

ARGUMENT

- 1 This action, which indisputably was not served on any defendant until almost a year after its original filing, was properly dismissed pursuant to S C Code Ann § 15-3-20(B), which provides that a civil action is commenced “if actual service [of the summons and complaint] is accomplished within one hundred twenty days after filing ”**

As held by the Circuit Court, *S C Code Ann § 15-3-20(B)* unequivocally provides that

(B) A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing

(Emphasis added) It is undisputed that neither the original Complaint nor the Amended Complaint was served within 120 days of the filing of action 07-CP-40-3365 in May 2007 The Plaintiff did not serve anything on any defendant until May 2008, almost an entire year after the action was filed

Plaintiff claims that the 120-day provision of § 15-3-20(B) had only one purpose, and that purpose was to extend, by up to 120 days, the time for service of cases that had been filed, but not served, within the statute of limitations *See generally* Brief of Appellant, Question 1 However, the language of the statute contains no such restrictions Instead, it simply provides, without exception or condition, that a civil action is commenced “court if actual service is accomplished within one hundred twenty days after filing ” Plaintiff never quotes § 15-3-20(B), but does repeatedly refer to *Hooper v Ebenezer Senior Services and Rehabilitation Center*, 377 S C 217, 229, 659 S E 2d 213, 219 (Ct App 2008), *rev d* 386 S C 108, 687 S E 2d 29 (2009), which did not involve facts similar to those in the present case

The statute and Rule 3, S C R C P , are consistent Rule 3(a)(1) provides that

A civil action is commenced when the summons and complaint are filed with the clerk of court if

(1) the summons and complaint are served within the statute of limitations in any manner prescribed by law, or

Section 15-3-20(B) adds the requirement that the action “is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing ” Finally, Rule 3(a)(2) provides that “if [the summons and complaint are] not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing ”

A review of the history of the statute and Rule 3 demonstrates that neither the legislature nor the courts have ever intended for there to be an indefinite, open-ended period for the service of a filed civil action Rule 3(a), as originally promulgated in 1985, simply provided that a civil action is commenced by the filing of a summons and complaint, but Rule 3(b) provided that an action could be commenced upon filing with the clerk of court and delivery to the sheriff for service, “provided that actual service must be accomplished within a reasonable time thereafter” Former Rule 3(b) The heading of former Rule 3(b) provided that it applied to “Commencement When Defendant Absent,” but in *Garner v Houck*, 312 S C 481, 486, 435 S E 2d 847, 849 (1993), the Supreme Court held that the text of the rule contained no such limitation to absent defendants, and that other inconsistencies and vagaries would arise if Rule 3(b) were held to apply only to absent defendants Thus, as of 1993, when *Garner v Houck* was decided, an action was deemed to have been commenced when filed with the clerk and delivered to the sheriff for service, “provided that actual service must be accomplished within a reasonable time ” Former Rule 3(b) The Note to former Rule 3(b)

stated that the requirement of actual service within a reasonable time was one “which the cases have implied ”

In 2002, the General Assembly provided more definition of the concept of a reasonable time for service by enacting § 15-3-20(b). That section, already quoted above, provides that “A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing ” Finally, in 2004, the Supreme Court amended Rule 3, deleting the reference to a reasonable time and to absent defendants, and instead expressly providing that an action filed within the statute of limitations would be deemed commenced, even if not served within the statute of limitations, if actual service was accomplished not later than 120 days after filing. To reiterate, the Rule provides that an action is commenced upon the filing and service of the summons and complaint, the statute adds the requirement that the summons and complaint must be served within 120 days, and the Rule further provides that if the action is timely filed, the time for serving it is extended for up to 120 days. Taken together, they clearly require the dismissal of the present action because of the untimeliness of service.

A requirement that a civil action be served within a given time in order to be viable is also found in the federal system. Rule 4(m) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

(m) Time Limit for Service

If a defendant is not served within 120 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

The purpose of Federal Rule 4(m), which was first promulgated in 1983, is “to encourage and prod counsel into expediting service in order that the merits of the case may be reached” *Motsinger v Flynt*, 119 F R D 373, 375 (M D N C 1988), *see also e g Wei v State of Hawaii* 763 F 2d 370, 372 (9th Cir 1985)(Rule 4(m)(formerly 4(j)) was “intended to force parties and their attorneys to be diligent in prosecuting their causes of action”), *Tillman v New York State Dept of Mental Health*, 776 F Supp 841, 843 (S D N Y 1991)(Rule 4(m) is “aimed at ensuring diligent prosecution of civil cases”) Several courts have stated that a plaintiff should “treat the 120 days with the respect reserved for a time bomb” *Braxton v US* 817 F 2d 238, 241 (3d Cir 1987)(citation omitted) In the present case, the lingering 2007 Summons and Complaint were treated more like an exploded “dud,” unearthed by Plaintiff’s attorney a year later to see whether it would still go off These Defendants respectfully submit that this Court should bury it, and the attempt to have it spark a revived action, for good

If the present action were to be permitted to go forward, the result would be noncompliance both with the unambiguous terms of § 15-3-20(B), and with the principle that litigation should be diligently pursued, as expressed in the federal cases cited above From a practical standpoint, it would give plaintiffs in such situations the advantages of having a “stealth lawsuit” in place for potentially long periods without the defendant’s knowledge While it is true, of course, that a potential defendant is never completely safe from litigation until the statute of limitations has actually expired, an unfair situation would nevertheless be created if a plaintiff could file a lawsuit without notice and seek to benefit later from that filing, while the defendant is left unaware of the filing of the

action, and therefore less likely to prepare for litigation as early as the defendant might otherwise have done

2 Equitable tolling should be not considered in the absence of the commencement of a civil action by the filing of a Summons and Complaint, and service thereof within 120 days, and Plaintiff's equitable tolling arguments are without merit in any event

Judge Strickland's Order of November 23, 2009, held that "a Court decision regarding the applicable statutes of limitations is premature at this time " R ____⁷ This conclusion was clearly correct. Until such time as an action alleging a claim for equitable tolling has been validly filed and served, the issue of whether and when equitable tolling might apply is merely hypothetical. In other words, simply as a matter of logic, there must first be before the court a properly filed and served civil action, even if that action appears on its face to be time-barred. The court cannot deem a limitations period tolled when there is no actual lawsuit before it. Plaintiff makes the bare assertion, completely without discussion or foundation, that the statute of limitations had not expired when the 2008 Summons and Complaint were filed. Brief of Appellant at 2, 17. These Defendants submit that the time for discussing that issue will occur, if it occurs at all, at such time as there is a properly initiated lawsuit before a Circuit Court.

In any event, such argument as Plaintiff makes on appeal on this issue is without merit. In addition, no record has been made on this issue, a fact that militates it being considered on this appeal. Moreover, as the Supreme Court has held, "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its

⁷ Plaintiff's representatives probably cannot be said to have challenged the Order below on this point, unless the argument on pp. 4-6 of Plaintiff's Rule 59(e) motion, dealing with alleged "reprisal" concerns, may be said to have raised the issue.

use” *Hooper v Ebenezer Sr Services and Rehabilitation Center*, 386 S C 108, 117, 687 S E 2d 29, 33 (2009)

Plaintiff claims a right to tolling based on several grounds. First, he cites his disability, but offers no suggestion as to when the disability should be deemed to have ended, as it undoubtedly was, by his having a guardian. Secondly, he claims that “bad acts by the defendants” should toll the statute, but this is essentially preposterous, because there has been no showing of anything that would have prevented the service of the 2007 Summons and Complaint as soon as they had been filed. Thirdly, Plaintiff claims tolling in order to prevent “technical forfeitures” from preventing consideration of the merits of the claim, but the service of a summons and complaint within the timeframe set forth for such service has been deemed a fundamental defect, rather than a mere technical one. *See e.g. American Family Mut Ins Co v Royal Ins Co of America* 167 Wis 2d 524, 534, 481 N W 2d 629, 633 (1992). Finally, Plaintiff claims that tolling should occur under the rule that if the same claim is timely raised in the wrong forum, then tolling can occur. This doctrine is completely inapplicable to the present case. Plaintiff’s administrative appeal, abandoned by Plaintiff after it had been briefed in this Court in 2008, was the proper forum for Plaintiff’s claims relating to eligibility for funding or services, as set forth in n 1 above. As for any other claims that might have been made in the administrative appeal, there was nothing before the Circuit Court that would indicate precisely what was raised in the administrative appeal, and Plaintiff’s assertions fail for that reason alone. It is, or should be, clear, however, that a party who tries to raise such traditional court claims as tort claims and Section 1983 claims in a state administrative proceeding limited to determinations of eligibility for funding or services

should not be heard to claim that an attempt to raise them in that forum should toll the statute of limitations. As a result, the “wrong forum” exception simply does not apply here.

3 This action was also properly dismissed under Rule 41(b), S C R C P , for failure to prosecute

The Circuit Court also held that the nonservice of the Summons and Complaint within 120 days additionally justified dismissal of the case under SCRC P Rule 41(b). R ___ On appeal, Plaintiff’s counsel argues primarily that she actively participated in the case after the purported Amended Summons and Complaint were filed. However, the Circuit Court’s determination was based on the failure to commence this action promptly and properly. *Id.* These Defendants submit that dismissal for failure to prosecute constitutes an alternative ground for dismissal of this action without prejudice. Federal courts have treated a failure to timely serve under Federal Rule 4(m) as an instance in which dismissal for failure to prosecute is appropriate. *See e.g. Moutsinas v. Department of Educ. of the City of New York*, 2005 WL 1711092 (S.D.N.Y. 2005). Plaintiff here contends that more detailed findings should have been made, but the fact of the nonservice for a year is the sole basis of the Circuit Court’s decision, and is clearly set forth.

Accordingly, even if it were to be held that § 15-3-20(B) does not in itself mandate dismissal based on nonservice for more than 120 days after filing, this Court should nevertheless hold that a dismissal for failure to prosecute may properly occur where, as here, there has been a failure to serve an action for a time period nearly three times as long as the 120 day-period set forth in § 15-3-20(B).

4 A Complaint cannot be amended as of right in an action which has not previously been served and which is subject to dismissal for non-service of the Summons and Complaint within one hundred twenty days after filing

In his final issue, Plaintiff argues that Rule 15 does not require the service of an original Complaint in order for a plaintiff to be permitted to amend as of right. The short answer to this is the answer given in the Order below, which is that

As a result of the Plaintiff's failure to accomplish service within 120 days and commence the civil action, there was no suit in existence in which an Amended Complaint could be filed. Therefore, the filing and service of the Plaintiff's Summons and Amended Complaint in May 2008 bearing case action number 07-CP-40-3365 constituted a legal nullity.

R. ___ (Order at 4) Likewise, and also as held in the Order below,

Because service of the original Summons and Complaint was never attempted, and because service of the second Summons and Amended Complaint were ineffective, this case must be dismissed for insufficiency [sic] of process under Rule 12(b)(4) and insufficiency of service of process under Rule 12(b)(5).

Id. Only one of these Defendants, Stanley Butkus, was named as a defendant in the 2007 Summons and Complaint. He was in no position to move to dismiss that case at any time prior to his being served with the purported Amended Complaint in 2008, because he was never served with the 2007 Summons and Complaint (and as far as is shown by the record and known to counsel, he was never actually aware of the existence of the case prior to being served in 2008).

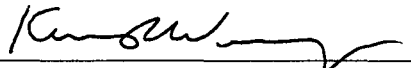
CONCLUSION

For the foregoing reasons, the Respondent respectfully submits that the Order of the Circuit Court dated November 23, 2009, and the subsequent Order denying reconsideration thereof, should be affirmed

Respectfully submitted,

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BY



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September 1, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M Strickland, Special Circuit Court Judge

Case No 07-CP-40-3365

RECEIVED

SEP 02 2010

SC Court of Appeals

Edward Mims,

Appellant,

v

Babcock Center, Inc , Judy Johnson, the South Carolina Department
of Disabilities and Special Needs,
Kathi Lacy and Stanley Butkus,

Respondents

**INITIAL BRIEF OF RESPONDENTS DDSN, LACY AND BUTKUS
(CORRECTED)**

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COUNTERSTATEMENT OF ISSUES ON APPEAL

- 1 Whether this action, which indisputably was not served on any defendant until almost a year after its original filing, was properly dismissed pursuant to *S C Code Ann* § 15-3-20(B), which provides that a civil action is commenced “if actual service [of the summons and complaint] is accomplished within one hundred twenty days after filing ”
- 2 Whether equitable tolling should be considered in the absence of the commencement of a civil action by the filing of a Summons and Complaint and service thereof within 120 days, and whether Plaintiff’s equitable tolling arguments are without merit in any event
- 3 Whether this action was also properly dismissed under Rule 41(b), *S C R C P* , for failure to prosecute
- 4 Whether a Complaint can be amended as of right in an action which has not previously been served and which is subject to dismissal for non-service of the Summons and Complaint within one hundred twenty days after filing

STATEMENT OF THE CASE

This action was filed on May 29, 2007, but the original Summons and Complaint were never served. The Complaint alleged injuries to the plaintiff, a mentally retarded person, on several unrelated occasions between 2002 and May 2005. R __ Plaintiff's representatives also claimed that he had been denied certain Medicaid services. R ____¹

Plaintiff's representatives took no action regarding this case, other than the filing of the Summons and Complaint, until almost a year later. On May 7, 2008, plaintiff's representatives filed, and shortly thereafter served, a purported amended Summons and Complaint. That pleading deleted some of the original defendants and added several new defendants. The original 2007 Summons and Complaint have never been served at all.²

All defendants moved to dismiss. R __ The motion of defendants DDSN, Lacy and Butkus was based primarily on the late service that failed to comply with § 15-3-20(B), or in the case of the original Complaint, the non-service by plaintiff's representatives. R __

The motions to dismiss were originally denied by Judge Strickland following a hearing on March 30, 2009. R __ A written order was filed on June 4, 2009. R __ At

¹ While the Court will probably not need to address the issue of Medicaid services, it should be noted that matters pertaining to eligibility for Medicaid assistance are not properly brought in original civil actions such as the present case, but through a state administrative appeals process. *Doe v Kidd*, 501 F.3d 348, 352 (4th Cir. 2007) ("Appeals from DDSN decisions about the services, if any, it will provide are taken to a DHHS hearing officer and, after that, to the state of South Carolina's Administrative Law Judge Division").

² Plaintiff notes that "defendants were on notice of the [2007] complaint," Br. of Appellant at 2. While this may be true for some or all of the Babcock Center Defendants, there is no evidence in the record to suggest that the two state government Defendants named in the original Complaint were aware of its existence until almost a year after its filing. The Brief of Appellant, p. 3, incorrectly states that Defendant Butkus was added by the purported Amended Complaint. In fact, he was listed in the original Complaint.

the hearing, Judge Strickland had indicated that the basis for his decision was “judicial economy,” R ___, apparently based on a belief that the case could be re-filed without changing the rights of any parties, although in fact any re-filed action would need to comply with the statute of limitations as of the date of its filing *See e.g. Frasca v US* 921 F 2d 450, 453 (2d Cir 1990)(under analogous federal procedure, if service is not complete by the end of the 120 days, the governing statute of limitations again becomes applicable, and plaintiff must refile prior to the termination of the statute of limitations period)

All defendants filed a Rule 59(e) motion for reconsideration, R ___, which was heard by Judge Strickland on September 4, 2009. By Order dated November 23, 2009, Judge Strickland determined that the action should be dismissed because of Plaintiff’s representatives’ failure to serve the Summons and Complaint within 120 days, and also for nonprosecution based on the failure to serve R ___

Plaintiff’s representatives filed a motion to reconsider the November 23, 2009, order, R ___, which was denied by order dated February 8, 2010. R ___ This appeal followed

STATEMENT OF FACTS

The facts pertinent to the limited issue presented by this appeal are largely limited to those set forth above in the Statement of the Case. Plaintiff alleges that several unrelated personal injuries occurred while he was a resident at the Babcock Center. Most of the alleged injuries occurred more than three years prior to the original filing of the unserved Complaint in May 2007, and all but one of them occurred more than three years prior to the service of the purported Amended Complaint in May 2008. R. __ (Amended Complaint, pp. 4-8) ³

The last-referenced injury was a tear on the bottom of the Plaintiff's penis that occurred on May 27, 2005, just short of three years prior to the service of the purported Amended Complaint. R. __ (Mims Affidavit Attachments, p. 88). This incident, as far as can be told, occurred while Plaintiff was by himself for a moment while his caregiver went to get clothing for him prior to his going home for the weekend. *Id.* The tear lengthened somewhat as it was examined by a nurse, and lengthened still further upon examination by a doctor. *Id.* Eventually, it was 4 centimeters long and required seven stitches. *Id.* The clinicians at Lexington did not believe that the injury was the result of abuse or neglect, and as a result, they permitted Plaintiff to return to Babcock that same evening. *Id.* A medical consultant from DDSN, Dr. Graeme Johnson, examined Plaintiff several days later. He concluded that the cause for the laceration was unknown, but that it did not appear to have resulted from abuse or neglect. R. __ (*Id.*, p. 93). The injury apparently healed quickly and without incident. *Id.*

³ No subsequent lawsuit has ever been filed with respect to these alleged injuries.

The remaining events set forth below do not directly involve the issue on appeal, but in light of the many irrelevant details set forth in Plaintiff's Statement of Facts, these Defendants feel constrained to make mention of the facts below. Plaintiff had been committed to the care of DDSN by the Probate Court in 2001. R __ (Id) at 32-34. The Probate Court at the time issued a Consent Order, agreed to by counsel for Plaintiff's mother, counsel for Petitioner, and Petitioner's guardian ad litem, to the effect that it was agreed by all concerned "that Mrs. Mims will be unable to care for her son in her home." R __ (Id) ⁴ As a result, Plaintiff was committed to the care of DDSN, but with provision for weekend visits with his mother. R __ (Id)

Plaintiff now argues that the guardian ad litem, Leigh Flynn (an attorney) was given false information by DDSN prior to her consenting to the 2001 Consent Order. Brief of Appellant 7, citing Flynn Affidavit. R __. These Defendants intend to controvert those assertions, but the issue was not before the Circuit Court for decision. These Defendants at this point would simply advise that the issue will be contested if it should ever come before any court for a decision. ⁵

⁴ In view of the consensual nature of this Order, which Plaintiff's mother and his guardian both agreed to, Plaintiff's counsel's repeated characterization of this commitment as "involuntarily" is essentially inaccurate.

⁵ The Brief of Appellant misstates or exaggerates other matters of fact as well, but in view of the very limited nature of the issues on appeal, as well as the fact that the factual record is essentially not developed, these Respondents will not undertake to address all of the factual details about which they believe the Brief of Appellant is in error.

There was no change in Plaintiff's situation for almost four years. Then, several weeks after the May 2005 laceration incident referenced above, Plaintiff's counsel obtained an *ex parte* Probate Court Order appointing Plaintiff's mother as his temporary guardian, which effectively permitted her to ask for Plaintiff to be returned home on a permanent basis if she so desired. R. __ (Id. at 107-108)

In failure of communication that could easily have been prevented by Plaintiff's counsel, she advised Babcock and DDSN's counsel, Jim Hill, by e-mail late in the afternoon on Friday, June 10, 2005, that Plaintiff "would not be returning to [Babcock]" on the following Sunday, that is, after his weekend visit. R. __ (Id. at 110). Reference was made to the "Court's Order," but the e-mail did not describe what that Order was, nor was the Order attached to the e-mail or even summarized in it.⁶ This led to concern on the part of DDSN's counsel that if DDSN were to permit Plaintiff to go home for the weekend when his mother had no intention of returning him to Babcock at the end of the weekend, then DDSN would be effectively facilitating a violation of the 2001 Probate Court Order. R. __ (Id. at 109). Eventually, Plaintiff's counsel did make the contents of the *ex parte* Order known, as should have occurred at the outset, and Plaintiff was permitted to go home later that same evening. Additional hearings were held on June 24, 2005, and on September 29, 2005, *see* R. __ (Id. at 112, 118-121), and the Probate Court issued an Order dated December 19, 2005, which held that Plaintiff's mother would be his permanent guardian. *Id.* DDSN expressed concern about whether Plaintiff's mother could adequately care for him, R. __ (Id. at 111-116), but the Probate Court held that

⁶ This Order, which apparently was issued the previous day, June 9, 2005, is the one erroneously referenced in Paragraph 46 of the purported Amended Complaint as being dated June 9, 2007.

DDSN was not a party, and did not consider the concerns expressed by DDSN R ___ (*Id* at 119)

Finally, Plaintiff has raised claims pertaining to the nature of the Medicaid services provided to him. Similar, if not identical claims had earlier been made in the appropriate forum of a DHHS administrative appeal, but were dismissed as a result of Plaintiff's counsel not submitting certain information to the DHHS Hearing Officer until approximately three weeks after it was due. The Administrative Law Court affirmed the dismissal. *See Mims v DHHS* <http://www.scalc.net/decisions.aspx?q=4&id=10465> (S C A L C 2007). An appeal to this Court was subsequently dismissed for procedural reasons on April 28, 2008. The Amended Summons and Complaint in the present case were filed only a few days later.

ARGUMENT

- 1 **This action, which indisputably was not served on any defendant until almost a year after its original filing, was properly dismissed pursuant to S C Code Ann § 15-3-20(B), which provides that a civil action is commenced “if actual service [of the summons and complaint] is accomplished within one hundred twenty days after filing”**

As held by the Circuit Court, *S C Code Ann* § 15-3-20(B) unequivocally provides that

(B) A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing

(Emphasis added) It is undisputed that neither the original Complaint nor the Amended Complaint was served within 120 days of the filing of action 07-CP-40-3365 in May 2007. The Plaintiff did not serve anything on any defendant until May 2008, almost an entire year after the action was filed.

Plaintiff claims that the 120-day provision of § 15-3-20(B) had only one purpose, and that purpose was to extend, by up to 120 days, the time for service of cases that had been filed, but not served, within the statute of limitations. *See generally* Brief of Appellant, Question 1. However, the language of the statute contains no such restrictions. Instead, it simply provides, without exception or condition, that a civil action is commenced “court if actual service is accomplished within one hundred twenty days after filing.” Plaintiff never quotes § 15-3-20(B), but does repeatedly refer to *Hooper v Ebenezer Senior Services and Rehabilitation Center*, 377 S C 217, 229, 659 S E 2d 213, 219 (Ct App 2008), *rev d* 386 S C 108, 687 S E 2d 29 (2009), which did not involve facts similar to those in the present case.

The statute and Rule 3, S C R C P , are consistent Rule 3(a)(1) provides that

A civil action is commenced when the summons and complaint are filed with the clerk of court if

(1) the summons and complaint are served within the statute of limitations in any manner prescribed by law, or

Section 15-3-20(B) adds the requirement that the action “is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing ” Finally, Rule 3(a)(2) provides that “if [the summons and complaint are] not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing ”

A review of the history of the statute and Rule 3 demonstrates that neither the legislature nor the courts have ever intended for there to be an indefinite, open-ended period for the service of a filed civil action Rule 3(a), as originally promulgated in 1985, simply provided that a civil action is commenced by the filing of a summons and complaint, but Rule 3(b) provided that an action could be commenced upon filing with the clerk of court and delivery to the sheriff for service, “provided that actual service must be accomplished within a reasonable time thereafter ” Former Rule 3(b) The heading of former Rule 3(b) provided that it applied to “Commencement When Defendant Absent,” but in *Garner v Houck*, 312 S C 481, 486, 435 S E 2d 847, 849 (1993), the Supreme Court held that the text of the rule contained no such limitation to absent defendants, and that other inconsistencies and vagaries would arise if Rule 3(b) were held to apply only to absent defendants Thus, as of 1993, when *Garner v Houck* was decided, an action was deemed to have been commenced when filed with the clerk and delivered to the sheriff for service, “provided that actual service must be accomplished within a reasonable time ” Former Rule 3(b) The Note to former Rule 3(b)

stated that the requirement of actual service within a reasonable time was one “which the cases have implied ”

In 2002, the General Assembly provided more definition of the concept of a reasonable time for service by enacting § 15-3-20(b) That section, already quoted above, provides that “A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing ” Finally, in 2004, the Supreme Court amended Rule 3, deleting the reference to a reasonable time and to absent defendants, and instead expressly providing that an action filed within the statute of limitations would be deemed commenced, even if not served within the statute of limitations, if actual service was accomplished not later than 120 days after filing To reiterate, the Rule provides that an action is commenced upon the filing and service of the summons and complaint, the statute adds the requirement that the summons and complaint must be served within 120 days, and the Rule further provides that if the action is timely filed, the time for serving it is extended for up to 120 days Taken together, they clearly require the dismissal of the present action because of the untimeliness of service

A requirement that a civil action be served within a given time in order to be viable is also found in the federal system Rule 4(m) of the Federal Rules of Civil Procedure provides in pertinent part as follows

(m) Time Limit for Service

If a defendant is not served within 120 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period

The purpose of Federal Rule 4(m), which was first promulgated in 1983, is “to encourage and prod counsel into expediting service in order that the merits of the case may be reached” *Motsinger v Flynt*, 119 F R D 373, 375 (M D N C 1988), *see also e g Wei v State of Hawaii* 763 F 2d 370, 372 (9th Cir 1985)(Rule 4(m)(formerly 4(j)) was “intended to force parties and their attorneys to be diligent in prosecuting their causes of action”), *Tillman v New York State Dept of Mental Health* 776 F Supp 841, 843 (S D N Y 1991)(Rule 4(m) is “aimed at ensuring diligent prosecution of civil cases”) Several courts have stated that a plaintiff should “treat the 120 days with the respect reserved for a time bomb” *Braxton v US* 817 F 2d 238, 241 (3d Cir 1987)(citation omitted) In the present case, the lingering 2007 Summons and Complaint were treated more like an exploded “dud,” unearthed by Plaintiff’s attorney a year later to see whether it would still go off These Defendants respectfully submit that this Court should bury it, and the attempt to have it spark a revived action, for good

If the present action were to be permitted to go forward, the result would be noncompliance both with the unambiguous terms of § 15-3-20(B), and with the principle that litigation should be diligently pursued, as expressed in the federal cases cited above From a practical standpoint, it would give plaintiffs in such situations the advantages of having a “stealth lawsuit” in place for potentially long periods without the defendant’s knowledge While it is true, of course, that a potential defendant is never completely safe from litigation until the statute of limitations has actually expired, an unfair situation would nevertheless be created if a plaintiff could file a lawsuit without notice and seek to benefit later from that filing, while the defendant is left unaware of the filing of the

action, and therefore less likely to prepare for litigation as early as the defendant might otherwise have done

2 Equitable tolling should be not considered in the absence of the commencement of a civil action by the filing of a Summons and Complaint, and service thereof within 120 days, and Plaintiff's equitable tolling arguments are without merit in any event

Judge Strickland's Order of November 23, 2009, held that "a Court decision regarding the applicable statutes of limitations is premature at this time " R __ ⁷ This conclusion was clearly correct. Until such time as an action alleging a claim for equitable tolling has been validly filed and served, the issue of whether and when equitable tolling might apply is merely hypothetical. In other words, simply as a matter of logic, there must first be before the court a properly filed and served civil action, even if that action appears on its face to be time-barred. The court cannot deem a limitations period tolled when there is no actual lawsuit before it. Plaintiff makes the bare assertion, completely without discussion or foundation, that the statute of limitations had not expired when the 2008 Summons and Complaint were filed. Brief of Appellant at 2, 17. These Defendants submit that the time for discussing that issue will occur, if it occurs at all, at such time as there is a properly initiated lawsuit before a Circuit Court.

In any event, such argument as Plaintiff makes on appeal on this issue is without merit. In addition, no record has been made on this issue, a fact that militates it being considered on this appeal. Moreover, as the Supreme Court has held, "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its

⁷ Plaintiff's representatives probably cannot be said to have challenged the Order below on this point, unless the argument on pp. 4-6 of Plaintiff's Rule 59(e) motion, dealing with alleged "reprisal" concerns, may be said to have raised the issue.

use” *Hooper v Ebenezer Sr Services and Rehabilitation Center*, 386 S C 108, 117, 687 S E 2d 29, 33 (2009)

Plaintiff claims a right to tolling based on several grounds. First, he cites his disability, but offers no suggestion as to when the disability should be deemed to have ended, as it undoubtedly was, by his having a guardian. Secondly, he claims that “bad acts by the defendants” should toll the statute, but this is essentially preposterous, because there has been no showing of anything that would have prevented the service of the 2007 Summons and Complaint as soon as they had been filed. Thirdly, Plaintiff claims tolling in order to prevent “technical forfeitures” from preventing consideration of the merits of the claim, but the service of a summons and complaint within the timeframe set forth for such service has been deemed a fundamental defect, rather than a mere technical one. *See, e.g. American Family Mut Ins Co v Royal Ins Co of America* 167 Wis 2d 524, 534, 481 N W 2d 629, 633 (1992). Finally, Plaintiff claims that tolling should occur under the rule that if the same claim is timely raised in the wrong forum, then tolling can occur. This doctrine is completely inapplicable to the present case. Plaintiff’s administrative appeal, abandoned by Plaintiff after it had been briefed in this Court in 2008, was the proper forum for Plaintiff’s claims relating to eligibility for funding or services, as set forth in n. 1 above. As for any other claims that might have been made in the administrative appeal, there was nothing before the Circuit Court that would indicate precisely what was raised in the administrative appeal, and Plaintiff’s assertions fail for that reason alone. It is, or should be, clear, however, that a party who tries to raise such traditional court claims as tort claims and Section 1983 claims in a state administrative proceeding limited to determinations of eligibility for funding or services

should not be heard to claim that an attempt to raise them in that forum should toll the statute of limitations. As a result, the “wrong forum” exception simply does not apply here.

3 This action was also properly dismissed under Rule 41(b), S C R C P , for failure to prosecute

The Circuit Court also held that the nonservice of the Summons and Complaint within 120 days additionally justified dismissal of the case under SCRC P Rule 41(b). R ___ On appeal, Plaintiff’s counsel argues primarily that she actively participated in the case after the purported Amended Summons and Complaint were filed. However, the Circuit Court’s determination was based on the failure to commence this action promptly and properly. *Id.* These Defendants submit that dismissal for failure to prosecute constitutes an alternative ground for dismissal of this action without prejudice. Federal courts have treated a failure to timely serve under Federal Rule 4(m) as an instance in which dismissal for failure to prosecute is appropriate. *See e.g., Moutsinas v. Department of Educ. of the City of New York*, 2005 WL 1711092 (S.D.N.Y. 2005). Plaintiff here contends that more detailed findings should have been made, but the fact of the nonservice for a year is the sole basis of the Circuit Court’s decision, and is clearly set forth.

Accordingly, even if it were to be held that § 15-3-20(B) does not in itself mandate dismissal based on nonservice for more than 120 days after filing, this Court should nevertheless hold that a dismissal for failure to prosecute may properly occur where, as here, there has been a failure to serve an action for a time period nearly three times as long as the 120-day-period set forth in § 15-3-20(B).

4 A Complaint cannot be amended as of right in an action which has not previously been served and which is subject to dismissal for non-service of the Summons and Complaint within one hundred twenty days after filing

In his final issue, Plaintiff argues that Rule 15 does not require the service of an original Complaint in order for a plaintiff to be permitted to amend as of right. The short answer to this is the answer given in the Order below, which is that

As a result of the Plaintiff's failure to accomplish service within 120 days and commence the civil action, there was no suit in existence in which an Amended Complaint could be filed. Therefore, the filing and service of the Plaintiff's Summons and Amended Complaint in May 2008 bearing case action number 07-CP-40-3365 constituted a legal nullity.

R. ___ (Order at 4) Likewise, and also as held in the Order below,

Because service of the original Summons and Complaint was never attempted, and because service of the second Summons and Amended Complaint were ineffective, this case must be dismissed for insufficiently [sic] of process under Rule 12(b)(4) and insufficiency of service of process under Rule 12(b)(5).

Id. Only one of these Defendants, Stanley Butkus, was named as a defendant in the 2007 Summons and Complaint. He was in no position to move to dismiss that case at any time prior to being served with the purported Amended Complaint in 2008, because he was never served with the 2007 Summons and Complaint (and as far as is shown by the record and known to counsel, he was never actually aware of the existence of the case prior to being served in 2008).

CONCLUSION

For the foregoing reasons, the Respondent respectfully submits that the Order of the Circuit Court dated November 23, 2009, and the subsequent Order denying reconsideration thereof, should be affirmed

Respectfully submitted,

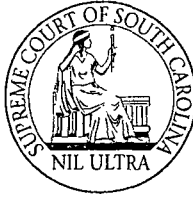
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*Counsel for Respondents DDSN
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September 2, 2010



The Supreme Court of South Carolina

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April 23, 2012

M. Dawes Cooke, Jr., Esquire
Barnwell Whaley Patterson & Helms, LLC
P O Drawer H
Charleston, SC 29402-0197

Re Mims, Edward v. Babcock Center

Dear Mr. Cooke:

The following Order has been endorsed on your Motion to be Relieved as Counsel in the above entitled case on appeal:

“Granted

s/ Jean H. Toal C.J.
For the Court

April 23, 2012”

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,



CLERK

DES/dmh

Mims, Edward v Babcock Center
Page Two
April 23, 2012

cc Patricia Logan Harrison, Esquire
Peter D Protopapas, Esquire
Brian D Newman, Esquire
Christian Stegmaier, Esquire
Joel W Collins, Jr , Esquire
Amy L Neuschafer, Esquire
Kenneth P Woodington, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case Tracking No 2010154146

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Joseph M Strickland, Special Circuit Court Judge

Case No 07-CP-40-3365

Edward Mims, by and through his legal Guardian, Margaret Mims

Appellant,

v

Babcock Center, Inc , Judy Johnson, the South Carolina Department
of Disabilities and Special Needs, Kathi Lacy and Stanley Butkis,

Respondents

MOTION TO BE RELIEVED AS COUNSEL

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Barnwell Whaley Patterson & Helms, LLC
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Charleston, SC 29402
(843) 577-7700
Attorney for Appellant

RECEIVED

MAR 20 2012

SC Supreme Court

AND NOW COMES M Dawes Cooke, Jr of the law firm of Barnwell Whaley Patterson & Helms, LLC, pursuant to S C R A P , Rule 264, and moves this Court for an Order to be relieved as counsel for Appellant Edward Mims, by and through his legal Guardian, Margaret Mims

As grounds therefor Movant states

1 This appeal is scheduled for oral argument on March 21, 2012

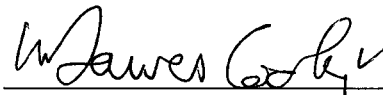
2 Appellant Edward Mims, by and through his legal Guardian, Margaret Mims will still be represented in this lawsuit by Patricia Logan Harrison, Esquire, Peter D Protopapas, Esquire, and Brian D Newman, Esquire Mr Protopapas expects and is prepared to make the oral argument in this appeal

3 Since entering his appearance in this case, it has been brought to the attention of the undersigned that his firm has a conflict of interest that prevents him from continuing his representation of Appellant in this matter

4 With the consent of the client, the undersigned's appearance as counsel will be withdrawn and representation of Appellant will continue uninterrupted through Attorneys Harrison, Protopapas and Newman, who are all admitted to practice before this Court and have appeared as counsel of record

5 For the foregoing reasons, M Dawes Cooke, Jr of the law firm of Barnwell Whaley Patterson & Helms, LLC request that the Court enter an Order withdrawing their appearance and striking them as counsel of record for Appellant in this case, and removing them from all distribution lists

6 This withdrawal of counsel will not cause any delay in this matter and will not prejudice Appellant or any other party to this lawsuit



M Dawes Cooke, Jr, Esq
Barnwell Whaley Patterson & Helms, LLC
P O Drawer H
Charleston, SC 29402
(843) 577-7700
Attorneys for Appellant

Dated March 19, 2012

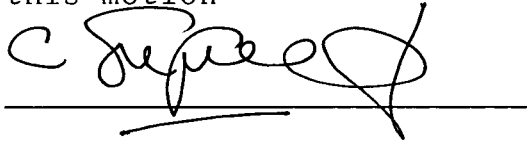
I, Peter D Protopapas, consent
to this motion



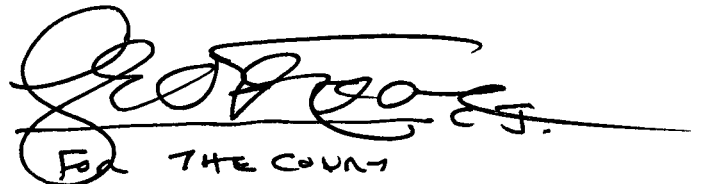
I, Legal Guardian for Edward
Mims, consent to this motion



I, Christian Stegmaier, counsel
for respondents, consents to
this motion



GRANTED


For THE COURT

April 23, 2012

I, Kenneth Woodington, counsel for
respondents, DDSN, et al , consent to
this motion

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case Tracking No 2010154146

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Joseph M Strickland, Special Circuit Court Judge

RECEIVED

MAR 20 2012

SC Supreme Court

Case No 07-CP-40-3365

Edward Mims, by and through his legal Guardian, Margaret Mims

Appellant,

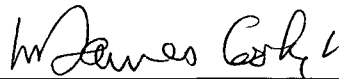
v

Babcock Center, Inc , Judy Johnson, the South Carolina Department
of Disabilities and Special Needs, Kathi Lacy and Stanley Butkis,

Respondents

PROOF OF SERVICE

I certify that I have served the Motion to Be Relieved as Counsel upon Respondents by depositing a copy of it in the United States Mail, postage prepaid, on March 19, 2012, addressed to their attorneys of record, Joel W Collins, Esq , Christian Stegmaier, Esq , and Amy L Neuschafer, Collins & Lacy, P C , Post Office Box 12487, Columbia, South Carolina 29211 and Kenneth Woodington, Esq and William Davidson, Esq , Davidson & Lindemann, P A, Post Office Box 8568, Columbia, South Carolina 29202



M Dawes Cooke, Jr , Esq
Barnwell Whaley Patterson & Helms, LLC
P O Drawer H
Charleston, SC 29402
(843) 577-7700
Attorney for Appellant

Hopkins, Debbie

From Kenneth P. Woodington <kwoodington@DML-LAW.com>
Sent Thursday, March 22, 2012 10:33 AM
To Hopkins, Debbie
Subject Mims v. Babcock Center et al

Dear Ms. Hopkins,

This will confirm our phone conversation in which I stated that I had no objection to Mr. Cooke's motion to be relieved as counsel in the above case.

Sincerely yours,

Ken Woodington

Kenneth P. Woodington
Davidson & Lindemann, P.A.
1611 Devonshire Drive, 2nd Floor
Post Office Box 8568
Columbia, South Carolina 29202-8568
kwoodington@dml-law.com
T 803-806-8222
F 803-806-8855

RECEIVED

MAR 22 2012

SC Supreme Court

BARNWELL WHALEY

PATTERSON & HELMS LLC

Attorneys for
businesses &
professionals
since 1938

M Dawes Cooke, Jr
mdc@barnwell-whaley.com

March 19, 2012

RECEIVED

MAR 20 2012

VIA FEDERAL EXPRESS

SC Supreme Court

The Honorable Daniel E Shearouse
Clerk, The South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

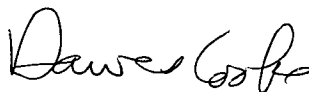
Re Edward Mims, by and through his legal guardian, Margaret Mims v Babcock Center,
Inc, Judy Johnson, the South Carolina Department of Disabilities and Special Needs,
Kathi Lacy, and Stanley Butkus
Case Tracking No 2010154146
Our File No 2116 102

Dear Mr Shearouse

Enclosed for filing are the original and seven copies of a Motion to be Relieved as
Counsel in the above matter, as well as our firm check in the amount of \$25 00 for the filing fee
Please return the clocked copy in the enclosed envelope

By copy of this letter, I am serving the same upon counsel of record

Sincerely,



M Dawes Cooke, Jr

MDCjr/klj
Enclosure

c Joel W Collins, Esq, Christian Stegmaier, Esq, and Amy L Neuschafer, Esq
William Davidson, Esq and Kenneth P Woodington, Esq
Patricia Harrison, Esq

William C Helms III
M Dawes Cooke Jr
B C Killough*
Randell C Stoney Jr

Phillip S Ferderigos
K Michael Barfield
Ernest B Lipscomb III*
J Gail Rahn

Todd M Musheff
Craig E Burgess
Lucinda D Gardner
John W Fletcher

John A Jones
Alissa D Fleming
Barbara J Wagner Ph D
Jeremy E Bowers

BARNWELL WHALEY

PATTERSON & HELMS LLC

Attorneys for
businesses &
professionals
since 1938

M Dawes Cooke, Jr
mdc@barnwell-whaley.com

March 30, 2012

RECEIVED

APR - 2 2012

SC Supreme Court

VIA FEDERAL EXPRESS

The Honorable Daniel E Shearouse
Clerk, The South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

Re Edward Mims, by and through his legal guardian, Margaret Mims v Babcock Center, Inc, Judy Johnson, the South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stanley Butkus
Case Tracking No 2010154146
Our File No 2116 102

Dear Mr Shearouse

This is respectfully submitted in response to your letter of March 22, 2012

The events of last Wednesday were the culmination of compounded errors on my part. My first error was not conducting an adequate conflicts analysis before entering an appearance as co-counsel of record¹. Some time after filing my notice of appearance, I received a call from Ken Woodington, counsel for Respondent South Carolina Department of Disabilities and Special Needs (SCDDSN). Mr Woodington called my attention to a potential conflict of interest in that SCDDSN is a state agency and my firm and I regularly represent state agencies. I then recalled that my firm had in fact represented SCDDSN facilities in several cases. Though none of those cases involved the Babcock Center or issues similar to the issues in this case, I recognized that a direct conflict of interest existed under SCRPC 17, precluding my representation of the Appellant without written informed consent by both parties. I inferred that SCDDSN did not consent to my participation in this case, and I determined that I must withdraw.

¹ Additional information relating to the conflict of interest is contained in the attached Appendix, which is being filed under seal.

William C Helms, III
M Dawes Cooke Jr
B C Killough*
Randell C Stoney Jr

Phillip S Ferderigos
K Michael Barfield
Ernest B Lipscomb III
J Gail Rahn

Todd M Musheff
Craig E Burgess
Lucinda D Gardner
John W Fletcher

John A Jones
Alissa D Fleming
Barbara J Wagner Ph D
Jeremy E Bowers

After researching the conflict of interest issue to confirm that I was indeed required to withdraw from the case, I regretfully informed Ms. Harrison what had happened. She was understanding of my dilemma and told me that she would associate other counsel to handle the oral argument. We discussed several candidates, and based on our separate experiences with Peter Protopapas, we agreed that he would do an excellent job if he would agree. Ms. Harrison subsequently informed me that she had discussed the case with Mr. Protopapas and he had agreed to handle the oral argument. I believed that under SCRPC 116(d) I could and should assist Mr. Protopapas in familiarizing himself with the issue on appeal, which I did.

My second error was in not immediately filing a motion for substitution of counsel. As soon as Mr. Protopapas agreed to take my place in making the oral argument, I asked an associate in my office to draft a consent motion for substitution of counsel. Mr. Protopapas filed his Notice of Appearance before this was done, however. I knew that I still needed to file a motion to withdraw, but I was relieved that Mr. Protopapas had noted his appearance so that he could make the argument. I momentarily put aside the task of preparing my motion to withdraw and then became preoccupied with other matters and forgot about the motion. I did not remember to prepare and file the motion to withdraw until I received the Court's letter setting the time limits for the argument. Because I was out of town most of the week of March 12, I did not receive the letter immediately and I was not able to prepare and sign the motion to withdraw until Monday, March 19.

My final error was in not realizing that I was expected to attend the oral argument even though I was not going to make the argument. I decided not to attend the argument because I thought that my presence would violate the spirit of my decision to withdraw from the case. I understood that I was still co-counsel of record unless and until relieved by the Court (per SCRAP 264 and *ex parte Strom*), and I did not presume that the Court would necessarily grant my motion. Yet — though I have participated in many appellate arguments and can offer no excuse for my ignorance on this point — I simply was not aware that non-arguing counsel are required to appear at oral argument. I reviewed the Rules of Appellate Procedure and did not find that requirement, and I recalled numerous instances when attorneys who had appeared on brief and thus were counsel of record had not attended oral argument. I concluded that I was not required to attend oral argument and therefore should not attend.

You have also asked about the absence of signatures of the other lawyers or the GAL on my motion to withdraw as counsel. Ordinarily I would obtain signatures of all interested parties on a consent motion. I did not do so in this case because — for the reasons stated above — I was so late in realizing that I had not already been relieved, and the Rules do not expressly require signatures of consenting parties. Even though I knew that the Court might not act on the motion before oral argument, I wanted to file the motion before the argument both so that the Court would know why I was not participating and so that opposing counsel would know that I had followed through on my agreement to withdraw.

I must add here that I have excellent support staff, who are relentlessly efficient in keeping me from making the kinds of errors that I made in this case. My overarching mistake was in undertaking to manage this case on my own rather than fully involving my staff as I would normally do.

I am embarrassed to have been the cause of concern to the Court and counsel. I must have appeared cavalier towards this case and to the Court, which could not be less true. It is a signal honor to appear before the Supreme Court of South Carolina, and I have appreciated every opportunity to do so. My greatest regret is that my actions might have caused Margaret Mims to doubt the competence of her son's legal representation, which would be wholly unwarranted at least as to Ms. Harrison and Mr. Protopapas.

I appreciate being afforded the opportunity to provide this explanation, and I am anxious to rectify this matter by whatever means the Court deems appropriate.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Dawes Cooke, Jr.", with a stylized, cursive script.

M. Dawes Cooke, Jr.

MDCjr/klj

Enclosure

c Joel W. Collins, Esq., Christian Stegmaier, Esq., and Amy L. Neuschafer, Esq.
William Davidson, Esq. and Kenneth P. Woodington, Esq.
Patricia Harrison, Esq.
Peter D. Protopapas, Esq. and Brian Newman, Esq.

BARNWELL WHALEY

PATTERSON & HELMS LLC

Attorneys for
businesses &
professionals
since 1938

M Dawes Cooke, Jr
mdc@barnwell-whaley.com

March 22, 2012

VIA FEDERAL EXPRESS

The Honorable Jean Hofer Toal
Chief Justice, South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29211

The Honorable Costa M Pleicones
Justice, South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29211

The Honorable Donald W Beatty
Justice, South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29211

The Honorable John W Kittredge
Justice, South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29211

The Honorable Kaye G Hearn
Justice, South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29211



RECEIVED
MAR 23 2012
S.C. SUPREME COURT

William C Helms III
M Dawes Cooke Jr
B C Killough*
Randell C Stoney Jr

Phillip S Ferderigos
K Michael Barfield
Ernest B Lipscomb III
J Gail Rahn

Todd M Musheff
Craig E Burgess
Lucinda D Gardner
John W Fletcher

John A Jones
Alissa D Fleming
Barbara J Wagner Ph D
Jeremy E Bowers

March 22, 2012

Page 2

Re Edward Mims, by and through his legal guardian, Margaret Mims v Babcock Center, Inc , Judy Johnson, the South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stanley Butkus
Case Tracking No 2010154146
Our File No 2116 102

Dear Chief Justice Toal and Justices of the Supreme Court

I write to apologize for my lack of consideration in failing to timely inform the Court that I would not be appearing on Wednesday to argue for the Appellant in the appeal of *Mims v The Babcock Center, et al*. I do not have a good excuse, but I do have an explanation. I did not realize that my appearance was expected since the Appellant had retained Peter Protopapas to make the argument on his behalf. I was previously associated for that purpose. After I made my appearance, counsel for one of the Respondents called my attention to a conflict of interest that he and I agreed required me to withdraw from the case. I notified Ms. Harrison of the objection of Respondent and informed her that I would notify the Court after substitute counsel was retained. She agreed to find a suitable replacement to make the argument. After considering a number of candidates, we both concluded, based on our separate experiences with Mr. Protopapas, that he would do an excellent job if he would agree. Mr. Protopapas graciously accepted representation and filed a Notice of Appearance. I believed that my appearance at oral argument, even as a spectator, would violate the spirit of my decision to withdraw from representation in the case. I simply did not realize that I would be expected to appear at oral argument if I was not going to participate. This was presumptuous of me. I realize that I should have filed a formal petition to be relieved as counsel weeks ago to ensure a smooth transition in representation and to avoid inconvenience to the Court and the parties and any risk of prejudicing my client's interests in this most important appeal.

I will apologize separately to Mr. Mims, Ms. Harrison, Mr. Protopapas, and opposing counsel. I offer this meager explanation and apology to the Court, and I will respectfully accept whatever sanction the Court might impose for my lack of consideration to all involved.

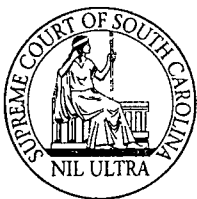
Sincerely,



M. Dawes Cooke, Jr

MDCjr/klj

c Joel W. Collins, Esq., Christian Stegmaier, Esq., and Amy L. Neuschafer, Esq.
William Davidson, Esq. and Kenneth P. Woodington, Esq.
Patricia Harrison, Esq.
Peter Protopapas, Esq.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

March 22, 2012

M Dawes Cooke, Jr, Esquire
Barnwell Whaley Patterson & Helms, LLC
P O Drawer H
Charleston, SC 29402-0197

Re Mims, Edward v Babcock Center

Dear Mr Cooke

This responds to your motion to be relieved as counsel in this matter. The motion was not received by this office until the day before oral argument and the Court was not able to review the motion until the morning of oral argument. While the motion indicated that it was filed with the consent of the other attorneys and your client, the motion did not bear any of the signatures of the other lawyers, or the GAL for your client. Further, you did not appear for oral argument.

The Court is concerned about the way this matter has been handled. First, this motion was not made until the eve of oral argument and did not contain any explanation as to why the motion could not have been made earlier. Second, the motion was missing signatures that the Court would normally expect to be present on a consent motion. Finally, and most importantly, the Court was at a loss to understand why you were not present for oral argument since the motion to be relieved had not been granted. Several of the members of the Court had questions about the motion and your absence prevented those matters to be fully explored by the Court.

Before ruling on your motion, the Court requests that you file a response to this letter addressing the concerns that I have outlined above. Further, the Court would request that you provide an explanation regarding the nature and facts surrounding the conflict of interest.

This response should be served and filed within ten (10) days of the date of this letter. If the information regarding the conflict of interest cannot be revealed to the other parties, that portion of the response may be filed under seal, and need not be served on opposing counsel.

Very truly yours,



CLERK

cc Patricia Logan Harrison, Esquire
Peter D. Protopapas, Esquire
Brian D. Newman, Esquire
Christian Stegmaier, Esquire
Joel W. Collins, Jr., Esquire
Amy L. Neuschafer, Esquire
Kenneth P. Woodington, Esquire



Christian Stegmaier | Direct Dial 803 255 0454 | E-Mail cstegmaier@collinsandlacy.com

March 20, 2012

VIA HAND-DELIVERY

The Honorable Daniel E. Shearouse
The South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

RECEIVED

MAR 20 2012

SC Supreme Court

RE *Edward Mims, by and through his legal guardian, Margaret Mims v Babcock Center, Inc., Judy Johnson, the South Carolina Department of Disabilities and Special Needs, Kathi Lacy and Stanley Butkus*
C/A No. 07-CP-40-3365
C&L File No. 969-109

Dear Mr. Shearouse:

Pursuant to Rule 208(b)(7), SCACR, Respondents Babcock Center, Inc. and Dr. Judy Johnson provide the following additional pertinent and significant authorities, which arguably govern in the above-referenced matter (which is scheduled for argument on Wednesday, March 21, 2012, at 10:00 a.m.):

Respondents cite these authorities for the proposition that, inter alia, a statute as a whole must receive practical, reasonable and fair interpretation consonant with the purpose, design and policy of lawmakers. Further, all rules of statutory construction are subservient to the one that the legislative must prevail if it can be reasonably discovered in the language used and that the language must be construed in light of the intended purpose of the statute. Finally, it is well-settled that statutes dealing with the same subject matter are in pari materia and must be construed together, if possible, to produce a single harmonious result. The cases standing for the above-referenced propositions include:

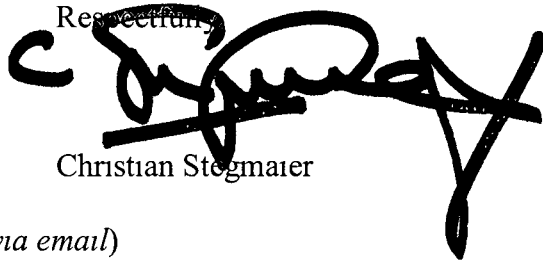
- Beaufort County v. S.C. State Election Comm'n, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011),
- Laurens County Sch. Dists. 55 and 56 v. Cox, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992),
- Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.E. 352, 468, 636 S.E.2d 598, 606-07 (2006), and
- State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010).

The Honorable Daniel E Shearouse

March 20, 2012

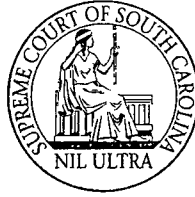
Page 2

Thank you for your time and attention. Please contact me with any questions or concerns.

Respectfully,

Christian Stegmaier

CBS lcc

cc Judy Johnson, Babcock Center (*via email*)
(*all via facsimile*)
Patricia L Harrison Esquire
M Dawes Cooke, Jr, Esquire
William Davidson, Esquire
Kenneth P Woodington, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

March 9, 2012

M. Dawes Cooke, Jr., Esquire
Barnwell Whaley Patterson & Helms, LLC
P O Drawer H
Charleston, SC 29402-0197

Patricia Logan Harrison, Esquire
611 Holly St
Columbia, SC 29205

Peter D. Protopapas, Esquire
Brian D. Newman, Esquire
Rikard & Protopapas, LLC
P O Box 5640
Columbia, SC 29250

Christian Stegmaier, Esquire
Joel W. Collins, Jr., Esquire
Amy L. Neuschafer, Esquire
Collins & Lacy
P O Box 12487
Columbia, SC 29211

Kenneth P. Woodington, Esquire
Davidson & Lindemann, PA
P O Box 8568
Columbia, SC 29202-8568

Re Mims, Edward v. Babcock Center

Dear Counsel

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows

Appellant	10 minutes
-----------	------------

Respondents	10 minutes
-------------	------------

Appellant in Reply	5 minutes
--------------------	-----------

This case is scheduled for hearing on Wednesday, March 21, 2012 at 10 00 a m

Very truly yours,

Daniel E Shearouse, Clerk

By Debbie M Shearouse
Administrative Assistant

DES/dmh



Christian Stegmaier | Direct Dial 803 255 0454 | E Mail cstegmaier@collinsandlacy.com

January 25, 2012

VIA UNITED STATES MAIL

The Honorable Daniel E. Shearouse
The South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RECEIVED

JAN 26 2012

SC SUPREME COURT

RE *Edward Mims, by and through his legal guardian, Margaret Mims v Babcock Center, Inc., Judy Johnson, the South Carolina Department of Disabilities and Special Needs, Kathi Lacy and Stanley Butkus*
C/A No 07-CP-40-3365
C&L File No 969-109

Dear Mr. Shearouse:

We are in receipt of your January 24, 2012, communication regarding argument in the above-referenced case. As we understand it, this case will prospectively be reached for hearing during the March 2012 of the South Carolina Supreme Court. As we further understand it, the Court will meet the days of March 6, 7, 8, 20, and 21. Please know that I have no technical conflict with any of these dates. However, please also know we have a case on the Newberry County Common Pleas roster for the March 5 term. The clients that we represent are very anxious to have their case tried. I cannot warrant to you that the case will actually be reached by the Circuit Court, however, I would very much appreciate it if the Court would schedule argument in the instant case for either March 20 or 21, 2012, just in case. Needless to say, I appreciate whatever accommodation the Court can provide with regard to this particular request.

Thank you for your time and attention. By copy of this letter, we are advising all opposing counsel and counsel for co-Respondent of this communication with your office.

Respectfully,

A handwritten signature in black ink, appearing to read "C. Stegmaier", written over the word "Respectfully".

Christian Stegmaier

CBS lcc

Enclosures

cc Bill Reese, Babcock Center
Judy Johnson, Babcock Center
Patricia L. Harrison, Esquire
M. Dawes Cooke, Jr., Esquire
William Davidson, Esquire
Kenneth P. Woodington, Esquire

DAVIDSON & LINDEMANN, P A

ATTORNEYS AND COUNSELLORS AT LAW

William H Davidson II
Andrew F Lindemann *
James M Davis Jr †
Robert D Garfield
Michael B Wren

1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202-8568
Telephone (803) 806-8222
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www dml-law com

Lawrence S Kerr M D †
Kate A Swedlow
Daniel C Plyler
Joel S Hughes
Justin T Bagwell

Of Counsel
Kenneth P Woodington

January 25, 2011

Also admitted in North Carolina
† Certified Mediator

Writer s Email kwoodington@dml.law.com

Hand Delivered

The Honorable Daniel E Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

RECEIVED

JAN 25 2012

S C Supreme Court

RE Edward Mims, *et al* v Babcock Center, Inc , *et al*
Court of Appeals Tracking Number 2010154146
Civil Action Number 2007-CP-40-3365
Claim Number 44654
Our File Number 104 7785

Dear Mr Shearouse

The above case is on the preliminary list for March 2012 I would request that the case not be scheduled for either March 6 or March 20 The first request is for personal reasons, because I plan to be out of the state several days before March 6, returning in the evening of March 5 In addition, a month long trial that I will be in is scheduled to end on March 2

The second request is made because another case, *Anonymous v SCDLLR*, is set for oral argument in the Court of Appeals on March 20 I am available all of the other days on the list

I appreciate any consideration that can be given to this request

With highest regards, I am

Sincerely yours,

DAVIDSON & LINDEMANN, P A



Kenneth P Woodington

KPW/jmb

The Honorable Daniel E Shearouse
January 25, 2012
Page Two

cc Patricia L Harrison, Esquire
611 Holly Street
Columbia, South Carolina 29205

Christian Stegmaier, Esquire
Collins & Lacy, P C
1330 Lady Street, Sixth Floor
Post Office Box 12487
Columbia, South Carolina 29211



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Patricia Logan Harrison Esquire
From Daniel E. Shearouse
Date January 24, 2012
RE March Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the March 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of March 6, 7, 8, 20, and 21. Please notify this office in writing prior to January 31, 2012, as to any scheduling conflicts for the March term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Mims, Edward v. Babcock Center



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To M. Dawes Cooke, Jr., Esquire
From Daniel E. Shearouse
Date January 24, 2012
RE March Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the March 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

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Mims, Edward v. Babcock Center



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To: Kenneth P. Woodington, Esquire
From: Daniel E. Shearouse
Date: January 24, 2012
RE: March Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the March 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

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Mims, Edward v. Babcock Center



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

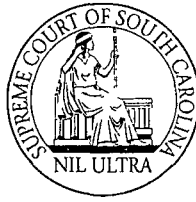
P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Christian Stegmaier Esquire
Joel W. Collins Jr. Esquire
Amy L. Neuschafer Esquire
From Daniel E. Shearouse
Date January 24, 2012
RE March Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the March 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of March 6, 7, 8, 20, and 21. Please notify this office in writing prior to January 31, 2012, as to any scheduling conflicts for the March term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Mims, Edward v. Babcock Center



The Supreme Court of South Carolina

DANIEL E SHEAROUSE
CLERK OF COURT

BRENDA F SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

January 11, 2012

M Dawes Cooke, Jr , Esquire
Barnwell Whaley Patterson & Helms, LLC
P O Drawer H
Charleston, SC 29402-0197

Patricia Logan Harrison, Esquire
611 Holly St
Columbia, SC 29205

Christian Stegmaier, Esquire
Joel W Collins, Jr , Esquire
Amy L Neuschafer, Esquire
Collins & Lacy
P O Box 12487
Columbia, SC 29211

Kenneth P Woodington, Esquire
Davidson & Lindemann, PA
P O Box 8568
Columbia, SC 29202-8568

Re Mims, Edward v Babcock Center

Dear Counsel

When the roster for the February 2012 term of Court was prepared, the above referenced case was not scheduled. Our records indicate that you are counsel of record in this case.

Mims, Edward v Babcock Center
Page Two
January 11, 2012

This case will be placed on the March 2012 Preliminary List of Cases Court will meet the days of March 6, 7, 8, 20 and 21

Very truly yours,

Daniel E Shearouse
BS

CLERK

DES/dmh

DAVIDSON & LINDEMANN, P A

ATTORNEYS AND COUNSELLORS AT LAW

William H Davidson II
Andrew F Lindemann *
James M Davis Jr †
Robert D Garfield
Michael B Wren

1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202-8568
Telephone (803) 806-8222
Facsimile (803) 806-8855
www.dml-law.com

Lawrence S Kerr M D †
Kate A Swedlow
Daniel C Plyler
Joel S Hughes
Justin T Bagwell

Of Counsel

Kenneth P Woodington

December 19, 2011

Also admitted in North Carolina
† Certified Mediator

Writer's Email kwoodington@dml-law.com

Hand Delivered

The Honorable Daniel E Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

RECEIVED

DEC 19 2011

RE Edward Mims, *et al* v Babcock Center, Inc, *et al*
Court of Appeals Tracking Number 2010154146
Civil Action Number 2007-CP-40-3365
Claim Number 44654
Our File Number 104 7785

S.C Supreme Court

Dear Mr Shearouse

The above case is on the preliminary list for February 2012. I would request that the case be continued beyond that term, because I will be involved in a month long trial starting February 6, 2012 in Richland County in No. 2005-CP-40-2925, *T R et al, v South Carolina Department of Corrections et al*. That case is the one involving mental health care in the Department of Corrections.

I appreciate any consideration that can be given to this request.

With highest regards, I am

With best regards, I am

Sincerely yours,

DAVIDSON & LINDEMANN, P A



Kenneth P Woodington

KPW/jmb

The Honorable Daniel E Shearouse
December 19, 2011
Page Two

cc Patricia L Harrison, Esquire
611 Holly Street
Columbia, South Carolina 29205

Christian Stegmaier, Esquire
Collins & Lacy, P C
1330 Lady Street, Sixth Floor
Post Office Box 12487
Columbia, South Carolina 29211



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Patricia Logan Harrison Esquire
From Daniel E. Shearouse
Date December 12, 2011
RE February Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the February 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of February 7, 8, 9, 22, and 23. Please notify this office in writing prior to December 20, 2011, as to any scheduling conflicts for the February term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Mims, Edward v. Babcock Center



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To M. Dawes Cooke, Jr., Esquire
From Daniel E. Shearouse
Date December 12, 2011
RE February Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the February 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of February 7, 8, 9, 22, and 23. Please notify this office in writing prior to December 20, 2011, as to any scheduling conflicts for the February term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Mims, Edward v. Babcock Center



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Kenneth P. Woodington Esquire
From Daniel E. Shearouse
Date December 12, 2011
RE February Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the February 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of February 7, 8, 9, 22, and 23. Please notify this office in writing prior to December 20, 2011, as to any scheduling conflicts for the February term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Mims, Edward v. Babcock Center



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Christian Stegmaier Esquire
Joel W. Collins Jr. Esquire
Amy L. Neuschafer Esquire
From Daniel E. Shearouse
Date December 12, 2011
RE February Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the February 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of February 7, 8, 9, 22, and 23. Please notify this office in writing prior to December 20, 2011, as to any scheduling conflicts for the February term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Mims, Edward v. Babcock Center

The Supreme Court of South Carolina

Edward Mims, by and through his
legal guardian, Margaret Mims, Appellant,

v

Babcock Center, Inc , Judy
Johnson, the South Carolina
Department of Disabilities and
Special Needs, Kathi Lacy and
Stanley Butkus, Respondents

The Honorable Joseph M Strickland
Richland County
Trial Court Case No 2007-CP-40-03365

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this
appeal is hereby certified for review by the South Carolina Supreme Court Upon
receipt of this order, the Court of Appeals is hereby directed to forward the case
file, all records and briefs and any exhibits on file to this Court

IT IS SO ORDERED


CJ
FOR THE COURT

Columbia South Carolina
November 14, 2011

cc M Dawes Cooke, Jr, Esquire
Patricia Logan Harrison, Esquire
Christian Stegmaier, Esquire
Joel W Collins, Jr , Esquire
Amy L Neuschafer, Esquire
Kenneth P Woodington, Esquire
The Honorable Tanya Gee



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

June 17, 2011

M Dawes Cooke, Jr, Esquire
Barnwell Whaley Patterson & Helms, LLC
P O Drawer H
Charleston, SC 29402-0197

Patricia Logan Harrison, Esquire
611 Holly St
Columbia, SC 29205

Re Mims, Edward v Babcock Center
2010154146

Dear Counsel

Upon review, it has come to the Court's attention that Mr Cooke's information is not on the covers of the Final Brief and the Record on Appeal, as required by Rule 267(a) of the South Carolina Appellate Court Rules. It will be necessary that you or someone authorized by you come to the Court and place labels on the covers of the Final Brief and the Record on Appeal to show Mr Cooke's information within ten (10) days of the date of this letter.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/mpm

cc Christian Stegmaier, Esquire
Joel W Collins, Jr, Esquire
Amy L Neuschafer, Esquire
Kenneth P Woodington, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case Tracking No 2010154146

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M Strickland, Special Circuit Court Judge

Case No 07-CP-40-3365

Edward Mims, by and through his legal Guardian, Margaret Mims

Appellant,

v

Babcock Center, Inc , Judy Johnson, the South Carolina Department
of Disabilities and Special Needs, Kathi Lacy and Stanley Butkus,

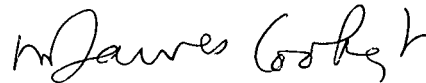
Respondents

NOTICE AND ENTRY OF APPEARANCE

M Dawes Cooke, Jr , Esq
Barnwell Whaley Patterson & Helms, LLC
P O Drawer H
Charleston, SC 29402
(843) 577-7700
Attorney for Appellant

RECEIVED
MAY 18 2011
SC Court of Appeals

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney hereby appears on behalf of Plaintiff/Appellant, Edward Mims, by and through his legal Guardian, Margaret Mims, in the above entitled action for all purposes, including oral argument This appearance is in addition to the previous appearance of Patricia L Harrison on behalf of Plaintiff/Appellant



M Dawes Cooke, Jr , Esq
Barnwell Whaley Patterson & Helms, LLC
P O Drawer H
Charleston, SC 29402
(843) 577-7700
Attorneys for Plaintiff/Appellant

Dated May 17, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case Tracking No 2010154146

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M Strickland, Special Circuit Court Judge

Case No 07-CP-40-3365

Edward Mims, by and through his legal Guardian, Margaret Mims

Appellant,

v

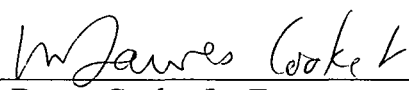
Babcock Center, Inc , Judy Johnson, the South Carolina Department
of Disabilities and Special Needs, Kathi Lacy and Stanley Butkus,

Respondents

PROOF OF SERVICE

I certify that I have served the Notice and Entry of Appearance upon Respondents by depositing a copy of it in the United States Mail, postage prepaid, on May 17, 2011, addressed to their attorneys of record, Joel W Collins, Esq , Christian Stegmaier, Esq , and Amy L Neuschafer, Collins & Lacy, P C , Post Office Box 12487, Columbia, South Carolina 29211 and William Davidson, Esq and Kenneth Woodington, Esq , Davidson & Lindemann, P A , Post Office Box 8568, Columbia, South Carolina 29202

May 17, 2011



M Dawes Cooke, Jr , Esq
Barnwell Whaley Patterson & Helms, LLC
P O Drawer H
Charleston, SC 29402
(843) 577-7700
Attorney for Plaintiff/Appellant

BARNWELL WHALEY

PATTERSON & HELMS LLC

Attorneys for
businesses &
professionals
since 1938

M Dawes Cooke, Jr
mdc@barnwell-whaley.com

May 17, 2011

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MAY 18 2011

SC Court of Appeals

The Honorable Tanya Gee
Clerk, S C Court of Appeals
1015 Sumter Street
Columbia, SC 29211

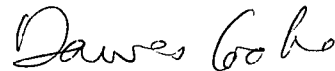
Re Edward Mims, by and through his legal guardian, Margaret Mims v Babcock Center,
Inc , Judy Johnson, the South Carolina Department of Disabilities and Special Needs,
Kathi Lacy, and Stanley Butkus
Case Tracking No 2010154146
Our File No 2116 102

Dear Ms Gee

Enclosed for filing are the original and one copy of a Notice and Entry of Appearance in
the above matter Please return the filed copy in the enclosed envelope

By copy of this letter, I am serving the same upon counsel of record

Sincerely,



M Dawes Cooke, Jr

MDCjr/klj
Enclosure

c Joel W Collins, Esquire
Christian Stegmaier, Esquire
Amy L Neuschafer, Esquire
William Davidson, Esquire
Kenneth P Woodington, Esquire
Patricia Harrison, Esquire

William C Helms III
M Dawes Cooke Jr
B C Killough*
Randell C Stoney, Jr

Phillip S Ferderigos
K Michael Barfield
Ernest B Lipscomb III*
J Gail Rahn

Todd M Musheff
Craig E Burgess
Lucinda Gardner Wichmann
John W Fletcher

John A Jones
Alissa DeCarlo
Barbara J Wagner Ph D
Jeremy E Bowers



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11679
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

May 16, 2011

Christian Stegmaier, Esquire
Joel W Collins, Jr, Esquire
Amy L Neuschafer, Esquire
Collins & Lacy
P O Box 12487
Columbia, SC 29211

Patricia Logan Harrison, Esquire
611 Holly St
Columbia, SC 29205

Re Mims, Edward v Babcock Center
2010154146

Dear Counsel

The following Order has been endorsed on the Respondents Babcock Center, Inc and Dr Judy Johnson's Motion for Leave to File Final Brief Out of Time in the above entitled case on appeal

"Granted

John Cannon Few C J
For the Court

By s/ V Claire Allen
Deputy Clerk

May 16, 2011 "

Upon review, it has come to the Court's attention that the covers of the Second Volume of the Record on Appeal do not show the opposing parties. It will be necessary that the Appellant or someone authorized by the Appellant come to the Court and places labels on the covers of the Second Volume of the Record on Appeal to show the opposing parties within ten (10) days of the date of this letter.

Very truly yours,

V. Claude Allen, Deputy

CLERK

TAG/mpm

cc Kenneth P. Woodington, Esquire



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

May 16, 2011

Patricia Logan Harrison, Esquire
611 Holly St
Columbia, SC 29205

Re Mims, Edward v Babcock Center
2010154146

Dear Ms Harrison

I received your e-mail regarding the Record on Appeal and caption in Mims v Babcock. The Court is unaware of any objections to the Record on Appeal or any extension requested by the Respondents to file their Final Briefs. Nor have we received a complaint about the caption. If there are issues with any of these matters and the parties seek the Court's assistance, please contact the Court via letter or motion as appropriate, and I will process your request. At this time, e-mail communication with the Court is disfavored, though I understand this limitation is inconvenient.

Very truly yours,

Claire Allen, Deputy
CLERK

TAG/mpm

cc Christian Stegmaier, Esquire
Joel W Collins, Jr, Esquire
Amy L Neuschafer, Esquire
Kenneth P Woodington, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case Tracking No 2010154146

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M Strickland, Special Circuit Court Judge

Case No 07-CP-40-3365

Edward Mims, by and through his legal
Guardian, Margaret Mims,

Appellant,

v

Babcock Center, Inc , Judy Johnson, the
South Carolina Department of Disabilities
And Special Needs, Kathi Lacy and
Stanley Butkus,

Respondents

**RESPONDENTS BABCOCK CENTER, INC
AND DR JUDY JOHNSON'S
MOTION FOR LEAVE TO
FILE FINAL BRIEF OUT OF TIME**

TO THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS

Respondents Babcock Center, Inc and Dr Judy Johnson (collectively "the Babcock Center Respondents") respectfully move this Court for an Order granting them leave to file their Final Brief out of time

By letter to the Clerk of this Court dated April 26, 2011, Respondents Babcock Center, Inc and Dr Judy Johnson advised the Court there were deficiencies in the Record on Appeal

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APR 28 2011
SC Court of Appeals

8

served by Appellant that needed to be resolved prior to these Respondents filing their brief and further requested a stay of the deadline to serve final briefs until these deficiencies were discussed and resolved Counsel for Appellant has since responded and represented that the deficiencies noted were resolved in the Final Record filed with the Court Counsel for Respondents Babcock Center, Inc and Dr Judy Johnson have reviewed the Record on Appeal filed with the Court The corrections were made in a less than ideal fashion, nevertheless, in the interest of moving this appeal forward, Respondents now seek to submit their Final Brief to the Court for its review and disposition of the case

Respondents Babcock Center, Inc and Dr Judy Johnson would greatly appreciate the Court's time, attention, and assistance with regard to this request for leave to file their Final Brief out of time

Respectfully submitted,

COLLINS & LACY, P C



By

JOEL W COLLINS, JR
jcollins@collinsandlacy.com
CHRISTIAN STEGMAIER
cstegmaier@collinsandlacy.com
AMY L NEUSCHAFER
aneuschafer@collinsandlacy.com
1330 Lady Street, Suite 601 (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660 (voice)
(803) 771-4484 (facsimile)

ATTORNEYS FOR RESPONDENTS
BABCOCK CENTER, INC & DR
JUDY JOHNSON

GRANTED
JOHN CANNON FEW, C J
FOR THE COURT

By V. Claire Allen
(Clerk) (Deputy Clerk)

FILED
5/16/11

Columbia, South Carolina

April 28, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case Tracking No 2010154146

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M Strickland, Special Circuit Court Judge

Case No 07-CP-40-3365

Edward Mims, by and through his legal
Guardian, Margaret Mims,

Appellant,

v

Babcock Center, Inc , Judy Johnson, the
South Carolina Department of Disabilities
And Special Needs, Kathi Lacy and
Stanley Butkus,

Respondents

PROOF OF SERVICE

I hereby certify that I served Respondents Babcock Center, Inc and Judy Johnson's Motion for Leave to File Final Brief Out of Time upon counsel of record, by placing a copy in the United States mail, postage prepaid, to Patricia L Harrison, Esquire, 611 Holly Street, Columbia, South Carolina 29205, and to William Davidson, Esquire, Davidson & Lindemann, P A, Post Office Box 8568, Columbia, South Carolina 29202, on April 28, 2011

[Signature Page to Follow]

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APR 28 2011
SC Court of Appeals

Respectfully submitted,

COLLINS & LACY, P C

By



JOEL W COLLINS, JR
jcollins@collinsandlacy.com
CHRISTIAN STEGMAIER
cstegmaier@collinsandlacy.com
AMY L NEUSCHAFER
aneuschafer@collinsandlacy.com
1330 Lady Street, Suite 601 (29201)
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660 (voice)
(803) 771-4484 (facsimile)

ATTORNEYS FOR RESPONDENTS
BABCOCK CENTER, INC & DR
JUDY JOHNSON

**PROOF OF SERVICE –
RESPONDENTS BABCOCK CENTER,
INC AND DR JUDY JOHNSON’S
MOTION FOR LEAVE TO FILE FINAL
BRIEF OUT OF TIME**

Columbia, South Carolina
April 28, 2011



Christian Stegmaier | Direct Dial 803 255 0454 | E Mail cstegmaier@collinsandlacy.com

April 28, 2011

VIA HAND-DELIVERY

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29211

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#76116
APR 28 2011
\$25.00
SC Court of Appeals

RE *Edward Mims, by and through his legal guardian, Margaret Mims v Babcock Center, Inc , Judy Johnson, the South Carolina Department of Disabilities and Special Needs, Kathi Lacy and Stanley Butkus*
Court of Appeals Tracking No 2010154146
C/A No 07-CP-40-3365
C&L File No 969-109

Dear Ms Gee

Please find enclosed for filing the original and fifteen (15) copies of Respondents Babcock Center, Inc and Dr Judy Johnson's Final Brief, along with the Certificate of Counsel and Proof of Service of same upon counsel in the above-referenced case

I am also enclosing herewith for filing the original and seven (7) copies of Respondents Babcock Center, Inc and Dr Judy Johnson's Motion for Leave to File Final Brief Out of Time, along with a check in the amount of \$25 00 for the required filing fee

Please return a clocked copy of the Final Brief and Motion for Leave to me via my courier

By copy of this letter, I am serving a copy of same upon all counsel

Thank you for your time and attention. As always, please contact me with any questions or concerns

Respectfully,

A handwritten signature in black ink that reads "Christian Stegmaier". The signature is fluid and cursive, with a circled initial "C" at the end.
Christian Stegmaier

CBS lcc
Enclosures

cc Patricia L Harrison, Esquire
 William Davidson, Esquire

PATRICIA L HARRISON
ATTORNEY AT LAW
611 HOLLY STREET
COLUMBIA SOUTH CAROLINA 29205

TELEPHONE (803) 256 2017

FAX (803) 256 2213

April 26, 2011

The Honorable Tanya Gee
Clerk of Court
SC Court of Appeals
1015 Sumter Street-2nd Floor
Columbia, SC 29201

Re Edward Mims v Babcock, Inc , et al
07 CP 40 03365
Court of Appeals Tracking No 2010154146

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APR 28 2011
SC Court of Appeals
RF
SC Court of Appeals

Dear Ms Gee

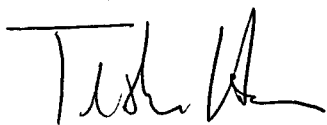
We have no objection to Court allowing the defendants an additional week to file their final briefs We did not receive Mr Stegmaier's objections until the afternoon of April 19th, after we had sent the Record to the printer (to be bound, double-sided, as the Rules require) and after the other defendants had filed their final brief I believe that the caption used in the Record is the same previously used by the Court and it is the same as used by defendants DDSN et al in their final brief I have been unable to locate a caption referring to Judy Johnson as "Dr Judy Johnson " Please advise if the Court wants us to change the caption as requested by Judy Johnson

We included the certificate in the Record filed today, as is required by the Rules

Since the Record had already been copied and bound when we received Mr Stegmaier's objections and Defendants DDSN, Lacy and Butkus had already filed their final brief, we covered the two pages to which Mr Stegmaier objected, so as not to require DDSN to amend and refile their brief We also covered the reference to that document in the index We hand delivered copies of the two-sided, two volume record to counsel for all parties today

I apologize for any inconvenience to the Court

Cordially,



Patricia L Harrison

cc Christian Stegmaier, Esquire
Ken Woodington, Esquire



Christian Stegmaier | Direct Dial 803 255 0454 | E Mail cstegmaier@collinsandlacy.com

April 26, 2011

VIA HAND-DELIVERY

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29211

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APR 26 2011

SC Court of Appeals

RE *Edward Mims, by and through his legal guardian, Margaret Mims v Babcock Center, Inc , Judy Johnson, the South Carolina Department of Disabilities and Special Needs, Kathi Lacy and Stanley Butkus*
Court of Appeals Tracking No 2010154146
C/A No 07-CP-40-3365
C&L File No 969-109

Dear Ms Gee

Collins & Lacy represents the Respondents Babcock Center, Inc and Dr Judy Johnson in the above-referenced matter. The parties' final briefs are due to be filed with the Court today. However, there are several issues with the Record on Appeal prepared by Appellant that have not yet been resolved. Specifically, we have noted the following errors in the Record on Appeal served on Respondents:

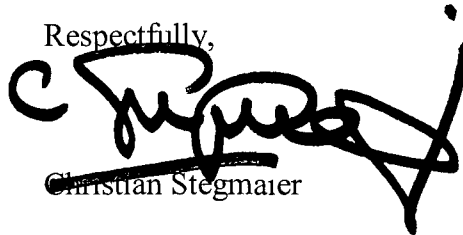
- The caption is incorrect. The correct caption is Edward Mims, by and through his legal Guardian, Margaret Mims v Babcock Center, Inc , Dr Judy Johnson, the South Carolina Department of Disabilities and Special Needs, Kathi Lacy and Stanley Butkus.
- The Record must be double-sided because it exceeds 100 pages. See Rule 267(c), SCACR.
- The Record must be bound in volumes not exceeding 250 sheets per volume. Therefore, the Record must be divided into two volumes. See Rule 267(d), SCACR.
- The index must be revised to reflect the fact the Record contains two volumes and the contents of each volume.
- The Certificate of Counsel pursuant to Rule 210(g), SCACR, must be included in the Record.
- Respondent DDSN's Motion to Strike has been included in the Record on pages 82-83, but we are unable to locate this motion in any of the parties' Designation of Matter. We have requested Appellant either omit this motion from the Record and correct the index to reflect its omission or let us know which party designated this motion for inclusion in the Record on Appeal.

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
April 26, 2011
Page 2

By letter dated April 19, we communicated these errors to Appellant's counsel and requested a revised version of the Record on Appeal. To date we have not received a response to this request. Therefore, we respectfully request the Court hold the deadlines for filing and service of the final briefs in abeyance until we have resolved the above-described issues with the Record on Appeal.

Thank you for your time and attention. Should you have any questions, please do not hesitate to contact me.

Respectfully,

A handwritten signature in black ink, appearing to read 'Christian Stegmaier', written over a horizontal line.

Christian Stegmaier

CBS lcc

cc Patricia L. Harrison, Esquire
William Davidson, Esquire

DAVIDSON & LINDEMANN, P A

ATTORNEYS AND COUNSELLORS AT LAW

William H Davidson, II
Andrew F Lindemann*
James M Davis, Jr †
Robert D Garfield

1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202-8568
Telephone (803) 806-8222
Facsimile (803) 806-8855
www.dml-law.com

Michael B Wren
Lawrence S Kerr, M D †
Kate A Rice
Daniel C Plyler
Joel S Hughes
Kristy M Grafton

Of Counsel
Kenneth P Woodington

April 7, 2011

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APR 07 2011

Also admitted in North Carolina
† Certified Mediator

SC Court of Appeals

Hand Delivered

The Honorable Tanya A Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE Edward Mims, by and through his legal guardian, Margaret Mims v Babcock Center, Inc ,
Judy Johnson, the South Carolina Department of Disabilities and Special Needs, Kathi Lacy
and Stanley Butkus
SCCA Tracking Number 2010154146
Civil Action Number 07-CP-40-3365
Claim Number 44654
Our File Number 104 7785

Dear Ms Gee

Please find enclosed for filing the original and fifteen copies of the **Final Brief of Respondents DDSN, Lacy and Butkus** in the above referenced matter Please file the original and return a clocked-in copy to me by way of my courier

By copy of this letter, I am serving a copies on all counsel of record Thank you for your assistance in this matter

With highest regards, I am

Sincerely yours,

DAVIDSON & LINDEMANN, P A



Kenneth P Woodington

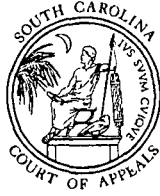
KPW/jmb
Enclosures

The Honorable Tanya A Gee
April 7, 2011
Page Two

cc (w/ Enclosure)

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The South Carolina Court of Appeals

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Re Mims, Edward v Babcock Center
2010154146

Dear Counsel

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

If you have any questions, please do not hesitate to contact this office

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/mpm

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE RICHLAND COUNTY
Court of Common Pleas

Joseph M Strickland, Special Circuit Court Judge

Case No 07-CP-40-3365

RECEIVED
MAR 07 2011
SC Court of Appeals

Edward Mims,

Appellant,

v

Babcock Center, Inc , Judy Johnson, SCDDSN,
Kathi Lacy, Stanley Butkus,

Respondents

Final Designation of Matter to be Included in the Record on Appeal

Appellant proposes the following be included in the Record on Appeal

- 1 Summons and Complaint filed May 27, 2007
- 2 Letter from Christian Stegmaier dated July 5, 2007
- 3 Amended Summons and Complaint filed May 7, 2008
- 4 Certificate of Service of Amended Summons and Amended Complaint
- 5 Defendants' Answer to Amended Complaint
- 6 Defendants' (SCDDSN, Lacy and Bukus) Motion to Dismiss filed June 9, 2008
- 7 Defendants Babcock Center, Inc and Judy Johnson's Motion to Dismiss filed June 11, 2008
- 8 September 18, 2008 Notice of Hearing
- 9 Affidavit of Margaret Mims dated March 6, 2009 with Exhibits

- 10 Transcript of Hearing dated March 30, 2009
- 11 Circuit Court Order dated March 30, 2009 denying Defendants' Motion to Dismiss
- 12 Form 4 Order filed March 31, 2009
- 13 Defendants Babcock Center and Judy Johnson's Motion to Alter or Amend or for Reconsideration dated April 10, 2009
- 14 Defendant's Motion to Alter or Amend or for Reconsideration filed April 13, 2009
- 15 Order dated June 4, 2009
- 16 DDSN, et al Motion to Reconsider dated June 15, 2009
- 17 Transcript of Hearing dated September 4, 2009 before Judge Strickland
- 18 Defendants Babcock Center, Inc and Judy Johnson's Memorandum in Support of Joint Motion for reconsideration and exhibits thereto dated September 4, 2009
- 19 Circuit Court Order dated November 23, 2009 granting Defendants' Motion to Dismiss
- 20 Plaintiff's Motion to Reconsider dated December 3, 2009 with attachments
- 21 Order denying Plaintiff's Rule 59(e) Motion to Reconsider dated February 8, 2010
- 22 Notice of Appeal to the SC Court of Appeals filed on March 10, 2010

I certify that this designation contains no matter which is irrelevant to this appeal

March 7, 2011



Patricia L. Harrison
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE RICHLAND COUNTY
Court of Common Pleas

Joseph M Strickland, Special Circuit Court Judge

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MAR 07 2011

SC Court of Appeals

Case No 07-CP-40-3365

Edward Mims,

Appellant,

v

Babcock Center, Judy Johnson, the
South Carolina Department of Disabilities
and Special Needs, Kathi Lacy, Stanley Butkus,

Respondents

CERTIFICATE OF SERVICE

I, Patricia L Harrison, do certify that on March 7, 2011, I served all counsel of record as below listed in this action a copy of *Reply Brief of Appellant and Final Designation of Matter* at the addresses listed below by

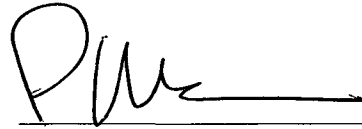
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() mailing it to him/her at his her last known address by depositing it in the US Mail, in an envelope with sufficient postage affixed, to

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March 7, 2011

A handwritten signature in black ink, appearing to read 'PLH', followed by a horizontal line.

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March 7, 2011

The Honorable Tanya Gee
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MAR 07 2011

SC Court of Appeals

Re Edward Mims v Babcock, Inc , et al
07 CP 40 03365
Court of Appeals Tracking No 2010154146

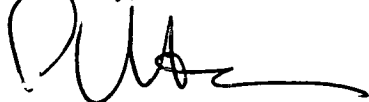
Dear Ms Gee

Please find enclosed for filing one original and one copy of Appellant's *Reply Brief* and one original and one copy of Appellant's *Final Designation of Matter* Also enclosed are copies to be clocked

By copy of this letter to counsel of record, we are serving a copy of the Brief and Designation of Matter

Thank you for your attention to this matter

Sincerely,



Patricia L Harrison

cc Christian Stegmaier, Esquire
Kenneth P Woodington, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE RICHLAND COUNTY
Court of Common Pleas

Joseph M Strickland, Special Circuit Court Judge

Case No 07-CP-40-3365

Edward Mims,

Appellant,

v

Babcock Center, Inc, Judy Johnson, the
South Carolina Department of Disabilities and Special Needs,
Kathi Lacy, and Stanley Butkus,

Respondents

REPLY BRIEF OF APPELLANT

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1 Defendants' construction of the law related to commencement of a civil action is contrary to the express language of the governing statutes, rules and recent case law

Defendants argue in their brief that the governing Rules of Civil Procedure and statutes mandate that process must be served within 120 days of filing in all cases and the failure to do so requires the dismissal of the complaint. Defendants' argument is without merit because their interpretation is not supported by the language of the governing rules and statutes, and it is undermined by a recent case directly on point, *Hooper v Ebenezer Senior Servs and Rehab Ctr.*, 386 S C 108, 687 S E 2d 29 (2009).

(A) Defendants' construction is not supported by the interpretation rendered by the justices of the South Carolina Supreme Court and the circuit judges of this State

Defendants and the court below primarily rely upon the following statute to support the dismissal of this action:

(A) Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute.

(B) A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing.

S C Code § 15-3-20 (emphasis added). Defendants' arguments in this appeal are at odds with the plain meaning of this statute and have been contradicted by the interpretation expressed by the justices of the South Carolina Supreme Court.

Once the legislature amended S C Code § 15-3-20 in 2002 (Act 281), it was the responsibility of those justices, in general convention with the circuit court judges, to interpret the amended statute and to revise the South Carolina Rules of Civil Procedure (S C R C P) accordingly, so as to comply with the legislative intent of the amendment. See S C Code § 15-1-160 (requiring South Carolina Supreme Court justices to meet with the circuit judges for purpose of amending Rules of Civil Procedure to establish rules which "shall not be inconsistent

with any of the statutes of this State”) The rules so adopted by the general convention must be applied “to every trial court of civil jurisdiction within this state ” See Rule 81, S C R C P

In 2004, the justices of the South Carolina Supreme Court met with the circuit judges to consider “the legislative intent expressed in § 15-3-20 as amended by 2002 S C Act No 281, § 1" (see S C R C P , Rule 3, Note to 2004 amendment) They amended Rule 3(a), S C R C P in 2004 to reflect that legislative intent of the General Assembly as follows

Commencement of Civil Action A civil action is commenced when the summons and complaint are filed with the clerk of court if

- (1) the summons and complaint are served within the statute of limitations in any manner prescribed by law, or
- (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing

Rule 3(a), S C R C P (emphasis added) Applying the plain language of the Rule, the two paragraphs are mutually exclusive Paragraph (1) governs when the summons and complaint are served within the statute of limitations On the other hand, Paragraph (2), which contains the 120 day limitation, applies when process is served after the statute of limitations has expired The language is plain and unambiguous and Rule 3(a) conveys a clear meaning which should be enforced by this Court

“In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes ” *See Farnsworth v Davis Heating and Air Conditioning Inc*, 367 S C 634, 638, 627 S E 2d 724, 726 (2006) (*quoting Maxwell v Genez*, 356 S C 617, 620, 591 S E 2d 26, 27 (2003)) The following basic rules govern statutory interpretation

If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced *See Maxwell*, 356 S C at 617, 591 S E 2d at 26, *Knotts v S C Dep't of Natural Resources*, 348 S C 1, 10, 558 S E 2d 511, 516 (2002) Courts should consider not only the particular clause in which a word may be used, but the word and its meaning in conjunction with the purpose of the whole rule and the policy of the rule *S C Coastal Council v S C State Ethics Comm'n*, 306 S C 41, 44, 410

S E 2d 245, 247 (1991) (applying this rule of construction to a statutory provision) In construing a rule, language in the rule must be read in a sense which harmonizes with its subject matter and accords with its general purpose *Mun Ass'n of S C v AT & T Communications of Southern States Inc.*, 361 S C 576, 606 S E 2d 468 (2004) (applying this rule of construction to a statutory provision) The Rules of Civil Procedure “shall be construed to secure the just, speedy, and inexpensive determination of every action ” Rule 1, SCRCP

See Ex Parte Wilson, 367 S C 7, 15, 625 S E 2d 205, 209 (2005) "Although the title and headings of a statute may not be construed to limit the plain language of a statute, they may be used to shed light on an ambiguous word or phrase " *See McInnis v McInnis* 348 S C 585, 592, 560 S E 2d 632, 636 (Ct App 2002) (*citing Garner v Houck*, 312 S C 481, 486, 435 S E 2d 847, 849 (1993)) "[Moreover, a] statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous " *See State v Sweat*, 379 S C 367, 377, 665 S E 2d 645, 651 (Ct App 2008) (*quoting Matter of Decker*, 322 S C 215, 219, 471 S E 2d 462, 463 (1995))

Applying these rules of construction, several things become immediately apparent First, based upon the inclusion of S C Code § 15-3-20 in the Chapter governing statutes of limitations, it is apparent that the purpose of the statute is to determine **when** a case is to be deemed commenced for purposes of determining whether it is time-barred, not to establish a deadline for service of process Under these rules, any action filed and served within the statute of limitations is timely The general rules governing service of process are contained in a different chapter of Title 15 (Chapter 9)

- (B) **In order to achieve the meaning Defendants’ desire, this Court would have to rewrite Rule 3(a) to replace the word “or” with “and” in paragraph (1) and would have to strike through “if not served within the statute of limitations” in paragraph (2), which would create a strained interpretation not allowed by the applicable rules of construction**

To reach the result desired by the Defendants, the Court would have to rewrite Rule 3(a) as follows

Commencement of Civil Action A civil action is commenced when the summons and complaint are filed with the clerk of court if

- (1) the summons and complaint are served within the statute of limitations in any manner prescribed by law, ~~or~~ and
- (2) ~~if not served within the statute of limitations~~ actual service must be accomplished not later than one hundred twenty days after filing

But that is not the interpretation adopted by the justices of Supreme Court in 2004 in fulfilling their responsibilities under S C Code § 15-1-160 to effect the intent of the General Assembly

Applying the plain meaning of the word “or” in paragraph (1), as it is actually written in Rule 3(a), the only reasonable conclusion this Court can reach is that paragraph (2) provides a second, independent method for determining when an action is commenced where the statute of limitations expires before process is served. The plain meaning of “or” is that the plaintiff can comply either by meeting the requirements of paragraph (1) (i.e. filing and serving within the statute of limitations), or by meeting the requirements of paragraph (2) (filing within the statute of limitations and serving within 120 days thereafter, even if service occurs after expiration of the statute of limitations)

Defendants ask this Court to treat the language “if not served within the statute of limitations” in Rule 3(a)(2) as superfluous so as to make that 120 day deadline apply to all complaints, whether or not served within the statute of limitations. However, Defendants' construction contradicts the well-settled rule recognized by this Court in *Lee v Thermal Engineering Corporation*. “We presume that the legislature did not insert idle verbiage or superfluous language in the statute. Each word, clause, sentence, and section of a statute should be given meaning.” 352 S.C. 81, 572 S.E.2d 298 (Ct. App. 2002)

In other words, the statute and Rule 3(a) plainly create two paths for analyzing when an action is commenced for purposes of the statute of limitations: (1) if the action is filed and served

before the expiration of the statute of limitations, it is timely, **or** (2) if the action is filed before expiration of the statute of limitations and served within 120 days thereafter, it is also timely. The second sentence is inapplicable here, because process was served within the statute of limitations. Nothing in the statute or the rule suggests that a summons and complaint must be served within 120 days, where service occurs within the statute of limitations. Moreover, nothing in either Rule 3(a) or S.C. Code § 15-3-20 expresses a mandatory time limit for service, rather, the statute and Rule set forth various ways in which an action can be deemed to have been commenced on the date of filing (as opposed to the date of service).

If the General Assembly and the South Carolina Supreme Court had intended to establish a mandatory, across-the-board 120 day time limit for serving a complaint, they could have simply stated in the statute and the rule that “a summons and complaint must be served within 120 days of being filed.” No such requirement is included in the statute or the rule. The interpretation of the statute and the Rule urged by Defendants completely ignores important language in Rule 3(a). If the South Carolina Supreme Court intended to have an absolute rule requiring service within 120 days of filing, the words “or” and “if not served within the statute of limitations” contained in Rule 3(a) would be unnecessary and meaningless surplusage. To give full effect to entire language of Rule 3(a), the 120-day time period described in Rule 3(a)(2) must be read separately from and independent of the “within the statute of limitations” time period for service described in Rule 3(a)(1).

C Defendants’ construction is contradicted by prior pronouncements of this Court

Plaintiff’s construction of the Rule and the statute is not only consistent with the rule of construction seeking to avoid superfluous language, but it also comports with this Court’s prior precedent. Specifically, this Court has stated (as Plaintiff argues here) that the 120-day period only applies where the plaintiff fails to serve process before the expiration of the statute of limitations.

If a statute’s terms are clear, the court must apply the terms according to their literal meaning. *Brown v. S.C. Dep’t of Health & Envtl. Control*, 348 S.C. 507,

515, 560 S E 2d 410, 414 (2002) “An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute ” Id Section 15-3-20 and Rule 3 **pellucidly state if the defendant is not served within the limitations period**, service must occur within 120 days after the pleadings are filed

Hooper does not dispute Ebenezer was served after the limitations period expired and 129 days after she filed the complaint As evidenced by the transpicuous language in both Rule 3 and section 15-3-20, service must be completed within 120 days of the filing of the complaint **if service is not completed during the limitations period** Hooper did not commence the action within the statutory period The trial court did not err in granting Ebenezer summary judgment based on the statute of limitations

See Hooper v Ebenezer Senior Servs and Rehab Ctr., 377 S C 217 229, 659 S E 2d 213, 219 (Ct App 2008) *rev'd on other grds* 386 S C 108, 687 S E 2d 29 (2009)

Thus, the only reasonable interpretation that can be given to S C Code § 15-3-20 and Rule 3(a) is that — in order for the date of "commencement" to relate back to the date of filing — process must be served by the later of (a) the expiration of the statute of limitations, (b) 120 days after filing the complaint Since Plaintiff filed and served the amended complaint within the statute of limitations, the 120 day extension provided by the ‘savings clauses’ contained in Rule 3(a)(2) and S C Code § 15-3-20(B) simply does not apply to the facts of this case The additional 120 days was not needed in this case because the complaint was filed within the applicable statute of limitations

In light of the foregoing, this case was properly commenced when the complaint was filed and process was served before the expiration of the statute of limitations As the trial court properly held — and Defendants correctly state in their Brief — "a Court decision regarding the applicable statute of limitations is premature at this time " (See Defs ' Br , at p 11) As such, the this Court should reverse and remand this case to the trial court There, the parties can engage in complete discovery into the accrual and applicable tolling of the statute of limitations Upon the completion of that discovery — and upon a fully-developed record — the trial Court can analyze the applicable statute of limitations in this case

D The trial court's dismissal directly conflicts with recent Supreme Court precedent

The linchpin of Defendants' argument is the legal interpretation that — irrespective of when the statute of limitations expires — service must always be completed within 120 days for an action to "commence " However, this position directly contrary to the South Carolina Supreme Court's decision in *Hooper v Ebenezer Senior Servs and Rehab Ctr*_, 386 S C 108, 687 S E 2d 29 (2009)

Ebenezer moved to dismiss Hooper's action on the basis service was not completed before the running of the three-year statute of limitations of section 15-3-530, nor within the time limits of Rule 3(a)(2) of the South Carolina Rules of Civil Procedure (SCRCP), which requires that service be made within the statute of limitations or, if made thereafter, that it be made within 120 days of filing the summons and complaint Ebenezer alleged Hooper's decedent died on May 15, 2003, therefore, the three-year statute of limitations expired on May 15, 2006 In this case, the summons and complaint were filed on February 6, 2006 and **service was not effected until June 15, 2006, which was after the running of the statute of limitations and more than 120 days after filing of the summons and complaint**

The trial court **rejected Hooper's argument that the 120-day period should not begin running until the last day of the statute of limitations**, finding this conflicts with the clear and unambiguous wording of Rule 3(a)(2) The trial court also rejected Hooper's arguments that the statute of limitations should be equitably tolled or that Ebenezer should be equitably estopped from asserting the statute of limitations based on its failure to accurately list its registered agent for service of process with the Secretary of State as required by state law

See Hooper, 386 S C at 113-14, 687 S E 2d at 31 (emphasis added) The Supreme Court reversed, holding that the plaintiff was not obligated to serve process within 120 days, **where the statute of limitations had not yet expired**

Hooper finally was able to effect service after the statute of limitations had run, only after she exercised reasonable and due diligence to serve Ebenezer's agent Under Rule 3(a)(2), SCRCP, even if the limitations period has run, service may still be effected if it is accomplished within 120 days of filing of the summons and complaint Unfortunately, **Hooper was approximately one week past the 120 days** Thus, under the unique circumstances of this case, we conclude it is appropriate to equitably toll the statute of limitations for the time Hooper spent in pursuit of Ebenezer's nonexistent agent

See id , 386 S C at 119, 687 S E 2d at 34 (emphasis added)

Thus, the Supreme Court has expressly permitted an action to be served beyond the 120-day window because the statute of limitations was tolled and, consequently, had not expired. This is precisely the position Plaintiff argues in this appeal, as the statute of limitations is extended for five years pursuant to South Carolina Code § 15-3-40. *Harrison v Bevilacqua*, 354 S C 129, fn 5, 580 S E 2d 109 (2003). The trial court's (and Defendants') black-line 120-day rule is inconsistent with the Supreme Court's decision in *Hooper*. As a result, under plain Supreme Court precedent, it is clear that the trial court's dismissal should be reversed.

2 Plaintiff's argument is favored by strong public policy

"Public policy favors the disposition of cases 'on their merits rather than on technicalities.'" See *Micronics Inc v South Carolina Dep't of Revenue*, 345 S C 506, 511, 548 S E 2d 223, 226 (Ct App 2001) (citing *Columbia Pools Inc v Galvin*, 288 S C 59, 339 S E 2d 524 (Ct App 1986)). South Carolina Rules of Civil Procedure provide in Rule 8(f) that "all pleadings shall be so construed as to do substantial justice to all parties." This Court recently discussed in *HHH Hunt Corp v Town of Lexington* the rules for determining whether a motion to dismiss was properly granted.

"The trial court and this [C]ourt on appeal must presume all well pled facts to be true." *Morrow Crane Co v T R Tucker Constr Co*, 296 S C 427, 429, 373 S E 2d 701, 702 (Ct App 1988). "[P]leadings in a case should be construed liberally so that substantial justice is done between the parties. Further, a judgment on the pleadings is considered to be a drastic procedure by our courts." *Russell v City of Columbia*, 305 S C 86, 89, 406 S E 2d 338, 339 (1991) (citation omitted). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Doe*, 373 S C at 395, 645 S E 2d at 248.

699 S E 2d 699 (Ct App 2010). In this case, a profoundly disabled person has alleged atrocious sexual injuries, negligent treatment persisting over many years and reprisal against his mother for

attempting to protect his civil rights R at ____ Amended Complaint In her affidavits, his mother describes the retaliation she experienced when she attempted to protect her son from abuse and neglect R at ____ Affidavits of Margaret Mims These allegations are supported by the affidavit of the independent guardian ad litem, M Leigh Flynn, a member of the South Carolina Bar R at ____ Ms Flynn confirmed in her affidavit that

Clusters employees intentionally withheld information from me about the conditions at Clusters in 2001 and about the many incidents in which Edward had been injured at the facility so that I would recommend that he be involuntarily committed to the facility

After Edward was injured at another Babcock Center facility (Kensington) in 2005, I was provided with evidence showing that Babcock Center employees had intentionally provided false information to me in 2001 in order to prevent Edward from returning to the custody of his mother

R at ____ Affidavit of M Leigh Flynn The record contains evidence that Defendants temporarily terminated Edward's services based on a false report of abuse or neglect filed in 2007 R at ____ (Exhibit 2 Rule 59(e) motion filed on Dec 3, 2009) Edward's mother signed a sworn affidavit describing her past and present fears of reprisal

Like a lot of other parents, I have been fearful of reprisals and have experienced reprisals when I have attempted to enforce the rights of my son, Edward Mims

I am always afraid of what Judy Johnson and the officials at the Babcock Center will do to me and to Edward to get back at me for getting Edward out of an abusive situation and reporting them to law enforcement and regulatory agencies

Other families and employees have experienced similar reprisals for reporting abuse and have reported these fears to me and to legislators

R at ____ 2d Affidavit of Margaret Mims

The South Carolina Rules of Civil Procedure provide in Rule 8(f) that "all pleadings shall be so construed as to do substantial justice to all parties " This Court must construe the pleadings and the Rules in a light most favorable to the Plaintiff, especially where the rights of

persons who are under a legal disability are at stake. As a matter of public policy, courts have a special duty to zealously protect the rights of parties who are under a disability. Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 69 (1999). See *Joiner v. Rivas*, 335 S.C. 648, 518 S.E.2d 51 (Ct. App. 1999). This duty to protect the rights of persons who are under a legal disability “has precedence over procedural rules.” *State v. Covert*, 368 S.C. 188, 628 S.E.2d 482 (Ct. App. 2006) referring to *Caughman v. Caughman*, 247 S.C. 104, 146 S.E.2d 93 (1965).

Justice demands that Plaintiff have his day in court, not only to protect his own rights, but to establish a strong public policy of zealously guarding the rights of the most vulnerable citizens of this State. This Court should send a clear message to the lower court that slamming the courthouse door in the faces of people who have disabilities will no longer be tolerated.

3 The text of Federal Rule 4(m) supports Plaintiff's construction of South Carolina law

In their brief, Defendants cite the Federal Rules of Civil Procedure as support for their 120-day requirement for “commencement” of a civil proceeding. (See Defs.’ Br., at p. 9 (“A requirement that a civil action be served within a given time in order to be viable is also found in the federal system.”) However, Federal Rule 4(m), which Defendants quote in their brief, actually supports Plaintiff’s argument.

As Defendants note, the Federal Rules of Civil Procedure contain a requirement that Plaintiffs serve process within 120 days; however, the federal rules differ in a very significant respect from South Carolina Rules of Civil Procedure.

Time Limit for Service **If a defendant is not served within 120 days after the complaint is filed, the court--on motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant or order that service be made within a specified time.** But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

See Fed R Civ P 4(m) (emphasis added) It is apparent from first glance that this Rule is very different from South Carolina Rule of Civil Procedure 3(a) and S C Code § 15-3-20 Rather than merely addressing when a case "commences," the Federal Rule sets an explicit affirmative obligation to serve process within 120 days More importantly, Federal Rule 4(m) expressly imposes consequences for the failure to do so dismissal without prejudice or an order requiring that service be completed by a specified time The Rule and the statute relied upon by the Defendants contain no such language

In addition, the federal rule requires the court to give notice to the plaintiff and to determine whether "good cause" exists for the delay When "good cause" is shown by the plaintiff, the federal rule requires extension of the time to serve the summons and complaint

Rather than follow the Federal Rule's lead, the South Carolina Rule and statute do not make service within 120 days mandatory and, notably, **do not expressly authorize dismissal for failure to serve within 120 days** If, as Defendants suggest, the Supreme Court and the legislature intended to impose a firm 120-day requirement for service, they would have used language similar to the federal rules However, they chose not to do so If anything, the glaring differences between state and federal law demonstrates that the trial courts' and Defendants' interpretation of South Carolina law is incorrect

4 Contrary to Defendants' suggestion, there is no risk of "stealth" litigation from Plaintiff's application of the law to the facts of this case

Defendants further suggest that Plaintiff's argument "would give plaintiffs in such situations the advantages of having a 'stealth lawsuit' in place for potentially long periods without the defendant's knowledge " (See Defs ' Br , at p 10) Because of the extension of time under South Carolina Code § 15-3-40, due to Plaintiff's mental condition, he could have waited until 2012 to file his lawsuit against the individual defendants and the Babcock Center for the 2005 sexual assault Indeed, defendants who cause harm to a child are at risk of being sued for more than twenty years Clearly, the General Assembly is more concerned about protecting the rights of persons under a legal disability than protecting defendants from "stealth lawsuits "

Defendants materially mischaracterize what Plaintiff argues in this case. All that Plaintiff argues is that because service was made before the expiration of the statute of limitations, it was timely under South Carolina Code § 15-3-40 and Rule 3(a). This does not entail any ambush, surprise or "stealth" litigation. In point of fact, Defendants learned of this lawsuit years before the statute of limitations expired.

5 Defendants' argument that Plaintiff failed to prosecute the lawsuit is without merit and the lower court failed to make factual findings which were necessary to support dismissal under Rule 41(b)

In its order dismissing Plaintiff's complaint, the trial court cited as additional grounds for dismissal failure to prosecute pursuant to Rule 41(b), S C R C P. These grounds were not argued by the Defendants in their original motion. They were added by the Defendants in their motions for reconsideration and granted to the trial judge without making the findings of fact necessary to support dismissal under Rule 41(b), S C R C P. Ironically, the same judge who dismissed Plaintiff's lawsuit citing Rule 41(b) in 2010, had previously issued an order denying Defendants' motions to dismiss, finding that the service of his lawsuit was timely, first from the bench in March 2009 and again in a written order in June 2009.

When a court renders a judgment on the merits against a plaintiff, the court must "make findings as provided in Rule 52(a)." The lower court failed to include such findings of fact and conclusions of law to support S C R C P Rule 41(b), S C R C P as grounds for dismissal. There is no evidence that dismissal was "imposed to maintain the orderly disposition of cases in the face of repeated warnings to the offending party or multiple opportunities to proceed with trial, and only then upon a finding of unreasonable neglect." *McComas v. Ross*, 368 S C 59, 626 S E 2d 902 (Ct. App. 2006).

In granting dismissal for failure to prosecute, there must also be some showing of indifference to the rights of the defendant. *E.g. Orlando v. Boyd*, 320 S C 509, 511, 466 S E 2d

353, 355 (1996) (holding that precluding a witness from testifying was an abuse of discretion without a showing of willful disobedience when exclusion amounted to a judgment of default or dismissal) There has been no indifference in this case to the rights of the Defendants They were not prejudiced, because Plaintiff could have delayed even longer before filing the lawsuit Besides, it is alleged that the cause for delay resulted from actions taken in bad faith by the Defendants R at ____ Affidavits of Margaret Mims and M Leigh Flynn The record contains evidence of reprisal, including forced institutionalization and loss of services when Plaintiff's mother attempted to enforce his rights Id

The Fourth Circuit Court of Appeals addressed the criteria for dismissal for failure to prosecute *McCargo v Hedrick* 545 F 2d 393 (4th Cir 1976) In that case, the Fourth Circuit held that dismissal is a harsh sanction, which "should be resorted to only in extreme cases " Id at 396 Dismissal is appropriate only in the face of a clear record of delay or contumacious conduct by the plaintiff Id The discretion should be exercised discreetly and only after due consideration of the availability of sanctions less severe than dismissal Id *Bush v US Postal Serv.*, 496 F 2d 42, 44 (4th Cir 1974) The Fourth Circuit has established four factors a trial court should consider before dismissing a case for failure to prosecute (1) the plaintiff's degree of personal responsibility, (2) the amount of prejudice caused the defendant, (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion, and (4) the effectiveness of sanctions less drastic than dismissal *Hillig v Comm'r of Internal Revenue*, 916 F 2d 171, 174 (4th Cir 1990) See also *Herbert v Saffell*, 877 F 2d 267, 270 (4th Cir 1989), *McCargo*, 545 F 2d at 396, *Chandler Leasing Corp v Lopez*, 669 F 2d 919, 920 (4th Cir 1982) The Plaintiff was not capable of personal responsibility for the delay due to his profound mental disabilities There is no history of proceeding in a dilatory fashion, indeed, the summons and complaint had

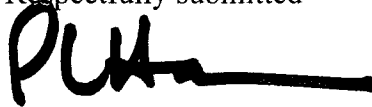
already been served two years before the judge dismissed the lawsuit. There is no evidence that the court even considered less drastic sanctions. *See McComas v Ross*, 368 S.C. 59, 62-63, 626 S.E.2d 902, 904-05 (Ct. App. 2006). Importantly, in this case, there is no evidence of prejudice to the Defendants (or indifference to their rights). Plaintiff filed this action five years before the expiration of the statute of limitations and served process four years before expiration. Plaintiff has presented credible evidence of legitimate concerns of reprisal, which could have again affected the services she needed to keep her son at home. R. at ____ Affidavits of Margaret Mims, Affidavit of M. Leigh Flynn. The trial judge failed to discuss whether her expression of fear of reprisal was “good cause” for delay in serving the complaint upon persons who had previously retaliated against Edward and his mother.

Simply put, the trial court did not engage in the methodical, detailed analysis that the Court of Appeals has called for in *McComas*.

6 Conclusion

Edward Mims has filed and served a lawsuit alleging that he was sexually assaulted at the Babcock Center, claiming that Defendants have retaliated against him because of his mother’s attempts to protect him by denying the services she needs to keep him safe at home. For the reasons set forth above, he prays that this Court will remand this case for trial.

Respectfully submitted,



Patricia L. Harrison
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Columbia, South Carolina

March 7, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case Tracking No 2010154146

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M Strickland, Special Circuit Court Judge

RECEIVED
FEB 23 2011
SC Court of Appeals

Case No 07-CP-40-3365

Edward Mims, by and through his legal
Guardian, Margaret Mims,

Appellant,

v

Babcock Center, Inc , Judy Johnson, the
South Carolina Department of Disabilities
and Special Needs, Kathi Lacy and
Stanley Butkus,

Respondents

**RESPONDENTS BABCOCK CENTER, INC
AND DR JUDY JOHNSON'S DESIGNATION OF MATTER FOR
INCLUSION IN THE RECORD ON APPEAL**

Appellants designate the following items for inclusion in the Record on Appeal

- 1 Form 4 Order filed March 31, 2009,
- 2 Order Granting Defendants' Motion for Reconsideration filed November 23, 2009,
- 3 Order Denying Plaintiff's Rule 59(e) Motion filed February 8, 2010,
- 4 Transcript of Hearing dated March 30, 2009,
- 5 Transcript of Hearing dated September 4, 2009,

- 6 Summons and Complaint filed May 29, 2007,
- 7 Amended Summons and Amended Complaint filed May 7, 2008,
- 8 Defendants Babcock Center, Inc and Dr Judy Johnson's Motion to Dismiss filed June 11, 2008,
- 9 Motion to Dismiss of the South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stanley Butkus dated June 9, 2008,
- 10 Motion to Alter or Amend or For Reconsideration filed April 13, 2009,
- 11 Defendants Babcock Center and Judy Johnson's Motion for Reconsideration filed April 10, 2009,
- 12 Plaintiff's Motion to Alter or Amend Judgment Pursuant to Rule 59(e) dated December 3, 2009,
- 13 Defendants Babcock Center, Inc and Judy Johnson's Memorandum in Support of Joint Motion for Reconsideration and Exhibits thereto dated September 4, 2009,
- 14 Affidavit of Margaret Mims

Counsel for Respondents certify that this designation contains no matter which is irrelevant to this appeal

[Signature Page to Follow]

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By



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ATTORNEYS FOR RESPONDENTS
BABCOCK CENTER, INC. & DR
JUDY JOHNSON

**RESPONDENTS BABCOCK CENTER,
INC. AND DR JUDY JOHNSON'S
DESIGNATION OF MATTER**

Columbia, South Carolina
February 23, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case Tracking No 2010154146

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

RECEIVED

FEB 23 2011

SC Court of Appeals

Joseph M Strickland, Special Circuit Court Judge

Case No 07-CP-40-3365

Edward Mims, by and through his legal
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v

Babcock Center, Inc , Judy Johnson, the
South Carolina Department of Disabilities
And Special Needs, Kathi Lacy and
Stanley Butkus,

Respondents

PROOF OF SERVICE

I hereby certify that I served Respondents Babcock Center, Inc and Dr Judy Johnson's Designation of Matter for Inclusion in the Record on Appeal upon counsel of record, by placing a copy in the United States mail, postage prepaid, to Patricia L Harrison, Esquire, 611 Holly Street, Columbia, South Carolina 29205, and to William Davidson, Esquire, Davidson & Lindemann, P A, Post Office Box 8568, Columbia, South Carolina 29202, on February 23, 2011

[Signature Page to Follow]

Respectfully submitted,

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**PROOF OF SERVICE -
RESPONDENTS BABCOCK
CENTER, INC. AND DR JUDY
JOHNSON'S DESIGNATION
OF MATTER FOR INCLUSION
IN THE RECORD ON APPEAL**

Columbia, South Carolina
February 23, 2011



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February 23, 2011

VIA HAND-DELIVERY

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29211

RECEIVED
FEB 23 2011
SC Court of Appeals

***RE Edward Mims, by and through his legal guardian, Margaret Mims v Babcock Center, Inc , Judy Johnson, the South Carolina Department of Disabilities and Special Needs, Kathi Lacy and Stanley Butkus
Court of Appeals Tracking No 2010154146
C/A No 07-CP-40-3365
C&L File No 969-109***

Dear Ms Gee

Please find enclosed for filing the original and one (1) copy of Respondents Babcock Center, Inc and Dr Judy Johnson's Initial Brief and Respondents Babcock Center, Inc and Dr Judy Johnson's Designation of Matter for Inclusion in the Record on Appeal in the above case. Also, enclosed is the Proof of Service with regard to the service of each upon counsel. Please return a clocked copy of each to me via my courier.

By copy of this letter, I am serving a copy of same upon all counsel.

Thank you for your time and attention. As always, please contact me with any questions or concerns.

Respectfully,

A handwritten signature in black ink, appearing to read "C. Stegmaier".

Christian Stegmaier

CBS lcc
Enclosures

cc Patricia L. Harrison, Esquire
William Davidson, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case Tracking No 2010154146

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M Strickland, Special Circuit Court Judge

Case No 07-CP-40-3365

Edward Mims, by and through his legal
Guardian, Margaret Mims,

Appellant,

v

Babcock Center, Inc , Judy Johnson, the
South Carolina Department of Disabilities
and Special Needs, Kathi Lacy and
Stanley Butkus,

Respondents

**RESPONDENTS BABCOCK CENTER, INC
AND DR JUDY JOHNSON'S INITIAL BRIEF**

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JUDY JOHNSON

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FEB 23 2011

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I Whether the Circuit Court properly ruled Rule 3, SCRCP, and S C Code Ann § 15-3-20 mandate dismissal of the instant action?
- II Whether tolling of the statute of limitations and 120-day service requirement is immaterial and should not be considered?
- III Whether the Circuit Court properly dismissed the action pursuant to Rule 41(b), SCRCP, based on Appellant's failure to prosecute the original Summons and Complaint?
- IV Whether a plaintiff may file and serve an amended complaint where a civil action has not been properly commenced?

STATEMENT OF THE CASE

The instant case is an appeal from the Circuit Court's dismissal of the purported civil action filed by Appellant Edward Mims, by and through his legal guardian, his mother Margaret Mims, alleging various causes of action against Babcock Center, Inc , Dr Judy Johnson, South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stanley Butkus (collectively "Respondents") arising out of the care and treatment Edward received while a resident of Babcock Center

On May 29, 2007, Appellant Edward Mims, by and through his legal guardian Margart Mims, filed a Summons and Complaint bearing the caption Edward Mims, by and through his guardian Margaret Mims v Babcock Center, Inc , Judy Johnson, Tonya Bradford, Craig Stoxen, Sue Slater, Stanley Butkus, Susan Bowling, and the South Carolina Department of Health and Human Services, 2007-CP-40-3365 (Summons & Complaint) This Summons and Complaint was never served on any of the defendants

Almost one year later, on May 7, 2008, Appellant filed an Amended Summons and Complaint The Amended Summons and Complaint bears the same civil action number as those filed one year earlier, but is entitled Edward Mims, by and through his guardian Margaret Mims v Babcock Center, Inc , Judy Johnson, South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stanley Butkus (Amended Summons & Complaint) Appellant served the Amended Summons and Complaint on defendants on or about May 12, 2008

Respondents moved to dismiss the Amended Summons and Complaint on June 9, 2008 (Respondents' Motions to Dismiss) The Honorable Joseph Strickland, sitting by designation as a special circuit court judge, held a hearing on Respondents' motions to dismiss on March 30,

2009 (March 30, 2009 Tr) Judge Strickland denied Respondents' motions to dismiss by order filed March 31, 2009 (Form 4 Order)

Respondents filed separate motions for reconsideration pursuant to Rule 59(e), SCRC (Motions for Reconsideration, Memo in Support of Motion for Reconsideration) Thereafter, Respondents answered the Amended Complaint A hearing was held on Respondents' motions for reconsideration before Judge Strickland on September 4, 2009 (Sept 4, 2009 Tr) By order dated November 23, 2009, Judge Strickland granted Respondents' motions for reconsideration and dismissed the Amended Complaint without prejudice (Order)

Appellant moved for reconsideration of Judge Strickland's order dismissing the Amended Complaint (December 3, 2009 Rule 59(e) Motion) This motion subsequently was denied by order dated February 8, 2010 (Order)

This appeal follows

STATEMENT OF THE FACTS

Because the instant appeal concerns the dismissal of Appellant's Amended Complaint on procedural grounds, the allegations underlying the Complaint are largely irrelevant for purposes of this appeal. Accordingly, Respondents Babcock Center, Inc. and Dr. Judy Johnson (collectively "Babcock Center Respondents")¹ will provide only a brief summary of the allegations giving rise to this litigation. The Babcock Center Respondents incorporate by reference the more detailed factual scenario outlined in the brief of Respondents DDSN, Kathi Lacy, and Stanley Butkus.

Appellant's original Complaint, filed May 29, 2007, named as defendants Babcock Center, Inc., Judy Johnson, Tonya Bradford, Craig Stoxen, Sue Slater, Stanley Butkus, Susan Bowling, and the South Carolina Department of Health and Human Services. The original Complaint alleged causes of action for negligence, violation of 42 USC § 1983, violation of Appellant's due process rights, violation of 42 USC §§ 1395 and 1396, and violation of S.C. Code Ann. § 44-81-1 et seq. (Summons & Complaint). These claims arose out of the care and treatment Edward Mims received while a resident of facilities operated by Babcock Center. Babcock Center provides residential and vocational support to persons with developmental disabilities, autism, and head and spinal cord injuries. Specifically, the allegations arise from alleged incidents and conduct occurring between January 2002 and June 2005. (Summons & Complaint). The original Complaint was not served on any of the defendants.

On May 7, 2008, Appellant filed the Amended Complaint, which named as defendants Babcock Center, Inc., Dr. Judy Johnson, South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stanley Butkus. The Amended Complaint alleged claims for violation of

¹ Dr. Judy Johnson is the Executive Director of Babcock Center, Inc.

42 USC §§ 1983 and 1985, violation of the Americans With Disabilities Act, negligent supervision, and unjust enrichment. The allegations of the Amended Complaint arose from alleged incidents and conduct occurring between December 2001 and June 2005. (Amended Summons & Complaint). The Amended Summons and Complaint was served on defendants on or about May 12, 2008.

In lieu of answering the Amended Complaint, Respondents filed separate motions to dismiss pursuant to Rule 12, SCRCF, based on Appellant's failure to serve the summons and complaint within 120 days of filing in compliance with Rule 3, SCRCF, and S.C. Code Ann. § 15-3-20. (Motions to Dismiss). Judge Strickland denied Respondents' motions to dismiss by way of a Form 4 order dated March 30, 2009. (Form 4 Order).

Respondents moved for reconsideration pursuant to Rule 59(e), SCRCF. (Motions for Reconsideration, Memo in Support of Motion for Reconsideration). After a hearing, Judge Strickland granted Respondents' motions for reconsideration and dismissed the Amended Summons & Complaint pursuant to Rules 12 and 41, SCRCF. (November 23, 2009 Order).

In this order, Judge Strickland clarified that his previous ruling denying Respondents' motions to dismiss was based on concepts of judicial economy, as Judge Strickland believed Appellant could have re-filed the action after its dismissal. On reconsideration, Judge Strickland reasoned the plain and unambiguous language of Rule 3, SCRCF, and S.C. Code Ann. § 15-3-20 specify that a civil action is commenced upon filing of the summons and complaint if service is made within 120 days after filing. Because the original Summons and Complaint were never served, Judge Strickland held no civil action was ever commenced. Judge Strickland further ruled that Appellant's failure to serve the original Summons and Complaint within 120 days of filing and, therefore, commence a civil action, rendered the Amended Summons and Complaint a

legal nullity. In other words, because no civil action was properly commenced, there existed no civil action in which an amended summons and complaint could be filed and served. Accordingly, Judge Strickland granted Respondents' motions to dismiss the Amended Summons and Complaint pursuant to Rules 12(b)(1), (b)(2), (b)(4), and (b)(5). Judge Strickland additionally dismissed the action pursuant to Rule 41(b) based on Appellant's failure to prosecute the original Summons and Complaint. (November 23, 2009 Order). This dismissal was without prejudice.

Appellant moved to alter or amend the order granting Respondents' motions to dismiss (December 3, 2009 Rule 59(e) Motion). Judge Strickland denied Appellant's motion to alter or amend by order dated February 8, 2010. (Order).

LAW/ANALYSIS

I The Circuit Court Properly Ruled Rule 3, SCRCP, and S C Code Ann § 15-3-20 Mandate Dismissal of the Instant Action

Appellant contends the sole purpose and impact of § 15-3-20 is to extend the time for serving a summons and complaint by 120 days where the statute of limitations has expired. However, Appellant's analysis of this issue focuses chiefly on the language of Rule 3, SCRCP. The language of § 15-3-20, on the other hand, when read in conjunction with Rule 3, does not support such a limitation.

Rule 3, in its original form, provided that a civil action was commenced by the filing of a summons and complaint. Rule 3(a), SCRCP (1985). Former Rule 3 further provided that for purposes of tolling the statute of limitations, an action would be considered commenced when the summons and complaint were filed and delivered to the sheriff for service, as long as service was actually effected within a reasonable time.² Rule 3(b), SCRCP (1985).

In 2002, the General Assembly enacted § 15-3-20, which provides as follows:

(A) Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute.

(B) A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing.

S C Code Ann § 15-3-20

Section 15-3-20, according to its plain language, does not restrict the requirement that service be accomplished within 120 days after filing to situations where the statute of limitations expires after filing of the summons and complaint. To the contrary, the 120-day service

² The heading of Rule 3 was amended in 1994 as well to reflect the decision in Garner v. Houck, 312 S C 481, 435 S E 2d 847 (1993). Garner clarified that Rule 3(b) did not apply only to absent defendants, as its heading indicated.

requirement set forth in § 15-3-20 contains no qualification or restriction and applies to all summons and complaints filed with the clerk of court

In an explicit effort to incorporate the legislature's intent in enacting § 15-3-20, in 2004, the South Carolina Supreme Court amended Rule 3, SCRPC, to state

(a) **Commencement of civil action** A civil action is commenced when the summons and complaint are filed with the clerk of court if

(1) The summons and complaint are served within the statute of limitations in any manner prescribed by law, or

(2) if not served within the statute limitations, actual service must be accomplished not later than on hundred twenty days after filing

Rule 3, SCRPC

“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature ” Hodges v Rainey, 341 S C 79, 85, 533 S E 2d 578, 581 (2000) (citation omitted) The text of a statute as drafted by the legislature is considered the best evidence of the legislative intent or will See id “If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning ” Strickland v Strickland, 375 S C 76, 88, 650 S E 2d 465, 472 (2007) (citation omitted) “The Court will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation ” Harris v Anderson County Sheriff's Office, 381 S C 357, 362, 673 S E 2d 423, 425 (2009) (citation omitted)

Section 15-3-20 must be read in congruence with Rule 3, SCRPC See Joiner ex rel Rivas v Rivas, 342 S C 102, 109 536 S E 2d 372, 375 (2000) (“It is well settled that statutes dealing with the same subject matter are in pari materia and should be construed together, if possible, to produce a single, harmonious result”) In fact, the official note to the 2004 amendments to Rule 3 makes

specific reference to § 15-3-20, stating “[t]hese changes are intended to reflect the legislative intent expressed in § 15-3-20 as amended by 2002 S C Act No 281, § 1 ” Rule 3, SCRCF, note to 2004 amendment Accordingly, when Rule 3 and § 15-3-20 are read together, they both specify that a civil action is commenced when the summons and complaint are filed, with § 15-3-20 including the additional requirement that service must be made within 120 days after filing, and Rule 3 addressing the scenario of service where the statute of limitations expires after filing by extending the time for service for 120 days Therefore, when Rule 3 and § 15-3-20 are read together in such a manner as to reflect the legislative intent expressed by the statute, it is clear that to properly commence a civil action, actual service must be accomplished in all cases within 120 days of filing of a summons and complaint

In the instant case, it is uncontroverted that Appellant **did not** serve the original Summons and Complaint on any parties Instead, **almost a year** after filing the original Summons and Complaint, Appellant filed and served an Amended Summons and Complaint bearing the same civil action number as the original Complaint Pursuant to the clear and unambiguous terms of § 15-3-20, because Appellant did not serve the original Summons and Complaint within 120 days of filing, a civil action was never commenced See also Brown v Evatt, 322 S C 189, 194, 470 S E 2d 848, 850 (1996) (a civil action is commenced upon the filing **and service** of the summons and complaint) Because the civil action was never properly commenced, there was no suit in existence in which an amended complaint could be filed Simply put, Appellant could not amend an action that did not exist Therefore, the Circuit Court properly dismissed this action pursuant to Rules 12(b)(1), (b)(2), (b)(4), and (b)(5)

The language of § 15-3-20 expresses an unequivocal intent that litigation be diligently pursued Allowing a plaintiff to file a complaint, fail to serve it for over a year, and then file an

amended complaint bearing the same civil action number is in direct contravention with the purpose and intent of § 15-3-20. In addition, such a scenario is potentially prejudicial to the defendants named in the latent lawsuit. For instance, the existence of a filed lawsuit is a matter of public record that could have potentially damaging effect on a defendant's reputation and business relationships. Under Appellant's analysis, a plaintiff could file a lawsuit the day the cause of action accrued and wait until 120 days after the expiration of the statute of limitations to serve the summons and complaint. A plaintiff should not be permitted to hold a defendant's reputation or other business interests hostage for such a prolonged period of time. Rather, if plaintiff has a viable case, he should be required to diligently serve and prosecute his case after filing so that the defendant is afforded the opportunity to formally defend against the allegations made against him in the public record.³

Appellant notes several times in her brief that counsel for the Babcock Center Respondents was aware the original Complaint had been filed. However, notice of a lawsuit that has been filed but not served provided the Babcock Center Respondents with no avenue to defend against the serious and inflammatory allegations made in the original Complaint. Because Appellant did not serve this lawsuit, thereby commencing suit, the Babcock Center Respondents were not in a position to engage in discovery, file motions, or otherwise formally defend against Appellant's allegations. Furthermore, the Babcock Center Respondents had no way of knowing whether Appellant would ever serve the original Complaint and should not be expected to expend time and resources preparing for a lawsuit that might never materialize. In

³ As Respondents DDSN, Kathi Lacy, and Stanley Butkus point out in their brief, Rule 4(m), Fed. R. Civ. P., expresses the sentiment that litigation should be diligently and timely pursued after it is filed. (Resp. Br. pp. 9-10). For the sake of brevity, the Babcock Center Respondents incorporate by reference co-Respondents' arguments on the impact of Rule 4(m) and the federal cases interpreting Rule 4(m).

fact, when Appellant finally served the Babcock Center Respondents in this matter, she did so with an “Amended Complaint” naming several different defendants and containing additional allegations

In short, the Circuit Court properly dismissed the Amended Complaint because no civil action was commenced. To allow Appellant to serve an amended complaint when the original complaint was filed a year earlier but never served on the defendants flies in the face of the mandate of § 15-3-20, which very clearly states “[a] civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing.”

II Tolling of the Statute of Limitations and 120-Day Service Period is Immaterial and Should Not Be Considered

Appellant devotes a significant portion of his brief to discussing the contention that the statute of limitations and the 120-day period for service are tolled due to Appellant’s disability, as well as the doctrine of equitable tolling. However, Appellant’s arguments on tolling miss the relevant issue in this appeal—whether an action was commenced in which an amended complaint could be filed and served.

In the order dismissing the Amended Complaint, Judge Strickland held “a Court decision regarding the applicable statutes of limitations is premature at this time.” (November 23, 2009 Order, pp 1-2). Instead, Judge Strickland dismissed the Amended Complaint without prejudice because a civil action was never properly commenced due to Appellant’s failure to serve the original Complaint within 120 days of filing in accordance with § 15-3-20. In other words, Judge Strickland did not need to address whether the statute of limitations applicable to the instant claims should be tolled because there was no properly commenced civil action before him in

which to rule whether tolling applied. The proper time to address a claim of equitable tolling will be when and if an action is properly filed and served asserting such a claim.

Notwithstanding the immateriality of the tolling doctrine to the issues presented by this appeal, Appellant's arguments in favor of tolling the statute of limitations are without merit. "The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use." Hooper v. Ebenezer Senior Servs. & Rehabilitation Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). Appellant has not established she is entitled to the benefit of the tolling doctrine.

Appellant contends the statute of limitations and companion 120-day service requirement are tolled as a result of Edward's disability. However, Appellant fails to explain when the period of Edward's disability should be deemed to have ended and the limitations period commenced. Appellant additionally argues Respondents' "bad acts" should toll the statute of limitations, but Appellant again fails to delineate the period of time for which the statute should be tolled as a result of these alleged "bad acts." By the very definition of tolling adopted by Appellant in her brief, the statute of limitations may only be tolled for a finite time. (App. Br. p. 12) ("Tolling refers to suspending or stopping the running of a statute of limitations, it is analogous to a clock stopping, then restarting") (citing 51 Am. Jur. 2d Limitation of Actions § 169 (2000)). The record is devoid of evidence as to when the statute of limitations "clock" stopped and restarted with respect to Edward's disability or Respondents' "bad acts." In addition, there is no evidence in the record demonstrated the original Summons and Complaint could not have been served within 120 days of filing.⁴

⁴ Appellant makes bald allegations that she feared "reprisals" by Respondents. (App. Br. p. 14). However, it is undisputed that Edward has not resided at Babcock Center, but has lived at home.

Appellant also contends equitable tolling should be applied to keep “technical forfeitures” from preventing a trial on the merits. However, Appellant does not explain how the failing to meet the crucial requirement commencing a civil action constitutes a mere “technical forfeiture.” Moreover, dismissal in this case was without prejudice to Appellant’s right to re-file the suit, meaning Appellant is entitled to re-file and properly serve his lawsuit. Once suit is properly commenced, Appellant will be afforded the opportunity to litigate the substantive issues presented by this case, as well as the equitable tolling claim.

Appellant relies heavily on Hooper v. Ebenezer Senior Servs. & Rehabilitation Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009), in support of her arguments related to equitable tolling. Specifically, Appellant contends Hooper holds the 120-day service requirement of § 15-3-20 does not apply when the plaintiff is entitled to tolling of the statute of limitations. Hooper is easily distinguishable from the instant case. Hooper dealt with the situation where a plaintiff sought to apply equitable tolling where the complaint was filed within the statute of limitations, but not served until 129 days after it was filed. The Hooper Court confined its analysis of this issue to Rule 3(a)(2), SCRCp, and did not address the effect of § 15-3-20. Accordingly, contrary to Appellant’s assertion, Hooper does not hold § 15-3-20 does not apply where plaintiff is entitled to tolling.

Furthermore, Hooper is factually distinct from the case sub judice. In Hooper, the Court’s decision focused chiefly on the fact that the plaintiff had difficulty serving the summons and complaint on the defendant because the defendant failed to properly list its registered agent for service of process with the Secretary of State. In addition, the Court emphasized that the

with Appellant, his mother, since 2005, almost two years before the original Summons and Complaint were filed. (Mims’ Affidavit, p. 5 at ¶ 48)

plaintiff had diligently attempted, through various channels, to obtain service on the defendant's agent. Thus, the Court ruled that "under the unique circumstances of this case," it was appropriate to equitably toll the statute of limitations during the period of time the plaintiff pursued service on the defendant's non-existent agent. Id. at 118-19, 687 S.C. at 34.

Appellant has offered no such "unique circumstances" that justify the use of tolling in this case. Additionally, unlike the plaintiff in Hooper, Appellant made no effort to commence her civil action through service of the original Summons and Complaint. Instead, Appellant filed the original Summons and Complaint and allowed them to languish in the clerk's office for almost a year before finally filing and serving an Amended Summons and Complaint. Hooper certainly does not address the propriety of the procedural scenario presented by the instant case.

III The Circuit Court Properly Dismissed the Action For Failure to Prosecute

As an alternative basis for dismissal, the Circuit Court ruled the instant action must be dismissed pursuant to Rule 41(b), SCRPC, for failure to prosecute. The Circuit Court cited Appellant's failure to serve the original Summons and Complaint as the basis for its decision on this issue. Whether an action should be dismissed for failure to prosecute is a decision within the sound discretion of the circuit court and will not be disturbed on appeal absent a clear showing of abuse of that discretion. Small v. Mungo, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970). Because Appellant has not demonstrated the Circuit Court abused its discretion in dismissing the action for failure to prosecute, this ruling must be affirmed.

Appellant contends she, through her counsel, actively participated in the action after the Amended Summons and Complaint were filed and that more detailed factual findings were necessary on this issue. Appellant's argument ignores that the Circuit Court granted dismissal for failure to prosecute based solely on Appellant's failure to serve the original Summons and

Complaint for almost an entire year, not on her conduct after the filing and service of the Amended Summons and Complaint. Appellant likewise fails to recognize that more detailed factual findings were not required, as the Circuit Court clearly set forth that the lengthy period of non-service of the original Summons and Complaint underpinned its dismissal for failure to prosecute.⁵ Accordingly, the Circuit Court did not abuse its discretion in dismissing the case for failure to prosecute under Rule 41(b), SCRCF.

IV A Plaintiff May Not File An Amended Complaint Where a Civil Action Has Not Been Commenced

Appellant argues in her final issue that Rule 15, SCRCF, permits the filing and service of an amended Complaint even where the original complaint has not been served. However, the same reasoning set forth for the dismissal of the instant case pursuant to Rule 12, SCRCF, explains why amendment of the original Complaint was improper. Because Appellant never properly commenced a civil action by serving the original Complaint within 120 days after filing, no civil action existed in which the Amended Complaint could be filed. Rule 15, SCRCF, simply does not come into play under the circumstances presented in the case sub judice.

⁵ In support of the assertion that more detailed factual findings are necessary on Appellant's failure to prosecute, Appellant cites Clegg v Lambrecht, Op. No. 2009-UP-376 (S.C. Ct. App. filed June 30, 2009). However, the original opinion in Clegg (to which Appellant appears to cite) was subsequently withdrawn, substituted, and re-filed as an unpublished opinion, having no precedential value. Furthermore, the re-filed Clegg opinion does not stand for the proposition that a court must make specific findings of fact in ruling on a motion under Rule 41(b). It merely states that a court may remand for more detailed factual findings if meaningful appellate review cannot be had on the findings presented. As described above, that is not the case here.

CONCLUSION

For the foregoing reasons, the Babcock Center Respondents respectfully request the Court affirm the decision of the Circuit Court dismissing the instant case, as well as the subsequent decision denying Appellant's motion for reconsideration

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INITIAL BRIEF OF RESPONDENTS BABCOCK CENTER, INC AND DR JUDY JOHNSON

Columbia, South Carolina
February 23, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case Tracking No 2010154146

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

RECEIVED
FEB 23 2011
SC Court of Appeals

Joseph M Strickland, Special Circuit Court Judge

Case No 07-CP-40-3365

Edward Mims, by and through his legal
Guardian, Margaret Mims,

Appellant,

v

Babcock Center, Inc , Judy Johnson, the
South Carolina Department of Disabilities
And Special Needs, Kathi Lacy and
Stanley Butkus,

Respondents

PROOF OF SERVICE

I hereby certify that I served Respondents Babcock Center, Inc and Dr Judy Johnson's Initial Brief upon counsel of record, by placing a copy in the United States mail, postage prepaid, to Patricia L Harrison, Esquire, 611 Holly Street, Columbia, South Carolina 29205, and to William Davidson, Esquire, Davidson & Lindemann, P A, Post Office Box 8568, Columbia, South Carolina 29202, on February 23, 2011

[Signature Page to Follow]

Respectfully submitted,

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**PROOF OF SERVICE -
RESPONDENTS BABCOCK
CENTER, INC. AND DR. JUDY
JOHNSON'S INITIAL BRIEF**

Columbia, South Carolina
February 23, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M Strickland, Special Circuit Court Judge

Case No 07-CP-40-3365

RECEIVED

FEB 03 2011

SC Court of Appeals

Edward Mims

Appellant,

v

Babcock Center, Inc , Judy Johnson, the South Carolina
Department of Disabilities and Special Needs,
Kathi Lacy and Stanley Butkus,

Respondents

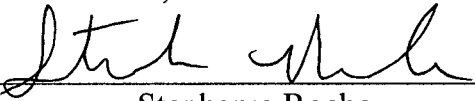
CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P A , attorneys for the Respondents South Carolina Department of Disabilities and Special Needs, Kathi Lacy and Stanley Butkus, does hereby certify that service of the **Amended Initial Brief of Respondents DDSN, Lacy and Butkus** in the above-captioned matter was made upon counsel for the Appellant by hand delivery and upon counsel for Respondent Babcock Center, Inc by placing copies in the United States Mail, first class postage prepaid, at the

below listed addresses clearly indicated on said envelopes this the 3rd day of February
2011

Hand Delivered

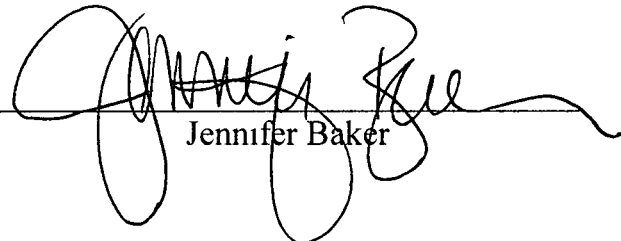
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The Honorable Tanya A Gee
Clerk of Court
South Carolina Court of Appeals
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Columbia, South Carolina 29201

RECEIVED

FEB 03 2011

SC Court of Appeals

RE Edward Mims, by and through his legal guardian, Margaret Mims v Babcock Center, Inc ,
Judy Johnson, the South Carolina Department of Disabilities and Special Needs, Kathi Lacy
and Stanley Butkus
Court of Appeals Tracking Number 2010154146
Civil Action Number 2007-CP-40-3365
Claim Number 44654
Our File Number 104 7785

Dear Ms Gee

Please find enclosed for filing the originals and one copy of the **Amended Initial Brief of Respondents DDSN, Lacy and Butkus** in the above referenced matter. These Respondents' **Designation of Matter to be Included in the Record on Appeal** has been filed previously. Please file the original and return a clocked-in copy to me by way of my courier.

This Amended Initial Brief incorporates several changes to record references as a result of the Court ordering Appellant's designation to be in need of amendment.

By copy of this letter, I am serving copies on all counsel of record.

Thank you for your assistance in this matter.

The Honorable Tanya A Gee
February 3, 2011
Page Two

With highest regards, I am

Sincerely yours,

DAVIDSON & LINDEMANN, P A



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KPW/jmb
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
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Joseph M Strickland, Special Circuit Court Judge

Case No 07-CP-40-3365

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FEB 03 2011

SC Court of Appeals

Edward Mims,

Appellant,

v

Babcock Center, Inc , Judy Johnson, the South Carolina Department
of Disabilities and Special Needs,
Kathi Lacy and Stanley Butkus,

Respondents

AMENDED INITIAL BRIEF OF RESPONDENTS DDSN, LACY AND BUTKUS

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COUNTERSTATEMENT OF ISSUES ON APPEAL

- 1 Whether this action, which indisputably was not served on any defendant until almost a year after its original filing, was properly dismissed pursuant to *SC Code Ann* § 15-3-20(B), which provides that a civil action is commenced “if actual service [of the summons and complaint] is accomplished within one hundred twenty days after filing ”
- 2 Whether equitable tolling should be considered in the absence of the commencement of a civil action by the filing of a Summons and Complaint and service thereof within 120 days, and whether Plaintiff’s equitable tolling arguments are without merit in any event
- 3 Whether this action was also properly dismissed under Rule 41(b), *SC R C P* , for failure to prosecute
- 4 Whether a Complaint can be amended as of right in an action which has not previously been served and which is subject to dismissal for non-service of the Summons and Complaint within one hundred twenty days after filing

STATEMENT OF THE CASE

This action was filed on May 29, 2007, but the original Summons and Complaint were never served. The Complaint alleged injuries to the plaintiff, a mentally retarded person, on several unrelated occasions between 2002 and May 2005. R __ Plaintiff's representatives also claimed that he had been denied certain Medicaid services. R __¹

Plaintiff's representatives took no action regarding this case, other than the filing of the Summons and Complaint, until almost a year later. On May 7, 2008, plaintiff's representatives filed, and shortly thereafter served, a purported amended Summons and Complaint. That pleading deleted some of the original defendants and added several new defendants. The original 2007 Summons and Complaint have never been served at all.²

All defendants moved to dismiss. R __ The motion of defendants DDSN, Lacy and Butkus was based primarily on the late service that failed to comply with § 15-3-20(B), or in the case of the original Complaint, the non-service by plaintiff's representatives. R __

The motions to dismiss were originally denied by Judge Strickland following a hearing on March 30, 2009. R __ A written order was filed on June 4, 2009. R __ At

¹ While the Court will probably not need to address the issue of Medicaid services, it should be noted that matters pertaining to eligibility for Medicaid assistance are not properly brought in original civil actions such as the present case, but through a state administrative appeals process. *Doe v Kidd*, 501 F.3d 348, 352 (4th Cir. 2007) ("Appeals from DDSN decisions about the services, if any, it will provide are taken to a DHHS hearing officer and, after that, to the state of South Carolina's Administrative Law Judge Division").

² Plaintiff notes that "defendants were on notice of the [2007] complaint," Br. of Appellant at 2. While this may be true for some or all of the Babcock Center Defendants, there is no evidence in the record to suggest that the two state government Defendants named in the original Complaint were aware of its existence until almost a year after its filing. The Brief of Appellant, p. 3, incorrectly states that Defendant Butkus was added by the purported Amended Complaint. In fact, he was listed in the original Complaint.

the hearing, Judge Strickland had indicated that the basis for his decision was “judicial economy,” R ___, apparently based on a belief that the case could be re-filed without changing the rights of any parties, although in fact any re-filed action would need to comply with the statute of limitations as of the date of its filing *See e g Frasca v US*, 921 F 2d 450, 453 (2d Cir 1990)(under analogous federal procedure, if service is not complete by the end of the 120 days, the governing statute of limitations again becomes applicable, and plaintiff must refile prior to the termination of the statute of limitations period)

All defendants filed a Rule 59(e) motion for reconsideration, R ___, which was heard by Judge Strickland on September 4, 2009 By Order dated November 23, 2009, Judge Strickland determined that the action should be dismissed because of Plaintiff’s representatives’ failure to serve the Summons and Complaint within 120 days, and also for nonprosecution based on the failure to serve R ___

Plaintiff’s representatives filed a motion to reconsider the November 23, 2009, order, R ___, which was denied by order dated February 8, 2010 R ___ This appeal followed

STATEMENT OF FACTS

The facts pertinent to the limited issue presented by this appeal are largely limited to those set forth above in the Statement of the Case. Plaintiff alleges that several unrelated personal injuries occurred while he was a resident at the Babcock Center. Most of the alleged injuries occurred more than three years prior to the original filing of the unserved Complaint in May 2007, and all but one of them occurred more than three years prior to the service of the purported Amended Complaint in May 2008. R. ___ (Amended Complaint, pp. 4-8) ³

The last-referenced injury was a tear on the bottom of the Plaintiff's penis that occurred on May 27, 2005, just short of three years prior to the service of the purported Amended Complaint. R. ___ (Mims Affidavit, attached to December 2009, Motion to Reconsider, Attachments, p. 101). This incident, as far as can be told, occurred while Plaintiff was by himself for a moment while his caregiver went to get clothing for him prior to his going home for the weekend. *Id.* The tear lengthened somewhat as it was examined by a nurse, and lengthened still further upon examination by a doctor. *Id.* Eventually, it was 4 centimeters long and required seven stitches. *Id.* The clinicians at Lexington did not believe that the injury was the result of abuse or neglect, and as a result, they permitted Plaintiff to return to Babcock that same evening. *Id.* A medical consultant from DDSN, Dr. Graeme Johnson, examined Plaintiff several days later. He concluded that the cause for the laceration was unknown, but that it did not appear to have resulted from abuse or neglect. R. ___ (*Id.*, p. 106). The injury apparently healed quickly and without incident. *Id.*

³ No subsequent lawsuit has ever been filed with respect to these alleged injuries.

The remaining events set forth below do not directly involve the issue on appeal, but in light of the many irrelevant details set forth in Plaintiff's Statement of Facts, these Defendants feel constrained to make mention of the facts below. Plaintiff had been committed to the care of DDSN by the Probate Court in 2001. R. ____ (*Id.* at 45-47). The Probate Court at the time issued a Consent Order, agreed to by counsel for Plaintiff's mother, counsel for Petitioner, and Petitioner's guardian ad litem, to the effect that it was agreed by all concerned "that Mrs. Mims will be unable to care for her son in her home." R. ____ (*Id.*)⁴ As a result, Plaintiff was committed to the care of DDSN, but with provision for weekend visits with his mother. R. ____ (*Id.*)

Plaintiff now argues that the guardian ad litem, Leigh Flynn (an attorney) was given false information by DDSN prior to her consenting to the 2001 Consent Order. Brief of Appellant 6, citing Flynn Affidavit. R. ____ These Defendants intend to controvert those assertions, but the issue was not before the Circuit Court for decision. These Defendants at this point would simply advise that the issue will be contested if it should ever come before any court for a decision.⁵

⁴ In view of the consensual nature of this Order, which Plaintiff's mother and his guardian both agreed to, Plaintiff's counsel's repeated characterization of this commitment as "involuntarily" is essentially inaccurate.

⁵ The Brief of Appellant misstates or exaggerates other matters of fact as well, but in view of the very limited nature of the issues on appeal, as well as the fact that the factual record is essentially not developed, these Respondents will not undertake to address all of the factual details about which they believe the Brief of Appellant is in error.

There was no change in Plaintiff's situation for almost four years. Then, several weeks after the May 2005 laceration incident referenced above, Plaintiff's counsel obtained an *ex parte* Probate Court Order appointing Plaintiff's mother as his temporary guardian, which effectively permitted her to ask for Plaintiff to be returned home on a permanent basis if she so desired. R __ (Mims Affidavit attachments, *supra* at 120-121)

In a failure of communication that could easily have been prevented by Plaintiff's counsel, she advised Babcock and DDSN's counsel, Jim Hill, by e-mail late in the afternoon on Friday, June 10, 2005, that Plaintiff "would not be returning to [Babcock]" on the following Sunday, that is, after his weekend visit. R __ (*Id.* at 123). Reference was made to the "Court's Order," but the e-mail did not describe what that Order was, nor was the Order attached to the e-mail or even summarized in it.⁶ This led to concern on the part of DDSN's counsel that if DDSN were to permit Plaintiff to go home for the weekend when his mother had no intention of returning him to Babcock at the end of the weekend, then DDSN would be effectively facilitating a violation of the 2001 Probate Court Order. R __ (*Id.* at 122). Eventually, Plaintiff's counsel did make the contents of the *ex parte* Order known, as should have occurred at the outset, and Plaintiff was permitted to go home later that same evening. Additional hearings were held on June 24, 2005, and on September 29, 2005, *see* R ____ (*Id.* at 125, 130-133), and the Probate Court issued an Order dated December 19, 2005, which held that Plaintiff's mother would be his permanent guardian. *Id.* DDSN expressed concern about whether Plaintiff's mother

⁶ This Order, which apparently was issued the previous day, June 9, 2005, is the one erroneously referenced in Paragraph 46 of the purported Amended Complaint as being dated June 9, 2007.

could adequately care for him, R __ (Id at 124-129), but the Probate Court held that DDSN was not a party, and did not consider the concerns expressed by DDSN R __ (Id at 131)

Finally, Plaintiff has raised claims pertaining to the nature of the Medicaid services provided to him. Similar, if not identical claims had earlier been made in the appropriate forum of a DHHS administrative appeal, but were dismissed as a result of Plaintiff's counsel not submitting certain information to the DHHS Hearing Officer until approximately three weeks after it was due. The Administrative Law Court affirmed the dismissal. See *Mims v DHHS*, <http://www.scale.net/decisions.aspx?q=4&id=10465> (S C A L C 2007). An appeal to this Court was subsequently dismissed for procedural reasons on April 28, 2008. The Amended Summons and Complaint in the present case were filed only a few days later.

ARGUMENT

- 1 This action, which indisputably was not served on any defendant until almost a year after its original filing, was properly dismissed pursuant to S C Code Ann § 15-3-20(B), which provides that a civil action is commenced “if actual service [of the summons and complaint] is accomplished within one hundred twenty days after filing ”**

As held by the Circuit Court, *S C Code Ann § 15-3-20(B)* unequivocally provides that

(B) A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing

(Emphasis added) It is undisputed that neither the original Complaint nor the Amended Complaint was served within 120 days of the filing of action 07-CP-40-3365 in May 2007 The Plaintiff did not serve anything on any defendant until May 2008, almost an entire year after the action was filed

Plaintiff claims that the 120-day provision of § 15-3-20(B) had only one purpose, and that purpose was to extend, by up to 120 days, the time for service of cases that had been filed, but not served, within the statute of limitations *See generally* Brief of Appellant, Question 1 However, the language of the statute contains no such restrictions Instead, it simply provides, without exception or condition, that a civil action is commenced “court if actual service is accomplished within one hundred twenty days after filing ” Plaintiff never quotes § 15-3-20(B), but does repeatedly refer to *Hooper v Ebenezer Senior Services and Rehabilitation Center*, 377 S C 217, 229, 659 S E 2d 213, 219 (Ct App 2008), *rev d* 386 S C 108, 687 S E 2d 29 (2009), which did not involve facts similar to those in the present case

The statute and Rule 3, S C R C P , are consistent Rule 3(a)(1) provides that

A civil action is commenced when the summons and complaint are filed with the clerk of court if

(1) the summons and complaint are served within the statute of limitations in any manner prescribed by law, or

Section 15-3-20(B) adds the requirement that the action “is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing ” Finally, Rule 3(a)(2) provides that “if [the summons and complaint are] not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing ”

A review of the history of the statute and Rule 3 demonstrates that neither the legislature nor the courts have ever intended for there to be an indefinite, open-ended period for the service of a filed civil action Rule 3(a), as originally promulgated in 1985, simply provided that a civil action is commenced by the filing of a summons and complaint, but Rule 3(b) provided that an action could be commenced upon filing with the clerk of court and delivery to the sheriff for service, “provided that actual service must be accomplished within a reasonable time thereafter” Former Rule 3(b) The heading of former Rule 3(b) provided that it applied to “Commencement When Defendant Absent,” but in *Garner v Houck*, 312 S C 481, 486, 435 S E 2d 847, 849 (1993), the Supreme Court held that the text of the rule contained no such limitation to absent defendants, and that other inconsistencies and vagaries would arise if Rule 3(b) were held to apply only to absent defendants Thus, as of 1993, when *Garner v Houck* was decided, an action was deemed to have been commenced when filed with the clerk and delivered to the sheriff for service, “provided that actual service must be accomplished within a reasonable time ” Former Rule 3(b) The Note to former Rule 3(b)

stated that the requirement of actual service within a reasonable time was one “which the cases have implied ”

In 2002, the General Assembly provided more definition of the concept of a reasonable time for service by enacting § 15-3-20(b) That section, already quoted above, provides that “A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing ” Finally, in 2004, the Supreme Court amended Rule 3, deleting the reference to a reasonable time and to absent defendants, and instead expressly providing that an action filed within the statute of limitations would be deemed commenced, even if not served within the statute of limitations, if actual service was accomplished not later than 120 days after filing To reiterate, the Rule provides that an action is commenced upon the filing and service of the summons and complaint, the statute adds the requirement that the summons and complaint must be served within 120 days, and the Rule further provides that if the action is timely filed, the time for serving it is extended for up to 120 days Taken together, they clearly require the dismissal of the present action because of the untimeliness of service

A requirement that a civil action be served within a given time in order to be viable is also found in the federal system Rule 4(m) of the Federal Rules of Civil Procedure provides in pertinent part as follows

(m) Time Limit for Service

If a defendant is not served within 120 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period

The purpose of Federal Rule 4(m), which was first promulgated in 1983, is “to encourage and prod counsel into expediting service in order that the merits of the case may be reached” *Motsinger v Flynt*, 119 F R D 373, 375 (M D N C 1988), *see also, e g*, *Wei v State of Hawaii* 763 F 2d 370, 372 (9th Cir 1985)(Rule 4(m)(formerly 4(j)) was “intended to force parties and their attorneys to be diligent in prosecuting their causes of action”), *Tillman v New York State Dept of Mental Health* 776 F Supp 841, 843 (S D N Y 1991)(Rule 4(m) is “aimed at ensuring diligent prosecution of civil cases”) Several courts have stated that a plaintiff should “treat the 120 days with the respect reserved for a time bomb” *Braxton v US* 817 F 2d 238, 241 (3d Cir 1987)(citation omitted) In the present case, the lingering 2007 Summons and Complaint were treated more like an unexploded “dud,” unearthed by Plaintiff’s attorney a year later to see whether it would still go off These Defendants respectfully submit that this Court should bury it, and the attempt to have it spark a revived action, for good

If the present action were to be permitted to go forward, the result would be noncompliance both with the unambiguous terms of § 15-3-20(B), and with the principle that litigation should be diligently pursued, as expressed in the federal cases cited above From a practical standpoint, it would give plaintiffs in such situations the advantages of having a “stealth lawsuit” in place for potentially long periods without the defendant’s knowledge While it is true, of course, that a potential defendant is never completely safe from litigation until the statute of limitations has actually expired, an unfair situation would nevertheless be created if a plaintiff could file a lawsuit without notice and seek to benefit later from that filing, while the defendant is left unaware of the filing of the

action, and therefore less likely to prepare for litigation as early as the defendant might otherwise have done

2 Equitable tolling should be not considered in the absence of the commencement of a civil action by the filing of a Summons and Complaint, and service thereof within 120 days, and Plaintiff's equitable tolling arguments are without merit in any event

Judge Strickland's Order of November 23, 2009, held that "a Court decision regarding the applicable statutes of limitations is premature at this time " R ____⁷ This conclusion was clearly correct. Until such time as an action alleging a claim for equitable tolling has been validly filed and served, the issue of whether and when equitable tolling might apply is merely hypothetical. In other words, simply as a matter of logic, there must first be before the court a properly filed and served civil action, even if that action appears on its face to be time-barred. The court cannot deem a limitations period tolled when there is no actual lawsuit before it. Plaintiff makes the bare assertion, completely without discussion or foundation, that the statute of limitations had not expired when the 2008 Summons and Complaint were filed. Brief of Appellant at 2, 17. These Defendants submit that the time for discussing that issue will occur, if it occurs at all, at such time as there is a properly initiated lawsuit before a Circuit Court.

In any event, such argument as Plaintiff makes on appeal on this issue is without merit. In addition, no record has been made on this issue, a fact that militates it being considered on this appeal. Moreover, as the Supreme Court has held, "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its

⁷ Plaintiff's representatives probably cannot be said to have challenged the Order below on this point, unless the argument on pp. 4-6 of Plaintiff's Rule 59(e) motion, dealing with alleged "reprisal" concerns, may be said to have raised the issue.

use ” *Hooper v Ebenezer Sr Services and Rehabilitation Center*, 386 S C 108, 117, 687 S E 2d 29, 33 (2009)

Plaintiff claims a right to tolling based on several grounds. First, he cites his disability, but offers no suggestion as to when the disability should be deemed to have ended, as it undoubtedly was, by his having a guardian. Secondly, he claims that “bad acts by the defendants” should toll the statute, but this is essentially preposterous, because there has been no showing of anything that would have prevented the service of the 2007 Summons and Complaint as soon as they had been filed. Thirdly, Plaintiff claims tolling in order to prevent “technical forfeitures” from preventing consideration of the merits of the claim, but the service of a summons and complaint within the timeframe set forth for such service has been deemed a fundamental defect, rather than a mere technical one. *See e.g. American Family Mut Ins Co v Royal Ins Co of America* 167 Wis 2d 524, 534, 481 N W 2d 629, 633 (1992). Finally, Plaintiff claims that tolling should occur under the rule that if the same claim is timely raised in the wrong forum, then tolling can occur. This doctrine is completely inapplicable to the present case. Plaintiff’s administrative appeal, abandoned by Plaintiff after it had been briefed in this Court in 2008, was the proper forum for Plaintiff’s claims relating to eligibility for funding or services, as set forth in n. 1 above. As for any other claims that might have been made in the administrative appeal, there was nothing before the Circuit Court that would indicate precisely what was raised in the administrative appeal, and Plaintiff’s assertions fail for that reason alone. It is, or should be, clear, however, that a party who tries to raise such traditional court claims as tort claims and Section 1983 claims in a state administrative proceeding limited to determinations of eligibility for funding or services

should not be heard to claim that an attempt to raise them in that forum should toll the statute of limitations. As a result, the “wrong forum” exception simply does not apply here.

3 This action was also properly dismissed under Rule 41(b), S C R C P , for failure to prosecute

The Circuit Court also held that the nonservice of the Summons and Complaint within 120 days additionally justified dismissal of the case under SCRC P Rule 41(b). R ___ On appeal, Plaintiff’s counsel argues primarily that she actively participated in the case after the purported Amended Summons and Complaint were filed. However, the Circuit Court’s determination was based on the failure to commence this action promptly and properly. *Id.* These Defendants submit that dismissal for failure to prosecute constitutes an alternative ground for dismissal of this action without prejudice. Federal courts have treated a failure to timely serve under Federal Rule 4(m) as an instance in which dismissal for failure to prosecute is appropriate. *See e.g. Moutsinas v Department of Educ. of the City of New York*, 2005 WL 1711092 (S.D.N.Y. 2005). Plaintiff here contends that more detailed findings should have been made, but the fact of the nonservice for a year is the sole basis of the Circuit Court’s decision, and is clearly set forth.

Accordingly, even if it were to be held that § 15-3-20(B) does not in itself mandate dismissal based on nonservice for more than 120 days after filing, this Court should nevertheless hold that a dismissal for failure to prosecute may properly occur where, as here, there has been a failure to serve an action for a time period nearly three times as long as the 120 day-period set forth in § 15-3-20(B).

4 A Complaint cannot be amended as of right in an action which has not previously been served and which is subject to dismissal for non-service of the Summons and Complaint within one hundred twenty days after filing

In his final issue, Plaintiff argues that Rule 15 does not require the service of an original Complaint in order for a plaintiff to be permitted to amend as of right. The short answer to this is the answer given in the Order below, which is that

As a result of the Plaintiff's failure to accomplish service within 120 days and commence the civil action, there was no suit in existence in which an Amended Complaint could be filed. Therefore, the filing and service of the Plaintiff's Summons and Amended Complaint in May 2008 bearing case action number 07-CP-40-3365 constituted a legal nullity.

R __ (Order at 4) Likewise, and also as held in the Order below,

Because service of the original Summons and Complaint was never attempted, and because service of the second Summons and Amended Complaint were ineffective, this case must be dismissed for insufficiency [sic] of process under Rule 12(b)(4) and insufficiency of service of process under Rule 12(b)(5).

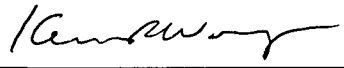
Id. Only one of these Defendants, Stanley Butkus, was named as a defendant in the 2007 Summons and Complaint. He was in no position to move to dismiss that case at any time prior to being served with the purported Amended Complaint in 2008, because he was never served with the 2007 Summons and Complaint (and as far as is shown by the record and known to counsel, he was never actually aware of the existence of the case prior to being served in 2008).

CONCLUSION

For the foregoing reasons, the Respondent respectfully submits that the Order of the Circuit Court dated November 23, 2009, and the subsequent Order denying reconsideration thereof, should be affirmed

Respectfully submitted,

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February 3, 2011

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JAN 26 2011
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE RICHLAND COUNTY
Court of Common Pleas

Joseph M Strickland, Special Circuit Court Judge

Case No 07-CP-40-3365

Edward Mims,

Appellant,

v

Babcock Center, Judy Johnson, the
South Carolina Department of Disabilities
and Special Needs, Kathi Lacy, Stanley Butkus,

Respondents

CERTIFICATE OF SERVICE

I, Patricia L Harrison, do certify that on January 24, 2011, I served all counsel of record as below listed in this action a copy of *Amended Initial Brief of Appellant and Amended Designation of Matter* at the addresses listed below by

() Hand-Delivering it to his office or,

(x) mailing it to him/her at his her last known address by depositing it in the US Mail, in an envelope with sufficient postage affixed, to

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January 24, 2011



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January 24, 2011

The Honorable Tanya Gee
Clerk of Court
SC Court of Appeals
1015 Sumter Street-2nd Floor
Columbia, SC 29201

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JAN 26 2011

SC Court of Appeals

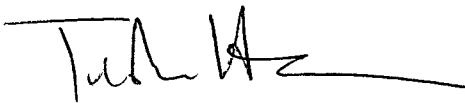
Re Edward Mims v Babcock, Inc , et al
07 CP 40 03365
Court of Appeals Tracking No 2010154146

Dear Ms Gee

Please find for filing Appellant's *Amended Initial Brief* and *Amended Designation of Matter* Also enclosed is a copy to be clocked and a self-addressed, stamped envelope for your convenience in returning our clocked copies

Thank you for your attention to this matter

Sincerely,



Patricia L Harrison

cc Christian Stegmaier, Esquire
Kenneth P Woodington, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE RICHLAND COUNTY
Court of Common Pleas

Joseph M Strickland, Special Circuit Court Judge

Case No 07-CP-40-3365

RECEIVED
JAN 26 2011
SC Court of Appeals

Edward Mims,

Appellant,

v

Babcock Center, Inc, Judy Johnson, the
South Carolina Department of Disabilities and Special Needs,
Kathi Lacy, and Stanley Butkus,

Respondents

AMENDED INITIAL BRIEF OF APPELLANT

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I Introduction

This is an appeal of the dismissal of an action brought by Edward Mims in the Court of Common Pleas in Richland County alleging violation of his rights to be protected from harm while he was involuntarily committed to the care of the South Carolina Department of Disabilities and Special Needs and the Babcock Center and the failure to provide services he was entitled to receive once he was released into the community. Edward asks this Court to reverse the decision of the lower court and to remand his case for trial.

II Statement of Issues on Appeal

- 1 Was the intent of the South Carolina General Assembly in passing South Carolina Code of Laws § 15-3-20 to extend the time for service of a complaint by 120 days past the end of the statute of limitations, or did the General Assembly intend to impose additional, more restrictive requirements for service of process which shorten the statute of limitations?**
- 2 Does statutory or equitable tolling prevent the lower court from dismissing the claim of a person who has profound disabilities when the record includes evidence of reprisal for his guardian making complaints about care in the facility, where the delay resulted from fear of reprisal and an amended complaint was filed and served within the statute of limitations before the case was dismissed by the Clerk of Court?**
- 3 Did the lower court err in dismissing Plaintiff's complaint under SCRCP Rule 41(b) in November 2009 when the record shows that between the filing of the amended complaint in May 2008 and the dismissal of this action, Plaintiff timely responded to every motion, participated in every hearing, filed briefs and motions, was prepared for trial of the case and zealously represented Edward's interest in these proceedings without unreasonable delay?**
- 4 Does SCRCP Rule 15 require Plaintiff to serve the original complaint on the Defendants when an amended complaint was subsequently filed and served on the Defendants before an answer to the original complaint was served?**

III **Statement of the Case**

This case was initiated by the filing of a summons and complaint on May 27, 2007 by Edward Mims, who has severe mental and physical severe disabilities, through his guardian, Margaret Mims R at ____ Original Summons and Complaint dated May 27, 2007 Neither the Babcock Center nor its employees filed an answer to the original complaint, which was not served, but the Defendants were on notice of its contents and obtained a copy On July 5, 2007, Counsel for Babcock Center and its employees wrote to Edward's counsel "We will be defending Babcock Center, Dr Johnson, Ms Bradford, Mr Stoxen and Ms Slater in this action " R at ____ Letter from Christian Steigmaer to counsel for Plaintiff

Plaintiff filed an amended complaint on May 9, 2008, before the expiration of the statute of limitations and before Defendants filed a responsive pleading to the original complaint R at ____ Summons and Amended Complaint The amended summons and complaint was timely served on the Defendants on or about May 12, 2008 R at ____ Certificate of Service of Amended Summons and Complaint

The original complaint alleged that Babcock Center, Judy Johnson, Craig Stoxen, Sue Slater, Tonya Bradford and the South Carolina Department of Health and Human Services were negligent in protecting Edward from mental, physical and sexual injury, including, but not limited to a sexual assault which occurred on May 27, 2005, while Edward was involuntarily committed to the care of the South Carolina Department of Disabilities and Special Needs (DDSN) and placed in a facility operated by the Babcock Center The complaint also alleged that Defendants failed, both before and subsequent to that assault, to provide Edward with necessary services with reasonable promptness as required by the Medicaid Act and that Defendants

violated Edwards' due process rights and that they violated his rights under the South Carolina Bill of Rights of Long Term Care Residents

The amended complaint added Stanley Butkus, Kathi Lacy and the South Carolina Department of Disabilities and Special Needs as Defendants and did not include some of the original Defendants. The amended complaint also alleged that Defendants violated their duty of care to Edward, his rights under the Americans with Disabilities Act and the Rehabilitation Act, and 42 U S C §§ 1983, 1985 and 1988.

Defendants claimed that Edward's amended complaint should be dismissed under SCRCF Rule 12 because the original complaint was not served on the Defendants within 120 days of filing. In their request for reconsideration, after the trial court first denied their motion to dismiss, Defendants argued for the first time that his complaint should be dismissed under SCRCF 41(b) for failure to prosecute.

Defendants filed a motion to dismiss under SCRCF Rule 12 on June 9, 2008. R. at ____ Motion to Dismiss dated June 9, 2008. On September 18, 2008 the circuit court sent a notice of hearing on that motion and scheduled a hearing for October 9, 2008. R. at ____ Notice of hearing dated September 18, 2008. The hearing on Defendants' motion to dismiss was continued, at the request of the Defendants, until March 9, 2009. R. at ____ Transcript of hearing on March 9, 2009. Plaintiff has not filed a motion for a continuance in the circuit court in this case. Other hearings were held in this action in the circuit court on Defendants' motions for continuance and protective orders.

A hearing was held on March 30, 2009 on Defendants' motion to dismiss and the judge denied Defendants' motion to dismiss from the bench. Transcript dated March 30, 2009. A written order denying Defendants' motion to dismiss dated June 3, 2009 was filed on June 4, 2009. R at ____ Order of Judge Strickland dated June 4, 2009.

Defendants filed a Motion to Alter or Amend the judge's denial of their motion to dismiss on April 10, 2009 and filed an answer to the amended complaint on April 17, 2009. R at ____ Motion to Alter or Amend or for Reconsideration dated April 10, 2009 and Answers of Defendants. On September 4, 2009, a second hearing was held before Judge Strickland, the same judge who had issued the order denying Defendants' motion to dismiss. At that hearing Defendants argued that Plaintiff's amended complaint should be dismissed under SCRCF 12(b), South Carolina Code of Laws § 15-3-20 and pursuant to SCRCF Rule 41(b) for failure to prosecute. R at ____

At the rehearing, the Master in Equity, sitting as a Circuit Court judge, granted Defendants' motion to dismiss under SCRCF 12(b) and SCRCF Rule 41(b). R at ____ Order dated November 23, 2009. Plaintiff filed a motion to reconsider the order dismissing Edward's complaint on December 3, 2009. Plaintiff's Motion to Alter or Amend with attachments. Plaintiff's Motion to Alter or Amend was denied by Judge Strickland on February 8, 2010 and was received by Plaintiff's counsel on February 11, 2010. R at ____ Order dated February 8, 2010. The notice of appeal to this Court was timely filed on March 10, 2010. R at ____ This is an appeal of the Order dated November 23, 2009 and the Order denying Plaintiff's Motion to Alter or Amend dated February 11, 2010. R at ____

IV Factual Background

Edward Mims is a 40 year old individual who has profound mental retardation and multiple physical disabilities R at ____ Plaintiff's Rule 59(e) Motion dated December 3, 2009 (Affidavits of Margaret Mims and M Leigh Flynn, Esquire) and Transcript of March 30, 2009 hearing at 8 and 12 In the Order dated June 3, 2009, the judge made the following findings of fact

Due to his obvious mental deficiencies, Plaintiff was unable to respond when asked to speak at the hearing on the Defendant's motion to dismiss It was apparent from his personal appearance in the courtroom and his inability to respond that Plaintiff is unable to protect his legal rights due to mental deficiency

Order dated June 3, 2009 at page 2

Edward's mother voluntarily admitted him to the Babcock Center when she was hospitalized in 1999 R at ____ Plaintiff's Rule 59(e) Motion dated December 3, 2009 (Affidavits of Margaret Mims and M Leigh Flynn, Esq) After his mother was discharged from the hospital, Edward would spend the weekends with her, while continuing to live at Clusters ICF/MR ¹ *Id* While under the care of the Babcock Center at Clusters, Edward suffered many "unexplained injuries " R at ____ *Id* His mother's repeated requests to DDSN and the Babcock Center that Edward return home to her care were denied R at ____ *Id* Mrs Mims reported to the Office of the South Carolina Attorney General that Edward was being abused after the Babcock Center refused to act on her complaints R at ____ *Id* Edward was beaten by an employee of the Babcock Center and this beating was witnessed by other employees, but his mother was not informed about the assault R at ____ *Id*

¹ ICF/MR stands for "Intermediate Care Facility/Mental Retardation " An ICF/MR is a nursing facility that is operated specifically to provide care and supervision for persons who have mental retardation or a related disability It is the most restrictive and expensive placement in the SCDDSN system

After Edward's guardian made these complaints and pursued prosecution of this offense against the Babcock Center employee who had beaten him, SCDDSN officials joined together with Babcock Center employees to accuse Edward's mother of neglecting him R at ____ *Id* The probate court appointed M Leigh Flynn, Esq as his guardian ad litem R at ____ *Id* Affidavit of M Leigh Flynn Ms Flynn met with Babcock Center employees and asked to review Edward's records R at ____ *Id* But information showing that Edward was beaten at Clusters and continued to receive "unexplained" injuries there was withheld from her R at ____ *Id* Ms Flynn was not informed that Edward had been subjected to multiple beatings at Clusters or that one of these beatings had actually been witnessed by other employees R at ____ *Id* The guardian ad litem later learned that there had been systemic abuse and neglect of residents during her representation of other clients who received services from the Babcock Center R at ____ *Id* DDSN and the Babcock Center together secured an order from the probate court involuntarily committing Edward to the custody of DDSN, based on this false and misleading information provided to the guardian ad litem R at ____ *Id* Edward continued to be abused there R at ____ *Id*

Ms Flynn asked the Court to restore Edward's weekend visits home, which had been terminated when these charges of neglect were brought by DDSN and the Babcock Center against his mother R at ____ *Id* However, the Babcock Center continued to ignore his mother's complaints about unexplained injuries and behavior that indicated that he continued to be abused at Clusters R at ____ *Id*

Edward's mother begged DDSN to discharge Edward from Clusters so that she could take care of him at home, but DDSN refused to release him from involuntary commitment R at ____ *Id* After Edward was beaten with the belt at Clusters, he was moved by the Babcock Center to

Kensington ICF/MR R at ____ *Id* Clusters was later closed after CMS (the federal Medicaid agency) and the South Carolina Department of Health and Human Services determined that the Babcock Center had failed to protect residents there from abuse and neglect R at ____ *Id*

The abuse and neglect continued unabated at Kensington after Edward was moved there from Clusters R at ____ *Id* Surveys of Kensington conducted by CMS, the South Carolina Department of Health and Human Services and the South Carolina Department of Health and Human Services documented life-threatening violations of Life and Safety Codes regular occurrences at Kensington *Id* A survey conducted by an independent quality assurance organization hired by DHHS, Carolina Medical Review, determined that Babcock Center ICF/MR facilities were not in compliance with federal Medicaid statutes and regulations R at ____ *Id*

According to Babcock Center records, Edward was found to have ant bites all over his body at Kensington and his bed was infested with ants in July 2004 R at ____ *Id* Edward's roommate choked to death at Kensington in September 2004 R at ____ *Id* CMS (the federal Medicaid agency) investigated his death and determined that staff did not properly prepare food and supervise residents while they ate and that staff was not properly trained R at ____ *Id* CMS determined in that the death of Edward's roommate was not thoroughly investigated by the Babcock Center or DDSN R at ____ *Id* Subsequently, after the Babcock Center failed to correct problems identified DHEC in late 2004 and early 2005, that agency recommended termination of Kensington's certification as a Medicaid provider due to Babcock Center failing to correct these deficiencies R at ____ *Id* HHS sent a notice informing Dr Johnson that Kensington was being decertified for Medicaid *Id*

DHHS required Dr Johnson to provide notice to all families of residents at Kensington informing them that the Babcock Center failed to meet federally mandated Medicaid participation requirements R at ____ *Id* DHHS instructed Dr Johnson to provide DHHS with plans for resident relocations by May 2, 2005 *Id* Dr Johnson sent notices to families of residents informing them that DHEC had determined that Kensington was being decertified *Id* On May 3, 2005, Dr Johnson notified all family members that DHEC determined that the Babcock Center had failed to correct deficiencies at Kensington and that termination of Kensington's Medicaid certification had been recommended R at ____ *Id* Dr Johnson notified families that "We have been directed to begin planning for relocating the residents " *Id* Yet, the Babcock Center and DDSN refused to allow Mrs Mims to remove Edward from Kensington

On May 27, 2005, Edward Mims was found in his room at Kensington to have a 4 cm "gaping laceration" on his penis which was not self-inflicted and required surgical repair R at ____ *Id* When Mrs Mims attempted to remove Edward from Kensington, however, DDSN objected DDSN even attempted to keep Mrs Mims from being appointed as his legal guardian when she turned to the Probate Court for help R at ____ *Id* When the court-appointed visitor arrived at Kensington, Babcock Center staff would not allow this agent of the Court to see Edward R at ____ *Id* The Richland County Probate Court issued an emergency order authorizing Edward's mother to remove him from Kensington, but even then, DDSN continued in its efforts to defeat her attempts to become his guardian R at ____ *Id* DDSN actually filed a report titled "Objections" with the probate court objecting to Mrs Mims being appointed as Edward's guardian R at ____ *Id*

Leigh Flynn, the attorney who had recommended that Edward be involuntary committed based on false information provided to her by the Babcock Center, recommended in 2004 that the

Probate Court appoint Mrs Mims as Edward's guardian and she informed the court that Edward was not safe at Kensington R at ____ *Id* The Probate Court issued an order appointing Mrs Mims as his permanent guardian R at ____ *Id* As a reprisal for Mrs Mims attempting to exercise Edward's right to move from a DDSN funded institution, Defendant Lacy determined that Edward did not qualify for Adult Day Care services and his guardian was required to file an appeal with DHHS to force DDSN to pay for these services R at ____ *Id* Edward's services were terminated for a period of time after someone at the Governor's Office called Because of the history of reprisals, Mrs Mims became fearful of what action Defendants would take if she pursued litigation against the Defendants R at ____ *Id* and Transcript dated September 4, 2009 at 27

Edward's guardian stated in a sworn affidavit that "Like a lot of other parents, I have been fearful of reprisals and have experienced reprisals when I have attempted to enforce the rights of my son, Edward Mims" R at ____ *Id* She stated that "I am always afraid of what Judy Johnson and the officials at the Babcock Center will do to me and to Edward to get back at me for getting Edward out of an abusive situation and reporting them to law enforcement and other regulatory agencies" *Id* R at ____ According to Mrs Mims "Other families and employees have experienced similar reprisals for reporting abuse and have reported these fears to me and to legislators *Id* R at ____

V Arguments

- 1 **Was the intent of the South Carolina General Assembly in passing South Carolina Code of Laws § 15-3-20 to extend the time for service of a complaint by 120 days past the end of the statute of limitations, or did the General Assembly intend to impose additional, more restrictive requirements for service of process which shorten the statute of limitations?**

The clear intent of the South Carolina General Assembly when South Carolina Code § 15-3-20(b) was passed in 2002 was to *extend* the time to serve a complaint by 120 days, not to add an additional requirement to effect service or to reduce the statute of limitations in any way. In *Hooper v Ebenezer*, the South Carolina Supreme Court held that service must be accomplished within 120 days “If the Defendant is ‘not served within the statute of limitations’ ” 377 S C 217, 219, 659 S E 2d 213 (2009). In Edward’s case, he served the Defendants with the amended complaint and a summons within the statute of limitations. The Court found in *Hooper* that Rule 3(a), SCRCP, is consistent with South Carolina Code § 15-3-20(b). Rule 3(a) states

A civil action is commenced when the summons and complaint are filed with the clerk of court if

(1) the summons and complaint are served within the statute of limitations in any manner prescribed by law, or

(2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing

The language of Rule 3(a) is clear on its face that the first paragraph applies when the summons and complaint are filed within the statute of limitations. The second paragraph applies when service occurs after the statute of limitations expires. That rule is clear on its face that either (1) the summons and complaint must be served within the statute of limitations in any manner prescribed by law (including the extended statute of limitations allowed by South Carolina Code of Laws § 15-3-50 where a disability is present), or (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing. The lower court imposed a requirement not contained in the rule or intended by the General Assembly when it required that the summons and complaint be filed within the statute of

limitations and that the summons and complaint be served within 120 days of filing, whether or not the statute of limitations had expired 120 days after filing. The lower court exceeded its authority by placing demands on the Plaintiff which were not imposed or intended by the General Assembly.

In *Roche v. Young Bros. Inc. of Florence*, the South Carolina Supreme Court clearly instructed the lower courts that “exacting compliance with rules of civil procedure is not required to effect service of process.” 318 S.C. 207, 210, 456 S.E.2d 897 (1995). In that case, the Court held that the lower courts should examine instead “whether Plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the Defendant and the Defendant has notice of the proceedings.” *Id.* The purpose of Rule 3(a) and South Carolina Code § 15-3-20(b) is to confer personal jurisdiction on the court and to assure that the Defendant has “reasonable notice of the action.” The service of the amended complaint and summons conferred personal jurisdiction of the court over the Defendants in this case. Indeed, Defendants had notice of the original complaint even sooner, within six weeks of its filing, as is evidenced by the July 5, 2007 letter from counsel for the Defendants. The statute of limitations had not expired in 2007 or 2008, due to the extension provided by South Carolina Code of Laws § 15-3-50, because of Edward’s profound mental retardation. Therefore, the Defendants received notice earlier than was necessary when Plaintiff filed the original complaint in 2007. Thus, Defendants were not prejudiced by the delay in Edward amending his complaint and filing the amended complaint with the summons in 2008.

- 2 **Does statutory or equitable tolling prevent the lower court from dismissing the claim of a person who has profound disabilities when the record includes evidence of reprisal for his guardian making complaints about care in the facility, where the delay resulted from fear of reprisal and an amended complaint was filed and served within the statute of limitations before the case was dismissed by the Clerk of Court?**

The issue of whether a complaint must be served in all circumstances within 120 days of filing was recently addressed by the South Carolina Supreme Court in *Hooper v Ebenezer*, with the Court reversing on the grounds of equitable tolling of the statute of limitations 386 S C 108, 687 S E 2d 29, 31 (2009) In that case, the Supreme Court clearly held that the 120 day rule does not require service within 120 days of filing where the statute of limitations is tolled In *Hooper*, the Court effectively held that the tolling of the statute of limitations also tolls the 120 days the Plaintiff has to serve the complaint

South Carolina Code of Laws § 15-3-20 is titled “General rule as to time for commencement ” As discussed by the Supreme Court in *Hooper*, this “general rule” does not apply when one of the tolling exceptions contained in Chapter 3 of Title 15 applies or when equitable tolling exists *Id* In *Hooper*, as in this case, the Defendants argued that service was not effected unless the complaint was served within 120 days of filing the complaint *Id* The Supreme Court disagreed, clearly holding that where the statute of limitations is tolled, it is not necessary to serve the complaint within 120 days of filing *Id* The Court explained that this is because

‘Tolling’ refers to suspending or stopping the running of a statute of limitations, it is analogous to a clock stopping, then restarting

51 Am Jur 2d *Limitation of Actions* § 169 (2000) According to the *Hooper* decision “Tolling may either temporarily suspend the running of the limitations period or delay the start of the limitations period ” *Id* When tolling exists, the “clock” for serving the complaint stops, until the statute of limitations expires Tolling applies not only to the filing of the complaint, but to the 120 day requirement, which is suspended during the disability

This case is even more clear than *Hooper*, in that the 120 day requirement (as described by Defendants) can not defeat Edward's claim, because the statute of limitations had *not* expired when the Defendants were served with his amended complaint. Just as the bad acts of the Defendants in *Hooper* extended the time for the statute of limitations, both the bad acts of the Defendants and Edward's disability should extend the statute of limitations in this case.

Plaintiff argues that equitable tolling provides a second reason that it is not equitable to dismiss Edward's complaint. In addition to the tolling of the statute for persons under a disability, which applies to Edward, the Supreme Court held in *Hooper* that "the statute of limitations should be tolled '[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits.'" *Id.* Not only should the statute of limitations prevent dismissal of Edward's complaint because of his disabilities, the doctrine of equitable tolling should be applied by this Court to toll the running of the statute of limitations on service, so as to suspend the limitations period. 54 C.J.S. *Limitations of Actions* § 115 (2005) and *Ocana v. Am. Furniture Co.* 135 N.M. 539, 91 P.3d 58, 66 (2004).

The Supreme Court held in *Hooper* that "Equitable tolling is judicially created, it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." Citing *Rodriguez v. Superior Court* 176 Cal. App. 4th 1461, 98 Cal. Rptr. 3d 728 (2009). Tolling should be applied where necessary to "ensure fundamental practicality and fairness." *Hooper* at 32. Defendants acted in bad faith trying to prevent Edward's mother from being appointed as his legal guardian, in an attempt to prevent her from having the authority to exercise his legal rights. Home and community based adult day nursing services were denied by Defendant Lacy. R. at ____ Affidavit of Margaret Mims attached to December 3, 2009. His mother had good reason to be fearful. In the past when she complained and attempted to exercise Edward's rights, he son

was subjected to physical, psychological and sexual atrocities while involuntarily committed to DDSN. For years, Edward and his guardian have suffered reprisals for exercising those rights. The record contains a sworn affidavit signed by Edward's guardian stating that she was fearful of reprisal when the lawsuit was filed. R. at ____ *Id*. In addition to the equities of this case, the amended complaint was filed within the statute of limitations, which is extended by South Carolina Code of Laws § 15-3-50 because of Edward's disabilities and therefore the Defendants have not been prejudiced thereby.

The equitable power of this Court is not bound by cast-iron rules but it exists "to do fairness." *Hooper* at 33. This Court should exercise its power so that "relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." *Hausman v. Hausman*, 199 S.W.3d 38, 42 (Tex. App. 2006). The record is clear that Edward has suffered a "gross wrong" at the hands of Defendants. Finally, public policy and the interests of justice weigh heavily in favor of allowing Edward's claim to proceed on the merits.

3. **Did the lower court err in dismissing Plaintiff's complaint under SCRCP Rule 41(b) in November 2009 when the record shows that between the filing of the amended complaint in May 2008 and the dismissal of this action, Plaintiff timely responded to every motion, participated in every hearing, filed briefs and motions, was prepared for trial of the case and zealously represented Edward's interest in these proceedings without unreasonable delay?**

The lower court order dismissing Edward's lawsuit states that the circuit judge relies upon Rule 41(b), which allows the court to dismiss an action for failure to prosecute. That rule, however, requires the court to state findings of fact and conclusions of law sufficient to allow a

reviewing court to ensure that the law “has been faithfully executed ” *Clegg v Lambrecht* ____ S C ____, 678 S C 2d 260, 261 In considering a motion under Rule 41(b), the court must consider (1) the Plaintiff’s degree of personal responsibility, (2) the amount of prejudice caused the Defendant, (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion and (4) the effectiveness of sanctions less drastic The lower court’s order contains no findings of fact necessary to show that these factors were considered Delays in this case, after Edward’s amended complaint was filed and served within the statute of limitations, were caused largely by the games Defendants have played in this case and their requests for continuance in the Circuit Court

There is simply no evidence of intentional delay in prosecuting this lawsuit on the part of the Plaintiff The sanction of dismissal is drastic and it is not justified by the facts of this case Not only were these grounds not set forth in the Defendants’ original motion to dismiss, the order does not contain the factual findings and the requirements to support a finding for dismissal under Rule 41(b)

4 **Does SCRPC Rule 15 require Plaintiff to serve the original complaint on the Defendants when an amended complaint was subsequently filed and served on the Defendants before an answer to the original complaint was served?**

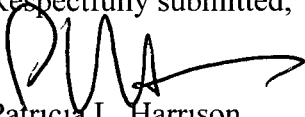
The South Carolina Rules of Civil Procedure allow a party to amend his pleadings once as a matter of course at any time before a responsive pleading is served SCRPC Rule 15(a) Within the statute of limitations, Plaintiff exercised that right Leave of court is not required

when a complaint is amended before an answer is served by the Defendants *Id* Defendants fail to cite any law, regulation or rule which would require the service of an original complaint once that complaint has been amended The purpose of serving a summons and complaint is to confer jurisdiction on the court and to provide the Defendants with notice of the action No purpose is served by serving Defendants with a complaint that has been amended In any event, the record shows that Defendants were on notice that the original complaint had been filed R at ____
Letter from Christian Steigmaer to counsel for Plaintiff

VI Conclusion

For the reasons set forth herein, Plaintiff respectfully asks this court to reverse the decision of the lower court and to remand this case for trial

Respectfully submitted,



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Attorney for Plaintiff

January 24, 2011

Columbia, South Carolina

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE RICHLAND COUNTY
Court of Common Pleas

Joseph M Strickland, Special Circuit Court Judge

Case No 07-CP-40-3365

Edward Mims,

Appellant,

v

Babcock Center, Inc , Judy Johnson, SCDDSN,
Kathi Lacy, Stanley Butkus,

Respondents

Amended Designation of Matter to be Included in the Record on Appeal

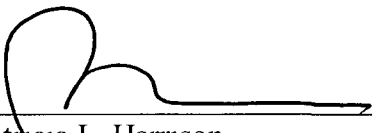
Appellant proposes the following be included in the Record on Appeal

- 1 Summons and Complaint filed May 27, 2007
- 2 Letter from Christian Stegmaier dated July 5, 2007
- 3 Amended Summons and Complaint filed May 9, 2008
- 4 Certificate of Service of Amended Summons and Amended Complaint
- 5 Defendants' Answer to Amended Complaint
- 6 Defendants' Motion to Dismiss filed June 9, 2008
- 7 September 18, 2008 Notice of Hearing
- 8 Transcript of Hearing dated March 30, 2009
- 9 Circuit Court Order dated March 30, 2009 denying Defendants' Motion to Dismiss
- 10 Motion to Alter or Amend or for Reconsideration dated April 10, 2009

- 11 Transcript of Hearing dated September 4, 2009 before Judge Strickland
- 12 Circuit Court Order dated November 23, 2009 granting Defendants' Motion to Dismiss
- 13 Plaintiff's Motion to Reconsider dated December 3, 2009 with attachments
- 14 Order denying Plaintiff's Motion to Reconsider dated February 8, 2010
- 15 Notice of Appeal to the SC Court of Appeals filed on March 10, 2010
- 16 Affidavit of Margaret Mims dated March 6, 2009 with Exhibits

I certify that this designation contains no matter which is irrelevant to this appeal

January 24, 2011



Patricia L. Harrison
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The South Carolina Court of Appeals

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January 4, 2011

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Re Mims, Edward v Babcock Center
2010154146

Dear Counsel

Enclosed is a copy of an Order of the Court regarding respondent Babcock Center, Inc 's letter and Motion in the above case Please be advised that the Appellant must serve and file an Amended Initial Brief and Designation of Matter within twenty (20) days of the date of this order Thereafter, Respondent Babcock Center, Inc shall serve and file its Initial Brief and Designation of Matter within thirty (30) days of the service and filing of the Amended Appellant's Initial Brief and f Designation of Matter

Very truly yours,

V. Claire Allen, Deputy

CLERK

TAG/mpm
cc Kenneth P Woodington, Esquire

The South Carolina Court of Appeals

Edward Mims, by and through his legal
guardian, Margaret Mims, Appellant,

v

Babcock Center, Inc , Judy Johnson,
the South Carolina Department of
Disabilities and Special Needs, Kathi
Lacy and Stanley Butkus, Respondents

The Honorable Joseph M Strickland
Richland County
Trial Court Case No 2007-CP-40-03365

ORDER

Respondents Babcock Center, Inc and Judy Johnson (Babcock Respondents) request clarification of this Court's order of November 16, 2010, which granted their "Motion to Strike & Hold Deadlines in Abeyance " Specifically, Babcock Respondents ask whether Appellant is required to file an Amended Initial Brief and Amended Designation of Matter omitting references to the items stricken from the Record on Appeal, as requested in Babcock Respondents' motion Because this Court granted Babcock Respondents' motion in its entirety, Appellant is required to file an Amended Initial Brief and Designation of Matter, which omit all references to items this Court struck from the Record on Appeal, within twenty days Babcock Respondents shall file their Initial Brief and Designation of Matter within thirty days after service of Appellant's amended filings Furthermore, the remaining Respondents may file any

Amended Initial Brief and Designation of Matter within thirty days after Appellant serves his
amended filings

IT IS SO ORDERED

Joseph M. Cantu by
/s/ Brian W. Allen

Columbia, South Carolina

cc Patricia Logan Harrison, Esquire
Christian Stegmaier, Esquire
Joel W Collins, Jr, Esquire
Amy L Neuschafer, Esquire
Kenneth P Woodington, Esquire

FILED
11/4/11