THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2007-CP-40-3365
Appellate Case No. 2014-001373

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 Stan Butkus ..... Respondents

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

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COUNTERSTATEMENT OF FACTS

The instant action was commenced with the service of the Summons and Amended Complaint on May 12, 2008. The Amended Complaint alleged Appellant Edward Mims (who died on March 7, 2015) ha[d] mental retardation, among other disabilities. {R._, Amended Complaint, Par. 1} This action was brought on his behalf by his mother, Margaret Mims, who was his legal guardian. The named defendants were Babcock Center, Inc., Judy Johnson (Babcock Center's executive director), the South Carolina Department of Disabilities and Special Needs (DDSN), Stanley Butkus (former DDSN director), and Kathi Lacy (a DDSN official during the relevant timeframe).

Appellant Edward Mims alleged several matters for which damages were sought. Those claims included:

1. Alleged violations of 42 U.S.C. § 1983 (First Cause of Action)
2. Federal civil rights conspiracy claims under 42 U.S.C. § 1985 (Second Cause of Action)
3. Negligent supervision under state law (Third Cause of Action)
4. Alleged violation of the Americans with Disabilities Act (ADA) and the Rehabilitation Act (Fourth Cause of Action)
5. Unjust enrichment (Fifth Cause of Action)

The matters not abandoned on appeal include: (a) several alleged physical injuries between 2000 and 2005, during which time Plaintiff was a resident at Babcock Center facilities;[1] and (b) certain largely-unspecified claims under the ADA about alleged denial(s) of services.[2]

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[1] {R. __ Amended Complaint, pp. 4-8}. Plaintiff alleges that several different personal injuries occurred between 1999 and 2005, during which time he was a resident at Babcock Center facilities. {R. __ Amended Complaint, pp. 4-8.} All but one of the alleged injuries occurred more than three years prior to the service of the Amended Complaint in May 2008.

Plaintiff resided at home with his mother until 1999, when his mother became ill. R. _ [Mims 2075] At that time, he was placed in a Babcock Center facility. Id. In 2001, Plaintiff's mother was desirous of having him return to her home. {R. _ [2001 Order]} The Department of Disabilities and Special Needs then filed a petition for judicial admission to the services of DDSN. {R. _} This petition was filed pursuant to S.C. Code Ann. §§ 44-20-450 and -460(B), the latter of which provides for such judicial admissions to DDSN when "the condition of the person is considered by the director or his designee to be such that he cannot be discharged with safety to himself or with safety to the general public ...." A psychologist recommended that a placement such as his then-existing one should be continued. {R. _ [5/10/01 letter]}

The Probate Court conducted a hearing on June 26, 2001. [2001 Order]. Plaintiff was present at the hearing, as were his mother and her attorney, Plaintiff's attorney, and Ms. Leigh Flynn, a court-appointed guardian ad litem. Id.

The last-referenced injury was a tear of unknown origin 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 Amended Complaint. This incident, as far as can be told, occurred while Plaintiff was by himself at a Babcock Center facility for a moment while his caregiver went to get clothing for him prior to his going home for the weekend. The record reveals the tear lengthened somewhat as it was examined by a nurse, and lengthened still further upon examination by a doctor. Eventually, it was four centimeters long and required seven stitches. The clinicians at the hospital did not believe that the injury was the result of abuse or neglect. As a result, they permitted Plaintiff to return to Babcock Center that same evening. 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. The injury apparently healed quickly and without incident.

[2] Plaintiff also made reference in the Circuit Court to a delay of several hours in permitting Plaintiff to go home as scheduled for a weekend visit on June 10, 2005; however, that claim was held unmeritorious by the Circuit Court and has been abandoned by Plaintiff on appeal.

By agreement of all parties, including counsel for Plaintiff, counsel for his mother, and the guardian ad litem, the Probate Court issued a Consent Order, which concluded that the parties had agreed that Plaintiff's mother "will be unable to care for her son in her home." Id.

The Consent Order accordingly judicially admitted Plaintiff to DDSN, but permitted weekend visitations in his mother's home as long as her home was maintained in a safe condition. Id.[3] Four years later, a different showing was made, and pursuant to another Probate Court order, Plaintiff went home to live with his mother. {R. _}

The incidents of alleged physical injury that form the basis for this appeal were limited by the Circuit Court to the three specific incidents discussed in Plaintiff's June 28, 2013 response to Defendants' motion for summary judgment. {R. _ [Order at 8-9]}[4] Those three incidents were as follows:

> 1. A purported occasion on August 13, 2000, when Plaintiff was residing at Babcock's Clusters facility and was beaten by Carl Anthony, an employee of Babcock Center. R. _, Pl. Mem. 5-6.
>
> 2. An alleged occasion on July 27, 2004, when Plaintiff was residing at Babcock's Kensington facility and was found to have a number of ant bites. {R. _, Pl. Mem. 6.}
>
> 3. An alleged occasion on May 27, 2005, when Plaintiff was residing at the Kensington facility and was found with an unexplained penis injury, which the treating physician at Lexington Medical Center described as "superficial," and

[3] In the Circuit Court and on appeal, Plaintiff asserts that this Consent Order was obtained through "false information," but that argument is based on disavowed portions of affidavits signed by the GAL and Ms. Mims years later.

[4] Plaintiff also made passing reference in opposing summary judgment to the statement of facts set forth in a May 29, 2013 memorandum filed by Plaintiff in support of his own motion for summary judgment. {R. _[Pl. Mem. at 1.} The court below declined to consider that memorandum, however, because it did not pertain to any of the legal contentions and standards by Defendants in support of their motions for summary judgment. {R. _[Order at 8 n.3]}

which he did not regard as indicative of abuse or neglect. {R. _ [Mims 1555]; R. _[Pl. Mem. 7.]}

On appeal, Plaintiff has not challenged the Circuit Court's decision to limit its examination of this case to those three purported incidents. As a result, only those three incidents are before this Court for appellate review. See, e.g., Gamble v. Inti. Paper Realty Corp. of S. Carolina, 323 S.C. 367, 474 S.E.2d 438 (1996) (citing Rule 207(b)(l)(B), SCACR ("[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal"); see also Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

COUNTERSTATEMENT OF THE CASE

This appeal is from an Order dismissing Plaintiff's claims for damages and injunctive relief against Respondents Babcock Center, Inc., Judy Johnson.[5]

This action was commenced with the service of the Summons and Amended Complaint on May 12, 2008.[6] Appellant Edward Mims (who died on March 7, 2015) was an adult who had mental retardation, among other disabilities. {R._ [Amended Complaint, Par. 1.} Appellant's death was presumably unrelated to the alleged injuries involved in this case; these alleged injuries occurred ten or more years ago. The instant case was brought on his behalf by his mother, Margaret Mims, who was appointed his legal guardian in June 2005.

The events alleged in the Amended Complaint occurred between 2000 and 2005, when Mims resided in facilities owned by the Babcock Center. Plaintiff alleges damage from several alleged incidents of purported physical injury occurring between 2000 and 2005. Only one of these incidents occurred less than three years before the Amended Complaint was filed on May 7, 2008.

On appeal, Plaintiff has abandoned two of the original five causes of action in the Amended Complaint.[7] The remaining three claims as follows:

1. Alleged violations of 42 U.S.C. § 1983 (First Cause of Action)[8]

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[5] In a separate order, the Circuit Court also granted summary judgment to the other defendants, Department of Disabilities and Special Needs, Stanley Butkus, and Kathi Lacy.

[6] An original Complaint had been filed in May 2007, but it was never served. The defendants named in that Complaint included some, but not all, of the present Respondents.

[7] The claims abandoned on appeal were the Second and Fifth Causes of Action in the Amended Complaint. Br. of Appellant 2, n. 1. These were claims for conspiracy under 42 U.S.C. § 1985 and for unjust enrichment, respectively.

[8] This claim also mentions 42 U.S.C. § 1988, the federal civil rights attorneys' fee statute; however, that statute is not implicated unless a plaintiff prevails on the

2. Negligent supervision under state law (Third Cause of Action)

3. Alleged violation of the Americans with Disabilities Act and the Rehabilitation Act (Fourth Cause of Action)

As previously noted, the original Summons and Complaint in this action were filed on May 29, 2007. However, the original 2007 Complaint was never served. On May 7, 2008, Plaintiff filed a second Summons and an Amended Complaint, dropping some parties and adding others.

The case was originally dismissed by the Circuit Court on grounds pertaining to untimely service; however, in a split decision, the Supreme Court reversed the Circuit Court and remanded the case for consideration of the merits. Mims ex rel. Mims v. Babcock Center, Inc., 399 S.C. 341, 732 S.E.2d 395 (2012).

Following remand and discovery, the Babcock Defendants moved for summary judgment in this action on a number of grounds, as set forth herein. {R. _} On April 23, 2013, the DDSN Defendants also moved for summary judgment. {R. __}

On May 8, 2013, following a status conference with the chief administrative judge in the Fifth Circuit that same day, the Circuit Court issued a notice setting the date of June 4, 2013, for the hearing of the summary judgment motions filed by both sets of defendants. {R. _}

Several weeks later, on May 24, 2013, counsel for both sets of defendants received from Plaintiff's counsel a motion for summary judgment, accompanied by a mountainous stack of exhibits totaling almost 2,300 pages. That date was the Friday before the Memorial Day weekend, and Defendants would have had only five business days to respond to Plaintiff's voluminous motion if that motion had been scheduled for hearing on June 4, 2013, the same day that Defendants' motions were scheduled to be heard. On the next business day, May 28, counsel

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substantive federal claim, which did not occur here.

for the DDSN Defendants sent a letter to the chief administrative judge by e-mail and U.S. Mail, with a copy to Plaintiff's counsel, requesting confirmation that Plaintiff's motion was not scheduled to be heard on June 4. {R. _} By e-mail of the following day, Judge Manning's law clerk confirmed that only the motions already scheduled for June 4 (that is, the Defendants' motions) would be heard then, and that Plaintiffs summary judgment motion would be heard at a later date, if necessary. {R. _.} Plaintiff complains that his cross motion for summary judgment was not heard at the same time as Defendants' motions, Br. of Appellant at 3-4, but does not point out that Plaintiffs motion was filed at the eleventh hour, and after Defendants' motions had been on the Circuit Court's calendar for almost a month.

Defendants' motions were heard by the Circuit Court on June 4, 2013, as scheduled. At the conclusion of argument, the presiding judge directed both sides to submit proposed orders on the Defendants' motions for summary judgment. {R. _(transcript) and _ (Form 4 order)}.

By orders entered on January 22, 2014, the Circuit Court granted summary judgment for both sets of defendants. {R. _.} Plaintiff filed motions to reconsider on or about February 4, 2014. Those motions were opposed by defendants and were denied by the Circuit Court filed on June 3, 2014. This appeal follows.[9]

[9] Respondent notes that review of Appellant's Notice of Appeal reveals that Appellant technically only appealed the Circuit Court's order denying Appellant's motion for reconsideration. Appellant did not appeal the Circuit Court's January 22, 2014 orders granting of summary judgment. {R. ___} To the extent Appellant's failure to appeal the orders granting summary judgment proves fatal to the instant appeal or otherwise alters this Court's analysis of the Circuit Court's determinations in the case at bar, Respondent craves reference to the same.

I. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

"When a motion for summary judgment is made, an adverse party may not rest upon the mere allegations or denials of his pleadings, but must set forth specific facts showing there is a genuine issue of material fact for trial." Charping v. J.P. Scurry & Co., Inc., 296 S.C. 312, 316, 372 S.E.2d 120, 122 (Ct. App. 1988). In resolving a motion for summary judgment, the court must consider all the evidence properly before it. Saluda Motor Lines v. Crouch, 300 S.C. 43, 45, 386 S.E.2d 290, 292 (Ct. App.1989). The court's ruling must rest on the entire record and not on isolated fragments of testimony or evidence. Id. The existence of some factual dispute is not enough to deny summary judgment; the disputed facts must be material. Id.

While the evidence must be viewed in the light most favorable to the nonmoving party, a party opposing summary judgment is not entitled to every **conceivable** inference from the facts, but only every **reasonable** inference. See Main v. Corley, 281 S.C. 525, 526–27, 316 S.E.2d 406, 407 (1984); Trotter v. First Federal Savings and Loan Ass'n., 298 S.C. 85, 86, 378 S.E.2d 267, 268 (Ct. App. 1989). "In reviewing a grant of summary judgment, our appellate court[s] [apply] the same standard as the trial court under Rule 56(c), SCRCP." Woodson v. DLI Properties, LLC, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014).

Finally, the Babcock Defendants note that argument of counsel is not a substitute for evidence. Brown v. Johnson, 276 S.C. 68, 72, 275 S.E.2d 876, 878 (1981); see also Rule 56(c),

SCRCP, quoted in Trivelas v. S.C. Dep't of Transp., 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001) ("The judgment sought shall be rendered forthwith if **the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits**, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.") (emphasis added).

II. INITIAL RESPONSE TO PLAINTIFF'S ARGUMENTS TO THE CIRCUIT COURT AND THIS COURT.

Appellant attempted to survive summary judgment and seeks to attempt reversal in this Court via the use of a voluminous document dump and the injection of numerous unfocused arguments citing alleged events and materials that are not relevant or germane (or admissible) to the instant case. In response, and as an overarching and running response to Appellant's arguments, the Babcock Defendants assert the following:

(1) A brief in opposition to summary judgment must make all arguments patently accessible and clear to the reviewing court, rather than asking the judges to play archaeologist with the record;[10]

(2) Filing a large evidentiary record, making conclusory and opinion-laden references to exhibits in that record, and expecting the Court "to scour those exhibits with the faint hope of stumbling across a disputed issue of fact" is simply insufficient to comply with our rules governing the defense of a summary judgment motion;[11]

(3) Only materials that were properly introduced to the Circuit Court should be considered on appeal;

(4) Asserted "facts" not supported by deposition testimony, documents, affidavits or other evidence admissible for summary judgment purposes should not be considered by this Court;[12] and

(5) Any issue not expressly raised to and ruled upon by the trial court should not be considered by this Court.

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[10] See Marable v. Marion Military Inst., 906 F. Supp. 2d 1237, 1251 (S.D. Ala. 2012) aff'd, 595 F. App'x 921 (11th Cir. 2014) (quoting DeSilva v. DiLeonardi, 181 F.3d 865, 867 (7th Cir.1999).

[11] See id. (citation omitted).

[12] See Thomas v. Lake Cnty. Jail, 2010 WL 148621, at *1 (N.D. Ill. Jan. 12, 2010).

III. THE CIRCUIT COURT DID NOT ERR IN DETERMINING THE MAJORITY OF PLAINTIFF'S CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS.

A. No tolling of the statutes of limitations could have occurred until Plaintiff was adjudicated to be incapacitated in June 2005.

Plaintiff has sought to rely on the tolling provisions of S.C. Code Ann. § 15-3-40(2), which provides a provision to toll the statute of limitations for individuals who are found "insane." Here, Plaintiff was not "insane." Although Plaintiff was profoundly mentally retarded, it is clear that he was not adjudicated to be incapacitated until the June 14, 2005 Probate Court Order.

The Circuit Court held S. C. Code Ann. § 44-26-90 provides a mentally retarded person has all the rights of citizenship unless and until the person is adjudicated to be incompetent and that Plaintiff was not so adjudicated until June 2005. R. _[Order at 25-26] Plaintiff argues that this issue was decided unfavorably to Defendants' position in Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 638 S.E.2d 650 (2006). However, the holding of that case was that the action had been filed within two years of the events in question, so there was no issue of tolling to be decided in that case. Plaintiff also cites Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994), which discussed the general rule as to the standard for insanity under tolling statutes, but did not find the plaintiff "insane," and therefore did not address section 44-26-90's requirement that there be an adjudication of incompetence. Finally, Plaintiff cites language in Harrison v. Bevilacqua, 354 S.C. 129, 580 S.E.2d 109 (2003), but that case also did not involve section 44-26-90. Plaintiff also erroneously contends that he was adjudicated to be incapacitated in 2001 in the Consent Order issued by the Probate Court in that year. Br. of Appellant at 4. However, while the 2001 Consent Order made reference to his mental retardation, it did not make an adjudication of incapacity, as section 44-26-90 expressly requires. The June 2005 Probate Court

Order, on the other hand, does contain the requisite finding, specifically holding that "Edward Mims is incapacitated... ," and appointing a guardian for him for the first time. R. _.

However, all of the allegations contained in Plaintiff's Amended Complaint relate to incidents that occurred between 1999 until May 2005. Therefore, it is clear that all of the causes of actions alleged by the Plaintiff accrued prior to the adjudication of his incompetence. See Stephens v. Draffin, 327 S.C. 1, 5, 488 S.E.2d 307, 309 (1997) ("A cause of action accrues at the moment when the plaintiff has a legal right to sue on it."). Because the Plaintiff had not been adjudicated incompetent at the time that the allegations contained within his Amended Complaint arose, he was not entitled to the tolling provision of section 15-3-40(2), and the applicable statutes of limitations bar all of the Plaintiff's claims other than the single claim brought pursuant to 42 U.S.C. § 1983 claim involving the unexplained injury discovered on May 27, 2005.

B. Alternatively, the appointment of a guardian in June 2005 ended any tolling that occurred under section 15-3-40(2).

Even if tolling is permitted, section 15-3-40(2) expressly provides that the tolling period "cannot be extended . . . (b) in any case longer than one year after the disability ceases." This action was filed by and through Margaret Mims, "who is the natural parent and the duly appointed guardian for Edward Mims." Amended Complaint, Par. 2. The power to sue is conferred on guardians such as Mrs. Mims by Rule 17(c), SCRCP.

No South Carolina case has decided the issue of whether the appointment of a guardian terminates the disability period under provisions of statute similar to section 15-3-40(2). Cases from other jurisdictions have reached conflicting results on this issue. See Annot., 111 A.L.R.5th 159 (2003). However, the Babcock Defendants submit that the better rule - and the one that should be adopted under the facts of this case - is that the statute of limitations is tolled only until the appointment of a capable guardian. As was held in Stewart v. Robinson, 115 F.Supp.2d 188,

195 (D.N.H. 2000), such a rule "gives effect to society's compelling interest in effectively protecting the rights of those who are disabled . . ., while also serving the important interests underlying statutes of limitations." The same case further holds that this rule serves several interests:

> (1) it protects a ward's legal rights for an additional two years [one year in South Carolina] after a guardian acquires the legal ability to vindicate those rights; (2) it encourages guardians to act in a timely manner to preserve and prosecute claims of the ward, gather relevant evidence, and identify potential defendants; . . . and (3) it protects defendants from potentially timeless liability.

115 Supp. 2d at 197.

This rule is clearly the better rule, because it prevents undue lengthening of the limitations period, while protecting the incapacitated plaintiff. This rule therefore not only protects potential defendants, it also protects potential plaintiffs against the loss of relevant evidence as a result of the passage of time. Accord, e.g., Hernandez v. New York City Health and Hospitals Corp., 78 N.Y.2d 687, 694, 585 N.E.2d 822, 826 (1991) (statute of limitations "tolled only until appointment of a guardian"); Fox v. Health Force, Inc., 143 N.C. App. 501, 507, 547 S.E.2d 83, 87 (N.C. App. 2001) (limitation period began to run from the time of appointment of a guardian). It is also noteworthy that in this case, Mrs. Mims was aware of all of the alleged claims of injury at the times they occurred. In addition, Mrs. Mims was represented by counsel (who is still her counsel at present) at least as long ago as June 2005, the time when Mrs. Mims was appointed guardian.

As applied to the facts of the present case, the appointment of the guardian in June 2005 extended the statute of limitations by one year for all of the older claims. S.C. Code Ann. § 15-3-40(b). In other words, for any claim for which the statute would otherwise already have run as of June 2005, Mrs. Mims had until June 2006 to bring suit upon such claims. She did not, however,

file a lawsuit between June 2005 and June 2006. For any claim for which the statute had not run as of the time of her appointment as guardian in June 2005, she could bring suit on such claims within the time remaining on the statute for such claims, or within one year of her appointment, whichever was longer. This does not add any viable claims to this case in addition to the ones from May and June 2005 discussed above. The next most recent claim is an ant bite incident alleged to have occurred in July 2004. The appointment of a guardian did not extend the time for filing suit on this 2004 claim as far out as May 2008, the time when the present action was served. Absent tolling, the state law action on this claim could have been filed as late as July 2006 (two years after July 2004), while the federal law action on this claim could have been filed as late as July 2007 (three years after July 2004). However, both of these dates were more than a year after Mrs. Mims' appointment as guardian in June 2005, so the tolling statute did not add any time to that which already existed.

C. Plaintiff's amended complaint does not relate back to the filing of the original complaint.

The Circuit Court properly determined the statute of limitations could not have begun to accrue when Plaintiff first filed the amended complaint on May 7, 2008 because Plaintiff did not serve the original 2007 summons and complaint. (Or. 18-19). See S.C. Code Ann. § 15-3-20(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."). On appeal, Plaintiff claims the "amended complaint relates back to the filing of the amended complaint" under Rule 15(c), SCRCP. (App. Br. 12). The only authority cited for this argument is Thomas v. Grayson, 318 S.C. 82, 456 S.E.2d 377 (1995). However, in Thomas, the original complaint had been duly served and answered prior to service of the Amended Complaint, and thus, it was irrelevant to the issue of whether an unserved complaint commences an action for

purposes of the statute. Section 15-3-20(B) makes it clear that an action is commenced only by filing plus service of the Summons and Complaint. Here, Plaintiff filed the summons and amended complaint on May 7, 2008 and served it on May 12, 2008. Thus, May 7, 2008 will be considered the date on which this action was commenced for purposes of the statute of limitations.

D. Plaintiff failed to preserve the issue of whether equitable tolling applies.

Plaintiff asserts a claim of equitable tolling with respect to the statute of limitations. Under well-settled principles, a contention never asserted to the trial court cannot be made for the first time on appeal. See, e.g., Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 117, 410 S.E.2d 537, 546 (1991). This principle has been specifically applied to bar an untimely equitable tolling claim. *Kelly v. Logan, Jolley, & Smith, L.L.P.*, 383 S.C. 626, 637 n.3, 682 S.E.2d 1, 7 n.3 (Ct. App. 2009) (finding equitable tolling argument not preserved for review where Plaintiff did not specifically make an equitable tolling or fraudulent concealment argument to the lower court).

Even if the merits of this belated claim were to be reviewed, it is clearly without merit. Plaintiff asserts only a vague claim of fear of retaliation if the guardian were to file a lawsuit. However, it has been held that

> To establish duress sufficient to toll the running of the limitation periods and defeat Defendants' motion for summary judgment, Plaintiff must do more than simply allege a subjective fear that retaliation might occur. Instead, Plaintiff must show some act or threat by the Defendants that precluded the exercise of her free will and judgment, and prevented her from exercising her legal rights.

Moses v. Phelps Dodge Corp., 818 F. Supp. 1287, 1289 (D. Ariz. 1993). No such showing

has been made in this case, but even if such a showing had been made, the argument is being presented to this Court for the first time on appeal and should be disregarded.

IV. THE CIRCUIT COURT DID NOT ERR IN FAILING TO CONSIDER EVENTS AND FACTS AS REQUIRED BY MADISON EX REL. BRYANT V. BABCOCK CENTER, INC., 371 S.C. 123, 638 S.E.2D 650 (2006).

Plaintiff argues the Circuit Court erred in failing to consider facts and events which occurred before the statute of limitations began to accrue. In Madison, DDSN argued only events occurring within the two years preceding the service of the complaint could be considered; otherwise the events would be time-barred by Tort Claims Act. 371 S.C. at 148-49, 638 S.E.2d at 663. There, the plaintiff was admitted to Babcock Center in 1994 and alleged she was sexually assaulted in August 1995. Id. The plaintiff filed her complaint in August 1997. Id. The supreme court concluded the allegations relating to DDSN's negligence in connection with the plaintiff's initial evaluation and admission were not time-barred. Id. at 664.

On appeal, Plaintiff fails to explain what events involving Johnson or the Babcock Center, which allegedly occurred before the statute of limitations began to run, that the Circuit Court failed to consider. (App. Br. 24). See Charping, 296 S.C. at 312, 372 S.E.2d at 122 ("When a motion for summary judgment is made, an adverse party may not rest upon the mere allegations or denials of his pleadings, but must set forth specific facts showing there is a genuine issue of material fact for trial."); Woodson, 406 S.C. at 528, 753 S.E.2d at 434 (providing appellate courts should apply the same standard as the trial court under Rule 56(c) in reviewing a grant of summary judgment). Plaintiff also fails to show how these unnamed events connected to her claims. (App. Br. 24). Further, unlike Madison where the plaintiff filed her complaint within the statute of limitations, the majority of Plaintiff's claims are barred by the statute of limitations. Accordingly, the Circuit Court did not err in failing to consider any earlier events.

V. THE CIRCUIT COURT PROPERLY DISMISSED PLAINTIFF'S SECTION 1983 CLAIMS BECAUSE PLAINTIFF NEITHER PLED NOR PROVED FACTS THAT WOULD ESTABLISH LIABILITY OF SUPERVISORY PERSONNEL UNDER SECTION 1983.

A. The Circuit Court properly found Plaintiff failed to state a claim against Johnson in her official capacity.

A review of the pleadings revealed it was unclear whether Plaintiff has intended to state a section 1983 claim, including a damages claim, against Johnson in her official capacity. If so, such claims are barred by Will v. Michigan State Police, 491 U.S. 58, 71 (1989) (providing a "suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself" (citation omitted)). In her response to the Babcock Defendant's motion for summary judgment, Plaintiff maintained it was her intention to pursue Johnson in her individual capacity on this ground. (Or. 7). Accordingly, the circuit court properly found Plaintiff failed to state a claim against Johnson in her official capacity.

B. The three-year statute of limitations bars Plaintiff's section 1983 claims against Johnson.

For causes of action based on 42 U.S.C. § 1983 and/or 42 U.S.C. § 1985, a three-year statute of limitations applies. See, e.g., Hoffman v. Tuten, 446 F.Supp.2d 455 (D.S.C. 2006) (three-year statute of limitations applies to claims brought in South Carolina under 42 U.S.C. § 1983); Harris v. Sumter County Sheriff's Dept., 2001 WL 34685102, *3 (D.S.C. 2001) (same for claims brought in South Carolina under 42 U.S.C. § 1985).

Plaintiff alleged a claim against Johnson under section 1983 for her alleged failure to monitor Plaintiff's condition and treatment needs. (Or. 5). However, the three-year statute of limitations bars any such claims against Johnson arising before May 7, 2005, given that Plaintiff

did not file the summons and amended complaint until May 7, 2008. Thus, the Circuit Court properly found the three-year statute of limitations barred all of Plaintiff's allegation, except for the May 27, 2005 penis injury and the alleged "refus[al] to allow Plaintiff's mother to remove him from the facility" on June 10, 2005." (Or. 8).

C. Regardless of whether the section 1983 claims were time-barred, Plaintiff failed to allege the necessary elements of a section 1983 supervisory liability claim.

The circuit court found the only events alleged in the Amended Complaint that were not barred by the three-year statute are the small laceration of unknown origin that occurred on May 27, 2005 and perhaps the alleged "refus[al] to allow Plaintiff's mother to remove him from the facility" on June 10, 2005. (Amended Complaint, Paragraphs 39 and 47). Neither has merit because Plaintiff failed to allege the necessary elements of a section 1983 supervisory liability claim.

Plaintiff does not suggest that Johnson actually inflicted the penis injury and did not show any other personal involvement of Johnson in that alleged incident. Johnson holds an administrative position at Babcock Center. She is not personally involved with the care of any consumers in Babcock Center facilities.

In Monell v. Department of Social Services, 436 U.S. 658 (1978), the United States Supreme Court held that a claim based on the doctrine of respondeat superior does not give rise to a claim under 42 U.S.C. § 1983. In other words, it is clear that the personal participation of a defendant is a necessary element of a § 1983 claim against a government official in his individual capacity. Davis v. D.S.S. of Baltimore Cty., 941 F.2d 1206 (4th Cir. 1991) (unpublished opinion) (citations omitted); see also Trulock v. Freeh, 275 F.3d 391 (4th Cir. 2001). Plaintiff has taken a number of depositions, but nowhere in them is there any suggestion of direct participation on the part of Johnson in any alleged events occurring while the Plaintiff resided at a Babcock Center

facility. Accordingly, there can be no claim against her under 42 U.S.C. § 1983.

The only exception to the requirement of personal participation occurs when the claim is brought as a supervisory claim. To the extent that the Plaintiff is attempting to assert liability against Johnson under a theory of negligent supervision, that claim should also fail. Although supervisors may be held liable in certain circumstances for the constitutional injuries inflicted by their subordinates, Shaw v. Stroud, 13 F.3d 791 (4th Cir. 1994), for a supervisor to be held personally liable under 42 U.S.C. § 1983 requires allegations of more than simply "failure adequately to supervise or control any conduct that directly caused the specific deprivation charged." Fisher v. Washington Metro. Area Transit Auth., 690 F.2d 1133, 1143 (4th Cir. 1982). In Shaw, the Fourth Circuit set forth three elements that must be shown to establish the theory of supervisory liability:

1. Actual or constructive knowledge on behalf of the supervisor that the subordinate's conduct was a "pervasive and unreasonable risk" to injury to citizens like the plaintiff;

2. Deliberate indifference or implied authorization of the conduct by the supervisor; and

3. An "affirmative causal link" between the supervisor's inaction and the constitutional injury suffered by the plaintiff.

13 F.3d at 799 (citations omitted).

Thus, supervisory liability can be imposed in situations such as where a supervisor has actual knowledge of a subordinate's constitutional violation and acquiesces, where supervisors "know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see," or where the supervisor has no actual knowledge of the violation but was reckless in his supervision of the subordinate. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (citations omitted). The standard for asserting a valid claim for section 1983 supervisory liability has become so strict that there is some doubt as to whether such claims are still viable at all:

> As the Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), Court observed, because masters do not answer for the torts of their servants in § 1983 cases, "the term 'supervisory liability' is a misnomer." Id. at 1949. Indeed, the dissent in Iqbal opined that "[l]est there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating [ ] supervisory liability entirely." Id. at 1957 (Souter, J., dissenting).

Davis v. Richland County, 2012 WL 6186470, 3 (D.S.C. 2012).

It is readily apparent that Plaintiff cannot satisfy the third part of this test (an "affirmative causal link"), and such failure in and of itself is sufficient to defeat Plaintiff's claim based on the small laceration of the penis. This was a factually unique incident. The clinicians at Lexington Medical Center, where Plaintiff was taken upon discovery of the injury, did not believe that the injury was the result of abuse or neglect and allowed Plaintiff to return to Babcock that same evening. R. __ [Exhibit 2]). Dr. Graeme Johnson, a medical consultant from DDSN, examined Plaintiff several days later, and he also concluded the cause of the laceration was unknown but ruled out abuse or neglect as a cause. R. __ [Exhibit 2]). Additionally, Plaintiff offered no evidence or argument at all that disputed the random nature or this event or that pointed to any action that Johnson wrongfully took or wrongfully failed to take. It was not foreseeable, and therefore no action by Johnson can logically be said to have been necessary to prevent it. As this Court held in Shealy v. Doe, 370 S.C. 194, 204, 634 S.E.2d 45, 50 (Ct. App. 2006), "For circumstantial evidence to be sufficient to warrant the finding of a fact, the circumstances must lead to the conclusion with reasonable certainty and must have sufficient probative value to constitute the basis for a legal inference, not for mere speculation." Applying this standard to the nonexistent evidence to support Plaintiff's May 2005 unexplained penis injury claim, there can be no doubt that there was nothing to show an "affirmative causal link" between some act or omission by Johnson and the penis injury.

Although Plaintiff argues on appeal that the penis injury would not have occurred "but for" Johnson allegedly refusing to release him to his mother's home, the Fourth Circuit has specifically held that a "but for" theory of causation does not satisfy the "affirmative causal link" standard. See Spell v. McDaniel, 824 F.2d 1380, 1388 (4th Cir. 1987) (providing "there must be proven at least an 'affirmative link' between policy or custom and violation; in tort principle terms, the causal connection must be 'proximate,' not merely 'but-for' causation-in-fact"). As a result, this incident, like the others discussed above, cannot serve as the basis for a section 1983 claim by Plaintiff.[13]

Finally, with respect to the slight delay in Plaintiff's being permitted to go home on the afternoon of Friday, June 10, 2005, the undisputed fact is that Plaintiff's counsel had an ex parte Probate Court Order, but did not send a copy of it to DDSN's General Counsel. Although the delay in Plaintiff's return home was minor, such delay as did occur was attributable to this failure of communication by Plaintiff's counsel, and not to any wrongful act of the Babcock Defendants.

Summary judgment is frequently granted in favor of defendants in section 1983 supervisory liability cases when a plaintiff's showing in opposition to summary judgment fails to satisfy one or more of the Shaw v. Stroud tests. See, e.g., Tigrett v. Rector and Visitors of University of Virginia, 290 F.3d 620, 630 (4th Cir. 2002) (affirming grant of summary judgment to defendants in section 1983 supervisory liability case); Carter v. Morris, 164 F.3d 215, 218 (4th Cir. 1999) (same; also noting that "rigorous standards of culpability and causation" apply in such cases, as opposed to "scattershot accusations of unrelated constitutional violations"); Estate of Cuffee ex rel. Cuffee v. Newhart, 498 Fed.Appx. 233, 237, 2012 WL 5954679, 3 (4th Cir. 2012)

[13] Even if not barred by the statute of limitations, Plaintiff's claims regarding the 2000 beating and the 2004 ant bite incident fail as a section 1983 claim because he did not some "affirmative casual link" between Johnson and these incidents.

(summary judgment granted for defendants where record did not contain any evidence of causation); Peter B. v. Sanford, 2012 WL 2149784, 9 (D.S.C. 2012) (summary judgment granted for defendant where the Amended Complaint "fail[ed] to make any allegations which reveal the presence of the required elements for supervisory liability"). Therefore, all of the Plaintiff's section 1983 personal injury claims against these defendants - whether arguably time-barred or not - should be dismissed with prejudice.

D. Plaintiff's brief ignores the requirements of Rule 56(e), SCRCP.

Throughout the Brief of Appellant, regarding both the Section 1983 claim and the other claims, Plaintiff continuously errs in relying on the Amended Complaint in order to try to defeat these Defendants' Motion for Summary Judgment. See, e.g., Br. of Appellant at 27, in which Plaintiff asks the Court to review this matter "looking at Mims' amended complaint and drawing all reasonable inferences in his favor...." Other similar statements are found in the Br. of Appellant at pp. 31-32.

In relying on the pleadings, Plaintiff seeks to do exactly what Rule 56(e) says cannot be done. That rule provides the following:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

As the appellate courts of this state have held many times, in opposing summary judgment, "[t]he nonmoving party must present specific facts showing a genuine issue for trial." Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008) (citing several other cases to the same effect). The Circuit Court correctly disregarded Plaintiffs efforts to rely on the Amended Complaint in opposing these Defendants' Motion for Summary Judgment.

VI. THE CIRCUIT COURT PROPERLY DISMISSED THE CLAIMS FOR NEGLIGENT SUPERVISION, NEGLIGENCE, AND GROSS NEGLIGENCE BECAUSE PLAINTIFF'S ONLY SHOWING WAS EITHER VAGUE AND CONCLUSORY OR NONEXISTENT.

A. The Tort Claims Act statute of limitations bars the negligent supervision claim against Babcock Center.

With some exceptions, residential and treatment services to persons with disabilities and special needs in South Carolina are largely delivered by DDSN rather than contractors. That is not the case in Richland and Lexington Counties. DDSN has detailed the substantial portion of this responsibility to Babcock Center. In Madison v. Babcock Center, 371 S.C. 123, 131, 638 S.E.2d 650, 654 (2006), the Supreme Court described Babcock Center and its relationship with DDSN in the following manner:

> Babcock Center is a private, non-profit corporation based in Columbia that provides housing and other services for people with autism, mental retardation, head or spinal injuries, or related disabilities. [DDSN] has approved Babcock Center as a contractual provider of such services . . . . This residential program offers mentally retarded persons the opportunity to live in the community and receive individualized supervision and support services. [DDSN] coordinates, directs, funds, and oversees the provision of services by contractual providers such as Babcock Center.

By virtue of its provision of residential and vocational supports to DDSN in Richland and Lexington Counties, Defendant Babcock Center is a "means," "agency," "agent," "medium," or "intermediary" employed by DDSN to deliver these services in those areas. Based on this proposition, Defendant Babcock Center is an "instrumentality" of the state, which brings it into the aegis of section 15-78-30 concerning entities covered by the Tort Claims Act. See also Frady v. Student Loan Processing Center, 313 S.C. 561, 562, 443 S.E.2d 580, 581 (Ct. App. 1994) (upholding the Circuit Court's finding the "Student Loan Processing Center" was a "governmental agency" for purposes of the Tort Claims Act). To that end, Defendant Babcock Center is entitled to the protections of the South Carolina Tort Claims Act, where applicable,

including provisions relating to the statute of limitations. Accordingly, the statute of limitations that applies to the state law claims is found in S.C. Code Ann. § 15-78-110. That section provides for a two year statute of limitations after the "date the loss was or should have been discovered." There is no question that the last act that even arguably damaged Plaintiff occurred or on about June 10, 2005. Amended Complaint, Par. 47.[14]

As discussed above, the Summons and Amended Complaint were filed on May 7, 2008, and served on these Defendants on or about May 12, 2008. The original 2007 Summons and Complaint were never served at all. Accordingly, this suit could not be deemed to have commenced any earlier than the date the Plaintiff first filed the Amended Complaint, which was May 7, 2008. See S.C. Code Ann. § 15-3-20(B) (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). The commencement date of May 7, 2008 was eleven months after the two-year statute had run in June 2007. Accordingly, Plaintiff's state law claims against Defendant Babcock Center are therefore clearly barred by section 15-78-110.

B. The Tort Claims Act renders Johnson immune from suit on the negligent supervision claim.

The South Carolina Tort Claims Act "constitutes the exclusive remedy for any tort committed by an employee of a governmental entity." S.C. Code Ann. § 15-78-70(a). The same subsection provides further that an employee of a governmental entity is immune from liability for tortious acts committed within the scope of his official duties. This statutory principle has been explained by the Court as follows:

The statutory dialectic [of the Tort Claims Act] reveals that a governmental

[14] Paragraph 46 of the Amended Complaint contains a typographical error to the effect that a Probate Court Order was issued on "June 9, 2007," but the date clearly should read "June 9, 2005."

> employee acting within the scope of official duty is exempt from personal liability . . . . When a plaintiff claims an employee of a state agency acted negligently in the performance of his job, the [Act] requires a plaintiff to sue the agency for which the employee works, rather than suing the employee directly.

Flateau v. Harrelson, 355 S.C. 197, 584 S.E.2d 413, 417–18 (Ct. App. 2003).

The only exception to this rule of immunity for the employees occurs when the employee commits actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. S.C. Code Ann § 15-78-70(a) and (b). However, the discovery process in this case has not revealed any evidence that Johnson acted outside the scope of her official duties by engaging in actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. Because all actions by Johnson were done within the scope of her official duties, she is entitled to immunity under the Tort Claims Act and any state law claims against them should be dismissed.[15]

C. Plaintiff has articulated only a *res ipsa loquitur* argument concerning the alleged May 27, 2005 penis injury.

Plaintiff has – at most – articulated only a res ipsa loquitur argument concerning the alleged May 27, 2005 personal injury to Plaintiff's penis while at Babcock Center. However, South Carolina courts do not recognize the doctrine of res ipsa loquitur. Merch. v. Columbia Coca-Cola Bottling Co., 214 S.C. 206, 208, 51 S.E.2d 749, 750 (1949). Instead, in this professional liability action sounding in negligence, it was incumbent upon Plaintiff to: (1) demonstrate the applicable duty of care via qualified expert testimony; and (2) propound admissible evidence demonstrating the applicable duty of care was breached and that such breach was a proximate cause of Plaintiff's alleged injuries. See City of York v. Turner-Murphy Co.,

[15] Although the Circuit Court found it was unnecessary to reach the issue of whether the two-year statute of limitations would apply to this claim against Johnson, Flateau also held that "the two-year statute of limitations applies even if the [individual defendants] acted outside the scope of their official duties or if their actions constituted fraud, actual malice, intent to cause harm, or a crime involving moral turpitude." 355 S.C. at 208-209, 584 S.E.2d at 419.

Inc., 317 S.C. 194, 196, 452 S.E.2d 615, 616-17 (Ct. App. 1994) (citing Doe v. American Red Cross Blood Servs., 297 S.C. 430, 377 S.E.2d 323 (1989) and Hoeffner v. The Citadel, 311 S.C. 361, 429 S.E.2d 190 (1993) ("In a professional negligence cause of action, the plaintiff must prove the professional failed to conform to generally recognized and accepted practices in the profession. If the plaintiff cannot meet this burden, then the professional cannot be found liable as a matter of law. Where professional negligence is alleged, expert testimony is usually necessary to establish both the standard of care and the professional's deviation from that standard, unless the subject matter is within the area of common knowledge and experience of the layman so that no special learning is needed to evaluate the professional's conduct.")). Plaintiff has made no such demonstration in the instant case. Accordingly, the circuit court properly found Plaintiff's negligence claim relating to the alleged May 27, 2005, personal injury to Plaintiff's penis while at Babcock Center failed as a matter of law.

D. Even if the Tort Claims Act does not apply, Plaintiff failed to prove the elements of negligent supervision.

A plaintiff in a negligent supervision claim must prove that "a specific person created an undue risk of harm .... Bank of New York v. Sumter Co., 387 S.C. 147, 156, 691 S.E.2d 473, 478 (2010)." R. _[Order 20] (emphasis added). The full quote from that case is as follows: "[T]his cause of action lies in circumstances where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public...." Id. The Court in Bank of New York affirmed the grant of summary judgment for the defendant, holding that "[t]here is no evidence here that [the defendant] knew or should have known that [the employees] posed an undue risk of harm to the public." Id. (internal quotation marks omitted). Plaintiff's brief on appeal does not even mention the Bank of York case on which the lower court relied.

The first specific incident referenced by Plaintiff under this heading is the May 27, 2005

penis incident. Br. of Appellant at 41. However, there was no proof that this incident was even caused by the action of some specific person other than Plaintiff himself. Given this absence of proof that "a specific person created an undue risk of harm," as Bank of York requires, there was no foundation for a negligent supervision claim regarding this incident.

With regard to the August 13, 2000 beating of Plaintiff by Babcock Center employee Carl Anthony, Plaintiff makes several references to this incident in the course of arguing the negligent supervision claim. Br. of Appellant at 42-43. Again, however, there has been no suggestion whatsoever by Plaintiff that the employment (by Babcock) of Carl Anthony posed an undue risk of harm to Babcock's clientele. This failure of proof is fatal to the negligent supervision claim as to this incident.

Plaintiff has not tried to argue that there is a viable state law supervisory negligence claim for the ant bite incident. Nor does Plaintiff cite a specific supervised person as the tortfeasor in connection with the penis incident or any other incident passingly referenced in the Brief of Appellant. The court below therefore correctly dismissed the negligent supervision claim.[16]

VII. THE CIRCUIT COURT PROPERLY DISMISSED PLAINTIFF'S VAGUE ADA CLAIMS AS MOOT. ALTERNATIVELY, IF THE ADA CLAIMS WERE NOT MOOT, THE CIRCUIT COURT PROPERLY DISMISSED THEM.

The Amended Complaint vaguely asserts claimed violations of the ADA and the Rehabilitation Act for DDSN Defendants failing to provide Plaintiff with unspecified "needed services." Amended Complaint, Paragraphs 83-89. The only specific allegation of the Amended Complaint in this regard was the assertion in Paragraph 52 of the Amended Complaint that "Defendant Lacy denied Plaintiff's request for adult health care services, requiring Plaintiff to

[16] To the extent Plaintiff asserts the Babcock Defendants were negligent or grossly negligent, this argument is unpreserved. See Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733. Although the Circuit Court addressed these causes of action against the DDSN Defendants, it did not address them as to the Babcock Defendants.

appeal eligibility for those services." That record occurred in 2005.

The Babcock Defendants do not dispute that DDSN in June 2005 found that Plaintiff was not eligible for Adult Day Health Services. That decision was appealed by Plaintiff to the DHHS Hearing Officer, who reversed DDSN's decision by order dated March 7, 2006. The short answer to this claim of a denial of services is accordingly that it was rendered moot by the Hearing Officer's decision of March 7, 2006.

Plaintiff's only response with reference to this cause of action did not even address the mootness of that claim regarding the 2005 denial of services. See Plaintiff's Memorandum in Opposition to Summary Judgment, pp. 29-30. The rest of Plaintiff's response relating to this cause of action was devoid of reference to any specific denial of services. Id. Plaintiff provided the Circuit Court and the defendants in this matter with no information about what was presently being sought via this cause of action, with only one exception. That exception, it would appear, is a claim of a wrongful denial of services by DDSN on May 13, 2013 - five years after the filing of the Amended Complaint. This late claim, which obviously was not covered by the 2008 Amended Complaint, need not be considered, because it is beyond the scope of the Amended Complaint.

Plaintiff has not articulated a damage claim based on the June 2005 denial of services; nevertheless, to the extent, if any, that Plaintiff might be asserting a damage claim as a result of this June 2005 denial of services, such a claim would be barred by the one-year statute of limitations applicable to ADA and Rehabilitation Act claims. While the ADA and the Rehabilitation Act do not contain a specific limitation period, Congress has directed courts to borrow the most appropriate state statute of limitations to apply to the federal claim. McCullough v. Branch Banking & Trust Co., 35 F.3d 127, 129 (4th Cir.1994) (citing Wilson v. Garcia, 471

U.S. 261, 266–67 (1986)). The United States District Court for the District of South Carolina addressed the applicable statutes of limitations in ADA and Rehabilitation Act cases and applied the one-year statute of limitations found in the South Carolina Human Affairs Law (SCHAL), S.C. Code Ann. §§ 1–13–10, *et. seq.* See Cockrell v. Lexington Co. Sch. Dist. One, 2011 WL 5554811 (D.S.C. 2011). Accord Mestrich v. Clemson Univ., 2013 WL 842328 (D.S.C. 2013). Plaintiff's claim of alleged denial of services was based on a June 2005 DDSN decision. The present action was served in May 2008, nearly three years later. Accordingly, to the extent Plaintiff might assert damages or some other non-moot claim pertaining to the 2005 denial of services, the ADA and Rehabilitation Act claims are nevertheless barred by the one-year statute of limitations.

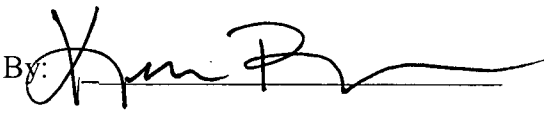
CONCLUSION

For the foregoing reasons, the Circuit Court's order granting summary judgment in favor of the Babcock Defendants and the order denying Appellant's motion for reconsideration should be affirmed.

[Signatures on next page]

Respectfully Submitted,

COLLINS & LACY, PC

By: 

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Columbia, South Carolina
May 7, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2007-CP-40-03365
Case No. 2014-001373

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

vs

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

PROOF OF SERVICE

Counsel for Respondents Babcock Center, Inc. and Judy Johnson certifies that (s)he has served the Designation of Matter to be Included in the Record on Appeal, the Initial Brief of Respondents Babcock Center, Inc. and Judy Johnson, the Motion to File Respondents' Initial Brief Out of Time, and Notice of Appearance of Kerri Rupert on all parties by depositing a copy of it

in the United States Mail, postage prepaid, on May 8, 2015, addressed to the following attorneys of record:

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Respectfully submitted,
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May 8, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Edward Mims, by and through his legal Guardian, Margaret Mims, Appellant, v. Babcock Center, Inc, Judy Johnson, et al, Respondents
Civil Action No. 2007-CP-40-3365
Appellate Case No. 2014-001373
C&L File No. 000969-00109

Dear Ms. Kitchings:

Enclosed for filing, please find an original of each of the following:

(1) Initial Brief of Respondents Babcock Center, Inc. and Judy Johnson;
(2) Respondents Babcock Center, Inc. and Judy Johnson's Designation of Matter to be Included in the Record on Appeal;
(3) Motion to File Respondents' Initial Brief and Designation of Matter Out of Time;
(4) Notice of Appearance of Kerri A. Rupert; and
(5) Proof of Service.

Thank you for your assistance in this matter and please call me with any questions.

Sincerely,

Kerri A. Rupert

KAR/mmm
Enclosures

cc: Patricia Logan Harrison
Kenneth P. Woodington

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