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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS
Honorable G. Thomas Cooper, Jr.
Circuit Court Case No.: 2007-CP-40-03365

Appellant Case No. 2014-001373

Estate of Edward James Mims, Laura M. Cole, Personal Representative, Appellant,

vs.

The South Carolina Department of Disabilities and Special Needs, Kathi Lacy and Stan Butkus,

Respondents.

APPELLANT'S FINAL [redacted]G BRIEF

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Issue 5. **The lower court erred in dismissing Mims' claims for violation of the Americans with Disabilities Act and the Rehabilitation Act based on a one year statute of limitations and because Mims met his *prima facie* burden and the defendants failed to prove that providing the services he needs to live in the least restrictive setting would require a fundamental alteration in the State's system.**

IV. STANDARD OF REVIEW

A trial court may grant a motion for summary judgment when "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." Rule 56(c), *Madison ex rel. Bryant v. Babcock Center*, 638 S.E.2d 650, 655, 371 S.C. 123 (S.C. 2006). It must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Id.

Summary judgment is a drastic remedy which should not be invoked to improperly deny a litigant a trial. Id. The party seeking summary judgment has the burden of establishing the absence of a genuine issue of material fact. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). Where a case raises novel questions of law, the appellate court is free to decide those questions with no deference to the lower court. *Madison* at 656.

V. STATEMENT OF THE CASE

Plaintiff's claims. This is an appeal of the lower court's May 29, 2014 order granting defendants' motions for summary judgment, dismissing Mims' lawsuit for the second time, without providing a hearing on Mims' pending motions. Mims has alleged that the individual defendants violated Mims' rights under § 1983; and that defendants were negligent in failing to (1) provide supervision and monitor Mims, (2) provide inadequate staffing, (3) investigate reports of abuse and neglect and (4) discharge him from an unsafe facility. Mims alleged that defendants violated his rights by obstructing his discharge from the Babcock Center and obstructing the guardianship proceedings for improper personal reasons. He complained that defendants violated the Americans with Disabilities Act (ADA) and the Rehabilitation Act, that

these violations are ongoing, and that they are subject to repetition and they have evaded review.[1]

The lower court's decision. The lower court found that Mim's § 1983 claims were barred by the statute of limitations, that the defendants had no personal involvement in the alleged wrongful acts, that Mims has suffered no injury and that claims for negligent supervision are barred by a two year statute of limitations under the Tort Claims Act, which also protect the Babcock Center defendants and that claims for violation of the Americans with Disabilities (ADA) became moot in 2006. Finally, the court held that claims against the DDSN defendants went "beyond the scope of the pleadings" and were "vaguely asserted."

History of the case. This case was commenced by the filing of a complaint on May 29, 2007, naming the Babcock Center, Johnson, other Babcock defendants, Butkus, and the South Carolina Department of Health and Human Services (DHHS) as defendants. On May 7, 2008, Mims filed an Amended Complaint, substituting the Associate State Director of DDSN, Kathi Lacy, for other individuals in the original complaint and substituting DDSN for DHHS. R. 73.

The Richland County Court of Common Pleas first denied, then later granted defendants' motions to dismiss, as set forth in *Mims v. Babcock Center*, 399 S.C. 341, 732 S.E.2d 395 (2012). On appeal, the South Carolina Supreme Court certified Mims' case under Rule 204 of the South Carolina Rules of Appellate Procedure. That Court ruled that the amended complaint was properly filed pursuant to Rule 15, SCRCP, because the 120 day period applies only when

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[1] Mims has elected not to pursue the cause of action for conspiracy and unjust enrichment in this appeal, in order to better focus on the § 1983, negligence/negligent supervision, statute of limitations and ADA issues. Mims is a member of a class of persons who have experienced discrimination due to their disabilities, thus meeting the discriminatory animus test. In *People by Abrams v. 11 Cornwell Co,* the State contended, without opposition, that the mentally retarded are a class protected by § 1985(3). 695 F.2d 34, 42 (C.A.2 1982), rev'd on other grounds 1718 F.2d 22 (2d Cir. 1983).

the service occurs outside of the statute of limitations,"[2] and remanded Mims's case back to the Richland County Court of Common Pleas for trial. Id.

On remand, the defendants and Mims filed motions for summary judgment. But, only defendants' motions were scheduled to be heard, and no hearing has been granted on any of plaintiff's motions. The court declined Mims' request to hear his motion. R. 122, 132, 135, 147-149. When the court granted defendants' motions for summary judgment, Appellant filed a motion to alter or amend on February 4, 2014, which was denied by the trial court on May 29, 2014. R. 61. This appeal was timely filed by Appellant in the Court of Appeals on June 24, 2014.

VI. ARGUMENTS

Issue 1. **The lower court erred in its determination that Mims' claims are barred by the statute of limitations, because (a) Mims was first adjudicated to be incompetent in 2001, not in 2005; (b) South Carolina Code of Laws § 15-3-40 tolls the statute of limitations for five years due to Mims' disability; (c) the 2008 amended complaint relates back to the date the original complaint; (d) some of the wrongful acts fell within the statute of limitations, even without tolling; (e) the Babcock Center and the individual defendants are not entitled to the protections of the Tort Claims Act; and (f) the doctrine of equitable tolling applies due to the bad acts of the defendants.**

(a) Mims was first adjudicated to be incompetent in 2001, not in 2005. The lower court erred in its determination that Mims "was not actually adjudicated to be incapacitated until the Probate Court order of June 14, 2005." R. 25. The defendants themselves caused Mims to be adjudicated to be incapacitated in 2001 for the express purpose of preventing his release from the

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[2] Judge Kittredge ruled in his concurring opinion that: "Because that complaint was filed and served *within the statute of limitations*, dismissal is not warranted." Id. at 398. Even the one dissenting Justice found that Mims' amended complaint was served before the expiration of the statute of limitations. (Emphasis added.) Id. at 399.

Babcock Center. Id. The lower court erred as a matter of law in ignoring the 2001 determination of incapacity, procured in bad faith, by falsely accusing Mims' mother of abusing him to cover up their own abuse. R. 3242-3245.

(b) South Carolina Code of Laws § 15-3-40 tolls the statute of limitations for five years due to Mims' disability. The lower court erred in finding that the lawsuit was not timely filed, because the statute of limitations is extended by South Carolina Code of Laws § 15-3-40 for five years. In *Hooper v. Ebeneezer Senior Services, Inc.*, the South Carolina Supreme Court recognized that: "'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). 687 S.E.2d 29, 32, 386 S.C. 108 (2009). "Tolling may either temporarily suspend the running of the limitations period or delay the start of the limitations period." Id. There is nothing in South Carolina's tolling statute that requires an adjudication of incompetence to start of the tolling period under South Carolina Code § 15-3-40. The lower court's finding that Mims was not ajudicated to be incompetent until 2005, thus he not entitled to tolling prior to that date, is not supported by a scintilla of evidence, or the defendant's own 2001 petition or the Probate Court order. R. 3242, 3245.

The trial court also erred in its ruling that Mims was not "insane" based on its adoption of the defendants' interpretation of "the mentally retarded person bill of rights (which) says that a mentally disabled person has all the rights a citizen to do anything until he's declared incompetent." In *Madison v. Babcock Center*,[3] the Supreme Court flatly rejected the same

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[3] In *Madison*, Judge Manning dismissed Madison's lawsuit brought against Judge Manning's former employer, the Babcock Center. *(Madison v. Babcock Center*, Richland County Court of Common Pleas Order granting summary judgment to defendants, 1997cp403082A).

argument (made by these same defendants):

> We further agree with Appellant that the circuit court erred in reasoning she was competent to make her own decisions — such as leaving the Babcock Center home — because she was not adjudicated incompetent to handle her personal and financial affairs until some two years after the events of August 1995. The circuit court relied on S.C.Code Ann. § 44-26-90 (2002), which provides that unless a client has been adjudicated incompetent, she must not be denied the right to, among other things, ...exercise rights of citizenship in the same manner as a non-disabled person.

Id. at 287. Judicial resources have been wasted by these arguments. At all times since his birth, Mims has been "insane," as defined by the Supreme Court in *Wiggins v. Edwards*:

> Insanity or mental incompetency that tolls the statute of limitations consists of a mental condition which precludes understanding the nature or effects of one's acts, an incapacity to manage one's affairs, an inability to understand or protect one's rights, because of an over-all inability to function in society, or the mental condition is such as to require care in a hospital. 54 C.J.S. Limitations of Actions § 117 at 159-169 (internal footnotes omitted).

442 S.E.2d 169, 170, 314 S.C. 126 (1994). DDSN took action in 2001 to have Mims adjudicated incompetent, informing the Probate Court that "Mr. Mims is 29 years old and profoundly retarded." R. 3242. The DDSN psychologist reported that Mims could not be left alone and that "he is on one-on-one care at Clusters." R. 3301. See also R. 314, 3270. DDSN informed the Probate Court that Mims was nonverbal and that he had the mental age of a two year old child. R. 3301. The lower court's finding that Mims was not "insane" is not supported by any facts in the record and Mims clearly meets the *Wiggins* criteria.

The lower court also erred as a matter of law in failing to recognize that the South Carolina Supreme Court found in *Harrison v. Bevilacqua* that:

Then Madison's case was settled on remand by a guardian ad litem appointed on motion of defendants, over the objections of Madison's court-appointed guardian. *(Madison v. Babcock Center*, S.C. Ct. Appeals case no. 2010-165546)

> ...an insane plaintiff would apparently have seven years from discovery to bring a negligence action under the Tort Claims Act. See §§ 15-78-110, 15-3-40; see also Fricks v. Lewis, 26 S.C. 237, 1 S.E. 884 (1887).

354 S.C. 129, 134, 580 S.E.2d 109 (S.C. 2003). In *Harrison*, the State moved for summary judgment, arguing that McLean's lawsuit was time-barred, because the alleged violations began in 1983 (when McLean had been determined to be incompetent and was involuntarily committed), but his lawsuit was not filed until 1995. Id. at 132. The court erroneously ruled that the tolling provisions of South Carolina Code § 15-3-40 provided McLean five years to bring his claims under the Tort Claims Act. The Supreme Court corrected this error. S.C. Code of Laws § 15-3-40. In footnote 5 in that case, the Supreme Court found that:

> We disagree with the Court of Appeals' interpretation of section 15-3-40. The express language of the statute allows the time for commencement of an action to be "extended" by a maximum of five years.

Id. Thus, Mims is entitled to an additional five year extension under the state tolling statute, due to his inability to understand and to protect his own rights and his over-all inability to function in society. *Harrison, supra* and *Wiggins v. Edwards,* 442 S.E.2d 169, 170, 314 S.C. 126 (1994), citing 54 C.J.S. Limitations of Actions § 117 at 159-169. Affirming the lower Court's adoption of the minority rule on tolling would contradict the "express language of the statute."

Even the out-of-state cases relied upon by the lower court do not support the termination of the tolling period upon the appointment of a guardian in a case such as Mims'. Those cases from New Hampshire, North Carolina and New York are clearly distinguishable. *Stewart v. Robinson* is a federal district court case from New Hampshire in which federal district judge Steven McAuliffe recognized that the Supreme Court of New Hampshire "has yet to confront the issue" of whether the appointment of a guardian terminates the tolling statute. 115 F. Supp.2d

188, 194 (D.N.H. 2000). He presumed, without certifying the question to the New Hampshire Supreme Court that that court "would interpret the statute in a manner consistent with what is currently the minority, but the more sensible view." Taking a "predictive approach", Judge McAuliffe ruled that because a court-appointed guardian "was vested not only with the right, but the obligation to bring the present civil action" the appointment of a guardian ended the tolling of the statute of limitations. Id. at 195. This ruling, placing such obligation on a court-appointed guardian, contradicts prior rulings of New Hampshire's highest court.[4] *Coffey v. Bresnahan* (equity and justice require the extension of the statute in cases involving persons under a disability). 127 N.H. 687, 506 A.2d 310 (1986).

The lower court in *Mims* also erred in its reliance on the North Carolina Court of Appeals decision in *Fox v. Health Force, Inc.* 143 N.C. App. 501, 547 S.E.2d 83, 84, 85 (2001). In that case, the plaintiff was injured in 1993, but a guardian was not appointed until 1998. Applying the North Carolina tolling statute, the Court of Appeals ruled that the statute of limitations did not began to run until 1998, when the guardian was appointed. Id. Thus, the statute of limitations had not run when Fox's lawsuit was filed in 1998. The North Carolina Supreme Court denied the defendant's petition for cert. in *Fox.* 553 S.E.2d 912 (2001). Even if this Court were to apply the holding of *Fox* to Mims' case, Mims' lawsuit was filed within the statute of limitations, even without tolling after the appointment of a guardian.

Mims' mother was appointed as his temporary guardian on June 9, 2005 (an amended

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[4] *Stewart* appears to have been cited only once in the fourteen years since it was issued, by another federal district court judge in an unreported case. *Margaret Jones v. Tommie C. McKenzie.* Case No. 10-cv-152-JL, Opinion No. 2011 DNH 209. In the fourteen years since *Stewart* was issued by the federal court, it has never been cited by the Supreme Court of New Hampshire.

order was issued on June 14, 2005. R. 3379) and she was not appointed as his permanent guardian until December 19, 2005, due to delays caused by defendant's attempted obstruction of her appointment. R. 522-523, 3381, 3383, 3390. The injury to Mims' penis and defendants' efforts to block his discharge from the Babcock Center occurred on May 27, 2005. Defendants then improperly interfered with the Probate Court proceedings through December 2005, when his mother was appointed as permanent guardian. In September, 2005, DDSN filed "objections" to her appointment in the Probate Court and appeared at a hearing, attempting to block Mrs. Mims from being appointed. Even under the holding in *Fox*, the statute of limitations for DDSN would not have run until June 9, 2007, at the very earliest. Thus, the injury on May 27, 2005 clearly fell within the statute of limitations, as did the filing of Mims' original complaint.

In any event, in South Carolina a guardian of the person has no obligation to file a lawsuit; even a conservator does not have an affirmative obligation to file a lawsuit. S.C. Code 62-5-424(B) provides that:

> A conservator, acting reasonably in efforts to accomplish the purpose for which he was appointed, may act without court authorization or confirmation, to: (17) prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of his duties.

No conservator has ever been appointed for Mims. Thus, the obligation on Mims' guardian was and is quite different from those imposed by the legislatures in New Hampshire and North Carolina. The lower court erred in applying the laws of those States by imposing a duty to file a lawsuit on a guardian that has not been imposed by the South Carolina General Assembly.

Finally, the lower court also supported his decision to adopt the minority rule with a decision of the New York Court of Appeals that was clearly inapplicable to Mims' case, which appears to have been overruled in New York. *Hernandez v. New York City Health & Hosps.*

Corp., 78 N.Y.2d 687, 578 N.Y.S.2d 510, 585 N.E.2d 822 (1991). The issue in *Hernandez* was the application of tolling on a minor who was a distributee in a wrongful death action, not a plaintiff. *Hernandez* did not address whether the statute of limitations is tolled in an action brought by an adult plaintiff who is under a disability. In fact, the New York court ruled in *Hernandez* in favor of tolling in order to protect the rights of the minor and it was careful to limit its analysis to wrongful death actions. *Hernandez* is clearly distinguished from Mims' case and the lower court failed to recognize that that New York case actually favored tolling.

Seven years later, in *Sanchez v. Wolkoff,* the lower court (the New York Supreme Court) ruled that an adult plaintiff's disability "ceased" when his wife filed a lawsuit on his behalf, ending the tolling of the statute of limitations. 669 N.Y.S.2d 337, 247 A.D.2d 529 (N.Y.A.D., 2 Dept. 1998). But then, a year later, in *Henry v. City of New York*, the highest court in that State addressed the issue of whether an infant's claim was time-barred when a parent or guardian filed a timely notice of claim, but then failed to commence the action within the statute of limitations. 94 N.Y.2d 275, 724 N.E.2d 372, 702 N.Y.S.2d 580 (1999). The appellate court reversed, finding that the statute of limitations was tolled, rather than being terminated when a parent or guardian took actions to pursue the infant's claim, because the infant, not the guardian or the parent, is the real party to the action. The court found that representation by the infant's parent or guardian does not bar the infant from later filing a lawsuit during infancy and that its outcome supports the strong public policy of protecting those who are under a disability.

The next year, *Sanchez* was expressly overruled in *Costello v North Shore Univ. Hosp. Ctr. for Extended Care & Rehabilitation*, 273 AD2d 190, 191 (2000). The *Costello* court found that the rationale of *Henry* should be applied to prevent the termination of tolling, even though a

fiduciary who had been appointed to protect a disabled adult failed to file a lawsuit within the statute of limitations. Finally, in *Carrasquillo v. Holliswood Hospital,* the New York court also ruled that the plaintiff was entitled to tolling where a guardian ad litem had been appointed years before and a lawsuit against other providers had actually been commenced six years before. 37 A.D.3d 509, 829 N.Y.S.2d 693, 2007 NY Slip Op 1234 (N.Y. App. Div., 2007). The New York court held in *Carrasquillo* that the appointment of a guardian ad litem did not terminate tolling, and, that same year, in *Ferreira v. Maimonides Medical Center,* a unanimous New York court found that the insanity toll is intended for "those individuals who are unable to protect their legal rights because of an over-all inability to function in society." 43 A.D.3d 856, 841, 858 N.Y.S.2d 678 (N.Y. App. Div., 2007).

What is significantly more important than these cases is that this court recently refused to adopt the minority rule in *Sims v. Amisub of S.C., Inc.*:

> While the Respondents cite persuasive authority ... supporting their position that the appointment of a conservator affects the viability of a person's insanity for tolling purposes, we need not address this issue.... **We also note we are hesitant to adopt a rule that has not previously been adopted by our courts**. (Emphasis added.)

408 S.C. 202, 758 S.E.2d 187 (Ct. App. 2014).

The lower court in *Mims* erred as a matter of law in relying upon three out-of-state cases, without determining if they actually represented the current rule of law on tolling in those states. The trial court also erred in adopting defendants' argument that "no South Carolina case has decided the issue of whether an appointment of a guardian terminates the disability period under provisions of (sic) statute similar to § 15-3-40(2)." As discussed above, this finding ignores the South Carolina Court of Appeals' finding in *Amisub* and the South Carolina Supreme Court's

finding in *Harrison*, where the highest Court in South Carolina found that the tolling statute extends the statute of limitations by five years in a case where the plaintiff (McLean), like Mims, had been adjudicated incapacitated years before. *Supra.*

The majority rule provides that: "the tolling of the statute of limitations continues until the disabled person's mind becomes 'sound,' or the person dies." *Sullivan v. Chattanooga Medical Investors, L.P.* 221 S.W.3d 506, 513 (2007). Adopting the majority rule in *Kiley v. Jennings*, the Supreme Court of Arizona found that the absence of clear legislative intent, it was inappropriate for the lower court here to "graft such an exception to the statute." 927 P.2d 796, 187 Ariz. 136, 141 (1996) (finding that neither the appointment of a guardian or a conservator ceases the tolling of the statute of limitations for persons "of unsound mind.") The lower court's order effectively renders the tolling statute a nullity and contradicts the clear intent of the South Carolina General Assembly to extend the statute of limitations.

This is a matter of tremendous public importance because, if this Court should rule that a guardian or a conservator becomes obligated to file a lawsuit (or lawsuits), then, to protect himself from liability, the fiduciary may be pressured to expend the ward's limited funds paying lawyers and associated litigation costs, instead of preserving those funds to provide care and support for the ward. Also, adopting such a rule would invite mischief, because agencies who have harmed a disabled person through negligent supervision would have incentive to cause a "friendly" guardian or conservator to be appointed simply to terminate tolling.

(c) **Mims' amended complaint relates back to the filing of the original complaint.** Rule 15(c), SCRCP, provides that: "[w]henever the claim ... asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original

pleadings, the amendment relates back to the date of the original pleading." Mims' claims in the amended complaint arose out of the conduct, transactions and occurrences previously set forth in the original complaint. In *Thomas v. Grayson,* the South Carolina Supreme Court held that:

> Rule 15© is based on the concept that once litigation involving particular conduct or a given transaction or occurrence has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims that arise out of the same conduct, transaction, or occurrence as set forth in the original pleading. Wright & Miller, Federal Practice and Procedure § 1496 (1990).

318 S.C. 82, 456 S.E.2d 377, 380 (1995). The purpose of Rule 15(c) is to salvage causes of action otherwise barred by the statute of limitations and Mims' amended complaint relates back under Rule 15 (c) to May 29, 2007, the date of the filing of the original complaint. Id.

(d) Mims alleged wrongful acts which fell within the statute of limitations, even without tolling. Mims alleged and provided the lower court with material facts showing violations occurring within the time period covered by the statute of limitations, even without consideration of the tolling statute. The lower court erred as a matter of law in failing to recognize Mims' claims, even without tolling. These violations include the unconstitutional treatment and confinement he suffered until June of 2005 and the violation of defendants' duty of care during that period. States are prohibited from depriving "the mentally retarded residents of their liberty interest in a humane and decent existence." *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239 (C.A.2 (N.Y.), 1984). As the United States Supreme Court held in *Youngberg v. Romeo* the State violates a disabled person's civil rights when it fails to provide a "professionally devised program to help ... maintain the fundamental self-care skills with which they entered...." Id. 1246. *Youngberg v. Romeo,* 457 U.S. 307, 314 and 327 (1982). The lower court erred by failing to recognize that citizens like Mims, who are involuntarily incarcerated in

DDSN funded facilities by the State, have important substantive rights that must be protected under the Fourteenth Amendment to the Constitution" Id. and *Terrance v. Northville Reg'l Psychiatric Hosp.*, 286 F.3d 834, 848 (6th Cir. 2002). These inalienable rights are greater than those due to criminals under the Eighth Amendment and they "must ...survive involuntary commitment." *Youngberg,* 457 U.S. at 316.

The lower court also erred as a matter of law in failing to recognize the constitutional violations associated with defendants' attempts to obstruct the appointment of Mims' mother as his guardian in 2005 and defendants' ongoing efforts to force him back into the Babcock Center by denying requested services, in violation of the ADA and the Rehabilitation Act. On September 10, 2014, this Court held that the imposition of limitations on services violated the ADA where the plaintiff was, like Mims, at risk of institutionalization. *Stogsdill v. DHHS*, 410 S.C. 273, 763 S.E.2d 638 (S.C. App. 2014). Mims clearly set forth in Count Four of his Amended Complaint claims for violations of the ADA and the Rehabilitation Act and he alleged that those violations have continued and they are subject to repetition, yet violation of his rights under the ADA and the Rehabilitation Act have evaded review.

According to the lower court's analysis, only one incident occurred less than three years before Mims' amended complaint was filed on May 7, 2008. But this ignores the undisputed fact that on May 27, 2005, Mims was left unattended and suffered a four centimeter "gaping laceration" on his penis that required seven stitches to repair. R. 485, 486, 3288, 3358-3360. This injury occurred just three weeks after defendant Johnson sent out a letter to families informing them that DHHS and DHEC had ordered the Babcock Center to relocate residents from Kensington after Immediate Jeopardy was again declared in that same facility. R. 1451-1454,

3350-3357. DHEC notified Johnson of its intent to terminate Kensington's ICF/MR license on April 29, 2005. R. 1453. All three of the individual defendants were aware of the citations described in federal, state and private surveys, investigations and audits of understaffing and lack of training of staff in Babcock Center facilities, particularly at Kensington, where defendant Butkus had placed Mims.[5] R. 1245, 1350-1393, 1399-1459. While ignoring the injuries to Mims at Clusters, then at Kensington, DDSN repeatedly refused the pleas of Mims' mother to allow him to return home, because DDSN and the Babcock Center had determined he could not be left unattended and required awake staff around him at all times. R. 3269, 3277-3291, 3298, 3306, 3311. The injury was a natural consequence of defendants' actions, it was foreseeable, and liability may arise under § 1983 from a "single sufficiently brutal incident." *Moore v. City of Columbia*. 284 S.C. 278, 326 S.E.2d 157, 161 (S.C. App. 1984).

The July 27, 2004 infestation of Mims' bed with ants also occurred within three years of Mims filing of his original complaint. The lower court erred in its decision that this infestation was a "one-of-a-kind" unforseen event for which defendants had no liability. R. 42. Appellant provided the lower court with the report of the USC School of Public Health that reported in 2004: "Problems with cleanliness and maintenance, homes lacking basic necessities like soap,

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[5] Defendant Butkus admitted in his deposition that he had responsibility for determining placement. R. 2618, l. 17, 2007, l. 11. S.C. Code of Laws § 44-20-420 provides that "The director or his designee may designate the service or program in which a client is placed. The appropriate services and programs must be determined by the evaluation and assessment of the needs, interests, and goals of the client." Code § 44-20-430 provides that "The director or his designee has the final authority over applicant eligibility, determination, or services and admission order, subject to policies adopted by the commission." Code § 44-20-480 provides that: "When the department determines that the welfare of a client would be facilitated by his placement out of the home, the client must be evaluated by the department, and the least restrictive level of care possible for the client must be recommended and provided when available.

pests such as lice, cockroaches and ***ants as hazards to client safety and welfare.***"(Emphasis added.) R. 1616 (at 1638). The infestation of Mims' bed with insects was not a "one-of-a-kind" incident. Also, Appellant provided evidence that the surveyors of Kensington, in 2004, found that sanitation was lacking in Babcock Center ICF/MR facilities and that its ICF/MR facilities did not meet standards for federal funding. CMR Review at R. 1409-1414. When ICF/MR surveyors visited Mims' facility, Kensington, they found buckets with standing mop water, no toilet paper and trash observed in the hallways. R. 1446. When Carolina Medical Review conducted its investigation of Babcock Center ICF/MR facilities in 2004, it found that Babcock Center's "infection control manual" had not been updated since 1993, while federal policies require annual review. R. 1219-1460. Mims provided many other investigations of DDSN and Babcock Center facilities showing the widespread nature of the violations of federal and state standards of care. Mims 0017 to 0255. DDSN reported the rate of substantiated cases of abuse, neglect and exploitation in 2003 at the Babcock Center was double the statewide average, and that by 2004, this rate had increased to four times the statewide average:

> Q. Now, a 2006 audit by HHS of your agency said that the substantiated rate of abuse and neglect was double the statewide average, I believe it was in 2003, and was quadruple the statewide average in 2004. Are you familiar with that audit?
> A. Well, not only am I familiar with that, it's stated that we provided them because we did the analysis. Those are documents that we gave HHS, so we generated them.

R. 2618, l. 9-21. This Court should reverse the lower court because Mims demonstrated that genuine issues of facts exists, even without consideration of the tolling statute.

(e) the Babcock Center and the individual defendants are not entitled to the protections of the Tort Claims Act. The lower court erred in granting protections of the Tort Claims Act to the Babcock Center and to the individual defendants sued in their individual capacities. The burden

of establishing entitlement to protection under the Tort Claims Act is upon the governmental entity asserting exemption from liability. *Steinke v. South Carolina Dep't of Labor, Licensing and Regulation,* 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999); *Plyler v. Burns*, 373 S.C. 637, 647 S.E.2d 188, 196 (2007). The Tort Claims Act provides limited protection from liability to "[t]he State, an agency, a political subdivision, and a governmental entity..." S.C. Code Ann. § 15-78-40 (2005). "Governmental entity" is defined as "the State and its political subdivisions." *Id.* § 15-78-30(d). The Act specifically excludes "independent contractors doing business with the State or a political subdivision of the State." S.C. Code 15-78-30(c).

The Supreme Court established four factors to determine whether an entity is entititled to the protections of the Tort Claims Act: (1) does it function statewide, (2) does it perform the work of the state, (3) was it created by the legislature, and (4) is it subject to local control? *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry,* 403 S.C. 623, 743 S.E.2d 808, 814 (2013). The Babcock Center was not created by an act of the General Assembly.[6] Its board members are not appointed by the Governor or any governmental entity, and its funds are not controlled by the State Treasurer.[7] Defendant Johnson wrote to Senator Jake Knotts on December 20, 2004 (just a few months before Mims suffered the injury to his penis) that:

SCDDSN fails to note that so long as Babcock Center remains a private, non-profit

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[6] The General Assembly did carve out two counties as exceptions to the general rule, Dorchester and Georgetown. Had the General Assembly intended to treat the Babcock Center as a local DSN Board, it would have specifically made an exception by statute, as it did for these two counties.

[7] Indeed, in *Babcock Center v. U.S.*, the court found that the Babcock Center was collecting the employees' share of employment taxes (fica), but not paying either the employees' share nor the employer's share to the Internal Revenue Service. Case No. 3:11-cv-01721, 3:11-cv-03155 (D.S.C. 2013).

> 501(c)(3) organization, no public body may approve or disapprove its board members. This is another reason to support Babcock Center's initiative to become a public entity and accountable to the respective County Councils of Lexington and Richland Counties.

R. 3078. In the letter, defendant Johnson goes on to state:

> The Babcock Center Board of Directors voted unanimously to step down if the respective County Councils of Lexington and Richland Counties approve the official establishment of the Babcock Center as a disabilities and special needs board. The Board of Directors is convince that Babcock's becoming a public agency ...is in the best interest of the people it supports...

R. 3076. South Carolina Code of Laws § 44-20-375 requires that local boards "must be created within a county or within a combination of counties by ordinance of the governing bodies of the counties concerned." There is no evidence in the record that Babcock Center was established by ordinance. South Carolina Code of Laws Sections 44-20-20 and 44-20-375. The General Assembly has declined to pass bills proposing to treat Babcock Center employees as state employees for purposes of participating in the State Health and Insurance Plans. S. 216, Session 119 (2011-2012), S. 25, Session 118 (2009-2010), S. 685 and House 3794, Session 117 (2007-2008). Those bills have never made it to the floor of the House or the Senate. Also, when Mrs. Mims wrote to the Attorney General in December of 2001, that office informed her that "The Attorney General does not have any authority over the Babcock Center" R. 3310.

Babcock Center has repeatedly been found by the South Carolina Supreme Court to be a private, non-profit organization. *Babcock Center, Inc. v. Office of Audits*, 334 S.E.2d 112, 113, 286 S.C. 398 (1985), *Madison v. Babcock Center*, 638 S.E.2d 650, 371 S.C. 123 (2006). In its analysis of the application of the Tort Claims Act in *Madison,* the Supreme Court only discussed the Act as applying to DDSN, not to the Babcock Center. Id. at 286. This Court should take notice that in *Madison v. Babcock Center,* DDSN argued that it had no responsibility for acts of the Babcock Center, because that private corporation was an independent contractor:

> Department asserts it is not liable for the torts of its **independent contractor**, Babcock Center, pursuant to S.C.Code Ann. § 15-78-60(20) (2005), which provides that a governmental entity is not liable for an "act or omission of a person other than an employee including but not limited to the criminal actions of third persons." Department also has asserted and the circuit court relied on S.C. Code Ann. § 15-78-30(c) (2005), which provides that the term "employee" "does not include an independent contractor doing business with the State." (Emphasis added.)

Supra, 285. In discussing DDSN's independent common law duty of care to protect the plaintiff in *Madison*, the Supreme Court noted that: "The fact an independent contractor provided services to Appellant or the fact a third party may have committed a criminal act in harming Appellant does not affect the existence of Department's duty." Id. The evidence in this case shows that Babcock Center is a private corporation that is not entitled to protection under the Tort Claims Act, so that the statute of limitations for claims against Judy Johnson and the Babcock Center is three years, extended by the five year tolling statute to eight years.

The individual defendants are also not protected by the Tort Claims Act and Mims has alleged that they have acted with evil motives and intent and that they have shown reckless and callous indifference to his Constitutionally protected rights. The Tort Claims Act does not protect an employee who acts outside of the scope of his official duties, or where the employee's acts constituted fraud, malice, intent to harm or a crime of moral turpitude. *Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (S.C. App. 2010). S.C. Code Ann. § 15-78-70(b) (2005). In *Pridgen*, the South Carolina Court of Appeals found that circumstantial evidence may be used to establish that state employees acted outside of the scope of their employment with an intent to harm based on personal motives.

Defendants violated Mims' due process rights by providing false information to the Probate Court to prevent him from leaving the Babcock Center not once, but twice. R. 3273,

3383.The deceitful actions of these defendants were not within the scope of their official duties and a jury could reasonably determine that the alleged violations constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. *Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58, 64 (S.C. App. 2011). As in *Anthony v. Ward,* defendants were not covered by the Tort Claims Act, because their acts were outside of the scope of their employment. Case No. 07-1932 (4th Cir. July 7, 2009).

The Babcock Center and the individual defendants failed to meet their burden of proving that they are entitled to protection under the Tort Claims Act. Mims provided evidence, which must be viewed in the most favorable light to him, that the individual defendants are not covered by the Act, because they acted outside of the scope of their employment and the Babcock Center is not a local DSN Board, but has repeatedly been found to be a private corporation.

(f) The doctrine of equitable tolling applies. The South Carolina tolling statute applies to extend the statute of limitations five additional years. But, even if the statutory tolling was not available, the doctrine of equitable tolling would prevent these defendants from avoiding liability due to their bad faith and malicious acts. In *Hooper v. Ebeneezer Sr. Services,* the South Carolina Supreme Court established that equitable tolling is available "in addition to statutory tolling mechanisms," where necessary "[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits..." 54 C.J.S. Limitations of Actions § 115 (2005). 386 S.C. 108, 687 S.E.2d 29, 34, (2009). The equitable tolling doctrine was judicially created and "it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." Id., citing *Rodriguez v. Superior Court*, 176 Cal.App.4th 1461, 98 Cal.Rptr.3d 728 (2009). As the Supreme Court recognized in *Hooper*: "Where a statute

sets a limitation period for action, courts have invoked the equitable tolling doctrine `to ensure fundamental practicality and fairness.'" Id. at 736 (citation omitted). Where the defendant actively misled or prevented the plaintiff in an extraordinary way from pursuing a lawsuit, the doctrine has been applied. *Kaplan v. Morgan Stanley & Co.*, 987 A.2d 258, 2009 VT 78 (2009) (2009 WL 2401952). The South Carolina Supreme Court in *Hooper* refused to limit its equitable powers "by cast-iron rules," ruling that the doctrine should be applied "to do fairness," taking into account "all the circumstances" where denying equitable tolling "would permit one party to suffer a gross wrong at the hands of the other." Id. As in *Hooper*, this Court should apply equitable tolling, to prevent defendants from being "the beneficiary of the drastic consequence of a dismissal." Id.

Mims showed that the delay in serving his complaint resulted from Mrs. Mims' fear of retaliation after his sole respite caregiver was placed on administrative leave without pay when Babcock Center claimed that someone at the Governor's Office reported that his respite caregiver was neglecting him in the spring of 2007, just as Babcock Center had done to Mrs. Mims prior to DDSN involuntarily committing him in 2001. In her affidavit, Mrs. Mims stated: "The Babcock Center and DDSN have made false accusations against me and Edward's caregiver and I have been fearful that his services will again be terminated in attempts to force me to return him to the Babcock Center." Mims 2079, paragraph 50. Mrs. Mims was dependent upon services from DDSN to keep her son at home and she was unable to work while these allegations were being investigated. In 2007, Mims' mother was left without the support services she needed to help take care of Edward in the event that DDSN further reduced his services. Id. As with the allegations defendants and their agents made against Mrs. Mims in 2001, this allegation of abuse

or neglect after Mims' discharge was never substantiated. A reasonable juror could consider these facts and determine that defendants acted with malice, fraud and ill will to benefit financially from his incarceration and to prevent anyone from suing the defendants.

It was reasonable that Mrs. Mims was fearful of retaliation if the complaint she filed in 2007 was served before these allegations of neglect by her son's caregiver were fully resolved. Mrs. Mims relied in good faith upon the "relation back" rule and the tolling statute to preserve her son's rights. Defendants should be prevented from benefitting from their bullying and retaliatory conduct. The record in this case documents that Mrs. Mims' fears of retaliation were justified. The guardian ad litem who was appointed by the Richland County Probate Court signed a sworn statement and testified in the probate court that she met with Babcock Center employees and legal counsel for DDSN to discuss Mims' "situation and his medical needs" when DDSN filed a petition to involuntarily commit Mims in 2001. R. 3334. Attorney Flynn's affidavit states that: "Clusters employees intentionally withheld information from me about the conditions at Clusters in 2001 and about many incidents in which Edward had been injured at the facility so that I would recommend that he be involuntarily committed to the facility." R. 3235. Babcock Center employees told the GAL that Mims was being abused or neglected at home by his mother, but the Record does not contain a scintilla of evidence to support those allegations. Id. While falsely accusing Mims' mother of abusing and neglecting him, defendants and their agents kept from the GAL the fact that Mims had been beaten by a Babcock employee. Id. The GAL made a recommendation to the probate court to involuntarily commit Mims "based on this false information..." Id. Attorney Flynn had "represented a number of residents who had been abused or neglected by Babcock Center employees" and it was her opinion that "Edward is not safe

there." R. 3236. She was "provided with evidence showing that Babcock employees had intentionally provided false information...in 2001 in order to prevent Edward from returning to the custody of his mother." Id.

Other witnesses shared their personal experiences related to the pervasive culture of retaliation at DDSN. Senator David Thomas swore that his office had been "flooded with phone calls" from DDSN constituents and their families, as well as employees and former employees of DDSN who were "fearful of retaliation by DDSN." R. 3213. Mims also presented affidavits from two parents of DDSN consumers describing patterns of retaliatory acts by DDSN after they filed lawsuits on behalf of their children. Rob Pruitt stated that defendant Lacy retaliated against his daughter by attempting to terminate her eligibility for services and by refusing to provide residential habilitation services because she filed a lawsuit against Kathi Lacy and DDSN. R. 3409-3411, 3453-3454. He stated that: "I have talked with other parents who receive services from DDSN and there is a general fear of retaliation amongst parents, especially a fear of retaliation by Dr. Lacy." R. 3411. Mr. Pruitt also described the retaliatory termination of Lennie Mullis, one of the providers of services to his daughter, who also provided an affidavit of Mims after she was appointed by the Probate Court to examine Mims and defendant Johnson refused to give her access to him, despite a court order to do so. Id. and R. 3272-3274. Twice DDSN terminated Ms. Mullis' certification to provide DDSN services, and twice the South Carolina Administrative Law Court reinstated her certification, finding that DDSN denied her right to due process. *Mullis v. DHHS I,* 04-ALJ-0194-AP (SCALC 2005) and *Mullis v. DHHS II,* 10-ALJ-08-0775-AP (SCALJ 2012).

Another parent, Amy Davenport, described the retaliation she experienced when she sued

DDSN: "After I filed a lawsuit against DDSN and the local DSN Board, DDSN refused to provide the hours as Kathi Lacy had promised me." R. 3453-3454. She found defendant Lacy to be "retaliatory and untrustworthy." Id. According to this parent: "Other parents I have spoken with have a fear of retaliation if they advocate for their child and Kathi Lacy's name comes up frequently in conversations between parents as instigating this retaliatory conduct." R. 3454.

Ms. Mims affirmed that when she was appointed as Edward's permanent guardian: "As a reprisal, Dr. Kathi Lacy and the South Carolina Department of Disabilities and Special Needs determined that Edward did not qualify for adult day nursing services in an attempt to force me to send him back to the Babcock Center." R. 3273. She also stated 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.
> I am always fearful 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.
> Other families and employees have experienced similar reprisals for reporting abuse and have reported these fears to me and to legislators.

R. 3274. Defendants should be equitably estopped because the delay in serving this lawsuit was caused by fear of retaliation and loss of services Mrs. Mims needed to keep her son at home.

Issue 2. The lower court erred in failing to consider facts and events which occurred before the start of the time period covered by the tolling statute and the statute of limitations, as required by *Madison v. Babcock Center*.

The South Carolina Supreme Court has ruled in another case brought by a Babcock Center resident who was allegedly sexually assaulted that facts dating back before the time period covered by the statute of limitations should be considered in determining whether DDSN and Babcock Center violated their duty of care. *Madison v. Babcock Center, supra.* In that case, the plaintiff was admitted to the Babcock Center in 1994. Id. at 654. Madison alleged that she was sexually assaulted on August 30, 1995 and the statute of limitations for her lawsuit against

DDSN was two years, under the Tort Claims Act. Id. at 663. She filed her lawsuit on August 29, 2007 alleging that Babcock Center and DDSN had been negligent in providing supervision. But, her admission to Babcock occurred outside of the period covered by the statute of limitations, yet the Supreme Court ruled that "allegations relating to Department's alleged negligence in connection with Appellant's initial evaluation and admission in 1994 are not time-barred."

Issue 3. The lower court erred in dismissing Mims' complaints for violation of 42 U.S.C. 1983 of the Civil Rights Act, because Mims provided material facts showing that the defendants violated his civil and Constitutional rights.

The Fourteenth Amendment guarantees that no person shall be deprived of life, liberty, or property in the United States without due process of law. U.S. Const. amend. XIV, § 1. The South Carolina Supreme Court recently addressed the requirement that there must be a rational basis that is not arbitrary before a person may be deprived of a life, liberty or property interest in *State v. Dykes.* 403 S.C. 499, 744 S.E.2d 505, 508 (2013). As the Supreme Court noted in *Dykes* "A person's interest in freedom from bodily restraint is 'at the core of the liberty protected by the Due Process Clause from arbitrary governmental actions.'" Justice Hearn wrote a brilliant dissent in that case recognizing the awesome importance of citizens' rights to be free from unnecessary governmental interference in their lives:

> Sir William Blackstone, in his landmark Commentaries on the Laws of England, noted the government's right to restrict an individual's free will is not immutable and any greater restriction than necessary threatens liberty in general: We may collect that the law, which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural, increases the civil liberty of mankind: but every wanton and causeless restraint on the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny. William Blackstone, Commentaries * 121 122.
>
> Blackstone's commentary reflects our substantive due process milieu, where the core rights of freedom and liberty can only be limited when sufficiently necessary to advance the public good.

Id. at 513. Mims has shown that defendants' violations of law and their tactics have been

tyrannical and that DDSN's involuntary commitment constitute the kind of "mischief" Blackstone described. There is no evidence of any public or private good being accomplished by the incarceration of Edward Mims from 2001 to 2005. Much suffering occurred as a result of this fraudulent and illegal action by DDSN. Throughout Mims' confinement, defendants failed to demonstrate any just cause for taking away his liberty interest and removing him from his home. The lower court's reliance on the dissent in *Ashcroft v. Iqbal* was misguided. 556 U.S. 662 (2009). As the Fourth Circuit recently held in *Tobey v. Jones*, the Supreme Court has held that § 1983 "anticipates that a government official will be responsible for the natural consequences of his actions." 706 F.3d 379 (4th Cir. 2013). DDSN's experts and Mims' physician determined that he should not be left unattended and that he required one-on-one supervision. R. 314, 3301. A pre-admission screening at Clusters found Mims to require "one-one accountability 24 hrs per day." R. 314, 3277, 3282, 3290. That was the reason for involuntarily committing him. Yet, where was Mims' one-on-one when he was being repeatedly beaten and suffering "unexplained injuries" while defendant Butkus not once in four years monitoring his placement?

Mims and his mother lived alone in her home prior to his admission to Babcock in 1999. There were no other persons lurking around in his home who were larger and more aggressive than he, as there were when he was placed at Clusters and Kensington. Upon admission to Clusters, Mims was supposed to have a one-on-one caregiver. But, almost immediately, he began suffering from unexplained injuries that should have been noticed by his one-on-one caregiver.[8]

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[8] The failure to actually provide one-on-one care funded by Medicaid was investigated by DHHS. R. 1313. DHHS asked "Were these consumers, in fact, receiving the one-on-one care?" Id. DHHS found incomplete documentation on this issue and that "DDSN should not pay extra funds for one-on-one care unless medical and/or behavioral need is documented by a physician or qualified professional...and approved by DDSN." Id. The practice of billing Medicaid for one-on-

R. 3277. The injuries Mims sustained at Clusters and Kensington were the natural consequences of removing an individual as medically fragile and defenseless as he, and then repeatedly leaving him unsupervised and confined with stronger, aggressive individuals who could hurt him. This was a recipe for disaster, and disaster occurred frequently in Babcock ICF/MR facilities. R. 3277. It was just as foreseeable that when Mims was left alone in an understaffed facility with stronger, aggressive, cognitively disabled adults, where staff was insufficiently trained that he would suffer injuries of the types alleged in his complaint. Mims repeatedly got hurt, requiring treatment in the emergency room. But no one could explain how most of these injuries occurred. Examining Mims' amended complaint and drawing all reasonable inferences in his favor, it is logical to assume that defendants "had a hand" in the resulting injuries because they failed to provide a safe and constitutionally adequate placement. Id. During Johnson's first year at Babcock the rate of abuse was double the state wide average, but a year later it had rocketed to four times the statewide average. R. 2619-2620. Butkus and Lacy were both aware of this rise in injuries, doing nothing to protect Mims or to move him to a smaller, less restrictive setting, where he would not

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one services that were not being provided appears to have been a systemic problem. DHHS charged DDSN to work with Babcock Center to develop and implement an adequate system of accountability for one-on-one services. R. 1314. Related to the issues in Mims' case, this investigation found:

> Intensive supervision is needed by some DDSN consumers whose safety (or when the safety of others) would be at risk if not supervised appropriately. DDSN consumers who are funded to receive one-on-one supervision should be supervised as specified in their plans of service. R. 1321.

During a three day period in 2003, even with federal surveyors in the house, surveyors documented repeated assaults of clients who had one-on-one caregivers at Clusters. R. 1366-1367. The supervisor informed surveyors that Clusters was often "running on bare minimum and the one-on-one requirement for two clients residing I that house could not always be maintained." R. 1367. During three days in November 2002, federal surveyors documented 29 incidents of "client-to-client" aggression in that house. Id.

be victimized by more aggressive clients. Id.

Mims was not capable of harming anyone else, and there is nothing in the record to suggest that he ever did. The record is equally bare of any evidence that Mims was protected by being forced to remain in the custody of DDSN at the Babcock Center. On the contrary, Mims provided the lower court with reams of evidence documenting that he was taken out of a safe placement and placed in facilities where defendants were not meeting basic federal and state standards of care. It was the South Carolina Department of Social Services, not DDSN, that had the authority to investigate allegations that Mims was abused or neglected in the home. But the fact that DDSN never even filed a report with DSS, even though anyone with knowledge of him being harmed at home had a legal obligation to report, supports Mims' claims that defendants fabricated those allegations in order to cover up the abuse he was suffering at Clusters and to protect themselves from their own liability for damages after Mims was beaten by a Babcock employee and defendants, particularly defendants Butkus and Johnson, could have been sued for negligent supervision and violating their duty of care to Mims. *Madison, supra.* These same defendants later schemed to protect themselves by arranging to have DDSN's medical "expert" Grame Johnson investigate Mims' injury, instead of reporting the sexual assault to law enforcement. R. 3097. In furtherance of defendants' last gasp attempt to protect themselves from being sued after Mrs. Mims successfully removed her son from the decertified facility, DDSN filed a document titled "Objections" arguing that there was no need for a guardian:

> There has been no showing that Edward has gone lacking for care and supervision by not having a guardian. Very few people with Edward's condition have a guardian...It is not enough to want to be the guardian of an incapacitated person; there must be a direct, realistic need for care and supervision that would otherwise be lacking without the appointment of a guardian.

R. 3387. The reader should compare the chronology, based on Babcock Center's own records with the sworn affidavit at R. 3269-3274 to determine whether he needed a guardian. Between June 2005 and March 6, 2009, the date the affidavit was signed, he sustained no serious injury in the care of his mother. During the three decades that Mims lived at home prior to his mother becoming ill in 1999, there were never any allegations that she even once failed to provide for her son's needs safely at home. The allegations only arose after Mims was beaten by Babcock Center employee, Carl Anthony, and Mrs. Mims attempted to remove her son from the facility. Despite defendants' best efforts to fraudulently paint her as an abuser, and even to deceive the GAL and the Probate Court, defendants failed to prove any of their allegations against Mrs. Mims, but they succeeded through their bullying to neutralize her powers to sue them. It was the defendants who violated the law that required them to report any allegations of abuse at home to DSS pursuant to the South Carolina Omnibus Adult Protection Act. Act No. 110, § 1, 1993 S.C. Acts 257, S.C. Code Ann. § 43-35-5. S.C. Code Ann. § 43-35-55(C) designates the Adult Protective Services Program in the Department of Social Services as the investigative entity for abuse or neglect occurring in the home. Section (A) and (B) give SLED and the State Ombudsman authority to investigate abuse or neglect in facilities.

The Amended Complaint provided material facts, which have been supported by credible evidence filed in response to motions before the lower court, showing violation of Mims' civil rights during three phases: (1) violation of Mims' due process and equal protection rights during the commitment proceedings; (2) violation of Mims right to liberty and freedom from bodily restraint and right to appropriate care and treatment; and (3) violation of Mims' rights to be free from governmental interference during the 2005 guardianship proceedings. Mims' allegations are

supported by extensive evidence during each phase which was not considered by the lower court.

Instead of reporting their "concerns" that Mims was being abused in the home to the appropriate authority, DSS, DDSN filed a petition in the Probate Court to have him involuntarily committed to their custody. The United States Supreme Court established in *Addington v. Texas* the Due Process requirement that the State must prove by clear and convincing evidence that he needed institutional care "for his own welfare and protection of others." 441 U.S. 418 (1979). Mims presented evidence, which was not considered by the lower court, that the real reason for committing him was to protect the defendants and their agents from liability for injury to Mims after he was assaulted by a Babcock employee and his mother insisted on prosecuting the employee. R. 3270. Mrs. Mims stated in her affidavit that:

> When I tried to remove Edward and reported that he was being beaten, the South Carolina Department of Disabilities and the Babcock Center joined together to prevent Edward from being discharged from Clusters by filing a petition to have Edward involuntarily committed to their custody.

R. 3270-3277. There is not a scintilla of evidence that Mims ever harmed anyone. But the chronology at Mims 2083 documents how many injuries he suffered from November 6, 1999, just a month after his voluntary admission to Babcock Center, until his release from the facility in 2005. R. 3277-3292.

In dismissing Mims' § 1983 claims, the lower court ignored the affidavit and testimony of Attorney Flynn, who said that information was withheld from her by Babcock employees and that false information was provided about the care being provided by Mims' mother. R. 3234. She testified that Babcock employees "intentionally withheld information" about the conditions at Clusters and the "many incidents in which Edward had been injured at the facility" so that she would recommend that he be involuntarily committed. R. 3235. Her recommendation to commit

Mims was based on "false information" that had been provided to her by Babcock and DDSN. Id. When she later learned of the injuries Mims suffered at Babcock, which were similar to those other persons she represented experienced, Attorney Flynn informed the Probate Court that Mims was not safe there. R. 3236. But the interference by the DDSN state actors did not stop once the temporary guardianship was established.

Mims showed that DDSN bullied his mother into consenting to the involuntary commitment by threatening to terminate her son's weekend home visits unless she consented to the order. R. 3270, paragraphs 10 and 14. She provided the Court with an affidavit which states that defendants had terminated her weekend visits with Edward at the time of the hearing in 2001 and that these visits would not be restored unless she agreed to the involuntary commitment. R. 3270. The lower court erred as a matter of law in ignoring Mims' allegations that defendants failed to monitor his condition and to provide safe and effective treatment after involuntarily committing him to the custody of DDSN. R. 2618. Defendants' involuntary committment of Mims did not abolish his liberty interests to safe conditions and adequate habilitation. *Youngberg* at 314 and 327 and *Thomas S. by Brooks v. Flaherty*, 902 F.2d 250, 252 (4th Cir. 1990). 42 U.S.C. § 1983 of the Civil Rights Act provides that:

> Every person who, under the color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding to redress.

In order to succeed in a § 1983 action, "a plaintiff is required to plead three elements: (1) an official policy or custom (2) that causes the plaintiff to be subjected to (3) a denial of a constitutional right." *Moore v. City of Columbia,* 284 S.C. 278, 326 S.E.2d 157 (Ct.App. 1985).

As this Court held in *Moore v. City of Columbia*, in South Carolina "the complaint is sufficient if it informs the defendant of the ultimate facts supporting each element of the cause of action; there is no necessity that the complaint state all the evidence to be presented upon the trial of the case" Id. at 160. Mims clearly set forth the grounds for his claims that Lacy, Butkus and Johnson violated his Constitutional, federal and common law rights in the Amended Complaint R. 73-91 at paragraphs 14, 37, 43, 49, 51, 52, 64, 66, 67, 68, 69, 72, 80 and 86. He pled how each supervisory defendant through his or her own individual actions violated his rights by failing to protect him from abuse and sexual assault, failing to provide supervision and protection from injury, failing to monitor his condition and treatment needs, failing to provide adequate staffing, failing to investigate reports of abuse, failing to discharge him to the care and custody of his mother, failing to report abuse and neglect to proper authorities, obstructing the appointment of his mother as guardian and providing false and misleading information to the court for the purpose of preventing him from leaving Babcock. R. 87 at paragraph 80.

The Fourth Circuit has held that omissions by officials are actionable when they constitute "tacit authorization" of or "deliberate indifference" to constitutional violations, as was present in Mims' case. *Avery*, 660 F.2d at 114. It is not necessary to prove that members of the officials personally participated in, or expressly authorized, the wrongful act. *Avery* at 114. Supervisory officials who have been "charged with the responsibility of making rules" may be liable under § 1983 "where their unreasonable failure to make rules causes their employees' unconstitutional practices." Id. Thus, the conduct of officials may be actionable "if their failure to promulgate policies and regulations rose to the level of deliberate indifference..." or "constituted tacit authorization" of the wrongful acts that violated Mims' rights. Id.

Importantly, a "pattern of official negligence gives rise to an inference that the attendant constitutional deprivations represent official policy." *Moore* at 161. Mims has demonstrated such a pattern, by providing the lower court with uncontradicted evidence demonstrating that both DDSN and the Babcock Center failed to provide care and treatment in accordance with federal and state standards. R. 1202-1863. In *Moore*, the South Carolina Supreme Court found that liability may result from "official knowledge of employee conduct which causes constitutional violations" or even from "a violation occurring from a single sufficiently brutal incident." Id. at 285. It is uncontradicted that Butkus held the key to Mims' release from the dangerous conditions and unconstitutional conditions at the Babcock Center. R. 2618. Mims has demonstrated that the proximate causes to his injuries were the defendants' repeated refusals to grant his mother's request to release him from confinement at Babcock and the utter failure to provide appropriate care and treatment in the least restrictive setting. Except for Butkus' refusal to release Mims, none of the injuries would have occurred after DDSN petitioned the Probate Court to have him involuntarily committed.

The lower court erred in its determination that Mims failed to show that defendants had personal liability for the harms he suffered. In their depositions, defendants admitted that they had knowledge of the alleged sexual injury and other injuries to Mims and others at the Babcock Center. R. 2620, 2594, 2589, 2585, 2228, 2149-2150. Butkus testified that judicial admissions were "very, very, very rare" and that Mims' was the only one he remembered during his 12 years at DDSN. R. 2590. This is not a case where the defendants were totally removed from the alleged wrongful acts. Butkus voluntarily assumed responsibility through the involuntary commitment in 2001 to take the authority away from Mims' mother who had protected him all of

his life. Having refused for years to allow Mims to return home, based on information provided to the Probate Court that he required constant supervision that his mother could not provide, Mims was unattended long in a facility where Immediate Jeopardy had been repeatedly declared long enough for him to be sexually assaulted, suffering a four centimeter laceration to his penis, which required surgical repair. The lower court found that this was just a "factually unique incident" that was not foreseeable or preventable. But the uncontradicted records Mims provided to the lower court documented that the injury was foreseeable and that Mims and other Babcock Center residents being regularly assaulted was more the norm than an exception to the rule. R. 1350-1393, 3277-3291.

The lower court erred in its analysis of the liability of supervisory state actors. In *Baynard v. Malone*, the Fourth Circuit affirmed the district court's denial of a principal's motion for summary judgment where the court held that he could be liable under § 1983 for a student being sexually assaulted by a sixth grade teacher:

> It is well settled that "supervisory officials may be held liable in certain circumstances for the constitutional injuries inflicted by their subordinates."Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir. 1994). Such liability is not based on ordinary principles of respondeat superior, but rather is premised on "a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict on those committed to their care." Slakan v. Porter, 737 F.2d 368, 372 (4th Cir. 1984). In order to establish supervisory liability under S 1983, a plaintiff must demonstrate:
>
> (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices[ ]; and (3) that there was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff. Shaw, 13 F.3d at 799 (internal quotation marks omitted).

268 F.3d 228, 235 (4th Cir.2001), quoting *Shaw v. Stroud,* 13 F.3d 791, 798 (4th Cir.1994)). Mims has documented the knowledge of the defendants of his injuries and the widespread and systemic nature of abuse and neglect at the Babcock Center, the deliberate indifference of these officials is proven, not only from the number of injuries Mims sustained without intervention, but by the actions defendants took to prevent a guardian from being appointed, finally the causal link is demonstrated by the fact that Butkus held the key to Mims' release and he failed to use it, joining together with Lacy and Johnson instead to perpetuate the cycle of abuse. The requirements set forth in *Shaw* and *Madison* have been met.

Subsequent to *Baynard,* in *Jennings v. University of North Carolina*, the Fourth Circuit found that the University's Attorney Ehringhaus, was not entitled to summary judgment where, like Butkus, Lacy and Johnson in this case, she had the authority to take action to prevent a coach from sexually harassing Jennings, but she failed to take action, thereby allowing the harassment to "continue unchecked." 482 F.3d 686, 701 (4th Cir. 2007). Jennings' claims that were based on the theory of supervisory liability were allowed to proceed to trial, because the attorney's response was "so inadequate as to show deliberate indifference or tacit authorization of the offensive practices." Id. The court found that Jennings was entitled to show that individual defendant Ehringhaus had "actual knowledge" of the misconduct, as did defendants in this case. Id. As in this case, there existed "an affirmative causal link" between the state actor's action and the constitutional injury. Id. at 702. Certainly, there can be no doubt, given the record Mims has gathered, but that defendants had knowledge of the failure to protect Mims and they allowed violations of his civil rights to continue unchecked.

Mims provided material facts to show that the defendants had not just constructive

knowledge that their subordinates were engaging in conduct that posed a pervasive and unreasonable risk of constitutional injury, but the individual defendants had actual knowledge of the injuries Mims had suffered over a long course of time, as well as the persistent failure of Babcock to meet federal and state standards of care in their ICF/MR facilites and to protect its residents from harm. Mims demonstrated that defendants' response showed deliberate indifference, as well as tacit authorization of the illicit conduct. The causal links have been demonstrated by the defendants efforts to prevent his release from unsafe facilities and their failure to require their subordinates to comply with federal and state standards. Even after Butkus was informed that Mims suffered injuries from his bed being infested by ants, after Kensington was decertified and after Mims was beaten by a Babcock Center employee and other residents, once with a belt, leaving whelps all over his face and body R. 3251-3252, 3456), defendants Butkus and Lacy continued to obstruct the efforts of his mother to be appointed as his permanent guardian. Butkus testified in his deposition that he decided to keep Mims at Kensington because "circumstances were still operating that led to the original involuntary admission." R. 2607. Butkus testified that his decision was based on "our professional assessment" of the "mom and the overall environment." R. 2613. He could not remember whether a home study had been done, but determined Mims should stay in the decertified facility because his mother was working and she did not have a "lot of resources, income was limited..." R. 2609. Butkus testified that Mims was in the facility that "we felt was best for him." R. 2611. These justifications were obviously a pretext, as there is no evidence that Mims was ever injured at home. Butkus testified that he was paying close attention to Babcock Center's data on abuse and neglect of clients during 2004, at first ordering them to downsize by 25%. R. 2619. But, he

testified that in the fall of 2004 he and Lacy recognized that "the trend line still was not good for the agency as a whole on quality."[9] He testified that it was defendant Lacy who kept track of abuse and neglect data and kept him informed when Mims was injured. R. 2620.

Lacy was the state official in charge of policies related to service delivery and she ran the "risk management..piece of the agency, getting the reports of abuse and neglect." R. 1935, 2006. She wrote at least half of the DDSN Directives, which the agency prefers to use instead of promulgating regulations. Id. In 2009, Lacy had worked as an official at DDSN for thirteen years, but she was not aware of the DDSN Commission ever discussing the promulgation of regulations. R. 2057. According to Lacy, since she arrvived at DDSN "there had been the understanding that the promulgation of regulations was not something that we did becausee we used other vehicles - to issue directives and to hold people accountable to what our expectations were. R. 2057. Lacy's responsibility was to "provide oversight" to the process of abuse and neglect investigations and to analyze trends. R. 1990. Every complaint filed with SLED related to a DDSN provider is sent to DDSN and Lacy performs a "concurrent" review and a "post-review," looking at trends. R. 1990. Lacy made recommendations to the director on sanctions against providers and was responsible for assuring compliance with Medicaid standards and regulations. R. 1938. She was the official who informed Butkus when Mrs. Mims appeared with a court order to remove her son from Kensington. R. 1948. Lacy attended the emergency meeting at the Probate Court on a Sunday afternoon, having discussed the agency's intentions with Butkus. R. 1955-1956. She informed [the court] that Mims would not qualify for adult day health

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[9] Butkus testified that it was defendant Lacy who was responsible for tracking abuse and neglect at the Babcock Center and was responsible for "quality assurance." R. 2574-2575, 2621-26224. Lacy kept Butkus informed of every significant injury to a DDSN client. Id. and R. 2576.

care services, so that the only day program option for him would be to return to the Babcock Center. R. 1964.

As discussed above, Johnson admitted in her deposition that she communicated directly with Dr. Butkus about serious injuries to Babcock clients after she became director in 2002. She had been at the helm of Babcock for one year when Butkus and Lacy's data showed that the substantiated rate of abuse and neglect was double the statewide average there. R. 2618. But just a year later, under Johnson's leadership, the rate of abuse and neglect had grown to four times the statewide average. Id. Johnson admitted in her deposition that as director, she was responsible for the "day-to-day operations" of Babcock. R. 2173.

Mims has pled and provided credible evidence showing that the individual defendants were consciously indifferent to his needs and in leaving him without adequate supervision in a dangerous facility and they acted maliciously and wantonly by obstructing the appointment of a permanent guardian, by filing "Objections" and appearing at hearings for the purpose of challenging Mrs. Mims' ability to care for her son. R. 3383. The maliciousness of this decision is demonstrated by the fact that there has been not even one substantiated allegation that Mims was ever injured at home. Mims' GAL provided a sworn statement that she was provided false and misleading information by defendants in order to involuntarily commit Mims to DDSN, and that other clients she had represented who received services from the Babcock Center had been injured by neglect and/or abuse while admitted to their facilities. R. 3234.

The Amended Complaint contains the required "plain and concise statement of the facts constituting [the] cause of action," S.C.Code Ann. § 15-13-220 (1976). Although Mims was not required to set out the facts in detail, the complaint and the affidavits, surveys, investigations and

reports filed by Mims clearly set forth facts that demonstrate material facts that support his § 1983 claim. The long history of violations of both federal and state standards of care, defendants' personal involvement in Mims' incarceration in a dangerous facility and their persistent failure to correct deficiencies "constituted tacit authorization of or deliberate indifference" to Mims' rights. Mims has not sued under a theory of *respondent superior,* but he has alleged that defendants had independent liability to protect him from harm and to provide care and treatment in a safe manner.

The court erred in failing to recognize that Mims had constitutionally protected liberty interests to reasonably safe conditions of confinement and training. *Youngberg v. Romeo*, 457 U.S. 307, 313 (1982). Defendants did not base their judgment to keep Mims at Kensington on "professional judgment" that was "acceptable in light of present medical or other scientific knowledge." Id. Instead, defendants Butkus and Judy Johnson joined together to cause DDSN's medical consultant to investigate Mims' injury. R. 486, 488, 3064, 3097. Dr. Johnson marched right past the signs on the doors notifying the public that Kensington had been cited for Immediate Jeopardy and was decertified, without even mentioning in his report any of the many recent findings of substandard care and conditions at Kensington. R. 488-490, 2095, 3362. His report did not mention the federal and state survey findings of deficiencies or that the Babcock Center had failed to make the necessary improvements required by surveyors and he failed to contact Mim's treating physician. Johnson made no reference in his report to the fact that Babcock failed to preserve evidence or assure that rape protocol was followed. R. 3064. He did not mention in his report the October 2004 findings by CMS that Babcock failed to properly investigate the death of Mim's roommate just a few months earlier.

DDSN, Babcock Center, Johnson, Butkus and Lacy were all well aware of the seriousness of the problems and the risk of harm to Babcock Center residents. R. 3071-3088. Butkus ordered Babcock Center to "downsize" by 50%. R. 3071, 3074. Butkus continued to justify his decision to prevent Mims' return home solely to protect himself and his co-defendants.

Although defendant Johnson is not a state employee, she may still be held liable, along with defendants Lacy and Butkus, for violation of Mims' rights under § 1983. This is because private individuals who act jointly with state officials performing state functions and private persons or corporations who contract with the government may be sued under the statute. As the United States Supreme Court held in *Lugar v. Edmondson Oil Company, Inc.:*

> Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents,' " quoting United States v. Price, 383 U.S., at 794, 86 S.Ct., at 1157.

457 U.S. 922, 942 (1982).

Issue 4. The lower court erred as a matter of law in dismissing Mims' claims for negligent supervision, negligence and gross negligence.

The Supreme Court established in *Madison v. Babcock Center* that DDSN and Babcock Center have a common law duty of care to protect Babcock residents from harm. *Supra.* The lower court erred in its finding that Mims' claims for neglect, negligent supervision and gross neglect were "conclusory." Mims provided specific details, including dates and supporting medical records supporting his allegations. Butkus and Lacy both testified that it was the practice for Lacy to inform him of serious incidents that occurred in DDSN funded facilities and to analyze data and trends. R. 2558, 2559, 2560, 2599. When Butkus ordered 50% of the Babcock

population to be released, he left Mims - the only person he claimed to have been involuntarily committed in the DDSN system, in a facility where federal and state surveyors had repeatedly declared that Kensington's residents were at risk of Immediate Jeopardy. R. 2590-2592. Mims has shown that "but for" Butkus' decisions not to release Mims from confinement at Babcock Center, Mims would not have suffered injuries, both physical and psychological, he suffered between 2001 and 2005. Mims' claims are supported by audits and investigations. which raised "serious questions about Babcock Center's ability to provide for the day-to-day safety and welfare of its clients." R. 1319. The State Medicaid Agency found that Babcock Center had failed to report and prevent resident-to-resident abuse, which "could be an indication of **negligent supervision.**"[10] (Emphasis added.) Id. The audit found that Babcock failed to follow corrective action plans to "provide for the safety and welfare of the consumer and to help prevent future occurrences of another incident." R. 1322.

Mims has clearly established through not only the evidence of injuries suffered by Mims, but the widespread systemic problems that went uncorrected for years, the necessary "causal connection" between defendants' violations and the harm he suffered. R. 1245-1780, 3277.

It is undisputed that on May 27, 2005, Mims was left unsupervised and was found to have a "gaping laceration" that was 4 cm long on his penis that required seven stitches to repair. R. 3288, 3316. If defendants had released Mims to his mother's care when she repeatedly begged for him to be discharged, none of these injuries would have occurred. The lower court's finding that there were no "widespread systemic problems" at Babcock is not supported by the record.

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[10] Insufficient staffing was substantiated in two of the five incidents involving abuse and neglect that DHHS reviewed. R. 1324.

The Director of DHHS wrote to defendant Johnson on January 19, 2005 that "Based on the findings of this limited scope review, I am concerned that the deficiencies noted may be indicative of more pervasive problems at Babcock." R. 3347. An audit by Carolina Medical Review found that Babcock Center ICF/MR facilities were not in compliance with federal standards for participation in the Medicaid program. R. 1409-1451.

Defendant Lacy attended the 2005 probate proceedings, attempting to obstruct his mother from being appointed as his guardian. R. 2690, 2715. Defendant Butkus admitted that he personally made the decision to keep Mims at Kensington and to prevent his return home. Given the lack of monitoring between 2001 and 2005, a reasonable juror could determine that their sudden interest in "protecting" Mims' was motivated for personal, not professional reasons, i.e. to prevent Mims from filing this lawsuit. *Pridgen, supra.* The court erred in failing to recognize that the proximate cause of his injuries was defendants' negligent failure to supervise and to require their subordinates to meet federal standards for quality of care. *Madison* at 287. The injury to Mims' penis would not have occurred if Butkus, Lacy and Johnson had released him when his mother begged for his discharge home. Id. Given the findings of surveyors, federal, state and private investigators, the injuries to Mims were foreseeable and natural consequences of defendants' actions. R. 1395, 1399, 1409, 1559, 1616-1780. The chronology attached to Mrs. Mims' affidavit documents ongoing assaults throughout the time Mims was at Clusters and Kensington. R. 3269. But, not a single injury was substantiated at home on Mims' weekend visits. Mims has shown, however, that when his mother attempted to remove him after he was beaten by Babcock Center employee, Carl Anthony, defendants involuntarily committed him to DDSN to prevent his mother from taking him home. R. 3292-3295. On September 4, 2000, Mrs.

Mims attempted to remove her son from Babcock. R. 3279. Nine days after Mrs. Mims attempted to remove her son from the facility in 2001, exactly a month after Anthony beat him, Anthony was terminated on August 13, 2001. R. 3296-3297. Mims' records suggest another serious "unexplained" altercation occurred on the same evening Anthony was terminated. The very next morning after Anthony was terminated, on September 14, 2000, Mims was found to have extensive unexplained injuries, including "multiple purple elongated lesion bilateral chest wall, neck, posterior ear, right eye lids and wrist and chest wall." R. 3280. Although the cause of the injury is not mentioned in his records, Mims' one-on-one caregiver at Clusters wrote that "Edward has scratches and bruises wrote it up in accident/injury form also nurse looked at it when she did am meds." Id. This reaction to a serious unexplained beating is indicative of the conscious indifference that existed at the Babcock Center and the warrant for Carl Anthony's arrest was not signed until October 3, 2001. R. 3293.

In November, 2001, Mrs. Mims wrote to the Attorney General, begging him to help her bring her son home. R. 3306. She pleaded "I don't understand why he can't come back home!" After commitment to DDSN, Mims continued to have multiple "unexplained injuries" at Clusters. R. 3283. On December 6, 2001, the Attorney General's Office responded to Mrs. Mims' letter, informing her that they had no control over the Babcock Center, but they referred her letter on to DDSN. R. 3310. Mims was assaulted by another client on December 16, 2001, just ten days after Mrs. Mims begged the AG to remove him, and he was treated at the emergency room again. It is not explained how this injury happened with Mims having a one-on-one caregiver. During 2002, Mims continued to have unexplained injuries and on January 24, 2002, he was beaten at Clusters with a belt by another resident. R. 496, 3222, 3041-3042, 3456.

Mims was treated at the emergency room again, due to the "severity of bruises." R. 3042. In February, Mims was again treated at the emergency room for injuries. R. 3285.

Mims was moved to Kensington in March of 2002, where he continued to be assaulted by other residents and have unexplained injuries, but the written reports were not as frequent as at Clusters. R. 3287. Kensington was cited on February 23, 2003 for medication errors, excessive use of drugs as restraints and mistreatment due to unexplained injuries. R. 1247. Three other Babcock Center ICF/MR facilities were cited with Immediate Jeopardy in 2003. R. 1264, 1274, 1288. The CMS investigation in 2004 found that Kensington was not adequately staffed and that staff was not properly trained. R. 1399. See also R. 1399. On November 19, 2004, Kensington was again cited for failing to "ensure that the governing body exercised sufficient operating direction..." R. 1406.

On January 18, 2005, Carolina Medical Review (CMR) reported that in the last quarter of 2004: "There is no comprehensive set of policies and procedures for the administration of programs and other aspects of business." DDSN reported to CMR that it has not "felt the need" for a comprehensive set of administrative policies and procedures. R. 1410. CMR reported extensive problems that prove the foreseeability of Mims' injury. R. 1412. Residents with widely disparate care needs were observed at Babcock Center ICF/MR facilities, including Kensington. R. 1413. Clients with "severe behavioral aggression" were housed with vulnerable clients and CMR concluded that it could not "provide assurance to DHHS that Babcock Center, Inc. is meeting the minimal conditions of participation in the Medicaid program as required by federal regulations." R. 1414. Just before Mims' injury, Immediate Jeopardy was once again declared at Mims' ICF/MR. R. 1451. Kensington was still in disrepair, according to the survey

report and on April 27, 2005, surveyors returned to Kensington for a follow up and DHEC found that problems had not been corrected "nor had sufficient progress been made in correcting these deficiencies." R. 1453. On April 29, 2005, defendant Judy Johnson was notified that Kensington's certification was being terminated and that plans must be made immediately to transfer all residents to other facilities. R. 1453. On May 3, 2005, defendant Johnson wrote to families informing them that DHEC recommended termination of Babcock Center's funding for Kensington and that families should plan to relocate their family members who lived there. R. 1454. Butkus and Johnson had an affirmative duty to protect Mims from further harm by removing him from, but, instead they joined together to block his discharge from the facility.

Again on May 20, 2005 another Babcock Center ICF/MR was found to be out compliance with Medicaid standards of care. In 2005, Protection &Advocacy found that:

> Some of South Carolina's most vulnerable citizens are needlessly suffering, even dying. They will continue to do so until South Carolina has the will, backed by the funds, to protect persons with disabilities by demanding an effective, independent investigation system to address these often criminal activities. Those least able to speak for themselves deserve no less.

R. 1485. P&A described its investigation as "an in-depth review of the entities that respond, or fail to respond, to allegations of abuse, neglect and exploitation" in the DDSN system. R. 1488. Their Report found in the DDSN system:

> Physical Abuse. Sexual Abuse. Neglect. Misuse of medications. Few incidents are reported. Fewer are properly investigated. Rarely are offenders held accountable. Those who should protect people with disabilities often fail to do so.

R. 1487. P&A discovered during this investigation that "DDSN exercises little control over the delivery of services by boards or contract providers" and that it has "created policies and

procedures that are inadequate in some places and not followed in others"[11] R. 1487, 1488. P&A also reported that "Investigations conducted by contract agencies were seriously flawed." R. 1489. In one case reported by P&A, DDSN failed to investigate sexual abuse and failed to protect the victim. Id. Less than one month after the director of DHHS notified defendant Johnson and DDSN that Kensington was being decertified, on May 27, 2005, Mims was left unattended in his room and he was found sitting in a chair without pants on with a serious "unexplained" injury to his penis. Babcock assessments had repeatedly found that Mims should not be left unattended. R. 3277-3291, 3311.

The Supreme Court has ruled that whether an injury is foreseeable in an action for negligent supervision is determined by looking to the natural and probable consequences of the complained of act, although it is not necessary to prove that a particular event or injury was foreseeable. *Madison* at 287. In *Madison,* the Supreme Court held "that, under the common law, a private person or business entity which accepts the responsibility of providing care, treatment, or services to a mentally retarded or disabled client has a duty to exercise reasonable care in supervising the client and providing appropriate care and treatment to the client." Id. 281.

Mims has provided evidence demonstrating that his injuries were a "natural and probable consequence" of leaving him unattended in a decertified facility with aggressive persons and inadequately trained staff. The South Carolina Supreme Court held in *Madison* that "The defendant's negligence does not have to be the sole proximate cause of the plaintiff's injury;

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[11] P&A noted in this report that DDSN Directive 534-02-DD, titled "Acts of Assault Between People Receiving Services" provides that "Failure to provide proper supervision to prevent people receiving services from assaulting each other could be a form of neglect if the employee fails to intervene or provide proper supervision when they have a duty to do so." R. 1549.

instead, the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury." *Madison* at 287, citing *Hughes v. Children's Clinic, P.A.*, 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977). Proximate cause can be determined "either by direct or circumstantial evidence." *Madison,* supra. Given the lengthy history of abuse and neglect at DDSN, Babcock Center, and at Babcock Center particularly, a jury would not have difficulty reaching the conclusion that the defendants proximately caused Mims' injuries, because those injuries resulted from the natural and probable consequence of defendants' failure to exercise reasonable care in supervising and providing care and treatment to Appellant." *Madison,* Id. Federal and State surveyors repeatedly found that the Babcock Center failed to provide care and treatment meeting the clearly established standards required of ICF/MR facilities. R. 1247, 1399, 1409, 1451, 1453, 1484, 1561, 1616. Butkus was well aware of the high rate of abuse, neglect and exploitation at the Babcock Center in 2004 and that these problems were so extensive that he ordered the provider to move half of its residential clients. R. 2619-2620, 3071, 3080. Mims' injury occurred during a time when the Babcock Center was reducing staffing due to financial mismanagement and its high rate of abuse and neglect. *Babcock Center v. U.S., supra.* Johnson was under orders from Butkus to move more than 300 persons out of beds at the Babcock Center, due to the rate of substantiated cases of abuse, neglect and exploitation increasing from double the statewide average in 2003, to four times the statewide average in 2004. R. 2618-2619. The lower court erred in its finding that Mims failed to present evidence of negligence, negligent supervision and gross negligence and the Court should grant Mims' motion for summary judgment on this issue, remanding Mims case for a speedy trial by a jury to determine damages.

Issue 5. The lower court erred in dismissing Mims' claims for violation of the

Americans with Disabilities Act and the Rehabilitation Act based on a one year statute of limitations and because Mims met his *prima facie* burden and the defendants failed to prove that providing the services he needs to live in the least restrictive setting would require a fundamental alteration in the State's system.

The United States Supreme Court ruled in *Olmstead v. L.C. ex rel. Zimring*, that "unjustified institutional isolation of persons with disabilities is a form of discrimination." 527 U.S. 581 (1999). Indeed, the South Carolina Court of Appeals recently held that DDSN's imposition of caps on home based services and the failure to provide home-based services to persons who are at risk of institutionalization violates the ADA. *Stogsdill v. DHHS,* 410 S.C. 273, 763 S.E.2d 638 (S.C. App. 2014). Thus, with or without the five year extension of the tolling statute, Mims' claims for violation of the ADA were brought within the statute of limitations. The lower court erred in finding that Mims' ADA claims were mooted in 2006. Mims' ADA claims are not moot, because those violations continue to this day.

Mims claims that the ADA violations he complained of were subject to repetition, yet they have evaded review. R. 89 at paragraph 89. He complained that (1) DDSN has operated its programs in such a way as to prevent Mims from remaining in his home by failing to provide payment to home-based caregivers commensurate with funding institutional services R. 88-89; (2) DDSN's official practices have caused Mims to be unnecessarily segregated and at risk of returning to an institution operated by DDSN, where he suffered serious injury and that defendants have operated their programs so as to keep their institutions full. R. 89. Mims' requests for prospective relief on his ADA claims have been ignored and his services were actually reduced during this litigation, in violation of the Act. His ADA and Rehabilitation Act claims are live.

It is not necessary for ADA litigants to wait until they are institutionalized to enforce their rights under the ADA. *Pashby v. Delia,* 709 F.3d 307 (4th Cir. 2013). While this lawsuit was pending, DDSN drastically reduced services based solely on claims of budget reductions. *Peter B., supra* and *Stogsdill, supra.* But, in *Stogsdill*, this Court ruled that the State failed to meet its burden of proving that providing the requested services would present "a fundamental alteration to its program." *Id. citing Olmstead,* 527 U.S. at 603-04. The *Stogsdill* joined the Third, Ninth, and Tenth Circuits in holding that "financial constraints alone cannot sustain a fundamental alteration defense." *Id. Citing Pashby,* 709 F.3d at 323-24 (internal quotation marks omitted). The Court of Appeals held that the State of South Carolina presented "no argument other than a general budgetary reduction and financial constraints" in its fundamental alteration defense and that DDSN must assess Stogsdill "without reference to the caps in the Waiver."

The lower court also erred as a matter of law in ruling that the statute of limitations for a claim brought under the Americans with Disabilities Act (ADA) is one year in the state courts of South Carolina. This is an important and novel issue for this Court to decide. Counsel is not aware of any appellate court in South Carolina having addressed the issue of the applicable statute of limitations for non-employment related ADA cases not brought under Title I of the Act. As the Supreme Court recognized in *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*: "The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right." 636 S.E.2d 598, 605 (2006). The ADA provides that for non-employment related claims like that of Mims, that are brought under Titles II or III of the ADA,

the applicable statute of limitations should be the state's personal injury statute of limitations.[12] The two South Carolina federal district court decisions that have held that the statute of limitations for non-employment claims brought under the ADA is one year, without certifying the issue to the South Carolina Supreme Court, are certainly not controlling law in this case. *Cockrell v. Lexington Cnty. Sch. Dist. One* (D.S.C., 2011) and *Robert Mestrich v.Clemson University,* C/A No. 8:12-2766-TMC (D.S.C. 2013). Neither of these cases was appealed to the Fourth Circuit, and they are not binding on this Court's decision in Mims' case. In any event, Mims has alleged that the ADA violations in this case result from acts in existence at the time the lawsuit was filed have continued. Mims met his *prima facie* test of demonstrating that he is a disabled person, the State has determined that his needs may be met in the community and he does not object to receiving services in the community. *Olmstead v. L.C., supra.*

VII. CONCLUSION

For the reasons set forth above, Mims prays that this Court will reverse the decision of the lower court and grant Mims' motion for partial summary judgment, remanding his case to the circuit court for a speedy trial. Mims prays for an award of interim fees and costs and such other relief as this Court shall determine to be just and appropriate.

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[12] However, an argument could be made that, the statute of limitations is four-years.§ 28 U.S.C. § 1658 contains a catchall four-year statute of limitations for actions arising under federal statutes enacted after December 1, 1990. The ADA was signed in July 1990, but amendments to the ADA went into effect in January, 2009, arguably making the Act subject to this catchall provision.

Respectfully submitted,

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February 28, 2016

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE COURT OF COMMON PLEAS
Honorable G. Thomas Cooper, Jr.
Circuit Court Case No.: 2007-CP-40-03565

Appellant Case No. 2014-001373

Estate of Edward James Mims,
Laura M. Cole, Personal Representative,
Appellant,

v.

The South Carolina Department of Disabilities
and Special Needs, Kathi Lacy and Stan Butkus,
Respondents.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Appellant's Final Brief complies with the Supreme Court's Order of August 13, 2007, regarding personal identifiers and sensitive information and with Rule 211(b) of the South Carolina Rules of Appellate Procedure.

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February 29, 2016
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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE COURT OF COMMON PLEAS
Honorable G. Thomas Cooper, Jr.
Circuit Court Case No.: 2007-CP-40-03365

Appellant Case No. 2014-001373

Estate of Edward James Mims,
Laura M. Cole, Personal Representative,
Appellant,

v.

The South Carolina Department of Disabilities
and Special Needs, Kathi Lacy and Stan Butkus,
Respondents.

CERTIFICATE OF SERVICE

I, Laura M. Cole, certify that I have served by hand-delivery Brief of Appellant, Reply Brief of Appellant and the Certificate of Compliance with Rule 211(b) on the attorney at the address shown below on February 29, 2016.

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