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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

RECEIVED
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SC Court of Appeals

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Appellant Case No. 2014-001373

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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.

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# REPLY BRIEF OF APPELLANT

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## TABLE OF CONTENTS

Errors in "Counter statement of the Case." . . . . . 1

Comments Related to Defendants' "Counter statement of Facts" . . . . . 4

Errors in Summary of Argument. . . . . 7

Errors in Arguments. . . . . 10

Conclusion. . . . . 25

## TABLE OF AUTHORITIES

FEDERAL CASES

*Allen v. State Board of Elections*, 393 US 544 (1969) . . . . . 2

*Anthony v. Ward*, Case No. 07-1932 (4th Cir. July 7, 2009) . . . . . 22

*Babcock Center v. U.S.*, 3:11-cv-01721-CMC, 3:11-cv-03155-CMC (D.S.C. 2013) . . . . . 15

*Disabled Patriots of America, Inc. v. Reserve Hotel Ltd.*, 659 F.Supp. 2d 877, (N.D. Ohio 2009) . . . . . 24

*Green ex rel. Estate of Green v. city of Welch*, 467 F. Supp. 2d 656 (S.D.W.Va. 2006) . . . . . 23

*Fisher v. Washington Metro Area Transit Authority*, 690 F.2d 1133 (4th Cir. 1982) . . . . . 11

*Flaum v. Gloucester Lanes, Inc.*, 4:2103cv00131(E.D. Va. 2015) . . . . . 23

*Hager v. First Virginia Banks, Inc.*, No. 7:01cv53, 2002 WL 57249 (W.D. Va. Jan. 10, 2002) 23

*Kettner v. Compass Grp. USA, Inc.*, 570 F. Supp. 2d 1121 (D. Minn. 2008) . . . . . 22, 23

*Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859 (11th cir. 1986) . . . . . 23

*Monell v. Department of Social Services*, 436 US 658 (1978) . . . . . 10

*Newman v. Piggie Park Enterprises, Inc.*, 390 US 400 (1968) . . . . . 1, 2

*Owens v. Baltimore City State Attorneys Office*, 767 F.3d 379 (4th Cir. 2014) . . . . . 10

*Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994) . . . . . 10

*Slakan v. Porter*, 737 F.2d 368 (4th Cir. 1984), cert. denied, 470 U.S. 1035 (1985) . . . . . 11

*Spell v. McDaniel*, 824 F.2d 1380 (4th Cir.1987) . . . . . 15, 16, 20

*Wright v. Collins*, 766F.2d 841, 850 (4th Cir. 1985) . . . . . 11

FEDERAL STATUES and REGULATIONS

American with Disabilities Act (ADA) . . . . . *passim*

Civil Rights Act . . . . . 1

Rehabilitation Act . . . . . 2, 22, 23

42 U.S.C. § 12205 . . . . . 24

42 U.S.C. § 1983 . . . . . *passim*

42 U.S.C. § 1988 . . . . . 24

42 C.F.R. 441.302 . . . . . 12

STATE CASES

*Bank of New York v. Sumter County*, 387 S.C. 147, 691 S.E.2d 473 (2010) . . . . . 20

*Fricks v. Lewis*, 26 S.C. 237, 1 S.E. 884 (1887) . . . . . 25

*Hainer v. American Medical Intern, Inc.*,492 S.E.2d 103, 328 S.C. 128 (S.C. 1997) . . . . . 9

*Harrison v. Bevilacqua.* 354 S.C. 129, 580 S.E.2d 109 (2003) . . . . . 25

*Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000) . . . . . 25

*Madison ex rel. Bryant v. Babcock Center*, 638 S.E.2d 650, 371 S.C. 123 (2006) . . . . . *passim*

*Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (S.C. App. 2011) . . . . . 11, 22

*Smith v. Smith*, 194 S.C. 247, 9 S.E.2d 584 (1940) . . . . . 9

*State v. Dykes,* 403 S.C. 499, 744 S.E.2d 505 (2013) . . . . . 19

*Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 580 S.E.2d 100 (2003) . . . . . 25

STATE STATUES and REGULATIONS

Tort Claims Act [South Carolina] . . . . . 22, 25

S.C. Code §15-3-40 . . . . . 25

S.C. Code §15-5-90 (1976) . . . . . 24

S.C. Code §15-78-110 . . . . . 25

S.C. Code §44-20-460(B) . . . . . 5

OTHER AUTHORITIES

*Unequal Justice for South Carolinians with Disabilities*: *Abuse and Neglect Investigations*, October 2005, Protection and Advocacy for People with Disabilities, Inc. of SC . . . . . 14

Wright, Miller & Kane, *Federal Practice and Procedure* § 1954 (3d ed. 2007) . . . . . 22, 23

**Errors in "Counter statement of the Case."** On page 1, the Defendants presume, without evidentiary support, that the cause of Edward Mims's death, at age 43, was not related to Defendants' violations described in his complaint. Mims died in March, 2015, but the record does not contain the cause of his death or any evidence to support Defendants' argument that his cause of death at such an early age was not related. Defendants argue on pages 2 and 3 that all violations occurred between 2000 and 2005, but that is also wrong.

After Mims' mother was appointed, in June 2005, as temporary guardian, Defendants continued to violate his civil rights by obstructing her appointment as permanent guardian, then denying funding for Adult Day Health Care services in retaliation. R. 3383 and 1098. This forced Edward into an administrative appeal obtain funding for Adult Day Health Care services necessary to prevent him from having to return to the Babcock Center workshop, where he had been repeatedly injured. R. 1098-1106.

Mims brought his § 1983 claims not only for himself, but in his capacity as a "private attorney general." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). Mims sought through his lawsuit to vindicate the important rights of disabled persons who have been subjected to abuse, neglect and exploitation in DDSN funded programs.[1] His Civil Rights Act claims, except those for prospective relief, were in no way affected by his death. The United States Supreme Court discussed the important Congressional goal of having private litigants enforce the Civil Rights Act in *Newman,* recognizing that Congress was well aware that "the Nation would have to rely in part upon private litigation as a means of securing broad compliance," given the

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[1] Mrs. Mims testified that "Im referring to all the things that happened to all the kids; not just my son." R. 2754, page 106:11.

obvious impossibility of the federal Government identifying and prosecuting every civil rights violation. Id. at 401. The Court held in *Newman* that a private party bringing a civil rights suit "does so not for himself alone but also as a private attorney general, vindicating a policy that Congress considered of the highest priority." Id. at 402. The next year, in *Allen v. State Bd. of Elections,* the Supreme Court reiterated that "The achievement of the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." 393 U.S. 544, 556 (1969).

Mims alleged in his amended complaint that the Defendants have established a pattern and practice of bringing reprisals against persons who complain about DDSN services. Amended Complaint. R. 76 at ¶17. In addition to the affidavit of Plaintiff's mother ®. 3269), allegations of reprisals are supported by affidavits signed by other parents ( R. 3409, 3453, 3454, 3457) and even the affidavit of a State Senator. R. 3212.[2]

Mims alleged that the violations of the Americans with Disabilities Act and the Rehabilitation Act were ongoing. Plaintiff's Response to Defendants' Motion for Summary Judgment states at R. 593:

> Mims' claims for violation of the ADA are based not only on those violations occurring before he was discharged from Kensington, but they are ongoing to this very day. For example, when Mims' mother was recently hospitalized and he required respite care for two weeks. But DDSN refused to provide more than 240 hours a month (10 days) of respite services, based on its policy which limits waiver participants to receiving more

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[2] The record contains a sworn statement signed by Senator David Thomas stating that his office had been flooded with calls after the Legislative Audit Council audit of DDSN was released in 2008 from families who "reported to me and my staff that they were fearful of retaliation by DDSN." R. 3212. See also "Senator: Agency retaliating against 5" at R. 3396. Affidavits of parents and a provider support these claims and, specifically state that Kathi Lacy had retaliated against families. R. 3409-3410, 3418, 3453-3454.

hours outside of an institution. Exhibit 1, Letter from Beverly Buscemi denying request for additional respite hours dated May 7, 2013.

R. 622. Yet, DDSN policies allowed Medicaid waiver participants to receive an unlimited number of days in a DDSN institution, at significantly greater costs. Id.

Defendants argument that Mims limited his complaints to only three incidents is fantasy. Defendants' Brief at 7 and 8. Mims' amended complaint, his response to Defendants' motion for summary judgment and his own motion for summary judgment alleged that Defendants were responsible for dozens of injuries, but the lower court ignored these allegations. In his Response to Defendants' Motion for Summary Judgment, Mims refers to the facts that were set forth in Plaintiff's Memorandum of Law filed with his Motion for Summary Judgment the week before, including allegations that Defendants:

1. Failed to provide proper supervision to protect Plaintiff from assault, battery and sexual assault;
2. Failed to provide supervision to protect Plaintiff from injury;
3. Failed to properly monitor Plaintiff's condition and treatment needs after initiating involuntary commitment proceedings;
4. Failed to provide adequate staffing needed to assure the health and welfare of Plaintiff and other residents;
5. Failed to thoroughly investigate reports of abuse, neglect and exploitation of Plaintiff and other residents at his facility;
6. Failed to discharge Plaintiff to the care of his mother;
7. Failing to provide services in the least restrictive setting;
8. Illegally obstructed Plaintiff's discharge from the Babcock Center;
9. Failed to report incidents of abuse and neglect which a reasonable person would know should be reported.
10. Illegally obstructed Plaintiff's guardian in the establishment of a guardianship.

Plaintiff's Response to Defendants' Motion for Summary Judgment and Motion to Strike at R. 616-621. See also pages 4, 12,15, 24, 30, 33 and reference to the affidavit of a registered nurse in that memorandum at R. 144, 3457.

In the motion filed on May 23, 2013, Mims sought summary judgment based, in part on violations of § 1983 by subjecting him to unconstitutional conditions, denying his right to receive services with reasonable promptness in a safe and in the least restrictive environment, failing to provide services in the amount, duration and scope necessary to prevent institutionalization and violating his right to liberty and the pursuit of happiness, his right to equal protection of the laws and his right to be secure in one's person and property (including the right to services) against unreasonable seizure.[3] Mims never abandoned those claims. His motion for summary judgment alleged that Defendants acted with evil motives and conscious indifference to his rights, and those claims were separate from his civil conspiracy cause of action.

In his amended complaint and motion for summary judgment, Mims also provided the Court with evidence that Defendants obstructed his discharge from the Babcock Center, and those claims for violation of his civil rights were not affected by the decision not to pursue the cause of action for conspiracy in this appeal.

Defendants complain on page 5 that Plaintiff filed his motion for summary judgment "at the eleventh hour," but they fail to mention that they themselves filed 90 pages that same day (the deadline set by the circuit court or that the Babcock Center Defendants did not file their brief until the day of the hearing. R. 143, 593.

**Comments Related to Defendants' "Counter statement of Facts"** On page 6,

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[3] The circuit court scheduled hearings on all motions filed by Defendants, but still had not scheduled a hearing on Mims' 2008 motion to recuse the judge (who was a former Babcock Center employee) who made the decision to schedule Defendants motions for summary judgment, but not Plaintiff's motion for summary judgment. Defendant's Brief at 4 and R. 118.

Defendants reference S.C. Code § 44-20-460(B), which authorizes the State Director of DDSN to postpone discharge of a patient and to apply for judicial admission when the patient "cannot be discharged with safety to himself or with safety to the general public." Paragraph (A) of that statute also authorized Defendant Butkus to discharge Mims when he learned of the abuse and neglect Mims suffered at Babcock Center. Plaintiff has alleged that Defendant Butkus had a duty to investigate and to return Mims to the care of his mother, but, instead, Defendant Butkus took no action to protect Mims for years, even though he received reports of the abuse and neglect Mims was suffering. R. 598-604, 1245-1780, 3109-3211. Defendants fail to mention that Mrs. Mims signed a sworn affidavit complaining that her weekend visits with her son were terminated when she went to the Attorney General seeking prosecution of Carl Anthony for beating her son. R. 3270, ¶14. Defendants then terminated her weekend visits and threatened that if she did not consent to their petition for involuntary commitment, those visits would not be restored and she would never see her son again. R. 2735, page 31:9, 2737, page 37:18-23.

At footnote 6, Defendants admit that they delayed Mims discharge when he presented the court order appointing his mother as temporary guardian. See also R. 522-524, 2598. They argue that Mims somehow abandoned claims for obstructing his discharge. But, this argument goes too far. Mims abandoned his conspiracy cause of action, but his § 1983 claim includes allegations that his civil rights were violated, including, but not limited to, his rights to "liberty and the pursuit of happiness, the right to equal protection of the laws and the right to be secure in one's person and property against unreasonable seizure." Amended Complaint at R. 84, ¶66. Those claims were not abandoned.

Plaintiff also disagrees with Defendants' statement in footnote 7 related to the affidavit of

Mims' guardian ad litem. The GAL did not disavow that information was withheld from her (the question was who withheld that information) or her testimony at the Probate Court in 2005 that she was provided false information in 2001 about the care Mims' mother provided. R. 1076-1086, 3235. Based on the information later provided to the GAL, she testified that Mims should be released to the custody of his mother and that his mother should be appointed as his legal guardian. R. 3235. The GAL also did not disavow that she had represented other Babcock Center patients who had been abused and neglected or her conclusion that Mims was not safe there. Id. The deposition of the GAL and Mims' mother shows that Defendants' counsel bullied the witnesses, a factor which should be taken into account in weighing the credibility of the witness. R. 1079-1080, 2737, 2751.

On page 6, Defendants attempt to justify their involuntary commitment based on a psychologist recommending he remain institutionalized. But the court failed to weigh the fact that this psychologist was a master's level employee of DDSN. R. 3301-3302. It is obvious from Ms. McCausland's report that she, like the GAL, had not been provided information about Mims being beaten by a staff member there or the other abuses Mims suffered at Clusters, because she reported that "he appeared to be well cared for." R. 3301.

Defendants admit that the lower court failed to consider Mims' May 29, 2013 memorandum. This was also an error of law. That memorandum and Mims' response to Defendants' motion for summary judgment referenced many pages in the six volumes of evidence referenced in Plaintiffs' response which the court had an obligation to consider. Defendants' Brief at page 7, fn 8. R. 409-442, 593-631, 1198-3457.

Defendants argue on pages 7 and 8 that Plaintiff has not challenged the lower court's

ruling that he only complained of the three "incidents" (pages 7 and 8) is nothing short of Kafkaesque. Mims' Brief discusses errors of the lower court during the commitment proceedings, during his confinement, when he was not provided safe and appropriate care and treatment, and during the guardianship proceedings. Id. at 29. Throughout Plaintiff's opening brief filed in this Court, he challenged Defendants' unconstitutional confinement (including, but not limited to pages 13, 14, 25, 27, 31, 32, 35, 39), being "regularly assaulted" and subjected to "widespread and systemic" abuse and neglect (pages 34 and 43), the reduction of services after Mims was released (page 21), retaliation (pages 21 to 24 and 29), unexplained injuries and the failure to provide one-on-one services funded by Medicaid (pages 26 to 27), failure to provide services in the least restrictive setting (pages 27, 33, 47-49), and negligence and negligent supervision (pages 28, 32, 36-38, and 40-47). Mims repeatedly referred in his brief filed in this Court to the chronology where he described dozens of actionable "incidents" which violated his rights. Id. at 28 to 30. It is inexplicable that Defendants would argue that Mims failed to appeal the lower court's erroneous decision to limit his claims to three "incidents."

Not only did Plaintiff plead that Defendants knew of their "subordinates'" conduct that placed Mims at risk of harm, but Butkus and Lacy admitted in their depositions that they had knowledge of not only the systemic problems at the Babcock Center, but also of the injuries Mims suffered. R. 2558-2567, 2574-2602, 2618*-2624, 2628-2637, 2640-2647. (How many men on a jury would consider a laceration requiring seven stitches to repair to be nothing more than a "superficial" injury?)

**Errors in Summary of Argument.** Defendants' suggestion beginning on page 9 that Babcock Center employees may not be considered to be subordinates of DDSN totally ignores

the ruling of the South Carolina Supreme Court in *Madison v. Babcock Center*, where that Court answered the question of whether DDSN has a duty of care to protect residents of its independent contractor (the Babcock Center) from harm. 638 S.E.2d 650, 661, 371 S.C. 123 (S.C., 2006). In that case, the Supreme Court ruled:

> We find this position unpersuasive because Department owes a common law duty of care directly to Appellant. 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... If Department is negligent in its duty, which may include 1) adequately supervising the provision of services by another entity or 2) its own conduct in relation to prior notice of inappropriate care of its clients by such entity, Department may be held liable for breach of its common law duty provided such negligence creates a foreseeable risk of and causes injury.

Id.

As discussed above, the two affidavits referenced on page 9 were not "disavowed" by the affiants. Despite bullying by Defendants' counsel, their affidavits at least established material questions of fact. See also Defendants' Brief at 26. Defendants also misstate "state law" as it relates to whether Mims had to prove that Defendants Butkus and Lacy knew of the employment of the "specific persons" who harmed him. Plaintiff presented many audits and investigations which placed these Defendants on notice of the dangerous conditions at the Babcock Center and the lack of training and background checks necessary to protect Babcock residents from harm. R. 1198-1780. Defendant Butkus himself ordered Babcock to downsize by 50% due to its high rate of substantiated cases of abuse, neglect and exploitation, which was four times the state-wide average. R. 2618-2620, 2646. Mims has demonstrated that it was Defendant Lacy's responsibility to review abuse, neglect and exploitation reports from the Babcock Center and to track trends. R. 2621-2623. It is undisputed that, despite knowledge of the dangerous and life threatening conditions at Babcock, both of these Defendants participated in the decision to

obstruct Mims' discharge from the Babcock Center and to attempt to prevent his mother from being appointed as his guardian. R. 2596-2599.

A reasonable juror could determine that Defendants' attempts to obstruct his mother's petition to be appointed as her son's guardian constituted evidence of malice. R. 2618, 2602-2618. A jury could also find that the decision to force Mims to remain in a then decertified facility where he had been sexually assaulted, at the same time, requiring Babcock Center to cut its population in half due to the high rates of abuse there evidenced maliciousness and conscious indifference.[4] R. 1454, 3083-3097, 2619-2620, 1409-1450, 1399-1452. Insisting that Mims could not return home because he required one-on-one supervision, then eliminating that level of supervision demonstrated malicious and consciously indifferent behavior. Malice and indifference to Mims' needs was also demonstrated by Defendants' decision to deny Mims access to Adult Health Care Day Services once he was released from Kensington, attempting to force his then working mother to return him to a Babcock Center workshop. R. 2609, 1963-1964.

Defendant Butkus later demonstrated conscious indifference when he testified that DDSN was justified in not discharging Mims because his mother was poor and had limited resources, even after he had lived at home for years without experiencing the injuries he suffered while in DDSN custody. R. 2609-2610.

On page 10, Defendants assert that Mims only sought prospective relief on his ADA

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[4] The South Carolina Supreme Court has defined actual malice as meaning that the defendant acted recklessly or wantonly, or with conscious disregard of the plaintiff's rights. *Hainer v. American Medical Intern., Inc.*, 492 S.E.2d 103, 328 S.C. 128 (S.C. 1997). Malice may be proved by direct or circumstantial evidence. Id. citing *Smith v. Smith*, 194 S.C. 247, 9 S.E.2d 584 (1940). Circumstantial is sufficient for the jury to infer malice, accordingly, the issue was for the jury in *Hainer*.

claims. But this argument ignores Paragraph 89 of the amended complaint at R. 89, requesting "damages, including legal fees; expert fees, other litigation and court costs and such other damages, including punitive damages, occasioned by such deprivation of services." Damages have included the cost of services Mims was required to purchase privately that should have been provided through the waiver program.

**Errors in Arguments.** On page 12, Defendants argue that Mims' § 1983 amended complaint claims were limited to his claims against the individual defendants, but Mims alleged in paragraph 65 that these claims were also brought against DDSN. The first cause of action realleges paragraphs 1 through 62, which also include allegations against the agency.

Mims discusses in his opening Brief that he has met the criteria established by the United States Court of Appeals for the Fourth Circuit in *Shaw v. Shroud*, 13 F.3d 791 (4th Cir. 1994). Plaintiff's Brief at 34-35. Defendants cite *Monell v. Department of Social Services*, 436 U.S. 658 (1978) in support of their arguments, but what the Supreme Court held in that case was that a § 1983 claim does not exist where the "sole nexus between the employer and the tort is the fact of the employer-employee relationship." Id. at 693. This is not such a case. Plaintiff has shown that Defendants Butkus and Lacy were both personally involved in the violations alleged in Mims' amended complaint.[5] The "sole nexus" here was not the employer-employee relationship. Where, as here, the defendants have subscribed to an unconstitutional "custom, policy, or practice," they may be held liable for violation of § 1983 under *Monell. Owens v. Baltimore City State's Attorneys Office,* 767 F.3d 379, 402 (4th Cir. 2014).

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[5] Except that only Butkus and the Department were at fault in the original proceedings brought for involuntary commitment, since Lacy was not employed by DDSN when Mims was first committed to DDSN custody.

Mims has made the necessary showing of personal knowledge and involvement of Defendants Butkus and Lacy in the deprivation of Mims' constitutional rights, as required by the Fourth Circuit in *Wright v. Collins*. 766 F.2d 841, 850 (4th 1985). As the Fourth Circuit recognized in *Fisher v. Washington Metro Area Transit Authority* (690 F.2d 1133, 1142-43 (4th Cir. 1982)), liability may attach under § 1983 where, as here, conduct that deprived the plaintiff of a constitutional right was undertaken to effectuate a policy or custom for which the official is responsible. A supervisory official may be liable for the acts of subordinates where the official is aware of a pervasive, unreasonable risk of harm from a specified source when that official, as here, fails to take corrective action as a result of deliberate indifference or tacit authorization. *Slakan v. Porter*, 737 F.2d 368, 372 (4th Cir.1984), cert. denied, 470 U.S. 1035 (1985). Mims has shown that the individual Defendants were well aware of the systemic abuse and neglect of clients by the Babcock Center. It was Lacy's job to analyze trends and, based on her analysis, Defendant Butkus ordered Babcock to "downsize" by 50%. Yet, even with this knowledge, these Defendants both personally participated in the efforts to prevent Mims' release from involuntary confinement at a dangerous facility where Immediate Jeopardy had been repeatedly declared and Mims' roommate had died. Mims 46, 194, 198, 252. As in *Pridgen v. Ward*, a jury could determine, based on these facts, that Defendants' conduct resulted from their desire to protect themselves from past wrongful conduct, rather than in the scope of their employment, with the intent to harm Mims. 391 S.C. 238, 705 S.E.2d 58 (2011).

At footnote 12, Defendants again argue that they had no supervisory liability over the Babcock Center. But, this argument ignores the facts that DDSN is the entity that has voluntarily accepted the responsibility for the day-to-day administration of the ID/RD (formerly MR/RD)

Medicaid waiver program and their duty of care to protect Mims from harm is based not only on the common law, but on federal Medicaid law, which requires the State to assure the federal government that the health and welfare of Medicaid waiver participants is protected. *Madison*, supra, and 42 C.F.R. 441.302.

The lower court ignored the affidavit from a registered nurse stating that the injuries to Mims were foreseeable and that Defendants violated the standard of care by placing him that defendants failed to meet the standard of care by placing him in facilities with physically and sexually aggressive individuals.[6] R. 625, 3457.

Defendants' argument that Mims was required to show that the individual defendants had knowledge that a "specific subordinate" had been abusive to DDSN clients is not supported by any legal authority. Defendants' Brief at 15. It was not necessary for Mims to identify the persons who abused, neglected and sexually assaulted him at the facilities where Immediate Jeopardy had repeatedly been declared. R. 1247-1263, 1399-1455.

Despite Defendant Butkus' claims that the "ant bite incident" was a "one of its kind" occurrence, a study conducted by the University of South Carolina Department of Public Health reported in 2007 "pests such as lice, cockroaches and ants as hazards to client safety and welfare." R. 1638. (USC Study at page 21, second paragraph.) Defendants' Brief at 19. Mrs. Mims also testified that her son's bed was also infested and he was bitten by ants when he was confined at Clusters. R. 2740, lines 9-15.

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[6] Defendant Butkus admitted in his deposition that he was the person responsible for making placement decisions and that he was informed of Mims being repeatedly beaten. R. 2564-2565, 2567, 2584.

Contrary to Defendants' arguments that the Carolina Medical Review findings post-dated the injuries to Mims, that investigation was based on a review of materials provided to researchers by the Babcock Center in 2004 and it was issued in 2005, a few months before Mims was sexually assaulted at Kensington. R. 1409. Likewise, the University of South Carolina study was based on interviews with family members who shared historical information. Most importantly, the findings of Immediate Jeopardy occurred between 2003 and 2005. R. 1247, 1264, 1350, 1399, 1451, 1453, 1454.

The CMS findings were issued in 2004, based on complaints made by Plaintiff's counsel. R. 1350. These included horrific injuries to residents at Clusters, where Defendant Butkus caused Mims to be confined after he was beaten by a Babcock Center employee, then involuntarily committed by DDSN. R. 1351-1367. The investigators reported failure to provide 1 on 1 supervision included in the resident's plan of care. R. 1356, 1361, 1364-1366. Defendants refused to allow Mims to be released, because they determined that he needed this level of supervision - yet it obviously was not being provided to him at Clusters. Even while the federal investigators were in the facility, during three days in 2003, they reported at least 4 incidents of client aggression in the presence of 1 on 1 staff. R. 1358-1359. They also reported the failure to "provide appropriate supervision which resulted in risk to the life and safety of the person receiving services..." R. 1366.

An article published in the Wall Street Journal reported the rape of a 78 year old Babcock Center resident by a 16 year old resident living in the same facility as the elderly client. R. 3183. Like Mims, this 78 year old had also been beaten with a belt by a house-mate. Id.

Defendants argue on page 16 that Mims failed to plead the necessary elements of § 1983.

But, as discussed in Mims' opening Brief, he pled and provided the lower court with evidence necessary to demonstrate violation of his civil rights. Plaintiff's Brief at 30-33. Mims showed that, although Defendant Butkus knew about the beating by Babcock Center employee, Carl Anthony, the assault was not reported to police in a timely manner (even though it was witnessed by other employees), nor was it properly investigated. R. 2737 at page 40, 3279-3283, 3292-3295, 3310, 3311. The pattern of failing to investigate abuse and neglect was again substantiated by Federal investigators after Mim's roommate died at Kensington. R. 1399. The "Unequal Justice for South Carolinians with Disabilities" report published in 2005 describes the failure of DDSN to protect residents from serious harm. R. 1484-1559. Likewise, unreported sexual assaults were reported in the evidence Mims presented to the lower court. R. 1584, 3046, 3183. Mims' claims were not "single incidents" which were not foreseeable, but they constituted such a pattern of which Defendants Butkus and Lacy were well aware. R. 1709-1710, 1719. Defendants' Brief at 18.

Defendants acknowledge that Mims sustained an injury to his penis that was 4 centimeters long and it required 7 stitches to repair. Defendants' Brief at 20. It is undisputed that Immediate Jeopardy had already been declared for other reasons at the facility where Butkus had placed Mims. R. 1399, 1451. Director Johnson had sent letters to family members advising them to that she was ordered to transfer residents of Kensington to other locations. R. 1454. But, Butkus kept Mims at Kensington and he got hurt - seriously hurt. Contrary to Defendants claim that the medical professionals at Lexington Medical Center "did not believe that the injury was the result of abuse or neglect," the hospital social worker assigned to Mims' case reported the injury to the State Ombudsman. R. 485. Defendants' Brief at 21.

Defendants argue on page 22 that the cause of the injury to Mims' penis was "completely unknown." But, it is was not unknown to Defendants that Babcock Center was on the brink of bankruptcy when these injuries occurred at Kensington, after they determined that Mims would no longer receive 1 on 1 supervision. R. 3211. This decision was made without input from his physician or notice to his mother (although the need for this level of supervision was the reason that DDSN denied Mrs. Mims' pleas to bring her son home at R. 3311). *Babcock Center v. U.S.*, C/A No. 3:11-01721-CMC and C/A No. 3:11-03155-CMC (D.S.C. May 2, 2013) at 3 and 14. But for the involuntary commitment in 2000 and the Defendants' repeated refusals to allow Mims' mother to bring him home, none of the beatings and the sexual injury would have occurred. R. 3245. Defendants did not dispute the claims of Mims' mother that the "unexplained" injuries stopped after he was discharged from the Babcock Center back to her care. R. 3273, ¶ 48.

Defendants' reliance on *Spell v. McDaniel* on page 23 is misplaced. 824 F.2d 1380, 1388 (4th Cir. 1987). Unlike Spell, who was "admittedly inebriated on alcohol and quaaludes" and was in possession of a quantity of illegal drugs when he was stopped by a police officer while driving an automobile, Mims was not in any way at fault. Id. at 1383. Like Mims, though, Spell suffered an injury to his groin. Id. The Fourth Circuit upheld a jury award of $900,000 in damages and the district court awarded legal fees for 1,964.5 hours. Id. at 1400-1401. The Fourth Circuit found that even though Spell's medical expenses were only $2,041, because "the evidence showed that the assault caused him intense pain...," the award was justified because the City was "sufficiently aware of the existence of a developed practice or custom of such conduct" which "did foster and encourage an atmosphere of lawlessness, anarchy [and] repression ..." that were "reflected the

policies or customs of the City of Fayetteville, and which resulted in the injury inflicted..." The Fourth Circuit did, however, reduce Spell's legal fees by the 50% multiplier that had been awarded by the district court. Id.

In *Spell,* the Fourth Circuit recognized that the term "policy" includes not only "official policy directives, regulations or ordinances" but "what the law considers de facto or in fact practices, customs or policies caused, maintained, tacitly encouraged or condoned by their supervisory personnel ... even though these ... have at no time received formal approval through the local government's decision making channels." Id. at 1397. As in *Spell*, the individual Defendants may be said to have "caused, maintained, tacitly encouraged or condoned the policies, customs, practices and procedures" of the Babcock Center. Id. at 1397-1398. Such persons, that Court held: "may fairly be said to cause, maintain, tacitly encourage or condone the ... policy, custom, practice or procedure of the ... City." Id. They were "representative" of the City in the sense that "policy or custom" created or condoned by them was that of the agency, hence the jury found that the defendants who had final policymaking authority, such as Defendants in this case, were liable and their acts were attributable to the City. Id. The Fourth Circuit found that the supervisory state actors had "established a policy or condoned a custom that proximately caused injury to the plaintiff by failing to "nullify" customs that "set in motion a series of acts by others which the representative defendant should have foreseen would cause his subordinates, including defendant McDaniel, to in fact inflict constitutional injury upon ... citizens." Thus, the "affirmative link," as here, between policy or custom and specific violation was established under § 1983.

The lower court ignored - and Defendants admit that it did not even consider - repeated

findings reported by Mims in Volumes 1 and 2 of the evidence ( R. 1198 to 2096) referenced in his response to Defendants' motion for summary judgment and his own motion for summary judgment. These investigations that former Defendant Johnson violated the constitutional rights of DDSN patients date back to 1995, when she was the Director of Whitten Center. R. 1202. Immediate Jeopardy declarations date to 2003, when Judy Johnson became director of the Babcock Center. R. 1247, 1288 and at least five facilities operated by the Babcock Center were found to be placing the residents at risk of harm. R. 1275, 1288, 1399, 1409, 1451, 1453, 1456. This was reconfirmed in the January, 2005 findings of the Carolina Medical Review surveyors who found that the ICF/MR facilities, including those where Defendant Butkus placed Mims, were not in compliance with federal standards. R. 1409-1450, 3083-3096.

In footnote 17, Defendants attempt to discredit the ~~affidavit~~ *testimony* of Mims' mother where she said that DDSN employees "told lies about me." The testimony at page 84 shows that Mrs. Mims did not understand the question Mr. Davidson asked her. She told him "I don't know what all ya'll talking about." R. 2751, page 95:5-7. Mrs. Mims had testified earlier that "There's a lot of things I don't understand. But a lot of things I know that happened to Edward was true." R. 2733, page 20:23-25. She testified that she believed that her son suffered retaliation as a result of her reporting the beating by Carl Anthony. R. (Page 27:10-13). Regarding the order committing her son to DDSN custody, Mrs. Mims testified that "I was afraid that if I didn't sign this, I wouldn't see Edward again" R. 2735, page 31:9-11 and that "They didn't let me say a word" at the hearing. R. 2735. "That was my impression - If I didn't sign the papers, I would not

see Edward again." R. 2736, page 36:11-12.[7]

On page 26, Defendants again claim that Leigh Flynn and Mims' mother "recanted" their affidavits. But, the lower court erred as a matter of law in accepting Defendants arguments that these witnesses "disavowed" their affidavits without reviewing the documentation Mims provided and it was legal error not to consider those facts in a light most favorable to the nonmoving party. *Madison* at 655. The lower court was obligated to review and give consideration to the affidavits and the depositions, taken as a whole and the lower court totally abdicated that responsibility by refusing to even consider the six volumes of evidence Mims presented and referred to in his motion for summary judgment and his response to Defendants' motion for summary judgment. R. 1198-3458.

It is undisputed that Mims was assaulted by Carl Anthony and that the assault was not reported to law enforcement for months, even though it was witnessed by other employees. R. 2099-2101. It is also undisputed, and the GAL did not "recant" her testimony that she was not informed about this assault or other injuries Mims sustained at Clusters. It is also undisputed that the GAL testified in the Probate Court that Mims should be returned to his mother's care and custody and that she should be appointed as Mims' guardian, because he was not safe at the Babcock Center. R. 3236. The lower court also failed to consider this evidence or the affidavits from a Senator and other parents which support Mrs. Mims claims of retaliation and erred, as a matter of law in granting Defendants' motion for summary judgment. R. 3212-3233, 3409-3455.

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[7] The transcript shows that Defendants' counsel began badgering Mrs. Mims at R. 2742, page 60:19 (..."I cautioned you about listening to my questions and being truthful because we're under oath, remember that?"). The deposition began at 10:06 a.m. and depositions were limited to two hours, but when Plaintiff's counsel reminded Defendants' counsel of this limitation, his response was "I don't care." R. 2745, page 72:20.

At page 27, Defendants argue that their attempts to obstruct Mims' mother being appointed as guardian "had absolutely no effect on the outcome of the proceedings," thus her claims for obstruction of those proceedings should be dismissed. But, this argument ignores Mims rights to be free from government interference and the additional six months of litigation that resulted from DDSN's efforts to derail the guardianship proceedings. See discussion on page 25 of Justice Hearn's dissent in *State v. Dykes.* 403 S.C. 499, 744 S.E.2d 505, 508 (2013). During this time, Mims was threatened with being returned to a facility where he had repeatedly been injured and there was no legitimate government interest in contesting the guardianship. Defendant Butkus testified that he approved the agency's contest of the guardianship because nothing had changed in regards to his mother's ability to care for Mims. R. 2610.

Mims has shown that Defendants Butkus and Lacy were aware of the multitude of injuries Mims sustained at the Babcock Center. R. 2618-2621. It is undisputed that they were aware of the many audits and investigations showing that Babcock Center was not meeting federal standards and its residents were at risk of harm. R. 1247-1780, 2558-2559, 2564-2566, 2620-2623. Viewing the facts in a light most favorable to the non-movant, as the lower court was required to do, Mims allegations that this attempt to thwart the appointment of a guardian was based on Defendants efforts to prevent him from exercising his right to sue DDSN and the Babcock Center, which clearly violated Mims' civil rights.

Defendants argument on page 27 that Mims rested on his amended complaint ignores the six volumes of evidence that Mims submitted to the lower court along with his response to Defendants' motion for summary judgment and his memorandum in support of Plaintiff's motion for summary judgment. Mims presented audits and investigations documenting Defendant's

personal knowledge of systemic abuse and neglect in Babcock Center facilities, medical evidence related to the abuse and neglect Mims suffered, affidavits from persons with personal knowledge regarding Mims' care and the longstanding patterns of retaliation against persons who complain about DDSN services. It was legal error for the lower court to ignore this evidence and Defendants arguments regarding Rule 56(e) are without merit.

Defendants arguments on page 28 regarding DDSN's "official policy"is also without merit. As discussed above, the term "policy" includes not only "official policy directives, regulations or ordinances" but "what the law considers de facto or in fact practices, customs or policies caused, maintained, tacitly encouraged or condoned by their supervisory personnel ... even though these ... have at no time received formal approval through the local government's decision making channels." *Spell* at 1397. Mims pled that DDSN's practices and its policies, which are described in the audits and investigations submitted to the lower court violated Mims civil rights and that was sufficient to meet the pleading requirements for violations of § 1983. He presented evidence that these policies discriminated against families who chose to keep their family member at home. R. 2651, 2652, 2610.

As discussed beginning at page 40 of Mims Brief to this Court, the correct standard to determine whether Defendants were negligent, grossly negligent or were guilty of negligent supervision is set forth in *Madison v. Babcock Center. Supra.* In *Bank of New York v. Sumter County*, 387 S.C. 147, 156, 691 S.E.2d 473, 478 (2010), the Supreme Court found that Defendants were not on notice of the risk of harm to the public. *Madison* sets forth a different standard, which Defendants have ignored, in a case specifically establishing the duty of care DDSN has to protect Babcock Center residents from harm. Not only did that case establish a

common law duty of care, but the Supreme Court ruled that "The defendant's negligence does not have to be the sole proximate cause of the plaintiff's injury; instead, the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury. Id. at 287. The Court held that "The question of proximate cause ordinarily is one of fact for the jury, and it may be resolved either by direct or circumstantial evidence." Id. The trial judge's "sole function" was to "inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence" and that the issue of whether the injuries of a plaintiff who claimed to have been sexually assaulted at the Babcock Center were proximately caused by the alleged negligence of Respondents is an issue of fact for the jury:

> The jury must determine whether Appellant's damages would have occurred "but for" Respondents' alleged negligence, as well as whether such damages were foreseeable, i.e., whether the damages were the natural and probable consequence of a failure to exercise reasonable care in supervising and providing care and treatment to Appellant. The jury may perform its task after gaining a proper understanding of the facts and circumstances of Appellant's case, as well as the applicable standards of care.

Id. at 287.

On page 33, Defendants make the disjunctive argument that the lower court should not have considered the chronology containing the dates, times and descriptions of injuries Mims sustained (along with the medical records to support those claims), then they complaint that Mims did not set forth "specific facts" in support of his claims. The lower court erred as a matter of law in refusing to consider the chronology contained at R. 3277. Mims also included photographs of the welts from being beaten with a belt on pages R. 3251-3252, 3457 and medical records contained at R. 3253-3268. (Additional medical records referenced in the chronology were previously provided to the Court at R. 3277.

Defendants' argument on page 34 that Mims failed to show forseeability ignores the

affidavit contained at R. 3457, as well as the Supreme Court's ruling in *Madison* that a plaintiff may prove neglect and negligent supervision through either direct or circumstantial evidence. Both were provided, but ignored by the lower court.

On page 35, Defendants argue that Mims' claims against Butkus and Lacy are barred by the Tort Claims Act because Mims has not alleged or proven malice, intent to harm or a crime involving moral turpitude. But, that argument ignores allegations contained in the amended complaint at R. 85-88, ¶¶69, 75, 81, as well as arguments made in Mims' response to Defendants' motion for summary judgment, where he argued:

> Plaintiff has presented facts which show that Butkus, Lacy and Johnson have committed acts of fraud, malice, intent to harm and/or a crime of moral turpitude. Defendants' Brief at 18. In *Pridgen v. Ward*, supra, and *Anthony v. Ward,* both the state and federal court held that the state officials who were defendants were not covered by the Tort Claims Act, because their acts were intentional and outside of the scope of their employment. Plaintiff has provided evidence that these individual defendants have acted outside of the scope of their employment and this issue should be submitted to the jury.

R. 615. In *Pridgen v. Ward*, the South Carolina Court of Appeals held that ruled that an "act is within the scope of a servant's employment where [it is] reasonably necessary to accomplish the purpose of his employment and in furtherance of the master's business." 391 S.C. 238, 705 S.E.2d 58 (S.C. App. 2011). However, if the servant "acts for some independent purpose of his own, as Butkus and Lacy have done, a purpose wholly disconnected with the furtherance of his master's business, his conduct falls outside the scope of his employment" and the employee is not protected by the Tort Claims Act. Id.

On page 36, Defendants argue that Mims' ADA and Rehabilitation Act claims have been rendered moot by his death. But, absent an expression of contrary intent by Congress, "whether a federal cause of action survives 'is governed by federal common law.'" *Kettner v. Compass Grp.*

*USA,* Inc., 570 F. Supp. 2d 1121, 1132 (D. Minn. 2008). 7C Charles Alan Wright et al., Federal Practice and Procedure § 1954 (3d ed. 2007). In *Kettner*, the district court reasoned that:

> The survival of claims under federal law depends in the first instance on whether there is an applicable federal survival statute. "There is no general survival statute for federal question cases." 2 Cook & Sobieski, Civil Rights Actions ¶ 4.05, at 4-80. Accord 7C Wright, Miller & Kane, Federal Practice and Procedure § 1954 (3d ed.2007)...
>
> With respect to civil rights actions, "the question whether a civil rights action survives the death of the plaintiff or defendant seldom is resolved explicitly by Congress," as "virtually none of the civil rights acts makes any express provision for survival." 2 Cook & Sobieski, Civil Rights Actions ¶ 4.05, at 4-80.

Under the federal common law, "only actions for penalties or forfeitures do not survive." *Kettner*, 570 F. Supp. 2d at 1133. See also *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 876 (11th Cir. 1986) ("[U]nder federal common law, a federal cause of action generally survives the death of the plaintiff unless it is an action for penalties."). A remedial statute, as compared with a penal statute, is redresses individual wrongs recovery runs directly to the individual. *Kettner*, 570 F. Supp. 2d at 1133. Thus, in *Kettner*, the court concluded that because the ADA and Rehabilitation Act are "remedial in nature," the trustee for the decedent's estate was "entitled to all available remedies" under those statutes, except for liquidated and punitive damages. Id. at 1134.

In *Flaum v. Gloucester Lanes, Inc.*, the district court in Virginia recently noted that the Fourth Circuit has not explicitly addressed the question of survival of claims under the ADA. 4:2103cv00131 (E.D.Va. 2015).[8] But, the *Flaum* court determined that because "the ADA

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[8] However, the Western District of Virginia found that under federal common law, an ADA claim survives the decedent. *Hager v. First Virginia Banks, Inc.*, No. 7:01cv53, 2002 WL 57249, at *3 n.2 (W.D. Va. Jan. 10, 2002). But, the Southern District of West Virginia ruled that state law governs the survival of ADA claims. *Green ex rel. Estate of Green v. City of Welch.* 467 F. Supp. 2d 656, 667 (S.D. W. Va. 2006).

is remedial in nature, and not punitive, under federal common law the plaintiffs cause of action survives." Id at 1134. The district court noted that Attorney's fees provisions are an important mechanism for parties to vindicate the violation of their civil rights, and therefore, they are remedial. See *Disabled Patriots of America, Inc. v. Reserve Hotel Ltd.. 659* F. Supp. 2d 877, 895, n.10 (N.D. Ohio2009) (discussing the legislative history of 42 U.S.C. § 1988 and the purpose of 42 U.S.C. § 12205). Therefore, plaintiff's ADA claims survived her death.

In any event, even if state law applies, all causes of action existing the time of the death of Edward Mims survive under the State's general survivability statute, S.C.Code Ann. § 15-5-90 (1976). "Causes of action for and in respect to ... any and all injuries to the person or to personal property shall survive both to and against the personal or real representative... of a deceased person ... any law or rule to the contrary notwithstanding." S.C.Code Ann. § 15-5-90 (1976).

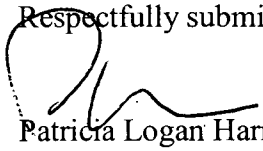
Defendants are wrong on page 37 in claiming that Mims never presented evidence of denial of services "that might trigger an ADA claim." On page 30 of Mims' response to Defendants' motion for summary judgment at R. 622, he reported that Mims' claims for violation of the ADA "are based not only on those violations occurring before he was discharged from Kensington, but they are ongoing to this very day." Id. For example, Mims informed the lower court "when Mims' mother was recently hospitalized and he required respite care for two weeks. But DDSN refused to provide more than 240 hours a month (10 days) of respite services, based on its policy which limits waiver participants to receiving more hours outside of an institution." Id. Yet, Mims argued in his response, that DDSN will provide Mims with an unlimited amount of hours and days of respite care in a DDSN institution, at greater costs. Id.

Mims has addressed Defendants' arguments regarding tolling in his opening Brief. If

Defendants' arguments were to be upheld by this Court, it would render the tolling statute at S.C. Code of Laws §15-3-40 a nullity. The language of the statute is clear and unambiguous. See *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." (citations omitted)). The Supreme Court has interpreted the tolling statute to extend the time for filing a lawsuit by five years. *Harrison v. Bevilaqua*, 354 S.C. 129580 S.E.2d 109, fn. 5 (2003). (The express language of the statute allows the time for commencement of an action to be "extended" by a maximum of five years. Thus, 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)." In *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003), the Court noted that the "Legislature is presumed to be aware of this Court's interpretation of its statutes." Having not amended the tolling statute during the 13 years since *Harrison*, this Court should decline to do so. Mims' claims against Defendant Butkus, in his individual capacity, thus relate back to the filing of his original complaint, to May 29, 2007, and they cover all claims dating back eight years under the tolling statute. Claims against DDSN date back seven years, pursuant to *Harrison*.

**Conclusion.** Plaintiff prays that this Court will reverse the lower court and grant Mims' motion for summary judgment, and that the Court will award interim fees and costs and such other relief as the Court shall determine to be just and proper.

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-40-03365

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Appellant Case No. 2014-001373

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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.

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CERTIFICATE OF COMPLIANCE

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The undersigned hereby certifies that Appellant's Final Reply 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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THE STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

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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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