

ORIGINAL

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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SC Court of Appeals

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.

Volume III

RECORD ON APPEAL

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May 29, 2013

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

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

Plaintiff,

v.

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

Defendants.

Civil Action No. 2007-CP-40-3365

MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT
ON BEHALF OF DEFENDANTS
SOUTH CAROLINA DEPARTMENT OF
DISABILITIES AND SPECIAL NEEDS,
KATHI LACY, AND STANLEY BUTKUS

STATEMENT

This action was commenced with the service of the Summons and Amended Complaint on May 12, 2008.¹ The Amended Complaint alleges that Plaintiff Edward Mims (an adult who is now 41 years old) has mental retardation, among other disabilities. Amended Complaint, Par. 1. This action was brought on his behalf by his mother, Margaret Mims, who is his legal guardian. The three DDSN Defendants are the Department of Disabilities and Special Needs itself, along with its former Director, Stanley Butkus, and Kathi Lacy, who was also a DDSN official during the relevant timeframe. The other two Defendants are the Babcock Center, Inc., and Judy Johnson, the Director of the Babcock Center.

Defendants South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stanley Butkus (DDSN Defendants) have moved for summary judgment in this action on the

¹ An original Complaint had been filed in May 2007, but it was never served.

basis of the statute of limitations (for most claims), and on other grounds for the remaining claims. For some claims, this motion is based both on the statute of limitations and on alternative grounds as well.

The events alleged in the Amended Complaint occurred between 2000 and 2005, when Mims resided in facilities owned by the Babcock Center.² Plaintiff claims damage from several incidents of alleged physical injury between 2000 and 2005. All but one of these incidents occurred more than three years before the Amended Complaint was filed on May 7, 2008.

Plaintiff's claims are as follows:

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

As noted above, the original Summons and Complaint in this action were filed on May 29, 2007. However, it is undisputed that the 2007 complaint was never served. On May 7, 2008, the Plaintiff filed a second Summons and an Amended Complaint, dropping some parties and adding others. The three DDSN Defendants in the present action were all served a few days later, on May 12, 2008. After the case was dismissed by Judge Strickland on grounds pertaining to untimely service, the Supreme Court reversed that decision and remanded the case for consideration of the merits. *Mims ex rel. Mims v. Babcock Center, Inc.*, 399 S.C. 341, 732 S.E.2d

² The Babcock Center is a private, non-profit organization which contracts with DDSN to house and care for individuals with mental retardation and other disabilities.

395 (2012). The Amended Complaint also sought certain injunctive relief, but as will be shown below, such claims have long been moot, and are barred for other reasons as well.

In 2009, while the Motions to Dismiss were still pending, Plaintiff took over 15 depositions. The Defendants took the deposition of the guardian, Margaret Mims, and of Leigh Flynn, Plaintiff's guardian ad litem during a 2001 Probate Court proceeding. The case is now before this Court on the DDSN Defendants' Motion for Summary Judgment. The private Defendants have also moved for summary judgment.

FACTS

Plaintiff alleges that several different personal injuries occurred between 2000 and 2005, during which time he was a resident at Babcock Center facilities. Amended Complaint, pp. 4-8. Plaintiff also alleges that a non-physical injury occurred on June 10, 2005, when his return home for a weekend visit was delayed for a short time. All but one of the alleged physical injuries occurred more than three years prior to the service of the Amended Complaint in May 2008.

The last-referenced physical injury was a tear of unknown origin on the bottom of the Plaintiff's penis that occurred on May 27, 2005, just short of three years prior to the service of the Amended Complaint. Exhibit 1, attached (Incident Report for May 27, 2005 incident). This incident, as far as can be told, occurred while Plaintiff was by himself at a Babcock Center facility for a moment while his caregiver went to get clothing for him prior to his going home for the weekend. *Id.* The tear lengthened somewhat as it was examined by a nurse, and lengthened still further upon examination by a doctor. *Id.* Eventually, it was four centimeters long and required seven stitches. *Id.* The clinicians at Lexington did not believe that the injury was the result of abuse or neglect. As a result, they permitted Plaintiff to return to Babcock that same evening. *Id.* A medical consultant from DDSN, Dr. Graeme Johnson, examined Plaintiff several

days later. He concluded that the cause for the laceration was unknown, but that it did not appear to have resulted from abuse or neglect. Exhibit 1. The injury apparently healed quickly and without incident. *Id.*

The Amended Complaint also asserts that "On June 10, 2005, officials at DDSN and the Babcock Center refused to allow Plaintiff's mother to remove him from the [Babcock] facility." Amended Complaint at 9, Par. 47. This allegation omits the undisputed fact that a short time later that same day, Plaintiff was indeed permitted to leave that facility. *See generally*, Exhibit 7 (incident report); *see also*, Affidavit of Margaret Mims (previously filed by Plaintiff), p. 5, Par. 44 (noting that Plaintiff returned home on June 10, 2005).

This entire incident was the result of a failure of communication by Plaintiff's counsel that would have been prevented if Plaintiff's counsel had simply provided the necessary supporting information for a request that she made that day. What happened was that late in the afternoon on Friday, June 10, 2005, Plaintiff's counsel peremptorily advised Babcock and DDSN's counsel, Jim Hill, by e-mail that Plaintiff "would not be returning to [Babcock]" on the following Sunday, that is, after his normal weekend visit to his mother's home. (The e-mail is at the end of Ex. 7, attached, the report of that incident.) Reference was made in that e-mail to the "Court's Order," but the e-mail did not describe what that Order was, nor was the Order attached to the e-mail or even summarized in it. (The Order, which was an *ex parte* Probate Court Order dated that same day, June 10, 2005, is attached as part of Exhibit 7.) This led to concern on the part of DDSN's counsel that if DDSN were to permit Plaintiff to go home for the weekend when his mother had no intention of returning him to Babcock at the end of the weekend, then DDSN would be effectively facilitating a violation of a 2001 Probate Court Order that committed Plaintiff to DDSN's care, except on weekends. *Id.* That 2001 Order is attached as Exhibit 8. As

indicated in the Critical Incident Report, Exhibit 7, the matter was resolved within a short time that same evening when a call was placed to the Probate Court judge, who scheduled a meeting for Sunday afternoon, June 12, 2005, in order to determine whether Plaintiff would be required to return to Babcock that afternoon. At that point, DDSN offered no further objection to Plaintiff's being removed from Babcock that Friday evening, because the Probate Court had agreed to decide whether he would be required to return on Sunday evening.

SUMMARY OF ARGUMENT

Plaintiff has sued three DDSN Defendants: the agency itself and two individual officers of the agency. There are five different causes of action, three of which are federal and the other two of which arise under state law. In order to assist the Court in reviewing the claims and defenses, the following outline is offered:

1. First cause of action (42 U.S.C. § 1983)(failure to monitor Plaintiff's condition and treatment needs)(applies only to individuals).³⁴
 - a. The three-year statute of limitations bars all claims except the May 2005 unexplained injury and the alleged delay of a visit home for a short time on June 10, 2005.
 - b. Neither the personal involvement of Butkus or Lacy nor the elements of supervisory liability have been pled or proven as to the any of the alleged physical injuries.

³ The Amended Complaint sets forth other vague allegations in addition to those discussed herein. Those allegations appear to be related solely to alleged failures to provide certain services, as alleged in the Fourth Cause of Action. That cause of action asserts only moot or otherwise unmeritorious claims. To the extent that Plaintiff may attempt to claim that the now-moot claims of failures to provide services are part of the Section 1983 cause of action, these Defendants incorporate by reference their contentions relating to the Fourth Cause of Action.

⁴ Exhibit 7 describes subsequent events, where are not relevant to Plaintiff's claim involving the Friday evening incident.

- c. If Plaintiff actually claims that any DDSN Defendant wrongfully delayed a trip home by Plaintiff (for a short time at most), the undisputed evidence shows that such delay was attributable to failures by Plaintiff's counsel to inform DDSN of an *ex parte* Probate Court order issued earlier that day at the behest of Plaintiff's counsel.
- 2. Second cause of action (conspiracy under 42 U.S.C. § 1985) (applies only to individuals).
 - a. The Amended Complaint does not allege class-based, discriminatory animus, as is necessary for a conspiracy claim brought pursuant to 42 U.S.C. §1985.
 - b. Even if such allegations had been made, this claim would be barred by the three-year statute of limitations.
- 3. Third cause of action (state law claim for negligent supervision)
 - a. The two-year statute of limitations of the Tort Claims Act bars this claim against the agency, DDSN.
 - b. The Tort Claims Act renders the individual Defendants immune from suit as to this claim.
 - c. Even if not time-barred, the claim for negligent supervision is without merit, because there is no claim that a specific person created an undue risk of harm to Plaintiff.
- 4. Fourth cause of action (Americans with Disabilities Act and Rehabilitation Act)
 - a. This claim was rendered moot in 2006.

b. If there are non-moot aspects of this claim, they are barred by the one-year statute of limitations.

5. Fifth Cause of action (unjust enrichment)

a. Plaintiff has no viable claim for unjust enrichment, because the Defendants did not receive anything of value from the Plaintiff.

6. To the extent, if any, that Plaintiff's disability tolled the statute of limitations, such tolling ended with the appointment of a guardian in 2005, and therefore the statute of limitations would still bar all claims except those occurring in May and June 2005, referenced above.

ARGUMENT

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

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

deny summary judgment; the disputed facts must be material. While the evidence must be viewed in the light most favorable to the nonmoving party, a party opposing summary judgment is not entitled to every *conceivable* inference from the facts, but only every *reasonable* inference. See *Main v. Corley*, 281 S.C. 525, 526–27, 316 S.E.2d 406, 407 (1984); *Trotter v. First Federal Savings and Loan Ass'n.*, 298 S.C. 85, 86, 378 S.E.2d 267, 268 (Ct. App. 1989).

Plaintiff's five causes of action are discussed separately below.

1. First Cause of Action (Section 1983).

a. DDSN is not subject to suit under 42 U.S.C. § 1983.

It is not entirely clear whether Plaintiff has intended to include the agency, DDSN, in the First Cause of Action, i.e., the claim made pursuant to 42 U.S.C. § 1983. However, any such claim, even if made, is subject to dismissal as a matter of law. It is well-settled that an agency of the state, such as DDSN, is not a "person" within the meaning of § 1983, and thus is not a proper defendant. *Will v. Michigan State Police*, 491 U.S. 58 (1989). Therefore, the claims against the Defendant DDSN pursuant to § 1983 must be dismissed from this action.

b. The individual DDSN Defendants Butkus and Lacy, if sued in their official capacities, are likewise not subject to suit under 42 U.S.C. § 1983.

It is also unclear whether Plaintiff has intended to state a claim, including a damage claim, against the individual DDSN Defendants Butkus and Lacy in their official capacities in the First Cause of Action. If so, such claims are also barred by *Will v. Michigan State Police*, *supra*, 491 U.S. at 71 ("suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. [Citation omitted] As such, it is no different from a suit against the State itself").

- c. Most of the Section 1983 claims against the Individual DDSN Defendants Butkus and Lacy in their individual capacities are barred by the three-year statute of limitations.**

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

This three-year statute of limitations for Section 1983 claims bars any such claims against the individual Defendants arising before May 12, 2005, given that this action was commenced no earlier than May 12, 2008. The three-year statute accordingly bars such claims as the 2001 injury alleged in Paragraph 25 of the Amended Complaint, various 2002 incidents alleged in Paragraphs 27 and 28 of the Amended Complaint, and the July 2004 ant bite incident alleged in Paragraph 29 of the Amended Complaint. It also bars other allegations in Paragraphs 30 through 38 that concern other events in 2004 and through March 2005.⁵

- d. Any claims under Section 1983 that were less than three years old at the time the Amended Complaint was served are unmeritorious because of lack of personal involvement by the individual DDSN Defendants or for other reasons.**

The only events alleged in the Amended Complaint that are not barred by the three-year statute are the small laceration of unknown origin that occurred on May 27, 2005 and perhaps the alleged “refus[al] to allow Plaintiff’s mother to remove him from the facility” on June 10, 2005. Amended Complaint, Paragraphs 39 and 47. Neither has merit.

⁵ Plaintiffs’ likely arguments about tolling are addressed under the last point in this Memorandum.

Plaintiff does not suggest that Defendants Lacy or Butkus themselves actually inflicted the penis injury. Likewise, they have not alleged, and cannot show, any other personal involvement of Defendants Lacy and Butkus in that alleged incident. It is undisputed that Lacy and Butkus hold administrative and supervisory positions. They were not personally involved with the care of Plaintiff.

Presumably, Plaintiff will assert some form of *respondeat superior* liability in connection with the Section 1983 claim, although the Amended Complaint is very vague in this regard. However, in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the United States Supreme Court held that a claim based on the doctrine of *respondeat superior* does not give rise to a claim under 42 U.S.C. § 1983. In other words, it is clear that the personal participation of a defendant is a necessary element of a § 1983 claim against a government official in his individual capacity. *Davis v. D.S.S. of Baltimore Cty.*, 941 F.2d 1206 (4th Cir. 1991) (unpublished opinion) (citations omitted); *see also Trulock v. Freeh*, 275 F.3d 391 (4th Cir. 2001). The Plaintiff has taken a number of depositions, but nowhere in them is there any suggestion of direct participation on the part of these Defendants in any alleged events occurring while the Plaintiff was housed at the Babcock Center. Accordingly, there can be no claim against these Defendants pursuant to 42 U.S.C. § 1983.

The only exception to the requirement of personal participation occurs when the claim is brought as a supervisory claim. To the extent that the Plaintiff is attempting to assert liability against Defendants Lacy and Butkus under a theory of negligent supervision, that claim should also fail. Although supervisors may be held liable in certain circumstances for the constitutional injuries inflicted by their subordinates, *Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994), for a supervisor to be held personally liable under 42 U.S.C. § 1983 requires allegations of more than

simple “failure adequately to supervise or control any conduct that directly caused the specific deprivation charged.” *Fisher v. Washington Metro. Area Transit Auth.*, 690 F.2d 1133, 1143 (4th Cir. 1982).

In *Shaw*, *supra*, the Fourth Circuit set forth three elements that must be shown to establish the theory of supervisory liability:

1. Actual or constructive knowledge on behalf of the supervisor that the subordinate’s conduct was a “pervasive and unreasonable risk” to injury to citizens like the plaintiff;
2. Deliberate indifference or implied authorization of the conduct by the supervisor; and
3. An “affirmative causal link” between the supervisor’s inaction and the constitutional injury suffered by the plaintiff. *Id.* at 799 (citations omitted).

All three elements must be pled and proven. The standard for asserting a valid claim for Section 1983 supervisory liability has become so strict that there is some doubt as to whether such claims are still viable at all:

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

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

The Amended Complaint fails to allege any of these elements of supervisory liability under 42 U.S.C. § 1983. For that reason alone, any Section 1983 claims against the DDSN Defendants should be dismissed. *See, e.g., Payne v. CCOH*, 2012 WL 6801387, 5 (D.S.C. 2012)(dismissing supervisory liability in part because “none of the three elements for such

liability have been pled”); *Mitchell v. Lewis*, 2012 WL 137471, 5 (D.S.C. 2012)(dismissal where “Plaintiff does not allege any facts to show the existence of an affirmative causal link between any alleged injury to Plaintiff and any action or inaction on the part of the defendants”).

Even if the three elements had actually been alleged, it is readily apparent that Plaintiff cannot satisfy the third element (an “affirmative causal link”). Such failure in and of itself is sufficient to defeat Plaintiff’s claim based on the small laceration of the penis, given that the test requires all three elements to be shown. The penis injury was a factually unique incident. There is no dispute that its cause was found to be simply unknown. Exhibit 2. It was not foreseeable, and therefore no action by a supervisor can logically be said to have been necessary to prevent it, much less that there was in fact any causal connection between the injury and action or inaction by the DDSN Defendants.

Even if the Court should consider the merits of the pre-2005 personal injury incidents that pre-date the filing of this action by more than three years, the Amended Complaint, such claims should also be dismissed because of the failure of the Amended Complaint to allege an “affirmative causal link” between those injuries and some action or inaction by the DDSN Defendants. All Plaintiff has done is to allege the existence of various other events at Babcock in the hope of thereby showing a logical or causal connection between those events and Plaintiff’s injuries. However, no such connection has even been alleged, much less been shown to exist.

While it is probably not even necessary to discuss the other parts of the supervisory liability tests, Plaintiff would need to show a history of widespread abuse by subordinates, to put the supervisors (Butkus or Lacy) on notice of a problem. *Wellington v. Daniels*, 717 F.2d 932

(4th Cir. 1983).⁶ The Fourth Circuit noted that “a single act or isolated incidents are normally insufficient to establish supervisory inaction upon which to predicate § 1983 liability.” *Id.* at 936 (citations omitted). The Fourth Circuit also found that the conduct of the subordinate must pose “an unreasonable risk of harm of constitutional injury.” *Slakan v. Porter*, 737 F.2d 368, 373–74 (4th Cir. 1984). In this case, the Plaintiff can only establish isolated unrelated incidents, not widespread abuse.

Plaintiff may attempt to assert liability by referring to several unrelated incidents. These include scratches and bruises on the Plaintiff’s body which could have been caused by himself, minor injuries caused by other consumers, an isolated incident of abuse by a Babcock Center employee, and the isolated incident of ants biting the Plaintiff in his bed. However, these incidents taken together do not evidence conduct by persons arguably supervised by DDSN that would pose a “pervasive and unreasonable risk of constitutional injury” or “widespread abuse.”

To the extent that employees of Babcock Center may have acted in a way that posed an unreasonable risk of injury, there is no evidence of an inadequate response by Butkus or Lacy. When the Plaintiff was assaulted by an employee of Babcock Center in 2000, an investigation began promptly and the employee was fired and prosecuted by the Attorney General. *See* Exhibit 3 (Deposition of Bradford, pp. 16–18); Exhibit 4 (Arrest Warrant for Carl Anthony). When another consumer intentionally harmed the Plaintiff, that consumer was moved to a different facility. *See* Exhibit 3 (Deposition of Bradford, pp. 30–34). The Plaintiff has not provided any evidence of an incident where these Defendants were on notice of a problem and responded inadequately to it.

⁶ This assumes, without conceding, that Butkus and Lacy actually had supervisory responsibilities over Babcock Center employees. However, it cannot reasonably be claimed by Plaintiff that such persons were in fact employees of DDSN. *Young v. South Carolina Dept. of Disabilities and Special Needs*, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007).

Additionally, even if there were evidence of abusive or neglectful conduct, the Plaintiff cannot establish deliberate indifference. This burden of proof is very high in failure to supervise cases. The reason for this is:

[O]rdinarily, [the plaintiff] cannot satisfy his burden of proof by pointing to a single incident or isolated incidents, for a supervisor cannot be expected to promulgate rules and procedures covering every conceivable occurrence within the area of his responsibilities. Nor can he reasonably be expected to guard against the deliberate criminal acts of his properly trained employees when he has no basis upon which to anticipate the misconduct. A supervisor's continued inaction in the face of documented widespread abuses, however, provides an independent basis for finding he either was deliberately indifferent or acquiesced in the constitutionally offensive conduct of his subordinates.

Slakan, 737 F.2d at 372-73 (internal citations omitted). To hold a supervisor liable, the Plaintiff must show a history of documented abuses and continued inaction by the supervisor. As stated above, the Plaintiff has not alleged such a history of abuses or continued inaction, and therefore, he has failed to establish this high standard of proof. Obviously, since he cannot establish the history of abuses, he cannot show continued inaction.

Based upon the record in this case, there is no evidence of widespread abusive conduct by employees of the Defendants and there is no evidence that these Defendants knew of and ignored widespread systemic problems. Therefore, all of the Plaintiff's Section 1983 personal claims against these Defendants, whether arguably time-barred or not, should be dismissed with prejudice.

Finally, with respect to the slight delay in Plaintiff's being permitted to go home on the afternoon of Friday, June 10, 2005, the undisputed fact is that Plaintiff's counsel had an *ex parte* Probate Court Order, but did not send a copy of it to DDSN's General Counsel prior to DDSN's brief refusal to allow Plaintiff to go home that evening. *See* Ex. 7 (e-mails). While the delay in

Plaintiff's return home was minor (and probably not even something he was aware of), such delay as did occur was clearly attributable to this failure of communication by Plaintiff's counsel, and not to any wrongful act of the DDSN Defendants. Any claim of injury that Plaintiff may assert as a result of that incident is simply unsupported by any evidence that the DDSN Defendants acted wrongfully in light of the information made available to them.

2. Second Cause Of Action (conspiracy under 42 U.S.C. § 1985).

a. The elements of a claim under 42 U.S.C. § 1985 have not been alleged, nor did they exist in fact.

In the Second Cause of Action, the Plaintiff has attempted to allege that the Defendants in this matter have acted in concert to deprive the Plaintiff of certain rights protected by the United States Constitution. *See* Complaint, ¶ 71–77. Plaintiff claims that the alleged conspiracy resulted in damages to him in violation of 42 U.S.C. § 1985. *Id.* This claim is without merit, however, because Plaintiff's allegations fall far short of what is necessary to state a cause of action for conspiracy under 42 U.S.C. § 1985.

In *Simmons v. Poe*, 47 F.3d 1370 (4th Cir. 1995), the Fourth Circuit described the elements of a claim under 42 U.S.C. § 1985 as follows:

The law is well settled that to establish a sufficient cause of action for “conspiracy to deny equal protection of the laws” under section 1985(3), a plaintiff must prove: (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy. Moreover, the law is well settled that to prove a section 1985 “conspiracy,” a claimant must show an agreement or a “meeting of the minds” by defendants to violate the claimant's constitutional rights.

47 F.3d at 1376–77 (internal citations omitted).

The Amended Complaint fails to allege or even suggest that any of the alleged conspirators were motivated by a specific class-based, invidiously discriminatory animus. Nor does it allege that any action against the Plaintiff was based on his inclusion in a specific protected class. As a result, the Second Cause of Action does not allege facts sufficient to constitute a cause of action.

Another reason for dismissal of the Second Cause of Action is that it is entirely conclusory as to the nature of the alleged conspiracy. As the Fourth Circuit has held,

[W]e have specifically rejected section 1985 claims whenever the purported conspiracy is alleged in a merely conclusory manner, in the absence of concrete supporting facts.

Simmons v. Poe, supra, 47 F.3d at 1377. As the Fourth Circuit has further held, a plaintiff “must demonstrate with specific facts that the defendants were ‘motivated by a specific class-based, invidiously discriminatory animus to [] deprive the plaintiff[s] of the equal enjoyment of rights secured by the law to all.’” *Francis v. Giacomelli*, 588 F.3d 186 (4th Cir. 2009) (quoting *Simmons*, 47 F.3d at 1376)(emphases added). *Simmons* also has noted that the Fourth Circuit “has rarely, if ever found that a plaintiff has set forth sufficient facts to establish a section 1985 conspiracy,” *Id.* at 1377.

A review of the allegations of the Second Cause of Action, Paragraphs 72 through 74 of the Amended Complaint, shows that those allegations could hardly be any more conclusory than they are. The only matters alleged are that the Defendants “entered into a conspiracy” (Par. 72), whose purpose was “to deprive . . . Plaintiff of services (Par. 73) and that the “Defendants’ acts in furtherance of this conspiracy injured Plaintiff in his person and deprived him of rights. . . .” (Par. 74). These allegations are clearly devoid of “specific facts.”

Given the complete absence of substantive merit of the claims under 42 U.S.C. § 1985, it is not necessary to consider the application of the statute of limitations to that claim. These

Defendants would point out, however, any such claims arising prior to May 12, 2005, would be time-barred in addition to being unmeritorious, as noted earlier. *Harris v. Sumter County Sheriff's Dept.*, 2001 WL 34685102, *3 (D.S.C. 2001).⁷

3. Third Cause of Action (Negligent Supervision).

a. The Tort Claims Act statute of limitations bars the negligent supervision claim against the agency, DDSN.

The statute of limitations that applies to the state law claims against DDSN is found in the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-110. That section provides for a two year statute of limitations after the “date the loss was or should have been discovered.” S.C. Code Ann. § 15-78-110. There is no question that the last act that even arguably damaged Plaintiff occurred or on about June 10, 2005. Amended Complaint, Par. 47.⁸

As discussed above, the Summons and Amended Complaint were filed on May 7, 2008, and served on these Defendants on or about May 12, 2008. The original 2007 Summons and Complaint were never served at all. Accordingly, this suit could not be deemed to have commenced any earlier than the date the Plaintiff first filed the Amended Complaint, which was May 7, 2008. *See S.C. Code Ann. § 15-3-20(B)*(civil action is commenced when the summons

⁷ While these are federal cases, the state pleading rules are, if anything, more stringent when it comes to alleging specific facts, as opposed to mere notice pleading. As the Court of Appeals has held:

Rule 12(b)(6), SCRCF, “retains the Code Pleading standard . . . rather than the more lenient notice pleading standard found in the federal rules.” Harry M. Lightsey, Jr. & James F. Flanagan, *South Carolina Civil Procedure* 93 (2nd ed. 1996).

Gaskins v. Southern Farm Bureau Cas. Ins. Co. 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000).

⁸ Paragraph 46 of the Amended Complaint contains a typographical error to the effect that a Probate Court Order was issued on “June 9, 2007,” but the date clearly should read “June 9, 2005.”

and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing). The commencement date of approximately May 12, 2008 was eleven months after the two-year statute had run in June 2007. Plaintiff's state law claims against DDSN are therefore clearly barred by § 15-78-110.

b. The Tort Claims Act renders the individual Defendants immune from suit on the negligent supervision claim.

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

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

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

The only exception to this rule of immunity for the employees occurs when the employee commits actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. S.C. Code Ann §15-78-70(a) and (b). However, the discovery process in this case has not revealed any evidence that Defendants Lacy or Butkus acted outside the scope of their official duties by engaging in actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. Because all actions by Defendants Lacy and Butkus were done within the scope of their official

duties, they are entitled to immunity under the Tort Claims Act and any state law claims against them should be dismissed.⁹

- c. **Even if not time-barred, the claim for negligent supervision is without merit, because there is no claim that a specific person created an undue risk of harm to Plaintiff.**

Even if Plaintiff's negligent supervision claim is not time-barred, it fails as a matter of law, because Plaintiff does not claim, as he must, that "a specific person created an undue risk of harm . . ." *Bank of New York v. Sumter County*, 387 S.C. 147, 156, 691 S.E.2d 473, 478 (2010). Plaintiff's claims, as already discussed, are limited to attempts to argue negligence in supervision, but the claims are based only on isolated incidents involving persons other than those who allegedly injured Plaintiff. Even if the negligent supervision claim had centered on a specific person, which it clearly did not, it still fails for the same reasons stated above in the Section 1983 context— a lack of evidence of foreseeability and causation. *See Degenhart v. Knights of Columbus*, 309 S.C. 114, 420 S.E.2d 495 (1992). In the absence of evidence that the DDSN Defendants knew or should have known of the necessity to exercise control over one or more specific individuals prior to the injuries of which Plaintiff complains, there can be no liability for negligent supervision. *See Brockington v. Pee Dee Mental Health Center*, 315 S.C. 214, 433 S.E.2d 16 (Ct. App. 1993). Moreover, as already discussed above, there is no question that Babcock Center employees are not employees of DDSN. *Young v. South Carolina Dept. of Disabilities and Special Needs*, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007).

⁹ While it is unnecessary to reach the issue of whether the two-year statute of limitations would apply to this claim against the individual Defendants, *Flateau* also held that "the two-year statute of limitations applies even if the [individual defendants] acted outside the scope of their official duties or if their actions constituted fraud, actual malice, intent to cause harm, or a crime involving moral turpitude." 355 S.C. at 208-209, 584 S.E.2d at 419.

4. Fourth Cause of Action (ADA and Rehabilitation Act).

Plaintiff's claims under the ADA and the Rehabilitation Act are moot, and/or barred by the one-year statute of limitations.

The Amended Complaint vaguely asserts claimed violations of the ADA and the Rehabilitation Act. Amended Complaint, Paragraphs 83-89. Apparently this claim is that the Defendants had failed, as of May 2008, when the Amended Complaint was served, to provide Plaintiff with some type of unspecified "needed services." Amended Complaint, Par. 83. The only specific allegation of the Amended Complaint in this regard is the assertion in Paragraph 52 of the Amended Complaint that "Defendant Lacy denied Plaintiff's request for adult health care services, requiring Plaintiff to appeal eligibility for those services."

The Defendants do not dispute that DDSN in June 2005 found that Plaintiff was not eligible for Adult Day Health Services. That decision was appealed by Plaintiff to the DHHS Hearing Officer, who reversed DDSN's decision by order dated March 7, 2006. Exhibit 5, attached. The short answer to this claim of a denial of services is accordingly that it was rendered moot in 2006 by the above-cited Hearing Officer decision in favor of Plaintiff.

To the extent, if any, that Plaintiff might be asserting a damage claim as a result of this June 2005 denial of services, such a claim would be barred by the one-year statute of limitations applicable to ADA and Rehabilitation Act claims. While the ADA and the Rehabilitation Act do not contain a specific limitation period, Congress has directed courts to borrow the most appropriate state statute of limitations to apply to the federal claim. *McCullough v. Branch Banking & Trust Co.*, 35 F.3d 127, 129 (4th Cir.1994) (citing *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1986)). The United States District Court for the District of South Carolina addressed the applicable statutes of limitations in ADA and Rehabilitation Act cases and applied the one-year statute of limitations found in the South Carolina Human Affairs Law (SCHAL), S.C. Code Ann.

§§ 1-13-10, et. seq. *Cockrell v. Lexington County School District One*, 2011 WL 5554811 (D.S.C. 2011). *Accord, Mestrich v. Clemson University*, 2013 WL 842328 (D.S.C. 2013). Plaintiff's claim of alleged denial of services is based on a June 2005 DDSN decision. The present action was served in May 2008, nearly three years later. Accordingly, to the extent the Plaintiff might assert damages or some other non-moot claim pertaining to the 2005 denial of services, the ADA and Rehabilitation Act claims are nevertheless barred by the one-year statute of limitations.

5. Fifth Cause of Action (Unjust Enrichment).

**The Amended Complaint Fails To State Facts Sufficient To Constitute
A Cause Of Action For Unjust Enrichment.**

In the Fifth Cause of Action, Plaintiff claims that the Defendants have been unjustly enriched by receiving "payment for staffing which was not provided to Plaintiff" and by receiving "payment for treatment which was not provided in a safe and effective manner." Amended Complaint, Paragraphs 91-92. However, the Plaintiff has failed to establish the elements of an unjust enrichment action.

"The equitable doctrine of quantum meruit allows an aggrieved party to recover for unjust enrichment." *See QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 202, 600 S.E.2d 105, 108 (Ct. App. 2004). "To prevail on this theory, a plaintiff must establish the following three elements: (1) a benefit conferred by plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for her to retain it without paying its value." *Id.* at 202-03, 600 S.E.2d at 108 (emphasis added).

Plaintiff's unjust enrichment claim must fail as a matter of law as the Plaintiff cannot establish that any of the Defendants inequitably obtained payments or anything else of value

from the Plaintiff. Although the Plaintiff alleges that the Defendant DDSN received payments for the staffing and treatment that the Plaintiff contends was not provided to him, the Plaintiff does not allege that any of those payments were made by the Plaintiff himself to the Defendants. Indeed, Plaintiff's mother, Margaret Mims, admitted at her deposition that neither she nor Edward Mims had ever been charged for services rendered to Edward. Exhibit 6 (Deposition of Margaret Mims p. 84). Accordingly, Plaintiff's cause of action for unjust enrichment must be dismissed.¹⁰

6. Any argument by Plaintiff regarding tolling of the statutes of limitations does not affect the application of statutes of limitations, as set forth above.

Plaintiff will presumably argue that he is a person for whom the applicable statutes of limitations should be tolled to some extent. There are several reasons why such an argument is unavailing in the present case.

a. Plaintiff was not adjudicated incompetent until 2005.

While South Carolina law provides a provision to toll the statute of limitations period for individuals who are insane, such provision has no application in this case. The South Carolina Code provides in relevant part that "[i]f a person entitled to bring an action mentioned in Article 5 of this chapter or an action under Chapter 78 of this title ... is at the time the cause of action accrued ... (2) insane ... the time of the disability is not a part of the time limited for the commencement of the action...." S.C. Code Ann. § 15-3-40(2). In this case, while the Plaintiff may have been profoundly mentally retarded, it is clear that he was not adjudicated to be incapacitated until the order of June 14, 2005. Code Section 44-26-90 provides that a mentally retarded person has all the rights of citizenship unless and until the person is adjudicated to be

¹⁰ Given that no grounds exist for an unjust enrichment claim, there is no event from which to compute the running of any otherwise-applicable statute of limitations.

incompetent. However, all of the allegations contained in the Plaintiff's complaint relate to incidents that occurred between 2004 until May 2005. Therefore, it is clear that all of the causes of actions alleged by the Plaintiff accrued prior to the adjudication of his incompetence. See *Stephens v. Draffin*, 327 S.C. 1, 5, 488 S.E.2d 307, 309 (1997) ("A cause of action accrues at the moment when the plaintiff has a legal right to sue on it."). Because the Plaintiff had not been adjudicated incompetent at the time that the allegations contained within his Complaint arose, he is not entitled to the tolling provision of S.C. Code Ann. § 15-3-40(2), and the applicable statutes of limitations bar all of the Plaintiff's claims other than the claims brought pursuant to 42 U.S.C. § 1983 involving the unexplained injury discovered on May 27, 2005 and the alleged detention on June 10, 2005.

b. The appointment of a guardian in June 2005 ended any tolling period that may have been in effect.

Even if tolling is permitted, § 15-3-40(2) expressly provides that the tolling period "cannot be extended . . . (b) in any case longer than one year after the disability ceases." This action was filed by and through Margaret Mims, "who is the natural parent and the duly appointed guardian for Edward Mims." Amended Complaint, Par. 2.¹¹ The power to sue is conferred on guardians such as Mrs. Mims by Rule 17(c), S.C.R.C.P.

No South Carolina case has decided the issue of whether the appointment of a guardian terminates the disability period under provisions of statute similar to § 15-3-40(2). While cases from other jurisdictions have reached conflicting results on this issue, the DDSN Defendants submit that the better rule, and the one that should be adopted under the facts of this case, is that the statute of limitations is tolled only until the appointment of a guardian. As held in *Stewart v. Robinson*, 115 F.Supp.2d 188, 195 (D.N.H. 2000), such a rule "gives effect to society's

¹¹ The Order appointing Mrs. Mims as guardian is part of Exhibit 7.

compelling interest in effectively protecting the rights of those who are disabled . . . , while also serving the important interests underlying statutes of limitations.” The same case further holds that this rule serves several interests:

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

115 F.Supp.2d at 197.

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

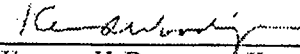
As applied to the facts of the present case, the appointment of the guardian in June 2005, extended the statute of limitations by one year for all of the older claims. §15-3-40(b). In other words, for any claim for which the statute would otherwise already have run as of June 2005, Mrs. Mims had until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

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

CONCLUSION

For these reasons set forth above, the DDSN Defendants ask the court to grant this motion for summary judgment and dismiss the Plaintiff's claims against these Defendants.

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May 29, 2013

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

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

Civil Action No. 2007-CP-40-3365

Plaintiff,)

v.)

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

Defendants.)
_____)

EXHIBIT 1

TO DDSN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Critical Incident Report for incident of May 27, 2005



SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident
Part II: Final Report

FILE

Agency: Babcock Center

County: Richland, Lexington

☒ District I:
☐ District II:

Region:
Region:

☒ Midlands
☐ Coastal

☐ Piedmont
☐ Pee Dee

Name of Primary Identifier: Edward Mims

(Name of primary person involved. If incident occurred on van or in facility or in a situation where all names are not listed, specify as such)

Date of Incident: Unknown

Time of Incident:

Location of Occurrence (indicate name of DDSN facility, i.e., unit name in Regional Center, Saleeby Center, provider operated facility, i.e., Sunrise CTH II or address in community, i.e., individual's home or other address, agency van at Joe Doe adult day program, respite caregiver home):

Kensington I

Results of Investigation:

RECEIVED

JUN 29 2005

DIVISION OF
QUALITY ASSURANCE

Babcock Center - Confidential Information

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SCDDSN Critical Incident Initial Report Form, Page 4 of 6, Revised February 2005



SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident
Part II: Final Report

At approximately 6:50pm on May 27, 2005 staff, Trelas Heatley, was helping Edward Mims, supported person, get ready to go home on pass. He noticed that Edward was not wearing any underwear. According to the staff, Edward had begun undressing earlier for bed but was instructed by the staff to put his pants back on. Edward did not put his underwear back on. Mr. Heatley instructed Edward to take off his pants so that he could put some underwear on and he left the room to get a pair of underwear for him. Edward's underwear and socks are not stored in his room but in a plastic bin in the hall closet. Edward is able to dress himself with verbal prompting. Edward will undress himself when he is ready to go to bed. When Mr. Heatley returned to the room, Edward was sitting in a chair with his pants down around his ankles. Mr. Heatley noticed blood dripping from the chair to the floor. Mr. Heatley went to get another staff to help him. At that time, he did not know where the blood was coming from. Mr. Heatley and Ms. Wilson checked Edward and found that there was a tear on the bottom of his penis. Ms. Wilson cleaned Edward's wound while Mr. Heatley was on the telephone with the nurse, Maggie Mobley. Ms. Mobley told the staff to call Jan McLane because she was on-call that evening and take him to the emergency room if necessary. Ms. Mobley stated that the staff told her that he had left the room to get some underwear for Edward and when he returned to the room, he noticed the blood. Jan McLane, Nurse, was called and arrived at the facility to evaluate the injury. She stated that there was a horizontal tear just below the head of the penis on the underside. When she lifted the penis to evaluate the injury, the skin began to tear more. The skin on that area was very thin. Ms. McLane stated that she checked under Edward's fingernails and did not notice any skin tissue or blood that would indicate that he had scratched himself. She stated that she and the staff checked the chair that Edward was sitting in and could not find anything that could have caused the injury. She stated that the injury did not appear to be the result of abuse or neglect. There was no bruising, no swelling, nor any redness in the area. Edward was transported to Lexington Medical Center for evaluation and treatment. According to the staff who accompanied Edward to the hospital, the wound again tore more when the doctor examined him. He received seven stitches to close the wound. It was also recommended that Edward be seen by a Urologist. He has an appointment scheduled for June 3, 2005.

Ms. Mims, Edward's Mother, was notified of the injury. Ms. Mims decided to make a report to the police department. The police officer called the Kensington facility and talked with the staff stating that they needed to ensure that Edward received proper wound care for the injury and that an internal investigation was completed. The officer, name unknown, stated that he would follow-up with the facility in a few days. As of June 2, 2005 there has been no additional contact from the police department.

E-mail was received from Tracy Kelly, Hospital Social Worker, stating that the staff at Lexington Medical Center did not feel that Edward was in any type of imminent danger, but requested that an incident report be completed because the staff could not isolate the origin of the injury. Investigator was unsuccessful in contacting Dr. Mark Johnson, Emergency Room Physician, to obtain his opinion of the injury. Maggie Mobley, nurse, from Kensington also attempted to obtain information from Dr. Johnson and the LMC emergency department. She was unable to obtain information as to Dr. Johnson's impression of the injury. She was told that Dr. Johnson recommended that Edward be seen by an Urologist for follow-up. Investigator interviewed Tracy Kelly on June 1, 2005. Ms. Kelly stated that she had become involved in the situation on Friday night due to the unusual nature of the injury and the fact that Edward was non-verbal. Investigator asked if Ms. Kelly knew the doctors impression on the night of the injury. She stated that Dr. Johnson was not there but that she would leave him investigator's questions. Ms. Kelly stated that the nurse from Friday night was available. Ms. Kelly talked with the nurse while investigator was on the telephone. The nurse did not remember any specific information from the evaluation on Friday. Ms. Kelly stated that neither she nor Dr. Johnson felt that the injury was the result of abuse or neglect. She stated that if they had felt that this was the case, then they would not have allowed Edward to return with the staff and would have notified the authorities. Ms. Kelly stated that the staff who accompanied Edward that night to the hospital was very nice and pleasant. He did not appear to be making excuses for the injury and did not appear to be defensive when questioned about the origin of the injury. Ms. Kelly called Kensington I that evening and also talked with Ms. Wilson, staff. She stated that again the staff could not provide the origin of the injury but that she did not feel that they were hiding anything.

On June 2, 2005 Dr. Graeme Johnson, Medical consultant, from DDSN arrived at the Kensington I facility to evaluate Edward's injury and assist with the investigation. Dr. Johnson also reviewed Edward's medical information, staff statements, investigator notes, accident injury record, evaluated the physical environment of Edward's room, and interviewed the nurse, Maggie Mobley. Dr. Johnson will forward his written report to investigator once it is completed. Dr. Johnson stated that he could not determine the origin of the injury but did not feel that the injury was the result of abuse or neglect.

Edward is not able to provide any information as to the origin of the injury. The staff present at the facility did not witness the injury occur. It is probable that the injury occurred while Mr. Heatley was out of the room getting Edward's underwear. There were no zippers or clasps on Edward's clothing that could have caused the injury. There was no blood in his pants. The staff also

Babcock Center - Confidential Information



SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident
Part II: Final Report

checked the underwear that Edward had been wearing earlier that evening and found no signs of blood. The chair in which Edward was found sitting, did not have any sharp edges that could have caused the tear. As the wound continued to tear with minimal evaluation of the injury, indicating a freshness and fragility of the skin in that area, it is believed that the tear was an accidental injury. Without any witnesses or objects that would provide a clear understanding of the injury, the origin remains unexplained. Based on a review of the physical environment, staff statements, nurse's evaluation, Dr. Graeme Johnson's evaluation and staff at Lexington Medical Center's evaluation, there is no reason to believe that the injury was caused by abuse or neglect.

Describe Action Taken:

Edward was evaluated by the nurse and sent to the emergency room for evaluation and treatment.

Is this incident a repeat occurrence with this consumer? ☐ Yes ☒ No

What quality assurance actions were taken to prevent the occurrence of an incident like this?

1. Nursing staff will ensure proper wound care and that Edward is seen by the Urologist.
2. Babcock Center will cooperate with the independent investigations.

Reporting: If the incident was reported to another agency with oversight of the facility/program, please indicate which agency:

Check all that apply:

☒ DDSN ☒ Ombudsman ☐ Service Coordination: _____
☐ DSS ☐ DHEC ☒ Other: Parent/Guardian

Reported by Whom/Title? Gilda Williams, QMRP on-call

Date: 05/27/2005

Signature of Investigator

6/2/05
Date

Signature of Executive Director/Facility Administrator

6/2/05
Date

This document should be forwarded to the following DDSN staff:

Darlyn Thomas, Director, Quality Assurance/Quality Improvement Division, SCDDSN
PO Box 4706, Columbia, SC 29240 Fax#: 803.898.9656 and
Sam Davis, Program Coordinator, Abuse/Neglect/Exploitation/Critical Incidents, SCDDSN
8301 Farrow Rd., Columbia, SC 29203 Fax#: 803-935.6170

** If the critical incident being reported is a death, then complete the Report of Death form.*

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SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident
Part I: Initial Report

Agency: Babcock Center

County: Richland, Lexington

☒ District I:
☐ District II:

Region: ☒ Midlands
Region: ☐ Coastal

☐ Piedmont
☐ Pee Dee

Date of Incident: Unknown

Time of Incident:

Type Location of Incident: (check one)

SCDDSN Provider Operated Community Program: ☐ CRCF ☐ CTH ☒ ICF ☐ SLP ☐ Day Program

☐ SCDDSN Regional Center ☐ Other (Specify):

Location of Occurrence (indicate name of DDSN facility, i.e., unit name in Regional Center, Saleeby Center, provider operated facility, i.e., Sunrise CTH II or address in community, i.e., individual's home or other address, agency van at Joe Doe adult day program, respite caregiver home):

Kensington I

☐ Check here if incident occurred on van or in facility or in a situation where all names do not have to be listed.

Specify (as staff, vehicle accident/vandalism/damage, facility incident): _____

People Involved: (staff, people with disabilities, family members, etc.):

Edward Mims Name of primary person involved (record will be identified by this name)

Name(s) of Others Involved & Involvement: (Check one category for each person)

Mims, Edward James, Consumer ☐ Perpetrator ☐ Other Consumer ☐ Staff ☐ Witness ☐ Family ☐ Other: _____

Brief Description of Incident:

At approximately 7:30pm on May 27, 2005 the staff noticed that Edward Mims was bleeding on his penis. The nurse examined the injury and sent Edward to the emergency room for evaluation and treatment. Edward received seven stitches to close the wound. The origin of the injury is unknown.

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SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident
Part I: Initial Report

Type Incident & Category (check all that apply):

Type Incident	Category	Consumer Directly Affected	Consumer to Consumer	Staff	Facility or Program Operations Impacted
☐ Accidents		☐			
☐ Aggression		☐	☐		
☐ Communicable Disease		☐		☐	
☐ Criminal Arrest		☐			
☐ Death		☐			
☐ Elopement		☐			
☐ Exploitation		☐	☐		
☐ Fall		☐	☐		
☐ Fire		☐			☐
☐ Firearms/Weapons/Explosives		☐	☐	☐	
☐ Illegal Substances		☐		☐	
☒ Injury		☒	☐		
☐ Law Enforcement		☐	☐	☐	
☐ Medication Errors		☐			
☐ Motor Vehicle		☐			☐
☐ Property Damage (natural or unusual)		☐	☐	☐	☐
☐ Sexual Assault		☐	☐		
☐ Suicide		☐			
☐ Theft		☐	☐	☐	☐
☐ Other (specify: _____)		☐	☐	☐	☐

Provide detailed information in narrative

The Investigation

Person Assigned to Investigate: Tonya Bradford, Consumer Advocate

Reporting: If the incident was reported to another agency with oversight of the facility/program, please indicate which agency:

Check all that apply:

☒ DDSN ☒ Ombudsman ☐ Service Coordination: _____
☐ DSS ☐ DHEC ☒ Other: Parent/Guardian

Reported by Whom/Title? Gilda Williams, QMRP on-call Date: 05/27/2005

Immediate Actions Taken to Protect the Consumer:

Edward was evaluated by the nurse and sent to the emergency room for evaluation and treatment.

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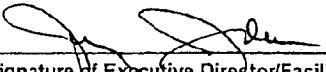
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SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident
Part I: Initial Report

Immediate Actions to Secure the Chain of Evidence and Assist the Investigator:



Signature of Executive Director/Facility Administrator

5-31-05

Date

This document should be forwarded to the following DDSN staff:

Darlynn Thomas, Director, Quality Assurance/Quality Improvement Division, SCDDSN
PO Box 4706, Columbia, SC 29240 Fax#: 803.898.9656 and
Sami Davis, Program Coordinator, Abuse/Neglect/Exploitation/Critical Incidents, SCDDSN
8301 Farrow Rd., Columbia, SC 29203 Fax#: 803-935.6170

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SCDDSN Critical Incident Initial Report Form, Page 6 of 6, Revised December 2004

Stanley J. Butkus, Ph.D.
State Director
Robert W. Barfield
Deputy State Director
Administration
Ronald C. Dotter
Associate State Director
Operations
Kathi K. Lacy, Ph.D.
Associate State Director
Policy



3440 Harden Street Ext (29203)
PO Box 4700, Columbia, South Carolina 29240
V/TTY: 803/898-9600, FAX: 803/898-9653
Toll Free: 888/DSN-INFO
Home Page: www.state.sc.us/ddsn/

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Edythe C. Dove

MEMORANDUM

CC: DOT

~~EDU/...~~
file

ky
6-2-05

TO: Dr. Judy Johnson
Executive Director,
Babcock Center

FROM: Stan Butkus, Ph.D. *B.*
State Director

DATE: June 1, 2005

RE: Request for our Independent Investigation

I have received your letter dated June 1, 2005 requesting an independent investigation of a laceration received by Edward Mims.

It is my understanding that the Ombudsman's Office will be investigating the matter. Jon Cook of the Ombudsman's Office has agreed to let our medical consultant, Dr. Graeme Johnson, participate in the investigation.

SB/jst

DISTRICT I

8101 Fritzsche Road, Columbia SC 29207
Phone: 803/935-7412

Midlands Center - Phone: 803/935-7500
Whitten Center - Phone: 804/853-2733

DISTRICT II

PO Box 9209, Florence, SC 29502-9209
Phone: 843/661-2655

Coastal Center - Phone: 843/873-5750
Paw Dee Center - Phone: 843/664-2600
Santee Center - Phone: 843/312-4104

When getting Edward ready to go home, I took him in his room to get his shoes. After putting his shoes on, I looked him over and found that he had on no underwear. I then removed his shoes and asked him to take off his pants as I walked to get a pair of underwear. When I returned to the room Edward had his pants down and he was sitting in the chair. I then noticed the blood on the chair drop on the floor so I went and got a co-worker.

Isabel Heitling
5-27-05

To: Tonya Bradford
Date: May 31, 2005
From: Jan McLane, RN
Ref: Edward Mims

On Friday evening, about 7:10, I received a page from Mr. Heatley at Kensington I. He stated that Mr. Mims was in the process of preparing to go to his mothers' house for the weekend. Mr. Heatley expressed to me he was surprised when he noticed Edward was not wearing underwear. He assisted Edward with removing his elasticized pants, asked Edward to put on his underwear and Mr. Heatley went to get him a fresh pair of pants. Mr. Heatley stated to me he was gone maybe 60-90 seconds. Upon his return he noticed bright red blood. Upon investigating the origination of the blood Mr. Heatley noted open skin, he called a tear, on the under side of Mr. Mims penis. Mr. Heatley seemed disturbed and puzzled, as well as concerned that Mr. Mims could be injured in such a short period of time.

I inquired about the possibility of the "tear" occurring with a zipper caught on the penile skin, I was told the pants removed were non-zippered. I inquired about the possibility of a fingernail doing the damage, Mr. Heatley inspected the nails for evidence of blood or skin tissue. He stated there was no blood or skin noted on Mr. Mims hands.

We discussed possible first aid options until my arrival. Staff to cover site with gauze loosely after applying a thin layer of antibiotic ointment. (Reportedly there was minimal bleeding and only skin tissue involvement.

I arrived at the home between 7:20 and 7:25 pm. Mr. Mims was fully dressed, in no apparent distress, standing in the open area near the main living space.

Mr. Heatley and I went to Mr. Mims room with Mr. Mims so that I could examine the penile wound. Mr. Mims followed directions well, was fully cooperative, he did not appear to be in any distress. When asked if he was in pain he smiled as he usually does when asked questions.

Examination of the wound revealed no apparent skin tear. The wound was a straight line, approximately 1/2 inch below the head of the penis, horizontal to the shaft. There was no edema (swelling), no bruising. Injury extent could not be determined until the penis was more dorsally placed, this stretched the shaft enough to reveal that the full thickness of, the very thin, skin was involved. No injury to the underlying tissue was noted. No bleeding was occurring at any time during my assessment. As the penis was more dorsally flexed the open skin tissue did seem to lengthen by 1-2 cm. This increase in the wound length did not produce any bleeding or noted pain for Mr. Mims.

A thin layer of antibiotic ointment was applied to wound.

Arrangements were made for Mr. Heatley to take Mr. Mims to Doctors Care for sutures, or to Lexington Med Center ER for sutures.

While in Mr. Mims room I checked the wooden edges of the furniture in his room for possible splintered pieces, I checked his nails and found no clues which would reveal to me how the injury occurred. On the cloth edge of the sitting chair there was a dark area approximately 2 inches by 3 inches which appeared to be damp with blood.

Minimal to no bleeding, no pain felt or at least expressed by Mr. Mims, and easy lengthening of the tissue. The wound was well covered by penile skin tissue when the penis was not being examined.

I spoke to Mr. Mims mother regarding the wound. She wanted to defer the decision to take him home this pm until he was seen by a physician.

Upon Mr. Mims return home, I was notified by Mr. Heatley of treatment rendered. I recommended to Mr. Heatley that Mr. Mims stay at Kensington on Friday night. Let the morning nurse check the wound and if okay with her then client could go to mothers house on Saturday. I asked Mr. Heatley to call Mr. Mims mother, he assured me he would.

5-29-05

It was in the great room
when the incident happened
with Edward Mims.

Mary Glenn

5-27-05

On Friday doing Acting with Resident
In question, about also, when Mr. Heatley
who was assisting Edward Mims in
his Bedroom on left wing, who was getting
ready to go home for the weekend.
When Mr. Heatley returned to Guestroom.
Stating Mrs. Wilson can you come here
for a minute, and look at Edward,
I went to see what was happening
And this is what I saw, Edward was
sitting in chair in his Bedroom with
shirt and sock on with blood in
the chair. I checked Edward mind
for injuries, asked Mr. Heatley, what
happened where is that blood coming
from. His response was I don't know
I continue to check Edward Mims
for injuries, and noticed that the
blood was coming from his penis area
I went and called C. Rivers who was
talking with Magg's mother the nurse. Mims
before, Magg's called back and talked with
Mr. Heatley. I returned to left wing. Edward
Mims Bedroom, and continued to assist him.

D. Wilson



Babcock Center, Inc.

Appendix 1

Accident / Injury Report

Page 1

Edward Mims
Individual's Name

Kensington I
Facility

5/27/05 6:50 am/pm
Date

Treles Heatley
Observing Staff

Reporting Staff

Location of Incident / Accident

- | | | |
|---|----------------------------------|--|
| ☐ Great Room | ☐ Hallway | ☐ Dining Area |
| ☒ Bedroom | ☐ Outside | ☐ Bathroom/Shower |
| ☐ School | ☐ Work | ☐ Vehicle |
| ☐ Unknown | ☐ Kitchen | |
| ☐ Other (specify) | | |

Type of Injury

- ☐ Puncture
- ☐ Insect Bite/Sting
- ☐ Allergic Reaction
- ☒ Cut/Laceration
- ☐ Burn
- ☐ Abrasion/Scrape
- ☐ Human Bite/Scratch
- ☐ Swelling/Bump/Knot
- ☐ Skin Irritation
- ☐ Redness
- ☐ Bruise/Contusion
- ☐ No Apparent Injury

Other (specify)

Cause of Injury

- ☐ Slip/Trip/Fall
- ☐ Allergic Reaction
- ☐ Animal/Insect Bite/Sting
- ☐ Human Bite/Scratch
- ☐ Self-Injurious Behavior
- ☐ Restraint (attach Restraint Form)
- ☐ Sexual Behavior
- ☐ Struck, Hit, or Injured By/Against
- ☐ Illegal Drugs / Alcohol
- ☐ Weapon
- ☐ Unknown (Complete Page 2)

Other (specify)

Body Part(s) Involved

- | | | |
|--|---|-----------------------------------|
| Toe ☐ left ☐ right | Finger ☐ left ☐ right | |
| Foot ☐ left ☐ right | Thumb ☐ left ☐ right | |
| Ankle ☐ left ☐ right | Hand ☐ left ☐ right | |
| Leg ☐ left ☐ right | Wrist ☐ left ☐ right | |
| Knee ☐ left ☐ right | Arm ☐ left ☐ right | |
| Thigh ☐ left ☐ right | Elbow ☐ left ☐ right | |
| Hip ☐ left ☐ right | Shoulder ☐ left ☐ right | |
| Ear ☐ left ☐ right | Eye ☐ left ☐ right | |
| ☐ Head | ☐ Chin | ☐ Back |
| ☐ Forehead | ☐ Neck | ☐ Abdomen |
| ☐ Face | ☐ Chest | ☐ Genitals |
| ☐ Nose | | |

Other (specify)

Penis

Description/Describe accident/injury in detail including size, color, shape, nature and extent of injury.

staff noticed what appears to be a scratch on the underside of his penis about half an inch across.

Call received from Mr. Heatley stating Edward had scratches on penis + bleeding. Mr. Heatley to home 8:35, then to a hospital for treatment. Full depth laceration, bruise, minor bleeding. When penis is examined the "tear" becomes lower, still no bleeding.

Treatment/Outcome

☐ No Injury ☐ Injury Required First Aid ☒ Injury Required Additional Treatment (i.e. x-ray, minor suturing, etc.)

Name of Hospital (if hospitalized): Taken to Doctors Care - Sunset Blvd.

[Signature]
Nurse's Signature (if applicable)

5/27/05
Date

Notifications			Name of Person Notified		Date and Time Notified	
QMRP/Coordinator			Angela Richardson	5-27	7:00	☐ am ☒ pm
Administrator/Director			Gilda Williams			☐ am ☐ pm
Nurse			Jan Malone / [Signature]	5-27	6:55	☐ am ☒ pm
Family/Surrogate			Richard Mims		7:30	☐ am ☒ pm

If Staff are injured, attach copy of SREO

LEXINGTON MEDICAL CENTER
2720 Sunset Blvd-- West Columbia, SC 29169 --(803)791-2360

INSTRUCTIONS FOR << MIMS,E >>

Our doctors and staff appreciate your choosing us for your emergency medical care needs. Read these aftercare instructions carefully. Please call us if you have any questions about your medical problem. We are here to serve you.

LACERATION REPAIR:

Lacerations are cuts that go all the way through the skin. They can be closed after they are properly cleaned. Rinsing a cut under a faucet is safe and helps clear away foreign material. A clean wound that is closed as soon as possible is less likely to get infected. These are ways lacerations can be repaired:

- * Stitches (sutures).
- * Staples (often on the scalp).
- * Topical skin adhesive (Dermabond).
- * Sterile tapes.

Cuts that are deep may require several layers of stitches. If the wound is old or there is severe damage to the skin or foreign material, closure may need to be delayed 4-5 days.

- * Your dressing should be changed and wound rechecked in _____ days.
- * Sutures or staples should be removed in 7 days.

However your wound has been closed, you should keep the area clean and dry. Try to rest and elevate the injured part until the pain and swelling are gone. It can take up to a year for a laceration to heal completely, so the area must be protected from further injury. Watch for signs of infection. See your doctor or go to the emergency room right away if your wound has signs of infection:

-
- * Unusual redness, swelling, pain, or tenderness around the wound.
 - * Pus or a foul-smelling drainage.
 - * Red streaks going up your arm or leg from the wound.

Cuts that are not closed with glue or tape may be left open to the air in a few days after they begin to heal. You can then clean the crusts off the wound with soap and water or half-strength peroxide 1-2 times daily. However do not soak your cut in water for long periods, and protect it from further injury with a dressing until it is no longer sensitive. You may need a tetanus booster if you have not had one within the past 5 years.

WOUND CARE:

Good wound care will help reduce pain and prevent infection. Puncture wounds and deep cuts are more likely to cause problems than scrapes and abrasions. General treatment includes:

- * Rest and elevate the injured area until the pain and swelling are better.
- * All foreign material like bits of dirt must be washed off.
- * Wounds should be cleaned daily with tap water and a gentle soap; dressings may be needed to protect the wound from further damage.
- * Watch for signs of infection: increased redness or swelling, pus drainage, or increased pain.
- * A tetanus shot may be needed if you are due for a booster.

Call your doctor or go to the emergency room promptly if you think your wound is infected or if you have any other concern about your injury.

SUTURED WOUND CARE:

Your cut has been cleaned and closed with stitches. Keep the area around your wound clean and dry. Rest and elevate the injured area until all the pain and swelling are gone.

1. If a dressing has been applied, it should be removed in ____ days.
2. See your doctor or return here for stitch removal in ____ days.
3. Watch for signs of wound infection:
 - * Unusual redness or swelling around the wound.
 - * Increasing pain and tenderness.
 - * Pus drainage.
 - * Red streaks going up the arm or leg.

See your doctor or return here at once if your wound looks infected. After your cut has begun to heal, you may leave it open to the air. You can clean the stitch line 1-2 times a day with soap and water or half-strength peroxide. However, be careful not to soak the area in water for long periods. Please wear a dressing to protect your injury while you are at work. You may need a tetanus booster if you have not had one within 5 years.

PRESCRIPTIONS:

Fill all the prescriptions ordered by your doctor and take them as directed.

- * If you have been given an antibiotic, be sure to take all of it.
 - * Keep your drugs out of the reach of children, in a cool, dry, dark place.
 - * Don't give your medicine to other people or use it for other illnesses.
 - * Call us right away if you have problems with drug side-effects or allergy.
- Bring your medicines with you any time you go to emergency for treatment.
-

TOPICAL ANTIBIOTICS:

Your doctor has prescribed a topical antibacterial medicine for you. These creams and ointments are useful in preventing and treating skin infections. Examples of these drugs are: Bactroban, Furacin, Mycitracin, Neosporin, Polysporin, and Silvadene. You should wash the affected area with a gentle soap and water to remove old medicine and other debris before you put on the new medicine; this should be done 1-2 times daily.

Stop using your medicine and contact your doctor if your infection is getting worse, or if you have symptoms of allergy to the drug (itching, skin rash, redness, or swelling). There is an increased chance of an allergic reaction if you use an antibiotic with neomycin (Neosporin, Mycitracin, or a triple antibiotic ointment or cream).

ADDITIONAL INSTRUCTIONS:

- 1) FOLLOW-UP WITH DR. STOTZER @ 796-9968
 - 2) SUTURE REMOVAL IN 7 DAYS; KEEP AS CLEAN AND DRY AS POSSIBLE; APPLY ANTIBIOTIC OINTMENT 3 TIMES A DAY
 - 3) RETURN TO ED FOR WORSENING OR CONCERNS
-

FOLLOW-UP CARE:

Your physician today has been DR. M. JOHNSON

For follow-up care you should see your doctor or return here in _____ days. When you see your doctor, bring your medicines and instructions to the office. If you had x-rays, an EKG, or lab tests today, they have been reviewed by your doctor. We will contact you at once if other important findings are noted after further review by our staff. If you do not continue to improve or if your condition worsens, please call your doctor or the emergency room right away.

I acknowledge receipt of these instructions. I understand that my condition may require more care and will arrange for further treatment as recommended.

Staff Signature

Patient or Representative Signature

Discharge Time: _____ Via: ☐ Ambulatory ☐ Self
☐ Wheelchair With: ☐ Family/Friend
☐ Other _____ ☐ other _____

IF POSSIBLE, RETURN FOR YOUR RECHECK BETWEEN THE HOURS OF 9AM TO 5PM. IF YOU SHOULD HAVE ANY CONCERNS ABOUT THE SERVICE YOU RECEIVED, YOU MAY CONTACT US AT 36-8127.

Friday, May 27, 2005 - 11:06 PM

Hello

Page 1 of 1

Bradford, Tonya

From: Tracy Kelly [tjkelly@lexhealth.org]
Sent: Saturday, May 28, 2005 3:05 AM
To: 'babcockcenter.org'; Bradford, Tonya
Subject: Hello

I am writing in an effort to follow up in reference to a patient who was seen this evening at Lexington Medical Center. Mr. Mims who resides at 100 Kensington Rd, Cola, SC 29203 was brought to the ED by Mr. T. Heatley (MRS). Mr. Mims presented with a laceration to his penis (approximately 4 centimeters in length). Mr. Mims was treated and returned home with Mr. Heatley. I am simply writing to follow up and ensure that an incident report was initiated. It is my understanding that Jan McClain, RN initiated and requested treatment for Mr. Mims. I spoke with MRS, Doris Wilson via phone who noted that the incident would be documented but was unable to tell me the policy and/or procedure for follow up. The staff of Lexington Medical Center did not feel as though the patient was in any type of imminent danger. However, since staff was unable to isolate how the incident occurred, Dr. Johnson and I felt the need for further follow up. I attempted to contact the hotline. However, this appeared to be a pager number and I did not feel as though it was necessary to page someone at 2 AM. I have elected to email a few members of the Babcock staff simply because I was unsure as to who would be the appropriate staff to contact. If you have any additional questions, you may contact my cell phone (803) 315-3743 or you may contact me Wed, Thurs or Friday evenings (6pm-6 am) at 791-2301. Thank you for your time.

Tracy J. Kelley, MSW

This email and any files transmitted with it may contain PRIVILEGED or CONFIDENTIAL information and may be read or used only by the intended recipient. If you are not the intended recipient of the email or any of its attachments, please be advised that you have received this email in error and that any use, dissemination, distribution, forwarding, printing, or copying of this email or any attached files is strictly prohibited. If you have received this email in error, please immediately purge it and all attachments and notify the sender by reply email or contact the sender at the number listed above if one is provided.

5/31/2005

0485

Bradford, Tonya

From: Johnson, Dr. Judy
Sent: Tuesday, May 31, 2005 9:47 AM
To: 'Tracy Kelly'; Bradford, Tonya
Cc: Marlow, Gene
Subject: RE: Hello

Thank you for your interest in Mr. Mims. The incident was reported to me this morning and I am the Executive Director of Babcock Center. The incident was also reported to Edward's mother, the Department of Disabilities and Special Needs and the Ombudsman's office. We are in the process of conducting an investigation as to how Edward received the injury.

-----Original Message-----

From: Tracy Kelly [mailto:tjkelly@lexhealth.org]
Sent: Saturday, May 28, 2005 3:08 AM
To: 'babcockcenter.org'; Bradford, Tonya
Subject: Hello

I am writing in an effort to follow up in reference to a patient who was seen this evening at Lexington Medical Center. Mr. Mims who resides at 100 Kensington Rd, Cola, SC 29203 was brought to the ED by Mr. T. Heatley (MRS). Mr. Mims presented with a laceration to his penis (approximately 4 centimeters in length). Mr. Mims was treated and returned home with Mr. Heatley. I am simply writing to follow up and ensure that an incident report was initiated. It is my understanding that Jan McClain, RN initiated and requested treatment for Mr. Mims. I spoke with MRS, Doris Wilson via phone who noted that the incident would be documented but was unable to tell me the policy and/or procedure for follow up. The staff of Lexington Medical Center did not feel as though the patient was in any type of imminent danger. However, since staff was unable to isolate how the incident occurred, Dr. Johnson and I felt the need for further follow up. I attempted to contact the hotline. However, this appeared to be a pager number and I did not feel as though it was necessary to page someone at 2 AM. I have elected to email a few members of the Babcock staff simply because I was unsure as to who would be the appropriate staff to contact. If you have any additional questions, you may contact my cell phone (803) 315-3743 or you may contact me Wed, Thurs or Friday evenings (6pm-6 am) at 791-2301. Thank you for your time.

Tracy J. Kelley, MSW

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5/31/2005

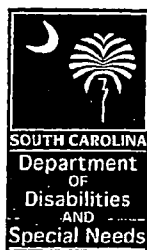
STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
Edward Mims, by and through his legal	)	
guardian, Margaret Mims,	)	Civil Action No. 2007-CP-40-3365
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Babcock Center, Inc., Judy Johnson,	)	
South Carolina Department of	)	
Disabilities and Special Needs,	)	
Kathi Lacy, and Stanley Butkus,	)	
	)	
Defendants.	)	
	)	

EXHIBIT 2

TO DDSN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Report of Graeme Johnson, M.D. relating to incident of May 27, 2005

Stanley J. Butkus, Ph.D.
State Director
Robert W. Barfield
Deputy State Director
Administration
Ronald G. Dozier
Associate State Director
Operations
Kathi K. Lacy, Ph.D.
Associate State Director
Policy



3440 Harden Street Ext (29203)
PO Box 4706, Columbia, South Carolina 29240
V/TTY: 803/898-9600, FAX: 803/898-9653
Toll Free: 888/DSN-INFO
Home Page: www.state.sc.us/ddsn/

COMMISSION
Bill G. Alexander
Chairman
Lyssa Harvey
Vice Chairman
J. Lewis Stephens
Secretary
Isaac B. Dickson, Jr.
Ronald Forrest
W. Robert Harrell
Edythe C. Dove

MEMORANDUM

To: Mr. Ron Dozier
Associate State Director, Operations

From: Dr. Graeme Johnson
Medical Consultant for SCDDSN

Date: June 2, 2004

Subject: Review of Critical Incident Occurring May 27 at Kensington I House

Question:

Review of medical information for inclusion in investigation data and evaluation

Procedure:

- Review in response to request from Babcock Center
- Arranged June 1, 2005
- Kensington I visited 8:20 a.m. – 10:00 a.m. on June 2, 2005
- Brief examination Edward Mims
- Interviews – Angela Richards (QRMP for house)
Maggie Mobly LPN (house nurse)
Tonya Bradford (Consumer Advocate Babcock Center)
- Notes reviewed:
 - Medical chart Edward Mims
 - Current medication, nursing, physical exam notes
 - Statements of staff present May 27, 2005
 - Notes received from ER visit

DISTRICT I

8301 Farrow Road, Columbia, SC 29203
Phone: 803/935-7412

Midlands Center - Phone: 803/935-7500
Whitten Center - Phone: 864/833-2733

DISTRICT II

PO Box 3209, Florence, SC 29502-3209
Phone: 843/664-2655

Coastal Center - Phone: 843/873-5750
Pee Dee Center - Phone: 843/664-2600
Saleeby Center - Phone: 843/332-4104

A. Reconstruction of Events:

Edward has profound mental retardation and is non verbal and dependent for most care. He is on medication for hypertension, gastroesophageal reflux, seizure disorder and allergies.

As usual on Friday nights Edward was being prepared for home visit about 6:20 p.m. on May 27, 2005. During check he was found to have changed clothes but had no underpants on. He was standing in his bedroom near a chair against the wall and the caregiver left room very briefly to get clothes and on return caregiver noted Edward to be sitting with his pants around his ankles and blood drops were noted on the chair. Checking found a laceration of the shaft of the penis. This was checked by the nurse and at the time it was reported that the skin tore a little more during the manipulation to examine the cut. It is reported that further extension of the skin laceration occurred when examined in the emergency room. When examined by the nurse at the house no blood or tissue was found under Mr. Mims finger nails. No bruising, ulcers, nor swelling were noted in the area. He was taken for care to Doctors Care which was closing and then he was taken to the ER at Lexington Medical Center and treated there. A 4cm laceration (horizontal, on the ventral surface of the shaft of the penis) was repaired using 7 stitches. From oral reports of doctor notes it appears no foreign bodies or anomalies were noted. Hospital staff was reported by social worker to have assessed the situation as not indicating any danger risk to Mr. Mims and he returned to Kensington I then went home for the weekend with family as usual. Mr. Mims has returned to the cottage and he, is his usual self. The wound has been treated each day with bacitracin ointment without incident.

On examination today Mr. Mims does have a few scalp scratches, acne on his upper back and slightly long finger nails (about 1/2cm with smooth edges and second finger nails either side are dysmorphic but not sharp) . He did not show distress when I explained I was a doctor and needed to look at his injury. No bruising, swelling nor tenderness were noted of scrotum, groin, penis. Urinary meatus and glans have normal circumcised appearance. On ventral surface of shaft of penis is a transverse laceration with sutures present. No swelling, no bruising, no exudates, and no evidence of any other skin irritation of penis noted.

B. Review Other Notes and Evidence:

My examination of chair he was sitting on showed no sharp areas, or protruding objects. No other sharp areas are noted on furniture close by – a rough area is on edge of drawers across room – unlikely to have been accessible in short staff absence. The clothing is reported to have had no tears or zips or button (sweatpants).

There is no history of masturbation. No history of excessive bleeding. No history of past injury to genital area. The demeanor of Mr. Mims today and that reported on by staff on the evening of the incident do not make an aggression on his person a likely explanation. The injury appears to have occurred suddenly and caused immediate bleeding. It is of note that the laceration extended easily with minimal handling. Mr. Mims forearm skin is fairly soft and fragile but groin and genital skin appears firm and have no local irritation, therefore it would not seem to be predictable that he would have trouble in the area. He does scratch himself in the scalp and cause small scratches/lacerations. It is possible minor scratching may have caused a small skin break on the penis, that lead to this laceration.

His medication regimen does not include medications that are anticipated to cause skin sensitivity nor self injurious acts. He appeared to be in a caring, supportative situation when the laceration occurred and appropriate care and follow-up has been provided.

C. Conclusion:

The evidence I have seen, the notes I have reviewed, and interviews I have conducted, lead me to a conclusion that it is unlikely that Edward Mims' laceration was due to abusive or negligent management. It is an unexpected problem that had no antecedents. His local (penile) skin appears to have been fragile at the time and the laceration may have been due to minor trauma such as fingernail scratches. Current care and findings do not however indicate a cause for this skin sensitivity. The current skin healing does not indicate likelihood of recurrence.

Cause for laceration unknown.

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Edward Mims, by and through his legal)
guardian, Margaret Mims,)
)
Plaintiff,)

Civil Action No. 2007-CP-40-3365

v.)

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

EXHIBIT 3

TO DDSN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Excerpts from Deposition of Tonya Bradford

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

COURT OF COMMON PLEAS

EDWARD MIMS, BY AND THROUGH
HIS LEGAL GUARDIAN,
MARGARET MIMS,

Plaintiff,

Case No.: 07-CP-40-03365

vs

BABCOCK CENTER, JUDY JOHNSON,
SCDDSN, KATHI LACY,
STANLEY BUTKUS,

Defendants.

D E P O S I T I O N

WITNESS: TONYA BRADFORD
DATE: Friday, June 12, 2009
TIME: 10:11 a.m.
LOCATION: Law Office of Patricia Harrison
611 Holly Street
Columbia, South Carolina
TAKEN BY: Attorneys for the Plaintiff
REPORTED BY: GINA M. SMITH
Certified Shorthand Reporter
Registered Professional Reporter

Gina M. Smith, CSR, RPR
117 Harmon Creek Court
Lexington, SC 29072
803-359-5705

1 **working days.**

2 Q. Now, where are these reports now?

3 A. **In files in file cabinets.**

4 Q. Do you have your critical incident reports
5 separate from the rest of the individual's file?

6 A. **Yes.**

7 Q. And where are those kept?

8 A. **In my storage office.**

9 Q. And where is that?

10 A. **Behind my office.**

11 Q. And where is your office?

12 A. **At the Mary L. Duffie Building,**
13 **administration building.**

14 Q. Have you recently reviewed Edward Mims'
15 files?

16 A. **Yes.**

17 Q. So you looked at all the critical
18 incidents involving Edward recently?

19 A. **I have looked at them, yes.**

20 Q. What was -- do you remember the name of
21 the employee that assaulted Edward?

22 A. **Yes.**

23 Q. And what was the name of the employee that
24 assaulted Edward?

25 A. **Carl Anthony.**

1 Q. And so you're saying within a day, the
2 investigation --

3 A. Would have been initiated.

4 Q. Was initiated.

5 How long after Edward was beaten by Carl
6 Anthony did he work?

7 A. He was placed on administrative leave
8 immediately.

9 Q. How long did it take for you to report
10 this to law enforcement?

11 A. It was reported to the ombudsman's office
12 immediately.

13 Q. What about law enforcement?

14 A. It was not reported to law enforcement in
15 that respect.

16 Q. How long did it take for Carl Anthony to
17 be charged with this crime?

18 A. I don't know.

19 Q. Did the witnesses report that Carl
20 Anthony -- did they come forward immediately?

21 A. I don't know.

22 Q. When was the next critical incident
23 involving Edward Mims?

24 A. I don't know the specific date.

25 Q. Now, the Carl Anthony incident -- excuse

1 me.

2 The Carl Anthony incident, was that the
3 first incident of abuse or neglect involving
4 Edward?

5 A. That I am aware of, yes.

6 Q. Now, according to my records, it appears
7 on August 13, 2000, Edward was beaten by Carl
8 Anthony.

9 A. I may have had the year wrong. I
10 apologize.

11 MR. DAVIDSON: What was that date again,
12 please?

13 MS. HARRISON: I'll give you the --
14 August 13, 2000.

15 BY MS. HARRISON:

16 Q. So you don't deny that it was in August of
17 2000 that -- was it before or after Edward was
18 involuntarily admitted to the Babcock Center?

19 A. I don't know.

20 Q. Are you aware that Edward was at some
21 point admitted to the Babcock Center?

22 A. I've read that.

23 Q. What do you know about that?

24 A. I don't have any direct personal knowledge
25 of the situation, but I read in the complaint of

1 that incident?

2 A. I did.

3 Q. And describe the condition of Edward Mims
4 after he was beaten with the belt.

5 A. He was found to have several red marks and
6 bruising on his body.

7 Q. And how old was the individual who beat
8 him with the belt?

9 A. I don't know.

10 Q. Was it a teenager?

11 A. He was young, but I don't know his exact
12 age.

13 Q. Was he larger than Edward Mims?

14 A. He was also small stature like Edward, but
15 maybe a little bigger than Edward.

16 Q. Which unit at Clusters was Edward living
17 in then?

18 A. House C.

19 Q. There were a lot of problems at Clusters,
20 were there not?

21 A. Which house?

22 Q. Any of the houses.

23 A. There weren't that I know of a lot of
24 problems in house C where Edward lived.

25 Q. So he's been beaten by an employee and he

1 was beaten by the individual who beat him with the
2 belt, but there weren't a lot of problems there?
3 Did you keep records as to how many incidents
4 occurred in each facility to look at trends?

5 A. Yes, I did.

6 Q. And so I assume you have records, then, to
7 show how many incidents there were in that -- in
8 building C?

9 A. I could determine that, yes.

10 Q. So Clusters in general, were there more or
11 less incidents of allegations of abuse or neglect
12 than other facilities?

13 A. Clusters, as you may or may not be aware,
14 were six individually-licensed homes. So each
15 house is an individual facility that is licensed as
16 an ICF/MR. The trends would be each individual
17 house, not Clusters as a whole, because it was not
18 one facility.

19 Q. But you have those?

20 A. Yes.

21 Q. And Clusters eventually was closed by CMS
22 and DHEC, was it not?

23 A. That's not correct.

24 Q. Tell me what happened at Clusters. Is it
25 open now?

1 A. No, it is not.

2 Q. Why is it not open now?

3 A. Babcock Center downsized its residential
4 facilities, and Clusters was a part of that
5 downsizing.

6 Q. So you're telling me it was voluntary for
7 Babcock to close all the units at Clusters?

8 A. That is my understanding, yes.

9 Q. Are you familiar with the DHEC findings of
10 immediate jeopardy at Clusters?

11 A. Yes.

12 Q. Tell me about those.

13 A. The only thing I am aware of is that it
14 occurred, that there was a finding. I was not
15 involved with the actual citations.

16 Q. And what was it based on?

17 A. I'm not sure.

18 Q. CMS also issued an immediate jeopardy
19 finding, did they not?

20 A. I thought that's what you were talking
21 about.

22 Q. Well, I was talking about DHEC. Were
23 there not separate findings of immediate jeopardy?

24 A. I don't recall.

25 Q. In different buildings?

1 A. I don't recall that.

2 Q. Now, during this time, I believe there was
3 also someone who was stealing from a Clusters
4 resident, was there not, an employee that was
5 stealing?

6 A. During what time?

7 Q. During the 2001, 2002 period.

8 A. There was a circumstance of theft that was
9 reported, yes.

10 Q. Tell me about that.

11 A. I don't have any direct personal knowledge
12 of that particular situation. That was prior to
13 consumer advocacy doing critical incidents.

14 Q. Now, the facility was left without a
15 director for some period of time during this time,
16 was it not?

17 A. I don't know.

18 Q. Now, the individual who beat Edward, what
19 happened after the -- with the belt, what happened
20 after Edward was beaten?

21 A. He was seen by a nurse and he was taken
22 for medical follow-up.

23 Q. And did he remain at Clusters?

24 A. Yes.

25 Q. Excuse me, I'm sorry --

1 A. I think so, yes.

2 Q. What happened to the individual who beat
3 Edward with the belt?

4 A. What do you mean what happened to him?

5 Q. Did he stay at Clusters?

6 A. I don't know.

7 Immediately or long-term?

8 Q. He went to Ida Lane, didn't he?

9 A. No.

10 Q. He did not go to Ida Lane?

11 A. He did not go to Ida Lane.

12 Q. Did he ever beat anyone else with a belt?

13 A. Prior to beating Edward with a belt?

14 Q. Before or after.

15 A. There was no knowledge that I could find
16 that there was a history of him hitting anyone with
17 a belt prior to Edward Mims.

18 Q. After Edward Mims did he hit anyone?

19 A. I am aware of one incident.

20 Q. And tell me about that incident.

21 A. There was documentation that he had struck
22 someone with a belt once.

23 Q. After Edward?

24 A. Yes.

25 Q. How soon after Edward?

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Edward Mims, by and through his legal)
guardian, Margaret Mims,)
Plaintiff,)

Civil Action No. 2007-CP-40-3365

v.)

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

EXHIBIT 4

TO DDSN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Arrest Warrant for Carl Anthony

STATE OF SOUTH CAROLINA
☐ County/ ☐ Municipality of
 Lexington

THE STATE
 against

CARL ANTHONY
 Address: 117 BIG HICKORY LANE
BOSTON, SC 29003
 Phone: 803-329-0022 SSN: 251-13-4636
 Sex: Male Race: B Height: 5-11 Weight: 150
 DL State: SC DL #: 12-03-1559 Agency ORI #: DEPT
 Prosecuting Agency: DEPT
 Prosecuting Officer: DEPT
 Offense: SIMPLE ASSAULT AND BATTERY
 Offense Code: COMMON LAW
 Code/Ordinance Sec. COMMON LAW

This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality of Lexington. The accused
CARL ANTHONY to be arrested and brought before me to be
 dealt with according to law.

Signature of Judge _____ (L.S.)
 Date: _____

RETURN
 A copy of this arrest warrant was delivered to
 defendant CARL ANTHONY
 on 08/13/2000
[Signature]
 Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:
William G. Shockley
500 Charlie Rast Rd.
Boston SC 29160

County/ Municipality of
 Lexington

AFFIDAVIT

Personally appeared before me the affiant INV. DAVID M. ADDISON
 being duly sworn deposes and says that defendant CARL ANTHONY
 did within this county and state on 08/13/2000 violate the criminal laws of
 State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of _____
 in the following particulars:
 DESCRIPTION OF OFFENSE: SIMPLE ASSAULT AND BATTERY

I further state that there is probable cause to believe that the defendant named above did do
 the crime set forth and that probable cause is based on the following facts:

THAT ON OR ABOUT AUGUST 13, 2000, CARL ANTHONY DID IN LEXINGTON
 COUNTY, COMMIT THE ACT OF ASSAULT AND BATTERY. MORE SPECIFICALLY
 CARL ANTHONY DID KNOWINGLY AND WILLFULLY STRIKE OR HIT EDWARD
 MIMS ABOUT THE HEAD. AT THE TIME MR. EDWARD MIMS WAS A RESIDE
 AT THE BABCOCK CENTER CLUSTERS, IN LEXINGTON, SOUTH CAROLINA.
 THE ABOVE FACTS ARE TRUE AND BELIEVABLE BASED UPON STATEMENTS
 GIVEN BY THE DEFENDANT, AND WITNESSES THAT PERSONALLY OBSERVED
 THE DEF. STRIKE OR HIT MR. MIMS.

Sworn to and subscribed before me
 on 08/13/2000
[Signature] (L.S.)
 Signature of Issuing Judge

Signature of Affiant [Signature]
 Affiant's Address ATTORNEY GENERAL OFFICE
1000 ASSEMBLY STREET
COLUMBIA, SC 29211
 Affiant's Telephone 803-734-3660

William G. Shockley
 STATE OF SOUTH CAROLINA
☐ County/ ☐ Municipality of
 Lexington

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe
 on 08/13/2000 defendant CARL ANTHONY
 did violate the criminal laws of the State of South Carolina (or ordinance of _____
☐ County/ ☐ Municipality of _____) as set forth below:

DESCRIPTION OF OFFENSE: COMMON LAW 1

SIMPLE ASSAULT AND BATTERY

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her
 me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to
 defendant at the time of its execution, or as soon thereafter as is practicable.

[Signature] (L.S.)
 Signature of Issuing Judge
 Judge Code: 666

Judge's Address 500 Charlie Rast Rd
Boston, SC 29160
 Judge's Telephone 803-568-7616
 Issuing Court: ☐ Magistrate ☐ Municipal ☐ Cir

ORIGINAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Edward Mims, by and through his legal)
guardian, Margaret Mims,)
)
Plaintiff,)

Civil Action No. 2007-CP-40-3365

v.)

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

EXHIBIT 5

TO DDSN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

HHS Hearing Officer Order, March 7, 2006

ADMINISTRATIVE DECISION AND IN THE APPEAL MATTER OF EDWARD MIMS vs. SCDHHS

Case #05-MISC-034 (MR/RD Waiver-Adult Day Health Services)

Hearing Date: 9/28/2005

JURISDICTION

This case is adjudicated under the authority granted by the South Carolina General Assembly to the South Carolina Department of Health and Human Services (SCDHHS) to administer various programs and grants (See e.g., S.C. Code Ann. 44-6-10, et seq.). This appeal has been conducted pursuant to the provisions of the Appeals and Hearings regulations of the SCDHHS (Reg. 126-150, et seq.) and the South Carolina Administrative Procedures Act (S.C. Code Ann. 1-23-310, et seq.).

STATEMENT OF THE CASE

The hearing in this matter was scheduled on September 29, 2005 in Columbia, South Carolina. The Petitioner, Edward Mims was present; however, he was unable to testify. The Petitioner's mother testified as a witness and is identified on the record. Present as Mr. Smith's representative and counsel was Patricia Harrison, Esquire. Present as representatives and counsel for SCDHHS and the South Carolina Department of Disabilities and Special Needs (SCDDSN) were: James R. Hill, Jr., Esquire, General Counsel (SCDDSN) and Byron Roberts, Deputy General Counsel (SCDHHS). Present as witnesses were: Janet Priest, Director of Division of Services and Support, SCDDSN and Lynn Lugo, Service Coordinator, Richland/Lexington Department of Special Needs Board (RLDSNB).

PRELIMINARY FINDINGS AND RULINGS

There were rulings made on the record with respect to the Motions for Summary Judgment and Directed Verdict on the record. Motions for Summary Judgment were denied, as the Hearing Officer determined that there were issues of fact or law for determination. Motions for Directed Verdict by both parties were also denied.

The Hearing Officer determined that the sole issues potentially involving fact or law, was the Petitioner's eligibility for Adult Day Health Services under the MR/RD Waiver.

EXHIBITS

The Hearing Officer took Official Notice of the entire case file, the Medicaid State Plan, the Medicaid Policy Manual and the 42nd Volume of the Code of Federal Regulations. The entire case file was incorporated as part of the record for review and consideration during the decision making process. The parties submitted pre-hearing briefs, which are part of the case file and record in this matter and are considered exhibits as identified due to the number and volume:

Petitioner's Prehearing Brief (Hearing Officer Exhibit A):

The appended exhibits to the Petitioner's pre-hearing brief are identified as follows:

- Exhibit 1. Edward Mims Chronology
- Exhibit 2. Babcock Center Records
- Exhibit 3. Funding Allocated to Edward Mims
- Exhibit 4. Emergency Room and Physician's Records
- Exhibit 5. Records Related to Physical Abuse
- Exhibit 6. Report of SCDDSN Psychologist for Judicial Admission
- Exhibit 7. Judicial Admission of Edward Mims
- Exhibit 8. Letter from SCDDSN Employee Lois Park Mole
- Exhibit 9. Wall Street Journal Article dated September 13, 2005
- Exhibit 10. Letter from Dr. Stan Butkus, State Director SCDDSN
- Exhibit 11. Babcock Center objection to body audits requested by Mrs. Mims
- Exhibit 12. Autopsy- Kensington Resident (identified on the exhibit)
- Exhibit 13. CMS Finding of Immediate Jeopardy at Edward's ICF/MR
- Exhibit 14. Letter from SC Medicaid Agency Transmitting Findings of Carolina Medical Review

- Exhibit 15. Letter from Director of Babcock Center re: Decertification
- Exhibit 16. Investigations of May 27, 2005 Injury
- Exhibit 17. Investigation of Court-Appointed Examiner
- Exhibit 18. Emergency Order Appointing Mrs. Mims as Temporary Guardian
- Exhibit 19. Order of Richland County Probate Court for Review of Judicial Admission
- Exhibit 20. Letter from SCDDSN Releasing Edward Mims from Judicial Admission
- Exhibit 21. Plan of Care of Edward Mims
- Exhibit 22. Physician's Orders for Adult Day Health Care Services
- Exhibit 23. Weight Records
- Exhibit 24. Report re: Polydipsia and hyponatremia
- Exhibit 25. Evidence of Need for Assistance with Dressing, Eating and Toileting
- Exhibit 26. Workshop Productivity Records
- Exhibit 27. Affidavit of R.N. (identified on the exhibit)
- Exhibit 28. Immediate Jeopardy Findings at Clusters Building B
- Exhibit 29. Letter from Lois Park Mole of SCDDSN re: Outlier Funding
- Exhibit 30. HCFA Olmstead Update #4
- Exhibit 31. HCFA Survey of SC MR/RD Waiver dated November 30, 1999
- Exhibit 32. SCDDSN Justification for Denial of Adult Day Health Services
- Exhibit 33. Photograph of Edward Mims

Respondent's Prehearing Brief (Hearing Officer Exhibit B):

The appended exhibits to the Respondent's pre-hearing brief are identified as follows:

- Exhibit A Patricia Harrison Letter to Dr. Stanley Butkus appealing denial of Adult Day Health Services; Adult Day Health Assessment of Need (MR/RD Form AA); Physician's Order for Adult Day Health Services (MR/RD Form 15-A); Physician's June 23, 2005 Examination Record

- Exhibit B Stanley J. Butkus, PH.D., June 28, 2005 Reconsideration Denial

- Exhibit C Patricia Harrison July 13, 2005 Appeal Request to Robert Pursley, Director, SCDHHS
- Exhibit D SCDDSN MR/RD Waiver Manual for Service Coordinators and Early Interventionists
- Exhibit E E. Mims, ADHC Request, 6/24/05, JB Priest; Record of Contact-6/17/05; Single Plan-3/11/05; Babcock Center, Inc., Annual or Pre-admission Examination Report-3/17/05; Family and Preventive Medicine (Office Visit: 3/17/05)-Signed by Tan J. Platt, M.D.- 3/18/05; Edward Mims Seizure Record (2005); Health and Rehab Services Occupational Therapy Assessment-(1/11/05)(1/21/05); Carolina Therapy Consultants (4/13/05); Babcock Center Monthly Nursing Summary (4/5/05)(5/2/05); Annual Assessment/Update-Dietary Nutrition (3/1/05); Annual Nutrition Assessment (3/1/05)

All of the exhibits, which were part of the pre-hearing briefs were admitted into the record. The Petitioner submitted additional exhibits during the Hearing:

Petitioner's Exhibit #1: "A Guide for Consumers and Families: Person-Centered Services"

Petitioner's Exhibit #2: Single Plan-Plan Implementation Date: 8/11/05

ISSUES

The issue(s) of merit in this matter concern: Whether the Petitioner qualifies for Adult Day Health Services (ADHS) under the MR/RD Waiver. Issues argued during the proceedings or hearing of this case but not addressed in the Preliminary Matters Section, Findings of Fact or Conclusions of Law of this Decision are deemed denied.

FINDINGS OF FACT

Having reviewed the documents presented and closely passed upon their credibility, and considering the burden of persuasion by the parties, I make the following Findings of Fact by a preponderance of the evidence:

1. The Petitioner was approved for the MR/RD Waiver and submitted a request for Adult Day Health Services on or about June 23, 2005. The request was denied by SCDDSN on June 24, 2005. A request for Reconsideration of the determination was denied on June 28, 2005 by SCDDSN;
2. Generally, an MR/RD Waiver client has a Service Coordinator who performs assessments, speaks with the client's family with respect to what is needed to improve quality of life, performs monitoring and referral for services;
3. At the time of application for ADHS, the Petitioner did not have a formal Richland/Lexington

DSN Service Coordinator. Typically, the Service Coordinator is responsible for submitting the ADHS request and obtaining the necessary records to substantiate the request.

4. The Petitioner suffers from profound mental retardation and the following conditions: hypertension, seizure disorder, gastroesophageal reflux disease, single kidney, water toxicity, episodes of agitation and allergic reaction to certain foods. The Petitioner also suffers from Pica and frequent ear infections. The Petitioner is unable to vocalize;
5. The Petitioner takes the following medications: Reglan 10mg, Prilosec 20mg, Phenobarbital 30mg, Phenobarbital 60mg, Clonidine HCL 0.1 mg, Claritin 10mg and Ativan .5mg;
6. The Petitioner's mother requested a Service Coordinator on June 23, 2005. Ms. Lugo testified that she first met with the Petitioner and his parent(s) for a home visit on or about June 23, 2005. As a result of that meeting, Ms. Lugo submitted a plan of care with a recommendation for Adult Day Health Care Services on August 11, 2005;
7. Ms. Lugo's visit was made on the same date the ADHS request submitted independently by the Petitioner's attorney and one day prior to the ADHS application denial by SCDDSN and five days prior to the SCDHHS reconsideration denial;
8. SCDDSN denied the ADHS request because, in their estimation, there were professional reports submitted with the MR/RD Form AA to substantiate the physician's assessment of need. The application reviewer considered MR/RD Waiver records the Single Plan developed by the QMRP at the Babcock Center of March 2005. The Petitioner was a judicial admission at the Babcock Center at that time. The Petitioner's mother had concerns regarding the Petitioner treatment at the ICF/MR where he resided and requested custody. Custody was relinquished in June 2005;
9. A Babcock Center Residential Supports Monthly review for the month of January 2005, with a review date of February 2005 is part of the evidence. The Active Treatment Training Information indicates the following objectives: Toileting, Bathing, Washing Hair, Thread Belt, Deodorant. On each objective there is an area for Progress Notes as: (Y=yes; N=no). For each objective, progress noted was checked as No. This is noted with respect to his need for hands on assistance with toileting while at Babcock;
12. The testimony of the Petitioner's mother was credible and persuasive, especially when considered with overall evidence of record. The Petitioner is unable to change his adult diapers by himself. At his current Adult Day program, the Petitioner's diapers must be changed at least two to three times a day. He will go to the bathroom, but he requires assistance. The Petitioner requires assistance with dressing, as he cannot properly put clothes on and when leaving the bathroom does not properly readjust clothing and at times does not raise his pants. The Petitioner requires assistance with eating. The Petitioner's mother feeds him, as he places too much food in his mouth and is at risk for choking. The Petitioner's food must be finely ground and he places items in his mouth that he should not. The Petitioner also has water toxicity condition and he must be monitored to assure he does not consume excessive amounts, which would cause him to lose electrolytes, resulting in hospitalization;

13. A Registered Nurse and Director of the Rosewood Adult Day Care submitted a notarized Affidavit dated September 20th 2005. The Petitioner has/had been an attendee at the center for three months (approximately July 2005 through September 2005). The affiant states that the Petitioner is incontinent, requiring changes of his diaper during the day and changing of his clothes when he wets them. The Petitioner requires extensive assistance with dressing, as he does not follow instructions for putting on or removing clothing and needs assistance with adjusting clothes after going to the bathroom. The Petitioner sometimes exits the bathroom with his pants down. The Petitioner is able to feed himself finger foods, but requires extensive assistance when eating with a spoon and his food must be mechanically prepared to prevent choking. The Petitioner's water intake must also be monitored;
14. The Petitioner has been treated or examined by Family and Preventive Medicine on more than one occasion. This established a treating relationship. On the MR/RD Form AA, dated June 23, 2005, David L. Keisler, M.D., assessed a functional need for extensive assistance with dressing, toileting and eating. The Petitioner is able to perform part of the task(s) but requires human assistance 50% or more of the time;
15. On the MR/RD Form 15-A, with respect to medical condition, Dr. Keisler assessed a need for daily monitoring/observation and assessment due to an unstable medical condition and attached a physical examination report of that date as required on the form. The Physician's Order for ADHS advised of the following limitations of activities: Needs Assistance with ambulation-close supervision due to a history of seizure disorder and a pureed diet. The record of examination also documents episodes of agitation for which Ativan was prescribed;
16. The Hearing Officer can determine weight and credibility of testimony and evidence. With respect to Dr. Keisler's assessment of ADHS need, the Hearing Officer finds that said need with respect to functional ability, i.e., dressing, eating, and toileting is substantiated by overall evidence of record. The Petitioner requires hands on assistance with dressing, eating and toileting. Furthermore, the Petitioner has a seizure condition, and although controlled with medication, I find the treating physician's assessment credible with respect to the Petitioner need for monitoring/observation due to this condition due the Petitioner's toxicity to water (due to having one kidney) he would require additional monitoring to assure this medical condition does not result in hospitalization;
17. All of the actions in this matter, from the release of the Petitioner from judicial admission, injury to his penis at the ICF/MR (suffered in May 2005), application for ADHS, request for a Service Coordinator, denial of ADHS application/reconsideration, home visit of the Service Coordinator and the formalization of the August 2005 Single Plan all occurred within ninety days. This Hearing Officer is not convinced that the Petitioner's condition changed so dramatically from the date his physician completed the MR/RD Form AA and MR/RD Form 15-A to the date that Ms. Lugo made her home visit and formalized the Single Plan in early August 2005;
18. The Petitioner is eligible for ADHS through the MR/RD Waiver effective June 2005, and I so find.

APPLICABLE LAW

1. A Hearing Officer has the authority, among other things, to: direct all procedures, issue interlocutory orders; schedule hearings and conferences; preside at formal proceedings; rule on procedural and evidentiary issues; require the submission of briefs and/or conclusions of law; call witnesses; recess, continue, and conclude any proceedings; dismiss any appeal for failure to comply with the requirements of this sub-article. South Carolina Department of Health and Human Services, Chapter 126, "Administration" R.126-154, §44-6-90, S.C. Code, 1976, as amended.
2. The standard of proof in administrative proceedings is a preponderance of the evidence, absent an allegation of fraud, or a statute or court rule requiring a higher standard. Anonymous v. State Board of Medical Examiners, 329 S.C. 371, 496 S.E.2d 17 (1998). Furthermore, in civil cases, generally, the burden of proof rests upon the party who asserts the affirmative of an issue. 29 Am. Jur.2d Evidence § 127 (1994); Alex Sanders, et. al., South Carolina Trial Handbook, § 9:3 Party with Burden, Civil Cases, (2000).
3. The preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in the mind the belief that what is sought to be proved is more likely true than not true. Sanders, Neese, and Nichols, South Carolina Trial Handbook, §9:5 Quantum of Evidence in Civil Cases (1994), (citing Frazier v. Frazier, 228 S.C. 149, 89 S.E.2d 225 (1955)).
4. Adult Day Health services are furnished 5 or more hours per day on a regularly scheduled basis for one or more days per week, in an outpatient setting, encompassing both health and social services needed to ensure the optimal functioning of the individual. This service is provided to consumers who are eighteen (18) or older. The objective of this service is to restore, maintain, and promote the health status of an individual through the provision of ambulatory health care and health-related supportive services. Physical, occupational, and/or speech therapies indicated in the individual's plan are not furnished as component parts of this service, but may be Health Care Center as separate services. South Carolina Department of Disabilities and Special Needs, MR/RD Waiver Manual For Service Coordinators and Early Interventionists, "Adult Day Health Care Services"-Definition (October 2001, With Revisions).
5. Adult Day Health services are only appropriate for those MR/RD Waiver recipients who, due to functional ability or medical condition, will not benefit from traditional SCDDSN Day Service options. If you believe Adult Day Health services may be needed or if these services are requested by the recipient or his/her family, you will be required to have the need assessed. The **Adult Day Health Care-Assessment of Need (MR/RD Form AA)** should be used to determine if the Adult Day Health Care Services are needed. This form must be completed by a licensed nurse/physician and the need for services indicated before Adult Day Health Services can be provided. South Carolina Department of Disabilities and Special Needs, MR/RD Waiver Manual For Service Coordinators and Early Interventionists, "Adult Day Health Care Services"-Arranging for the Services (October 2001, With Revisions).
6. MR/RD Form AA (Adult Day Health Assessment of Need) requires an assessors signature and Licensed Number and on the bottom of the form states "Attach copies of the professional

reports substantiating the information on the assessment. MR/RD Form AA provides: *Place a () beside the statement that best describes the person's abilities or condition. All responses must be substantiated by current professional reports. To be determined to need Adult Day Health services, the person must score "Yes" on at least one of the bolded questions. The "Yes" must be based on responses given to non-bolded questions in this section.*

I. Functional Ability (Check all that apply)

____ This person requires extensive assistance (hands on) with locomotion or transfer **and**, due to the degree of assistance required, he/she cannot benefit from training to develop, improve or enhance self help, socialization or adaptive skills; benefit from interventions designed to prevent loss of previously learned self-help, socialization or adaptive skills nor will he/she benefit from training or interventions designed to prepare him/her for paid or unpaid employment (NOTE: Extensive assistance means the person needs hands-on assistance for ambulation when appropriate devices are in use or needs human assistance to propel or direct a wheelchair. This may also be scored yes when continuous eye contact must be maintained and intervention provided to prevent wandering.)

____ This person requires extensive assistance (hands on) with dressing and toileting and eating. (Check only if assistance is needed in all three areas) **and**, due to the degree of assistance required, he/she cannot benefit from training to develop, improve or enhance self help, socialization or adaptive skills; benefit from interventions designed to prevent loss of previously learned self-help, socialization or adaptive skills **nor** will he/she benefit from training or interventions designed to prepare him/her for paid or unpaid employment. (NOTE: Extensive assistance means the person may perform part of the activity but needs human assistance to complete at least 50% or more of the task. Dressing in this case refers to adjusting clothes after toileting or donning clean clothes; dressing does not include clothing selection; toileting refers to using the commode, bedpan, or urinal without accident and cleaning self after use; eating refers to setting up prior to the meal as well as food consumption. Table manners or etiquette is not considered part of this.)

____ This person requires frequent (hands on) assistance with bowel incontinence care; or with daily catheter or ostomy care **and**, due to the degree of assistance required, he/she cannot benefit from training to develop, improve or enhance self-help, socialization or adaptive skills; benefit from interventions designed to prevent loss of previously learned self help, socialization or adaptive skills; benefit from interventions designed to prevent loss of previously learned self help, socialization or adaptive skills **nor** will he/she benefit from training or interventions designed to prepare him/her for paid or unpaid employment. (NOTE: the person may have some control or may be able to assist in some ways but generally requires human assistance for diaper change, toileting schedule, or catheter or ostomy care).

Based on this information, does this person have a functional deficit which prevents him/her from benefiting from day habilitation or prevocational skills training.

YES ☐ NO ☐

II. Medical Condition (Check all that apply.)

_____ This person requires daily monitoring/observation and assessment due to an unstable (not managed by routine medications and likely to change rapidly) medical condition which may include overall management and evaluation of medical care plan which changes daily or several times a week. (May include but are not limited to conditions such as those related to heart/circulation [hypertension, heart disease], sensory, neurological [seizures], psychiatric/mood, pulmonary [emphysema, cystic fibrosis]. Skin [decubiti], or others [diabetes, cancer, etc.]

_____ This person requires administration of multiple medications which require frequent dosage adjustment, regulation and monitoring (e.g., medications are given or held based on current conditions such as pulse rate or glucometer readings, etc.).

_____ This person requires administration of parenteral (not given by mouth) medications and fluids which require frequent dosage adjustment, regulation, and monitoring. (Routine injections scheduled daily or less frequently, such as insulin injections, do not qualify).

_____ This person requires special catheter care (e.g., frequent irrigation, irrigation with special medications, frequent catheterizations for specific problems).

_____ This person requires treatment for extensive decubitus ulcers or other widespread skin disorder.

_____ This person requires nasogastric tube or gastronomy feedings.

_____ This person requires administration of medical gases (e.g. oxygen).

_____ This person requires daily skilled monitoring or observation for conditions that do not ordinarily require skilled care, but because of the combination of conditions, may result in special medical complications.

Based on this information, this person needs skilled services due to his/her complex medical needs.

YES ☐ NO ☐

CONCLUSIONS OF LAW

Based on the above Findings of Fact and the testimony and evidence put forth in this case, I conclude the following as a matter of law:

1. The Petitioner by a preponderance of the evidence has established eligibility for ADHS under the MR/RD Waiver. It is reasonable to conclude that the Petitioner's condition did not dramatically change between the ADHS request and the Single Plan recommendation of August 2005. The Petitioner requires hands on assistance with dressing, eating and toileting. The Petitioner has medical conditions, which require observation. As the finder of fact, the Hearing Officer has the authority to weigh the evidence presented and determine the credibility of witnesses and determine its probative weight. A trier of fact is not compelled to accept an expert's testimony, but may give it the weight and credibility deemed deserved. The trier of fact may also accept the testimony of one expert over another. See, Doe v. Doe, 324 S.C. 492, 478 S.E.2d 854 (Ct. App. 1996); Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 440 S.E.2d 401 (Ct. App. 1994), cert. dismissed, 318 S.C. 187, 456 S.E.2d 918 (1995); Berkley Elec. Coop. v. S.C. Pub. Serv. Comm'n, 304 S.C. 15, 20, 402 S.E.2d 674, 677 (1991); S.C. Cable Television Ass'n. v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 221-22, 417 S.E.2d 586, 589 (1992). South Carolina Department of Health and Human Services, Chapter 126, "Administration" Reg. 126-150 et seq., §44-6-90, S.C. Code Ann., 1976, as amended.

DECISION

Based on the above Findings of Fact and Conclusions of Law, the ADHS denial determination is **REVERSED**. The Petitioner is eligible for ADHS through the MR/RD Waiver effective **June 23, 2005**.

AND IT IS SO ORDERED.


Kimberly B. Burrell
Hearing Officer

DATED AT COLUMBIA
South Carolina

March 7, 2006.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Edward Mims, by and through his legal)
guardian, Margaret Mims,)
Plaintiff,)

Civil Action No. 2007-CP-40-3365

v.)

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

EXHIBIT 6

TO DDSN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Excerpt from Deposition of Margaret Mims

State of South Carolina)
County of Richland) In the Court of Common Pleas

Edward Mims, by and) C/A No: 07-CP-40-3365
through his legal)
guardian, Margaret Mims,)
Plaintiff(s),) Deposition
vs.) of
Babcock Center, Inc., Judy) MARGARET MIMS
Johnson, the South)
Carolina Department of)
Disabilities and Special)
Needs, Kathi Lacy and)
Stanley Butkus,)
Defendant(s),)

Deposition of MARGARET MIMS, taken before Jennifer L. Thompson, CVR, Nationally Certified Verbatim Court Reporter and Notary Public in and for the State of South Carolina, scheduled for 10:00 a.m. and commencing at the hour of 10:06 a.m., Tuesday, June 23, 2009, at the office of Davidson & Lindemann, P.A., Columbia, South Carolina.

Reported by:

Jennifer L. Thompson, CVR

1 Q To your knowledge, has Edward or you ever been
2 charged for any services that you have been
3 provided for Edward -- that have been provided for
4 Edward?

5 A No.

6 Q Department of Disabilities never charged you
7 anything?

8 A Huh-uh.

9

10 MR. STEGMAIER: I'm sorry, is that a no?

11

12 Q No. Never been charged, or Edward's never been
13 charged for any of the services?

14 A No.

15 Q Do you know of any false or misleading information
16 that was ever provided to the probate court in
17 South Carolina in regard to Edward?

18 A What you mean?

19 Q Anything that you thought was false or shouldn't
20 have been said in open court?

21 A No, not as I know of.

22

23 MS. HARRISON: Are you asking her if she provided
24 false information or if there was false
25 information provided?

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Edward Mims, by and through his legal)
guardian, Margaret Mims,)
Plaintiff,)

Civil Action No. 2007-CP-40-3365

v.)

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

EXHIBIT 7

TO DDSN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Critical Incident Report for incident of June 10, 2005



SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident
Part II: Final Report

Agency: Babcock Center

County: Richland, Lexington

☒ District I:
☐ District II:

Region: ☒ Midlands
Region: ☐ Coastal

☐ Piedmont
☐ Pee Dee

Name of Primary Identifier: Edward Mims

(Name of primary person involved. If incident occurred on van or in facility or in a situation where all names are not listed, specify as such)

Date of Incident: 06/10/2005

Time of Incident: 5:00 pm

Location of Occurrence (Indicate name of DDSN facility, i.e., unit name in Regional Center, Saleeby Center, provider operated facility, i.e., Sunrise CTH II or address in community, i.e., individual's home or other address, agency van at Joe Doe adult day program, respite caregiver home):

Kensington I

Results of Investigation:

At approximately 4:15pm on June 10, 2005 Patricia Harrison, Attorney for Margaret Mims (Edward Mims' Mother) called the Kensington I facility stating that they were to take Edward home for his weekend visit as scheduled, but that Edward would not be returning to the facility. Dorothy Goodwin, Senior Director of Residential Services, was notified of the conversation. Ms. Goodwin informed DDSN of this information as Edward has been judicially admitted to DDSN for services. Ms. Goodwin then informed Ms. Mims that the staff would not transport Edward to her home for the weekend visit if she did not intend for him to return. At approximately 6:00pm, Ms. Harrison and Ms. Mims arrived at the Kensington facility to pick up Edward. Ms. Harrison and Ms. Mims was informed of the decision made by DDSN not to release him due to the court order stating that he was judicially admitted to DDSN. Ms. Harrison called the police to report the situation. An officer arrived at the facility. Sergeant Modeca of the Columbia Police Department was presented a court order for temporary guardianship for Ms. Mims and also presented with the court order showing that Edward was judicially admitted to DDSN. The officer phoned Judge Amy McCullough regarding the situation. It was decided that Edward be allowed to go home as scheduled returning on Sunday. The judge scheduled a meeting for Sunday June 12, 2005. Babcock Center staff and legal representation appeared at the meeting on June 12, 2005. DDSN staff and legal representation was also present. It was determined that the issue was between DDSN and Ms. Mims due to the two court orders. Judge McCullough advised Ms. Harrison to advise Ms. Mims to return Edward to Kensington as scheduled; however, she asked Mr. Hill (DDSN attorney) not to contact the police if Edward was not returned. Mr. Hill stated that would agree if Judge McCullough would relieve DDSN and Babcock Center of any liability for Edward's care. Judge McCullough agreed. A court hearing had already been scheduled for June 24, 2005 for Ms. Mims to pursue permanent guardianship. Edward did not return to Kensington on Sunday June 12, 2005 as scheduled. Ms. Goodwin made arrangements with the pharmacy to have Edward's medication packaged to last through June 27, 2005.

Describe Action Taken:

A meeting with Judge McCulloch was held on June 12, 2005 regarding visitation and Edward remaining at his Mother's house.

Is this incident a repeat occurrence with this consumer?

☐ Yes ☒ No

What quality assurance actions were taken to prevent the occurrence of an incident like this?
Babcock Center will follow DDSN's instructions regarding Edward Mims placement.

RECEIVED

JUN 29 2005

Babcock Center - Confidential Information

DIVISION OF
QUALITY ASSURANCE

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SCDDSN Critical Incident Initial Report Form, Page 4 of 5 Revised February 2005



SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident
Part II: Final Report

Reporting: If the incident was reported to another agency with oversight of the facility/program, please indicate which agency:

Check all that apply:

☒ DDSN ☒ Ombudsman ☐ Service Coordination: _____
☐ DSS ☐ DHEC ☒ Other: Parent/Guardian

Reported by Whom/Title? Dorothy Goodwin, Director

Date: 06/13/2005

Jonas S. Bradford
Signature of Investigator

6/15/05
Date

JA [Signature]
Signature of Executive Director/Facility Administrator

6/15/05
Date

This document should be forwarded to the following DDSN staff:

Darlyn Thomas, Director, Quality Assurance/Quality Improvement Division, SCDDSN
PO Box 4706, Columbia, SC 29240 Fax#: 803.898.9656 and
Sam Davis, Program Coordinator, Abuse/Neglect/Exploitation/Critical Incidents, SCDDSN
8301 Farrow Rd., Columbia, SC 29203 Fax#: 803-935.6170

* If the critical incident being reported is a death, then complete the Report of Death form.

Babcock Center - Confidential Information

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SCDDSN Critical Incident Initial Report Form, Page 5 of 5, Revised February 2005



SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident
Part I: Initial Report

Agency: Babcock Center

County: Richland, Lexington

☒ District I: Region: ☒ Midlands ☐ Piedmont
☐ District II: Region: ☐ Coastal ☐ Pee Dee

Date of Incident: 06/10/2005

Time of Incident: 5:00 pm

Type Location of Incident: (check one)

SCDDSN Provider Operated Community Program: ☐ CRCF ☐ CTH ☒ ICF ☐ SLP ☐ Day Program
☐ SCDDSN Regional Center ☐ Other (Specify):

Location of Occurrence (indicate name of DDSN facility, i.e., unit name in Regional Center, Saleeby Center, provider operated facility, i.e., Sunrise CTH II or address in community, i.e., individual's home or other address, agency van at Joe Doe adult day program, respite caregiver home):

Kensington I

☐ Check here if incident occurred on van or in facility or in a situation where all names do not have to be listed.

Specify (as staff, vehicle accident/vandalism/damage, facility incident): _____

People Involved: (staff, people with disabilities, family members, etc.):

Edward Mims Name of primary person involved (record will be identified by this name)

Name(s) of Others Involved & Involvement: (Check one category for each person)

Mims, Edward James, Consumer ☐ Perpetrator ☐ Other Consumer ☐ Staff ☐ Witness ☐ Family ☐ Other: _____

Brief Description of Incident:

At approximately 4:30pm on Friday June 10, 2005 the staff at Kensington I ICF/MR received a call from Patricia Harrison, Edward's Mother's legal representative, stating that the staff needed to bring Edward home on Friday evening and that he would not need to be picked up. Dorothy Goodwin, Director of Residential Services, spoke with Margaret Mims, Mother, stating that Edward would have to be picked up on Sunday due to the judicial admittment order limiting Mother to weekend visits. Ms. Mims and Ms. Harrison arrived at the Kensington facility and called the police. The police officer talked with the judge, Amy McCulloch, who had given Ms. Mims temporary guardianship on Friday June 10, 2005. The judge instructed the officer that Edward could be allowed to go home and a meeting would be held in her chambers on June 12, 2005 at 2:00pm. On June 12, 2005 the judge advised Ms. Harrison that Edward should be returned to the facility as originally scheduled at 6:00pm but that if he did not return DDSN would not call the police.

Babcock Center - Confidential Information



SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident
Part I: Initial Report

Type Incident & Category (check all that apply):

Type Incident	Category	Consumer Directly Affected	Consumer to Consumer	Staff	Facility or Program Operations Impacted
☐ Accidents		☐			
☐ Aggression		☐	☐		
☐ Communicable Disease		☐		☐	
☐ Criminal Arrest		☐			
☐ Death		☐			
☐ Elopement		☐			
☐ Exploitation		☐	☐		
☐ Fall		☐	☐		
☐ Fire		☐			☐
☐ Firearms/Weapons/Explosives		☐	☐	☐	
☐ Illegal Substances		☐		☐	
☐ Injury		☐	☐		
☒ Law Enforcement		☒	☐	☐	
☐ Medication Errors		☐			
☐ Motor Vehicle		☐			☐
☐ Property Damage (natural or unusual)		☐	☐	☐	☐
☐ Sexual Assault		☐	☐		
☐ Suicide		☐			
☐ Theft		☐	☐	☐	☐
☐ Other (specify: _____)		☐	☐	☐	☐
Provide detailed information in narrative					

The Investigation

Person Assigned to Investigate: Tonya Bradford, Consumer Advocate

Reporting: If the incident was reported to another agency with oversight of the facility/program, please indicate which agency:

Check all that apply:

☒ DDSN ☒ Ombudsman ☐ Service Coordination:

☐ DSS ☐ DHEC ☒ Other: Parent/Guardian

Reported by Whom/Title? Dorothy Goodwin, Director

Date: 06/13/2005

Immediate Actions Taken to Protect the Consumer:

A meeting with Judge McCulloch was held on June 12, 2005 regarding visitation and Edward remaining at his Mother's house.

Babcock Center - Confidential Information

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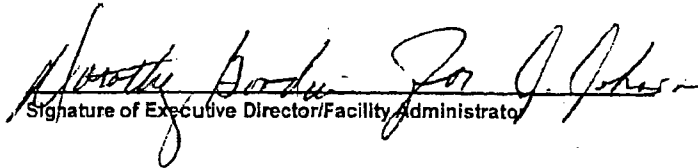
SCDDSN Critical Incident Initial Report Form, Page 5 of 6, Revised December 2004



SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident
Part I: Initial Report

Immediate Actions to Secure the Chain of Evidence and Assist the Investigator:

 6/13/05
Signature of Executive Director/Facility Administrator Date

This document should be forwarded to the following DDSN staff:

Darlynn Thomas, Director, Quality Assurance/Quality Improvement Division, SCDDSN
PO Box 4706, Columbia, SC 29240 Fax#: 803.898.9656 and
Sam Davis, Program Coordinator, Abuse/Neglect/Exploitation/Critical Incidents, SCDDSN
8301 Farrow Rd., Columbia, SC 29203 Fax#: 803-935.6170

3abcock Center - Confidential Information

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SCDDSN Critical Incident Initial Report Form, Page 6 of 6, Revised December 2004

Series of Events Surrounding Edward Mims

On June 10, 2005 at approximately 4:14 p.m., I received a telephone call from Angela Richards, QMRP at Kensington I facility. She stated Mrs. Patricia Harrison called the residence and spoke with a staff member, informing them that it was fine for them to bring Edward Mims home for his weekend visit, however, they would not need to make arrangements to pick him up on Sunday. When the staff reported this to Angela, she became concerned because she was aware of a court order that allowed Edward to go home with his mother for weekend visits and did not know what the mother's plan for returning. I asked Angela to call the mother and ask what her plans were.

Angela called me back to report the mother stated he would not be coming back Sunday and she would not give a date for his return. I then contacted DDSN, since Edward is judicially committed to the Department. I spoke with Bill Barfield and informed him that both Mrs. Harrison and Mrs. Mims have informed us that Edward would not be returning. Bill asked me when would he be returning to which I informed him that the mother refused to say. After speaking with Mr. Barfield and Dr. Butkus, I called Ms. Mims in an attempt to find out her intents as it pertains to Edward's home visit.

Ms. Mims informed me that she did not plan to have Edward return to Kensington on Sunday, June 12. I reminded her that Edward was judicially committed to DDSN and was only approved for weekend visits. I told her we would be happy to bring Edward home, but we would need to pick him up on Sunday. She stated he was not returning on Sunday and that "you'd better bring him home." I told Ms. Mims that I was sorry, but that we would not be bringing Edward home unless she assured me he was returning on Sunday. She asked me to call her back.

I waited 15 minutes and called Ms. Mims a second time. She told me I shouldn't be talking to her and that I should call Mrs. Harrison. I informed her that I would not be calling Mrs. Harrison and that we would not be bringing Edward home. In the meantime, Angela called back to state that Mrs. Harrison called back and stated that she had a court order giving Ms. Mims temporary guardianship and that she, along with Ms. Mims and the police would be coming to Kensington to get Edward. She stated a copy of the order was being delivered to Babcock Center and Kensington. (A copy of the order had not been delivered to Babcock Center before I left to go to Kensington). After speaking with the folks from the Department a second time (Dr. Butkus, Bill Barfield, Jim Hill-attorney), it was advised that the court order to commit Edward superseded the appointment of guardianship and that we were not to allow Edward to leave with Mrs. Harrison and his mom. Dr. Butkus informed me that Jim Hill received an e-mail from Patricia Harrison concerning the mother picking Edward up. Dr. Butkus stated that Jim Hill would respond to Mrs. Harrison's e-mail and sent me copy of the e-mail to share with Ms. Harrison if she showed up at Kensington.

After several attempts to reach Babcock Center's attorney by phone, I sent an e-mail detailing the events surrounding the situation with Edward.

At approximately 6:00, Angela Richards called to report that Mrs. Harrison and Ms. Mims were at Kensington attempting to take Edward home. I informed Angela that she should not release Edward and that I would be there shortly.

I went to Kensington, taking a copy of the court order and the e-mail response to Ms. Harrison from Jim Hill. When I arrived at Kensington, Ms. Harrison met me at the door and informed me that she had a court order giving Ms. Mims temporary custody of Edward and that we had no right to hold him. She continued rehashing events at Babcock Center and that if we did not release Edward, she would call the police. I told Ms. Harrison that she needed to do what she felt she needed to do, but we could not release Edward because it was our understanding that the guardianship appointment did not take precedence over the judicial committal to DDSN. While speaking with Jim Hill by phone, he asked to speak with Mrs. Harrison. Following this conversation, she went outside and spoke on her cell phone. By this time Christian Steigmeir was in collaboration with Jim Hill about the situation.

Shortly thereafter, a law enforcement officer pulled into the Kensington driveway. Mrs. Harrison showed Sgt. Modoca (?) a copy of the court order appointing Ms. Mims temporary guardian. I presented him with the court order showing he was judicially committed to DDSN. Unsure as to what to do, he went to his patrol car, made several calls; one of which was to the Judge McCullough who issued the guardianship order. After some discussion, he returned to state that the judge had spoken with Mr. Hill and wanted to speak with Mrs. Harrison. It was agreed that Edward would go home for his regular weekend visit, returning on Sunday. The judge scheduled a meeting at the Main Courthouse for Sunday, June 12 at 2:00 in the afternoon, to discuss this situation prior to Edward's anticipated return to the Kensington facility. Mr. Harrison showed up at the facility, however he never entered the facility and stood outside with Ms. Mims and Mrs. Harrison and Edward while the officer spoke on the telephone in his patrol car.

By this time, the nurse was gone and the facility agreed to deliver Edward's medication to him Saturday morning.

At approximately 8:20 p.m., Mrs. Harrison left Kensington with Ms. Mims and Edward.

Sunday, Jun 12, 2005

I arrived at the Richland County Court House at approximately 1:30 to meet with Christian Steigmeir and Angela Richards. Christian had brought along Joel Collins. We discussed that the issue at hand was really between Ms. Mims and DDSN. As the provider selected, we would be there to answer any questions we could.

After more than a 1 and ½ hour meeting, it was determined that Mrs. Harrison would advise her client to return Edward to Kensington as scheduled. However, she asked Mr. Hill not to contact the police if Edward was not returned. Mr. Hill stated he would not if

the Judge was relieving DDSN and Babcock Center of any liability for his care. Judge McCullough agrees.

At approximately 5:15 pm., Mrs. Harrison called my cell phone to inform me that Ms. Mims would not be returning Edward to Kensington and asked about additional medication. I informed her that the staff would arrive at Ms. Mims home as scheduled to pick him up. If Ms. Mims refused to allow him to return, the staff would give medication to last through Wednesday. She asked what could be done beyond that. I informed her I would need to speak with the nurse and pharmacist and contact her Monday, June 13.

I spoke with Mike Ross, pharmacist, Kathy Lacy with DDSN and Maggie, the nurse at Kensington to devise a solution to the medication issues. Since the agency will continue to receive funds for the bed for up to 60 day and we would continue to be able to bill Medicaid, it was agreed that we could give medication up to court hearing date.

I called Mrs. Harrison and informed her that we would send Edward's medication to Ms. Mims through June 24. Mrs. Harrison asked if we could send the medication through the 27th since the 24th was a Friday. This was a reasonable request and we agreed to have the pharmacist package Edward's medications through June 27.


Respectfully submitted by

6/13/05
Date

STATE OF SOUTH CAROLINA	)	IN THE PROBATE COURT
	)	
COUNTY OF RICHLAND	)	Case Number: 2003-ES-40-172
IN THE MATTER OF GUARDIANSHIP OF	)	
EDWARD MIMS	)	ORDER APPOINTING
	)	TEMPORARY GUARDIAN

This matter came before the Court on the Petition of Margaret Mims, who is the mother of Edward Mims. In attendance at the emergency hearing held on May 9, 2005 were Margaret Mims and her attorney, Patricia L. Harrison; the Court-appointed Guardian Ad Litem for Edward Mims, Edgar Kneece; and M. Leigh Flynn, who was previously appointed by this Court as Guardian Ad Litem for Edward Mims in another proceeding.

The court-appointed Visitor, Mary Katherine Miller, found the residence of Margaret Mims to be clean and in good condition. She reported that Mrs. Mims was very attentive to the needs of Edward Mims and that he appeared to be familiar and comfortable at home. Examiner Tan Platt reported that Edward Mims is incompetent, and is unable to make daily living and health care decisions. A July 3, 2001 Order of this Court found Edward Mims to be "profoundly mentally retarded." In addition, evidence was presented of six emergency room physicians having reported that Edward Mims is incapacitated by reason of mental retardation.

Based on these findings, I find that Edward Mims is incapacitated and I find that no Guardian has been appointed previously. Evidence was presented that Edward Mims' current residence, Kensington ICF/MR, was decertified by the South Carolina Department of Health and Human Services in April of 2005. On May 27, 2005, Edward Mims was found in the facility to have a serious unexplained injury.

Based on the evidence presented to the Court, I find that the welfare of Edward Mims requires immediate action and that the emergency appointment of a temporary Guardian is appropriate pursuant to S. C. Code Ann. §62-5-310. The Guardian Ad Litem joins in the recommendation to the Court that a temporary Guardian be appointed. I find that Margaret

1 of 2

Mims has priority under S. C. Code Ann. §62-5-311 and that it is in the best interest of Edward Mims to appoint Margaret Mims as his temporary Guardian.

By order dated July 3, 2001, this Court found that Edward Mims was in need of services of the South Carolina Department of Disabilities and Special Needs. I find that services of the South Carolina Department of Disabilities and Special Needs are needed by Edward Mims and that Margaret Mims, as Guardian for Edward Mims, shall have the full authority to exercise all rights to these services which Edward Mims could exercise if he were competent to do so. These services shall be provided in the least restrictive environment as required by state and federal law.

Margaret Mims shall be entitled to the custody of the person of Edward Mims and shall have all statutory powers of a Guardian, including but not limited to the authority to establish his placement. The Guardian shall be authorized to give consents and approvals for Edward Mims to receive medical and other professional care, counsel, treatment and services. In view of the emergency regarding placement, all medical providers shall provide medical records and information as requested by the Guardian.

The South Carolina Department of Disabilities and Special Needs shall be provided with notice of the hearing which has been scheduled in this Court for June 24, 2005. At that time, the Department shall provide the Court with copies of all treatment records of Edward Mims since the date of this Court's July 3, 2001 Order and shall provide the Court with notice of the appointment of a service coordinator and a treatment plan. At that hearing, the Court shall also rule on the Petitioner's request for a permanent Guardian.

IT IS SO ORDERED!

June 10, 2005
Columbia, South Carolina

Amy W. McCulloch
Honorable Amy W. McCulloch
Richland County Judge of Probate

05 JUN 10 PM 2:18
AMY W. McCULLOCH
PROBATE JUDGE
RICHLAND COUNTY, S.C.

FILED

2022 am

Goodwin, Dorothy

From: Hill, Jim [JHill@ddsn.sc.gov]
Sent: Friday, June 10, 2005 5:30 PM
To: Patricia L. Harrison; Charles Lang; Mary S. Leitner; Deirdra Singleton; Gloria Prevost; Ronald Reed
Cc: sbutkus@ddsn.sc.gov; Goodwin, Dorothy
Subject: RE: Edward Mims

Patricia, I called your office this afternoon, but missed you. I believe you were in a meeting and I left a message with your assistant.

I am in receipt of your email below concerning Edward. Please note that Edward was judicially admitted to the Department on July 3, 2001. Part of the Court Order for his admission indicated that he may visit his mother on weekends provided that she provide a safe environment and access for inspections of her home to ensure that it was safe for Edward. Your email indicates that Edward will not be returned to Kensington after visitation this coming weekend. This directly violates the Court Order. Because of your written intentions to violate the Court Order, we have asked Babcock to not allow Edward to visit his mother this weekend and we will attempt to review this matter next week or at the earliest convenient time for all involved.

In your email below, you mentioned that you sent Rivermont (Rich/Lex County DSN Board) a copy of the "Court's Order." This apparently is something new and pertains to Mrs. Mims efforts to seek guardianship of her son, Edward. Please fax me a copy of this Order. We are unaware of its contents. As mentioned, Edward was committed to DDSN, not Rivermont.

With regard to your request to have Edward discharged to his mother's care and admitted to a local daycare with access to other services provided from Rich/Lex, this must be presented and reviewed by Edward's team in accordance with normal procedures for individual habilitation plans and ICF/MR regulations. The items that you mentioned to me and in your email below constitute a significant transition for Edward. It is my understanding that these matters must be reviewed by the team and, therefore, we cannot comment on whether they are appropriate for Edward at this time.

The Babcock staff have appealed the de-certification and depopulation of Kensington and the matter has been deferred until the appeal has been heard. Any issue about alternate placement of individuals at this time based on de-certification is premature pending the appeal. As you know, alternative placements can be considered at anytime as long as it is planned and approved.

I trust this responds to your email below.

Jim Hill
General Counsel, SCDDSN

From: Patricia L. Harrison [mailto:plh.cola@worldnet.att.net]
Sent: Friday, June 10, 2005 4:55 PM
To: Charles Lang; Mary S. Leitner; Deirdra Singleton; Gloria Prevost; Ronald Reed; Hill, Jim
Subject: Edward Mims
Importance: High

6/13/2005

We notified Babcock Center that Edward would not be returning to Kensington on Sunday. I have sent Rivermont a copy of the Court's Order. Babcock called Mrs. Mims today to tell her that they will only send enough medicine home with him for five days. On Wednesday, I asked Mary Leitner that Carol King serve as Edward's service coordinator, but I have heard nothing back from RichLex. Carol has experience with these transitions and does a good job. We need her assistance.

Babcock Center is supposed to be transitioning people from a decertified facility into a placement of their choice. Who is going to handle matters like getting Edward's pharmacy changed (and I expect that we will not be able to get meds from a new pharmacy until next month), getting him into a day program, arranging for necessary transportation, etc?

Trisha Harrison

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
Edward Mims, by and through his legal	)	
guardian, Margaret Mims,	)	Civil Action No. 2007-CP-40-3365
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Babcock Center, Inc., Judy Johnson,	)	
South Carolina Department of	)	
Disabilities and Special Needs,	)	
Kathi Lacy, and Stanley Butkus,	)	
	)	
Defendants.	)	
_____	)	

EXHIBIT 8

TO DDSN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Probate Court Order of July 3, 2001

FILED

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE PROBATE COURT
CASE NO. J80011591:24

ANTHONY L. GILLOCH
PROBATE JUDGE
RICHLAND COUNTY, S.C.

James G. Christian, Ed.D.)
Director, Midlands Region,)
SC Dept. of Disabilities and)
Special Needs)

PETITIONER)

ORDER

IN THE MATTER OF:)

EDWARD JAMES MIMS)
(An alleged mentally retarded)
person))

This matter comes before the Court upon Petition of James C. Christian, Ed.D., Director, Midlands Region, South Carolina Department of Disabilities and Special Needs (SCDDSN) pursuant to S.C. Code Ann. §44-20-450 and 460(B) (Supp. 2000). The Court recognizes that it has jurisdiction in this matter. It appears that all parties were duly notified of this Petition.

A hearing in this matter was held at Midlands Center, Columbia, South Carolina, on June 26, 2001. All parties were duly notified of this hearing and the following persons were present:

Hon. Jacqueline D. Belton	Associate Judge of Probate
Edward J. Mims	Respondent
David E. Belding, Esq.	Attorney for Respondent
James C. Christian, Ed.D.	Petitioner
James R. Hill, Jr., Esq.	Attorney for Petitioner
M. Leigh Flynn, Esq.	Guardian ad Litem
Ms. Margaret Mims	Respondent's Mother
W.D. Morris, Esq.	Attorney for Ms. Mims
Jane McCausland, MS	Psychologist, SCDDSN

Other persons and staff from Babcock Center, Inc., were also present. A diagnostic report by Jane McCausland, MS, from SCDDSN was received into evidence without objection from any party.

With consent of the Court, the parties all agreed to forego actual testimony and to present brief verbal statements for the Court's consideration. It appears from statements by the parties, the diagnostic report and records in this matter that Mr. Mims' mother admitted him to SCDDSN in October, 1999. Mr. Mims suffers from profound mental retardation, has cerebral palsy and several other severe and complex medical conditions. Mr. Mims is medically fragile, takes a number of medications and requires close monitoring and assistance.

Ms. Mims had requested her son be discharged back to her care, which precipitated this Petition. Upon agreement of all the parties, it appears that Ms. Mims will be unable to care for her son in her home. She still wants him to visit in her home. However, concern was expressed that her home needs to be in a safe condition for these visitations. In this regard, Ms. Mims has agreed to allow staff from SCDDSN and/or Babcock Center to enter her home and to advise and assist Ms. Mims in making her home a safer place for her son to visit.

The Guardian ad Litem reported to the Court that she had reviewed Mr. Mims's records, visited with him at Babcock Center and visited with Ms. Mims in her home. She agreed that Mr. Mims was mentally retarded and in need of SCDDSN services. She felt that he could not be safely discharged to his mother's home. She agreed that visitations should occur as long as the home was maintained in a safe condition. She observed that there was a great amount of love in the family and that this should be fostered.

FINDINGS OF FACT and CONCLUSIONS OF LAW

The Court wants to thank all the parties in coming together. It is apparent that all parties have Mr. Mims's best interest in mind with proposing this Consent Order. After reviewing the record in this matter, observing Mr. Mims, and hearing from the parties, I find that Mr. Mims is profoundly mentally retarded and has complex medical needs. Thus, he needs the monitorship and services offered by SCDDSN through the Babcock Center. I also find that all the parties have agreed to these findings and the report of the Guardian ad Litem, and that they wish to enter into this Consent Order.

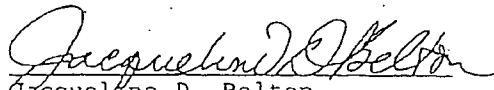
B. [Signature] mcf [Signature]

NOW THEREFORE, IT IS ORDERED that:

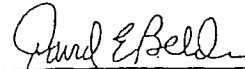
1. Because of his mental retardation and special medical needs, Edward James Mims is judicially admitted to the South Carolina Department of Disabilities and Special Needs.
2. To the extent feasible and in keeping with his treatment needs, Edward James Mims shall be allowed to have weekend visits with his mother, provided, that she maintains her home in a safe condition for her son's visitation.
3. Babcock Center and/or SCDDSN staff may visit in Ms. Margaret Mims home prior to her son's visit to advise and/or assist Ms. Mims in making her home safe for her son's visit. Ms. Mims will cooperate with such visits.
4. The parties to this matter have voluntarily agreed to this Order and placed their signatures below indicating their agreement.

AND IT IS SO ORDERED.

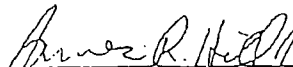
Signed this 3 day
of July, 2001
Columbia, South Carolina


Jacqueline D. Belton
Associate Judge of Probate
Richland County

We Consent:


David E. Belding


M. Leigh Flynn


James R. Hill, Jr.


W.D. Morris

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Edward Mims, by and through his legal)
guardian, Margaret Mims,)
)
Plaintiff,)

Civil Action No. 2007-CP-40-3365

v.)

CERTIFICATE OF SERVICE

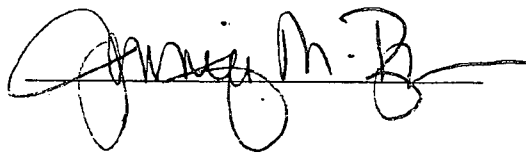
Babcock Center, Inc., Judy Johnson,)
South Carolina Department of)
Disabilities and Special Needs,)
Kathi Lacy, and Stanley Butkus,)
)
Defendants.)

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Defendants, South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stanley Butkus does hereby certify that service of the **Memorandum in Support of Motion for Summary Judgment on Behalf of Defendants South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stanley Butkus** in the above-captioned matter was made upon all counsel of record by email and by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 29th day of May 2013:

Patricia L. Harrison, Esquire
611 Holly Street
Columbia, South Carolina 29205
Email: Plh.cola@att.net

Christian Stegmaier, Esquire
Collins & Lacy, P.C.
Post Office Box 12487
Columbia, South Carolina 29211
Email: cstegmaier@collinsandlacy.com

Peter D. Protopapas, Esquire
Rikard & Protopapas, LLC
Post Office Box 5640
Columbia, South Carolina 29250
Email: pdp@rplegalgroup.com



Jan 4, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND) IN THE COURT OF COMMON PLEAS

Edward Mims, by and through his legal)
guardian, Margaret Mims,)
)
Plaintiff,)

Civil Action No. 2007-CP-40-3365

v.)

DEFENDANTS

BABCOCK CENTER, INC.

AND JUDY JOHNSON'S

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

MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

Defendants.)
)
)

FACTS/PROCEDURAL BACKGROUND

The instant action was commenced with the service of the Summons and Amended Complaint on May 12, 2008.¹

The Amended Complaint alleges Plaintiff Edward Mims (an adult who is now 41 years old) has mental retardation, among other disabilities. Amended Complaint, Par. 1. This action was brought on his behalf by his mother, Margaret Mims, who is his legal guardian. The defendants are Babcock Center, Inc.,² Judy Johnson (Babcock Center's executive director), the South Carolina Department of Disabilities and Special Needs, Stanley Butkus (former DDSN director), and Kathi Lacy (a DDSN official during the relevant timeframe).

Defendants Babcock Center and Judy Johnson (Babcock Defendants) and the DDSN Defendants have moved for summary judgment in this action. Their respective motions are

¹ An original Complaint had been filed in May 2007, but it was never served.

² Babcock Center is a private, non-profit organization based in the Midlands, which contracts with DDSN to house and care for individuals with mental retardation and other disabilities.

premised upon arguments relating to statute of limitations (for most claims) and on other grounds for the remaining claims.

The events alleged in the Amended Complaint occurred between 1999 and 2005, when Mims resided in facilities owned and managed by Babcock Center. Plaintiff claims damage from several incidents of alleged physical injury between 1999 and 2005. All but one of these incidents occurred more than three years before the Amended Complaint was filed on May 7, 2008.

Plaintiff's claims are as follows:

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

As noted above, the original Summons and Complaint in this action were filed on May 29, 2007. However, it is undisputed that the 2007 complaint was never served. On May 7, 2008, Plaintiff filed a second Summons and an Amended Complaint, dropping some parties and adding others. Service of process of the Amended Complaint was accomplished by Plaintiff.

After the case was dismissed by the Circuit Court on the grounds pertaining to untimely service, the Supreme Court reversed that decision and remanded the case for consideration of the merits. Mims ex rel. Mims v. Babcock Center, Inc., 399 S.C. 341, 732 S.E.2d 395 (2012). The Amended Complaint also sought certain injunctive relief; however, as articulated within this pleading, such claims have long been moot, and are barred for other reasons as well.

In 2009, while the Motions to Dismiss were still pending, Plaintiff took over 15 depositions. The defendants took the deposition of the guardian, Margaret Mims, and of Leigh Flynn, Plaintiff's guardian ad litem during a 2001 Probate Court proceeding. The case is now before this Court on the respective (and identical) motions for summary judgment by the Babcock Defendants and DDSN Defendants.

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

The last-referenced injury was a tear of unknown origin on the bottom of the Plaintiff's penis that occurred on May 27, 2005, just short of three years prior to the service of the Amended Complaint. Exhibit 1, attached (Incident Report). This incident, as far as can be told, occurred while Plaintiff was by himself at a Babcock Center facility for a moment while his caregiver went to get clothing for him prior to his going home for the weekend. Id. The tear lengthened somewhat as it was examined by a nurse, and lengthened still further upon examination by a doctor. Id. Eventually, it was four centimeters long and required seven stitches. Id. The clinicians at Lexington did not believe that the injury was the result of abuse or neglect. As a result, they permitted Plaintiff to return to Babcock that same evening. Id. A medical consultant from DDSN, Dr. Graeme Johnson, examined Plaintiff several days later. He concluded that the cause for the laceration was unknown, but that it did not appear to have resulted from abuse or neglect. Id. The injury apparently healed quickly and without incident. Id.

The Amended Complaint also asserts that "On June 10, 2005, officials at DDSN and the Babcock Center refused to allow Plaintiff's mother to remove him from the [Babcock] facility." Amended Complaint at 9, Par. 47. This allegation omits the undisputed fact that later that same day, Plaintiff was indeed permitted to leave that facility. Affidavit of Margaret Mims (previously filed by Plaintiff), p. 5, Par. 44.³

LAW/ANALYSIS

Plaintiff has sued Babcock Center and Judy Johnson, along with three DDSN-related Defendants (the agency itself and two individual officers of the agency). There are five different causes of action, three of which are federal and the other two of which arise under state law. In order to assist the Court in reviewing the claims and defenses, the following outline is offered:

1. First cause of action (42 U.S.C. § 1983)(failure to monitor Plaintiff's condition and treatment needs)(applies only to individuals)
 - a. The three-year statute of limitations bars all claims except the May 2005 unexplained injury
 - b. No personal involvement of Defendant Johnson has been shown as to the May 2005 injury

³ This entire incident was the result of a failure of communication by Plaintiff's counsel that could easily have been prevented if Plaintiff's counsel had simply provided the necessary supporting information for a request that she made that day. What happened was that late in the afternoon on Friday, June 10, 2005, Plaintiff's counsel peremptorily advised Babcock Center and DDSN's counsel, Jim Hill, by e-mail that Plaintiff "would not be returning to [Babcock]" on the following Sunday, that is, after his normal weekend visit to his mother's home. Exhibit 4, attached. Reference was made in that e-mail to the "Court's Order," but the e-mail did not describe what that Order was, nor was the Order attached to the e-mail or even summarized in it. This led to concern on the part of DDSN's counsel and Babcock Center that if DDSN and Babcock Center were to permit Plaintiff to go home for the weekend when his mother had no intention of returning him to Babcock Center at the end of the weekend, then DDSN and Babcock Center would be effectively facilitating a violation of a 2001 Probate Court Order that committed Plaintiff to DDSN's care. Id.

- c. If Plaintiff actually claims that any defendant wrongfully delayed a trip home by Plaintiff (for a short time at most), such delay was entirely attributable to failures by Plaintiff's counsel to inform Babcock Center and DDSN of an operable Probate Court order
- 2. Second cause of action (conspiracy under 42 U.S.C. § 1985) (applies only to individuals)
 - a. The Amended Complaint does not make the necessary allegations of class-based, discriminatory animus
 - b. Even if such allegations had been made, this claim would be barred by the three-year statute of limitations
- 3. Third cause of action (state law claim for negligent supervision)
 - a. The two-year statute of limitations of the Tort Claims Act bars this claim against Babcock Center, arguably an arm of the state.
 - b. The Tort Claims Act renders the individual Defendants immune from suit as to this claim
- 4. Fourth cause of action (Americans with Disabilities Act and Rehabilitation Act)
 - a. This claim was rendered moot in 2006
 - b. If there are non-moot aspects of this claim, they are barred by the one-year statute of limitations
- 5. Fifth Cause of action (unjust enrichment)
 - a. Plaintiff has no viable claim for unjust enrichment, because the Defendants did not receive anything of value from Plaintiff

6. The statute of limitations has not been tolled in any way, but even if tolled to some extent, such tolling would still not permit any claim other than those occurring in May and June 2005, referenced above.

I. Standard of Review: Summary Judgment

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

“When a motion for summary judgment is made, an adverse party may not rest upon the mere allegations or denials of his pleadings, but must set forth specific facts showing there is a genuine issue of material fact for trial.” Charping v. J.P. Scurry & Co., Inc., 296 S.C. 312, 372 S.E.2d 120, 122 (Ct. App. 1988). In resolving a motion for summary judgment, the court must consider all the evidence properly before it. The court’s ruling must rest on the entire record and not on isolated fragments of testimony or evidence. Saluda Motor Lines v. Crouch, 300 S.C. 43, 45, 386 S.E.2d 290, 292 (Ct. App. 1989). The existence of some factual dispute is not enough to deny summary judgment; the disputed facts must be material. While the evidence must be viewed in the light most favorable to the nonmoving party, a party opposing summary judgment is not entitled to every conceivable inference from the facts, but only every reasonable inference. See Main v. Corley, 281 S.C. 525, 526–27, 316 S.E.2d 406, 407 (1984); Trotter v. First Federal Savings and Loan Ass’n., 298 S.C. 85, 86, 378 S.E.2d 267, 268 (Ct. App. 1989).

Finally, the Babcock Defendants note that argument of counsel is not a substitute for evidence. Brown v. Johnson, 276 S.C. 68, 72, 275 S.E.2d 876, 878 (1981); see also Rule 56(c), SCRCP, quoted in Trivelas v. S.C. Dep’t of Transp., 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001) (“The judgment sought shall be rendered forthwith if the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”).

II. Plaintiff's Five Causes of Action: Babcock Defendants' Response

A. First Cause of Action (Section 1983).

1. Judy Johnson, If Sued In Her Official Capacity, Is Not Subject to Suit Under 42 U.S.C. § 1983

It is also unclear whether Plaintiff has intended to state a claim, including a damage claim, against Judy Johnson in her official capacity in the First Cause of Action. If so, such claims are also barred by Will v. Michigan State Police, 491 U.S. at 71 (“suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. [Citation omitted] As such, it is no different from a suit against the State itself”).

2. Most of the Section 1983 Claims Against Judy Johnson In Her Individual Capacity Are Barred By the Three-Year Statute of Limitations

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

This three-year statute of limitations for Section 1983 claims bars any such claims against the individual defendants in the instant case arising before May 12, 2005, given that this action was commenced no earlier than May 12, 2008. The three-year statute accordingly bars such claims as the 2001 injury alleged in Paragraph 25 of the Amended Complaint, various 2002

incidents alleged in Paragraphs 27 and 28 of the Amended Complaint, and the July 2004 ant bite incident alleged in Paragraph 29 of the Amended Complaint. It also bars other allegations in Paragraphs 30 through 38 that concern other events in 2004 and through March 2005.⁴

3. Any Claims Under Section 1983 That Were Less Than Three Years at the Time the Amended Complaint Was Served Are Unmeritorious Because of Lack of Personal Involvement by Judy Johnson or For Other Reasons

The only events alleged in the Amended Complaint that are not barred by the three-year statute are the small laceration of unknown origin that occurred on May 27, 2005 and perhaps the alleged “refus[al] to allow Plaintiff’s mother to remove him from the facility” on June 10, 2005. Amended Complaint, Paragraphs 39 and 47. Neither has merit.

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

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

⁴ Plaintiffs’ likely arguments about tolling are addressed under the last point in this Memorandum.

Plaintiff was housed at Babcock Center. Accordingly, there can be no claim against these defendants pursuant to 42 U.S.C. § 1983.

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

1. actual or constructive knowledge on behalf of the supervisor that the subordinate’s conduct was a “pervasive and unreasonable risk” to injury to citizens like the plaintiff;
2. deliberate indifference or implied authorization of the conduct by the supervisor; and
3. an “affirmative causal link” between the supervisor’s inaction and the constitutional injury suffered by the plaintiff. Id. at 799 (citations omitted).

Put another way, supervisory liability can be imposed in situations such as where a supervisor has actual knowledge of a subordinate's constitutional violation and acquiesces, where supervisors “know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see,” or where the supervisor has no actual knowledge of the

violation but was reckless in his supervision of the subordinate. Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009)(citations omitted).

It is readily apparent that Plaintiff cannot satisfy the third part of this test (an “affirmative causal link”), and such failure in and of itself is sufficient to defeat Plaintiff’s claim based on the small laceration of the penis. This was a factually unique incident. There is no dispute that its cause was found to be simply unknown. Exhibit 2. It was not foreseeable, and therefore no action by a supervisor can logically be said to have been necessary to prevent it. By way of contrast, if some specific type of injury, had been regularly occurring, then perhaps supervisory liability might have arisen if Plaintiff had been subjected to that specific kind of injury. However, Plaintiff’s 2005 injury was not similar in any way to anything that had happened at Babcock Center at any prior time.

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

B. Second Cause Of Action (Conspiracy Under 42 U.S.C. § 1985)

1. The Elements of a Claim Under 42 U.S.C. § 1985 Have Not Been Alleged, Nor Did They Exist In Fact

In the Second Cause of Action, the Plaintiff has attempted to allege that the defendants in this matter have acted in concert to deprive the Plaintiff of certain rights protected by the United States Constitution. See Complaint, ¶ 71–77. Plaintiff claims the alleged conspiracy resulted in damages to him in violation of 42 U.S.C. § 1985. Id. This claim is without merit because

Plaintiff's allegations fall far short of what is necessary to state a cause of action for conspiracy under 42 U.S.C. § 1985.

In Simmons v. Poe, 47 F.3d 1370 (4th Cir. 1995), the Fourth Circuit articulated the elements of a claim under 42 U.S.C. § 1985:

The law is well settled that to establish a sufficient cause of action for "conspiracy to deny equal protection of the laws" under section 1985(3), a plaintiff must prove: (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy. Moreover, the law is well settled that to prove a section 1985 "conspiracy," a claimant must show an agreement or a "meeting of the minds" by defendants to violate the claimant's constitutional rights.

47 F.3d at 1376–77 (internal citations omitted).

The Amended Complaint fails to allege or even suggest that any of the alleged conspirators were motivated by a specific class-based, invidiously discriminatory animus. Further, the Amended Complaint does not allege that any action against Plaintiff was based on his inclusion in a specific protected class. As a result, the Second Cause of Action does not allege facts sufficient to constitute a cause of action.

Moreover, dismissal of the Second Cause of Action is warranted because Plaintiff's claims are entirely conclusory as to the nature of the alleged conspiracy. As the Fourth Circuit has held: [W]e have specifically rejected section 1985 claims whenever the purported conspiracy is alleged in a merely conclusory manner, in the absence of concrete supporting facts. Simmons v. Poe, 47 F.3d at 1377. As the Fourth Circuit has further held, a plaintiff "must demonstrate with specific facts that the defendants were 'motivated by a specific class-based, invidiously discriminatory animus to [] deprive the plaintiff[s] of the equal enjoyment of rights secured by

the law to all.” Francis v. Giacomelli, 588 F.3d 186 (4th Cir. 2009) (quoting Simmons, 47 F.3d at 1376)(emphases added). Simmons also has noted that the Fourth Circuit “has rarely, if ever found that a plaintiff has set forth sufficient facts to establish a section 1985 conspiracy,” Id. at 1377.

A review of the allegations of the Second Cause of Action, Paragraphs 72 through 74 of the Amended Complaint, shows that those allegations could hardly be any more conclusory than they are. The only matters alleged are that the defendants “entered into a conspiracy” (Par. 72), whose purpose was “to deprive . . . Plaintiff of services (Par. 73) and that the “Defendants’ acts in furtherance of this conspiracy injured Plaintiff in his person and deprived him of rights. . . .” (Par. 74). These allegations are clearly devoid of “specific facts.”

Given the complete absence of substantive merit of the claims under 42 U.S.C. § 1985, it is not necessary to consider the application of the statute of limitations to that claim. Nevertheless, these defendants would show that any such claims arising prior to May 12, 2005, would be time-barred in addition to being unmeritorious, as noted earlier. Harris v. Sumter County Sheriff's Dept., 2001 WL 34685102, *3 (D.S.C. 2001).⁵

⁵ While these are federal cases, the state pleading rules are, if anything, more stringent when it comes to alleging specific facts, as opposed to mere notice pleading. As the Court of Appeals has held:

Rule 12(b)(6), SCRCF, “retains the Code Pleading standard . . . rather than the more lenient notice pleading standard found in the federal rules.” Harry M. Lightsey, Jr. & James F. Flanagan, South Carolina Civil Procedure 93 (2nd ed.1996).

Gaskins v. Southern Farm Bureau Cas. Ins. Co., 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000).

C. Third Cause of Action (Negligent Supervision)

1. The Tort Claims Act Statute of Limitations Bars the Negligent Supervision Claim Against Babcock Center

By virtue of its provision of residential and vocational supports to DDSN in Richland and Lexington Counties, Babcock Center maintains it is in essence an arm of the state in those geographies. To that end, Babcock Center asserts it is entitled to the protections of the South Carolina Tort Claims Act, where applicable. Assuming the Court concurs with Babcock Center's analysis, the statute of limitations that applies to the state law claims is found in S.C. Code Ann. § 15-78-110. That section provides for a two year statute of limitations after the "date the loss was or should have been discovered." There is no question that the last act that even arguably damaged Plaintiff occurred or on about June 10, 2005. Amended Complaint, Par. 47.⁶

As discussed above, the Summons and Amended Complaint were filed on May 7, 2008, and served on these Defendants on or about May 12, 2008. The original 2007 Summons and Complaint were never served at all. Accordingly, this suit could not be deemed to have commenced any earlier than the date the Plaintiff first filed the Amended Complaint, which was May 7, 2008. See S.C. Code Ann. § 15-3-20(B) (civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing). The commencement date of approximately May 12, 2008 was eleven months after the two-year statute had run in June 2007. Plaintiff's state law claims against Babcock Center are therefore clearly barred by § 15-78-110.

⁶ Paragraph 46 of the Amended Complaint contains a typographical error to the effect that a Probate Court Order was issued on "June 9, 2007," but the date clearly should read "June 9, 2005."

2. The Tort Claims Act Renders the Individual Defendants Immune From Suit on the Negligent Supervision Claim

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

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

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

The only exception to this rule of immunity for the employees occurs when the employee commits actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. S.C. Code Ann §15-78-70(a) and (b). However, the discovery process in this case has not revealed any evidence that Judy Johnson acted outside the scope of her official duties by engaging in actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. Because all actions by Judy Johnson were done within the scope of her official duties, she is entitled to immunity under the Tort Claims Act and any state law claims against them should be dismissed.⁷

⁷ While it is unnecessary to reach the issue of whether the two-year statute of limitations would apply to this claim against the individual Defendants, Flateau also held that “the two-year statute of limitations applies even if the [individual defendants] acted outside the scope of their official duties or if their actions constituted fraud, actual malice, intent to cause harm, or a crime involving moral turpitude.” 355 S.C. at 208-209, 584 S.E.2d at 419.

3. Plaintiff Has Articulated Only a Res Ipsa Loquitur Argument Concerning the Alleged May 27, 2005, Personal Injury

In the case at bar, Plaintiff has – at most – articulated only a res ipsa loquitur argument concerning the alleged May 27, 2005, personal injury to Plaintiff's penis while at Babcock Center. As this Court well knows, the doctrine of res ipsa loquitur, which is not applicable in this jurisdiction. Merch. v. Columbia Coca-Cola Bottling Co., 214 S.C. 206, 208, 51 S.E.2d 749, 750 (1949). Instead, in this professional liability action sounding in negligence, it is incumbent upon Plaintiff to: (1) demonstrate the applicable duty of care via qualified expert testimony; and (2) propound admissible evidence demonstrating the applicable duty of care was breached and that such breach was a proximate cause of Plaintiff's alleged injuries. See City of York v. Turner-Murphy Co., Inc., 317 S.C. 194, 196, 452 S.E.2d 615, 616-17 (Ct. App. 1994) (citing Doe v. American Red Cross Blood Servs., 297 S.C. 430, 377 S.E.2d 323 (1989) and Hoeffner v. The Citadel, 311 S.C. 361, 429 S.E.2d 190 (1993)) (“In a professional negligence cause of action, the plaintiff must prove the professional *failed to conform to generally recognized and accepted practices in the profession. If the plaintiff cannot meet this burden, then the professional cannot be found liable as a matter of law. Where professional negligence is alleged, expert testimony is usually necessary to establish both the standard of care and the professional's deviation from that standard, unless the subject matter is within the area of common knowledge and experience of the layman so that no special learning is needed to evaluate the professional's conduct.”). Plaintiff has made no such demonstration in the instant case. Accordingly, Plaintiff's negligence claim relating to the the alleged May 27, 2005, personal injury to Plaintiff's penis while at Babcock Center fails as a matter of law.

D. Fourth Cause of Action (ADA and Rehabilitation Act)

1. Plaintiff's Claims Under the ADA and the Rehabilitation Act are moot, and/or Barred by the One-Year Statute of Limitations

The Amended Complaint vaguely asserts claimed violations of the ADA and the Rehabilitation Act. Amended Complaint, Paragraphs 83-89. Apparently this claim is that the Defendants had failed, as of May 2008 (when the Amended Complaint was served) to provide Plaintiff with some type of unspecified "needed services." Amended Complaint, Par. 83. The only specific allegation of the Amended Complaint in this regard is the assertion in Paragraph 52 of the Amended Complaint that "Defendant Lacy denied Plaintiff's request for adult health care services, requiring Plaintiff to appeal eligibility for those services."

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

To the extent, if any, that Plaintiff might be asserting a damage claim as a result of this June 2005 denial of services, such a claim would be barred by the one-year statute of limitations applicable to ADA and Rehabilitation Act claims. While the ADA and the Rehabilitation Act do not contain a specific limitation period, Congress has directed courts to borrow the most appropriate state statute of limitations to apply to the federal claim. McCullough v. Branch Banking & Trust Co., 35 F.3d 127, 129 (4th Cir.1994) (citing Wilson v. Garcia, 471 U.S. 261, 266-67 (1986)). The United States District Court for the District of South Carolina addressed the applicable statutes of limitations in ADA and Rehabilitation Act cases and applied the one-

year statute of limitations found in the South Carolina Human Affairs Law (SCHAL), S.C. Code Ann. §§ 1-13-10, et. seq. See Cockrell v. Lexington County School District One, 2011 WL 5554811 (D.S.C. 2011). Accord Mestrich v. Clemson University, 2013 WL 842328 (D.S.C. 2013). Plaintiff's claim of alleged denial of services is based on a June 2005 DDSN decision. The present action was served in May 2008, nearly three years later. Accordingly, to the extent Plaintiff might assert damages or some other non-moot claim pertaining to the 2005 denial of services, the ADA and Rehabilitation Act claims are nevertheless barred by the one-year statute of limitations.

E. Fifth Cause of Action (Unjust Enrichment)

The Amended Complaint Fails To State Facts Sufficient To Constitute A Cause Of Action For Unjust Enrichment

In the Fifth Cause of Action, Plaintiff claims the defendants have been unjustly enriched by receiving "payment for staffing which was not provided to Plaintiff" and by receiving "payment for treatment which was not provided in a safe and effective manner." Amended Complaint, Paragraphs 91-92. However, the Plaintiff has failed to establish the elements of an unjust enrichment action.

"The equitable doctrine of quantum meruit allows an aggrieved party to recover for unjust enrichment." See OHG of Lake City, Inc. v. McCutcheon, 360 S.C. 196, 202, 600 S.E.2d 105, 108 (Ct. App. 2004). "To prevail on this theory, a plaintiff must establish the following three elements: (1) a benefit conferred by plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for her to retain it without paying its value." Id. at 202-03, 600 S.E.2d at 108 (emphasis added).

Plaintiff's unjust enrichment claim must fail as a matter of law as Plaintiff cannot establish that any of the Defendants inequitably obtained payments or anything else of value from the Plaintiff. Although Plaintiff alleges the Babcock Defendants received payments for the staffing and treatment that Plaintiff contends was not provided to him, Plaintiff does not allege that any of those payments were made by the Plaintiff himself to defendants. Indeed, Plaintiff's mother, Margaret Mims, admitted at her deposition that neither she nor Edward Mims had ever been charged for services rendered to Edward. Exhibit 3 (Deposition of Margaret Mims), p. 84. Accordingly, Plaintiff's cause of action for unjust enrichment must be dismissed.⁸

III. Any Argument by Plaintiff Regarding Tolling of the Statutes of Limitations Does Not Affect the Application of Statutes of Limitations, As Set Forth Above

Plaintiff will presumably argue that he is person for whom the applicable statutes of limitations should be tolled to some extent. There are several reasons why such an argument is unavailing in the present case.

A. Plaintiff Was Not Adjudicated Incompetent until 2005

While South Carolina law provides a provision to toll the statute of limitations period for individuals who are "insane," such provision has no application in this case. The South Carolina Code provides in relevant part that "[i]f a person entitled to bring an action mentioned in Article 5 of this chapter or an action under Chapter 78 of this title ... is at the time the cause of action accrued ... (2) insane ... the time of the disability is not a part of the time limited for the commencement of the action...." S.C. Code Ann. § 15-3-40(2). In this case, Plaintiff is not "insane." Further, while the Plaintiff may have been profoundly mentally retarded, it is clear that he was not adjudicated to be incapacitated until the order of June 14, 2005. However, all of the

⁸ Given that no grounds exist for an unjust enrichment claim, there is no event from which to compute the running of any otherwise-applicable statute of limitations.

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

B. The Appointment of a Guardian in June 2005 Ended Any Tolling Period That May Have Been in Effect

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

No South Carolina case has decided the issue of whether the appointment of a guardian terminates the disability period under provisions of statute similar to § 15-3-40(2). Cases from other jurisdictions have reached conflicting results on this issue. See Annot., 111 A.L.R.5th 159 (2003). However, the Babcock Defendants submit that the better rule - and the one that should be adopted under the facts of this case - is that the statute of limitations is tolled only until the appointment of a capable guardian. As held in Stewart v. Robinson, 115 F.Supp.2d 188, 195 (D.N.H. 2000), such a rule "gives effect to society's compelling interest in effectively protecting

the rights of those who are disabled . . . , while also serving the important interests underlying statutes of limitations.” The same case further holds that this rule serves several interests:

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

115 F.Supp.2d at 197.

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

As applied to the facts of the present case, the appointment of the guardian in June 2005 extended the statute of limitations by one year for all of the older claims. §15-3-40(b). In other words, for any claim for which the statute would otherwise already have run as of June 2005, Mrs. Mims had until June 2006 to bring suit upon such claims. She did not, however, file a lawsuit between June 2005 and June 2006. For any claim for which the statute had not run as of the time of her appointment as guardian in June 2005, she could bring suit on such claims within

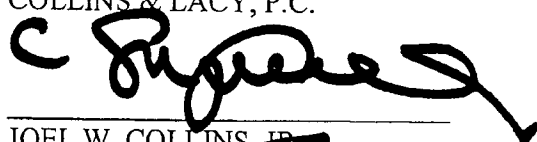
the time remaining on the statute for such claims, or within one year of her appointment, whichever was longer. This does not add any viable claims to this case in addition to the ones from May and June 2005 discussed above. The next most recent claim is an ant bite incident alleged to have occurred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

CONCLUSION

For these reasons set forth above, the Babcock Defendants respectfully request this Court grant their motion for summary judgment and dismiss the Plaintiff's claims against these defendants.

COLLINS & LACY, P.C.

By:



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JUDY JOHNSON

Columbia, South Carolina
June 4, 2013

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 07-CP-40-3365

CERTIFICATE OF SERVICE

The undersigned employee of Collins & Lacy, P.C., Attorneys at Law, 1330 Lady Street, Sixth Floor, Post Office Box 12487, Columbia, South Carolina, 29211, does hereby certify that the following named individual(s) were served with a copy of the pleading(s) indicated below by HAND DELIVERY on the date indicated below:

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PLEADINGS:

• DEFENDANTS BABCOCK CENTER, INC. AND JUDY JOHNSON'S
MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY

JUDGMENT

Columbia, South Carolina

June 4, 2013



SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident
Part II: Final Report

File

Agency: Babcock Center

County: Richland, Lexington

☒ District I:
☐ District II:

Region: ☒ Midlands
Region: ☐ Coastal

☐ Piedmont
☐ Pee Dee

Name of Primary Identifier: Edward Mims

(Name of primary person involved. If incident occurred on van or in facility or in a situation where all names are not listed, specify as such)

Date of Incident: Unknown

Time of Incident:

Location of Occurrence (indicate name of DDSN facility, i.e., unit name in Regional Center, Saleeby Center, provider operated facility, i.e., Sunrise CTH II or address in community, i.e., individual's home or other address, agency van at Joe Doe adult day program, respite caregiver home):

Kensington I

Results of Investigation:

RECEIVED

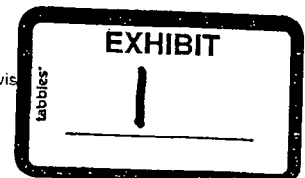
JUN 29 2005

DIVISION OF
QUALITY ASSURANCE

Babcock Center - Confidential Information

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SCDDSN Critical Incident Initial Report Form, Page 4 of 6, Revised





SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident Part II: Final Report

At approximately 6:50pm on May 27, 2005 staff, Trellas Heatley, was helping Edward Mims, supported person, get ready to go home on pass. He noticed that Edward was not wearing any underwear. According to the staff, Edward had begun undressing earlier for bed but was instructed by the staff to put his pants back on. Edward did not put his underwear back on. Mr. Heatley instructed Edward to take off his pants so that he could put some underwear on and he left the room to get a pair of underwear for him. Edward's underwear and socks are not stored in his room but in a plastic bin in the hall closet. Edward is able to dress himself with verbal prompting. Edward will undress himself when he is ready to go to bed. When Mr. Heatley returned to the room, Edward was sitting in a chair with his pants down around his ankles. Mr. Heatley noticed blood dripping from the chair to the floor. Mr. Heatley went to get another staff to help him. At that time, he did not know where the blood was coming from. Mr. Heatley and Ms. Wilson checked Edward and found that there was a tear on the bottom of his penis. Ms. Wilson cleaned Edward's wound while Mr. Heatley was on the telephone with the nurse, Maggie Mobley. Ms. Mobley told the staff to call Jan McLane because she was on-call that evening and take him to the emergency room if necessary. Ms. Mobley stated that the staff told her that he had left the room to get some underwear for Edward and when he returned to the room, he noticed the blood. Jan McLane, Nurse, was called and arrived at the facility to evaluate the injury. She stated that there was a horizontal tear just below the head of the penis on the underside. When she lifted the penis to evaluate the injury, the skin began to tear more. The skin on that area was very thin. Ms. McLane stated that she checked under Edward's fingernails and did not notice any skin tissue or blood that would indicate that he had scratched himself. She stated that she and the staff checked the chair that Edward was sitting in and could not find anything that could have caused the injury. She stated that the injury did not appear to be the result of abuse or neglect. There was no bruising, no swelling, nor any redness in the area. Edward was transported to Lexington Medical Center for evaluation and treatment. According to the staff who accompanied Edward to the hospital, the wound again tore more when the doctor examined him. He received seven stitches to close the wound. It was also recommended that Edward be seen by a Urologist. He has an appointment scheduled for June 3, 2005.

Ms. Mims, Edward's Mother, was notified of the injury. Ms. Mims decided to make a report to the police department. The police officer called the Kensington facility and talked with the staff stating that they needed to ensure that Edward received proper wound care for the injury and that an internal investigation was completed. The officer, name unknown, stated that he would follow-up with the facility in a few days. As of June 2, 2005 there has been no additional contact from the police department.

E-mail was received from Tracy Kelly, Hospital Social Worker, stating that the staff at Lexington Medical Center did not feel that Edward was in any type of imminent danger, but requested that an incident report be completed because the staff could not isolate the origin of the injury. Investigator was unsuccessful in contacting Dr. Mark Johnson, Emergency Room Physician, to obtain his opinion of the injury. Maggie Mobley, nurse, from Kensington also attempted to obtain information from Dr. Johnson and the LMC emergency department. She was unable to obtain information as to Dr. Johnson's impression of the injury. She was told that Dr. Johnson recommended that Edward be seen by an Urologist for follow-up. Investigator interviewed Tracy Kelly on June 1, 2005. Ms. Kelly stated that she had become involved in the situation on Friday night due to the unusual nature of the injury and the fact that Edward was non-verbal. Investigator asked if Ms. Kelly knew the doctors impression on the night of the injury. She stated that Dr. Johnson was not there but that she would leave him investigator's questions. Ms. Kelly stated that the nurse from Friday night was available. Ms. Kelly talked with the nurse while investigator was on the telephone. The nurse did not remember any specific information from the evaluation on Friday. Ms. Kelly stated that neither she nor Dr. Johnson felt that the injury was the result of abuse or neglect. She stated that if they had felt that this was the case, then they would not have allowed Edward to return with the staff and would have notified the authorities. Ms. Kelly stated that the staff who accompanied Edward that night to the hospital was very nice and pleasant. He did not appear to be making excuses for the injury and did not appear to be defensive when questioned about the origin of the injury. Ms. Kelly called Kensington I that evening and also talked with Ms. Wilson, staff. She stated that again the staff could not provide the origin of the injury but that she did not feel that they were hiding anything.

On June 2, 2005 Dr. Graeme Johnson, Medical consultant, from DDSN arrived at the Kensington I facility to evaluate Edward's injury and assist with the investigation. Dr. Johnson also reviewed Edward's medical information, staff statements, investigator notes, accident injury record, evaluated the physical environment of Edward's room, and interviewed the nurse, Maggie Mobley. Dr. Johnson will forward his written report to investigator once it is completed. Dr. Johnson stated that he could not determine the origin of the injury but did not feel that the injury was the result of abuse or neglect.

Edward is not able to provide any information as to the origin of the injury. The staff present at the facility did not witness the injury occur. It is probable that the injury occurred while Mr. Heatley was out of the room getting Edward's underwear. There were no zippers or clasps on Edward's clothing that could have caused the injury. There was no blood in his pants. The staff also

Babcock Center - Confidential Information

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SCDDSN Critical Incident Initial Report Form, Page 5 of 6, Revised February 2005



SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident
Part II: Final Report

checked the underwear that Edward had been wearing earlier that evening and found no signs of blood. The chair in which Edward was found sitting, did not have any sharp edges that could have caused the tear. As the wound continued to tear with minimal evaluation of the injury, indicating a freshness and fragility of the skin in that area, it is believed that the tear was an accidental injury. Without any witnesses or objects that would provide a clear understanding of the injury, the origin remains unexplained. Based on a review of the physical environment, staff statements, nurse's evaluation, Dr. Graeme Johnson's evaluation and staff at Lexington Medical Center's evaluation, there is no reason to believe that the injury was caused by abuse or neglect.

Describe Action Taken:

Edward was evaluated by the nurse and sent to the emergency room for evaluation and treatment.

Is this incident a repeat occurrence with this consumer? ☐ Yes ☒ No

What quality assurance actions were taken to prevent the occurrence of an incident like this?

1. Nursing staff will ensure proper wound care and that Edward is seen by the Urologist.
2. Babcock Center will cooperate with the independent investigations.

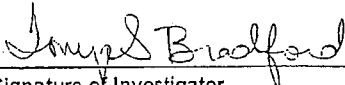
Reporting: If the incident was reported to another agency with oversight of the facility/program, please indicate which agency:

Check all that apply:

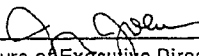
☒ DDSN ☒ Ombudsman ☐ Service Coordination: _____
☐ DSS ☐ DHEC ☒ Other: Parent/Guardian

Reported by Whom/Title? Gilda Williams, QMRP on-call

Date: 05/27/2005


Signature of Investigator

6/2/05
Date


Signature of Executive Director/Facility Administrator

6/2/05
Date

This document should be forwarded to the following DDSN staff:

Darlynn Thomas, Director, Quality Assurance/Quality Improvement Division, SCDDSN
PO Box 4706, Columbia, SC 29240 Fax#: 803.898.9656 and
Sam Davis, Program Coordinator, Abuse/Neglect/Exploitation/Critical Incidents, SCDDSN
8301 Farrow Rd., Columbia, SC 29203 Fax#: 803-935.6170

* If the critical incident being reported is a death, then complete the Report of Death form.

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SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident
Part I: Initial Report

Agency: Babcock Center

County: Richland, Lexington

☒ District I:
☐ District II:

Region: ☒ Midlands
Region: ☐ Coastal

☐ Piedmont
☐ Pee Dee

Date of Incident: Unknown

Time of Incident:

Type Location of Incident: (check one)

SCDDSN Provider Operated Community Program: ☐ CRCF ☐ CTH ☒ ICF ☐ SLP ☐ Day Program

☐ SCDDSN Regional Center ☐ Other (Specify):

Location of Occurrence (indicate name of DDSN facility, i.e., unit name in Regional Center, Saleeby Center, provider operated facility, i.e., Sunrise CTH II or address in community, i.e., individual's home or other address, agency van at Joe Doe adult day program, respite caregiver home):

Kensington I

☐ Check here if incident occurred on van or in facility or in a situation where all names do not have to be listed.

Specify (as staff, vehicle accident/vandalism/damage, facility incident):

People Involved: (staff, people with disabilities, family members, etc.):

Edward Mims

Name of primary person involved (record will be identified by this name)

Name(s) of Others Involved & Involvement: (Check one category for each person)

Mims, Edward James, Consumer

☐ Perpetrator ☐ Other Consumer ☐ Staff ☐ Witness ☐ Family ☐ Other:

Brief Description of Incident:

At approximately 7:30pm on May 27, 2005 the staff noticed that Edward Mims was bleeding on his penis. The nurse examined the injury and sent Edward to the emergency room for evaluation and treatment. Edward received seven stitches to close the wound. The origin of the injury is unknown.

Babcock Center - Confidential Information



SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident
Part I: Initial Report

Type Incident & Category (check all that apply):

Type Incident	Category	Consumer Directly Affected	Consumer to Consumer	Staff	Facility or Program Operations Impacted
☐ Accidents		☐			
☐ Aggression		☐	☐		
☐ Communicable Disease		☐		☐	
☐ Criminal Arrest		☐			
☐ Death		☐			
☐ Elopement		☐			
☐ Exploitation		☐	☐		
☐ Fall		☐	☐		
☐ Fire		☐			☐
☐ Firearms/Weapons/Explosives		☐	☐	☐	
☐ Illegal Substances		☐		☐	
☒ Injury		☒	☐	☐	
☐ Law Enforcement		☐	☐	☐	
☐ Medication Errors		☐			
☐ Motor Vehicle		☐			☐
☐ Property Damage (natural or unusual)		☐	☐	☐	☐
☐ Sexual Assault		☐	☐		
☐ Suicide		☐			
☐ Theft		☐	☐	☐	☐
☐ Other (specify: _____)		☐	☐	☐	☐
Provide detailed information in narrative					

The Investigation

Person Assigned to Investigate: Tonya Bradford, Consumer Advocate

Reporting: If the incident was reported to another agency with oversight of the facility/program, please indicate which agency:

Check all that apply: ☒ DDSN ☒ Ombudsman ☐ Service Coordination: _____
☐ DSS ☐ DHEC ☒ Other: Parent/GuardianReported by Whom/Title? Gilda Williams, QMRP on-call Date: 05/27/2005

Immediate Actions Taken to Protect the Consumer:

Edward was evaluated by the nurse and sent to the emergency room for evaluation and treatment.

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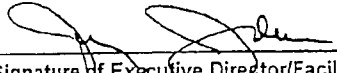
SCDDSN Critical Incident Initial Report Form, Page 5 of 6, Revised December 2004



SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident
Part I: Initial Report

Immediate Actions to Secure the Chain of Evidence and Assist the Investigator:



Signature of Executive Director/Facility Administrator

5-31-05

Date

This document should be forwarded to the following DDSN staff:

Darlynn Thomas, Director, Quality Assurance/Quality Improvement Division, SCDDSN
PO Box 4706, Columbia, SC 29240 Fax#: 803.898.9656 and
Sam Davis, Program Coordinator, Abuse/Neglect/Exploitation/Critical Incidents, SCDDSN
8301 Farrow Rd., Columbia, SC 29203 Fax#: 803-935.6170

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SCDDSN Critical Incident Initial Report Form, Page 6 of 6, Revised December 2004

Stanley J. Butkus, Ph.D.
State Director
Robert W. Barfield
Deputy State Director
Administration
Ronald C. Dozier
Associate State Director
Operations
Kathi K. Lacy, Ph.D.
Associate State Director
Policy



3440 Harden Street Ex: (29203)
PO Box 4706, Columbia, South Carolina 29240
V/TTY: 803/898-9600, FAX: 803/898-9653
Toll Free: 888/DSN-INFO
Home Page: www.state.sc.us/ddsn/

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Lyssa Harvey
Vice Chairman
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Secretary
Isaac B. Dickson, Jr.
Ronald Forrest
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Edythe C. Dove

MEMORANDUM

TO: Dr. Judy Johnson
Executive Director,
Babcock Center

FROM: Stan Butkus, Ph.D. *B.*
State Director

DATE: June 1, 2005

RE: Request for our Independent Investigation

CC: DOT
~~STUDY~~
fee

dy
6-2-05

I have received your letter dated June 1, 2005 requesting an independent investigation of a laceration received by Edward Mims.

It is my understanding that the Ombudsman's Office will be investigating the matter. Jon Cook of the Ombudsman's Office has agreed to let our medical consultant, Dr. Graeme Johnson, participate in the investigation.

SB/jst

DISTRICT I

8701 Furrow Road, Columbia SC 29204
Phone: 803/935-7412

Midlands Center - Phone: 803/935-7500
Whitten Center - Phone: 803/935-2733

DISTRICT II

PO Box 3209, Florence, SC 29502-3209
Phone: 843/664-2655

Coastal Center - Phone: 843/873-1700
Pee Dee Center - Phone: 843/664-2400
Santeeby Center - Phone: 843/332-4104

When getting Edward ready to go home, I took him in his room to get his shoes. After putting his shoes on, I looked him over and found that he had on no underwear. I then removed his shoes and asked him to take off his pants as I walked to get a pair of underwear. When I returned to the room Edward had his pants down and he was sitting in the chair. I then noticed the blood on the chair drop on the floor so I went and got a co-worker.

Osvaldo Attilio
5-27-05

To: Tonya Bradford
Date: May 31, 2005
From: Jan McLane, RN
Ref: Edward Mims

On Friday evening, about 7:10, I received a page from Mr. Heatley at Kensington I. He stated that Mr. Mims was in the process of preparing to go to his mothers' house for the weekend. Mr. Heatley expressed to me he was surprised when he noticed Edward was not wearing underwear. He assisted Edward with removing his elasticized pants, asked Edward to put on his underwear and Mr. Heatley went to get him a fresh pair of pants. Mr. Heatley stated to me he was gone maybe 60-90 seconds. Upon his return he noticed bright red blood. Upon investigating the origination of the blood Mr. Heatley noted open skin, he called a tear, on the under side of Mr. Mims penis. Mr. Heatley seemed disturbed and puzzled, as well as concerned that Mr. Mims could be injured in such a short period of time.

I inquired about the possibility of the "tear" occurring with a zipper caught on the penile skin, I was told the pants removed were non-zippered. I inquired about the possibility of a fingernail doing the damage, Mr. Heatley inspected the nails for evidence of blood or skin tissue. He stated there was no blood or skin noted on Mr. Mims hands.

We discussed possible first aid options until my arrival. Staff to cover site with gauze loosely after applying a thin layer of antibiotic ointment. (Reportedly there was minimal bleeding and only skin tissue involvement.

I arrived at the home between 7:20 and 7:25 pm. Mr. Mims was fully dressed, in no apparent distress, standing in the open area near the main living space.

Mr. Heatley and I went to Mr. Mims room with Mr. Mims so that I could examine the penile wound. Mr. Mims followed directions well, was fully cooperative, he did not appear to be in any distress. When asked if he was in pain he smiled as he usually does when asked questions.

Examination of the wound revealed no apparent skin tear. The wound was a straight line, approximately 1/2 inch below the head of the penis, horizontal to the shaft. There was no edema (swelling), no bruising. Injury extent could not be determined until the penis was more dorsally placed, this stretched the shaft enough to reveal that the full thickness of, the very thin, skin was involved. No injury to the underlying tissue was noted. No bleeding was occurring at any time during my assessment. As the penis was more dorsally flexed the open skin tissue did seem to lengthen by 1-2 cm. This increase in the wound length did not produce any bleeding or noted pain for Mr. Mims.

A thin layer of antibiotic ointment was applied to wound.

Arrangements were made for Mr. Heatley to take Mr. Mims to Doctors Care for sutures, or to Lexington Med Center ER for sutures.

While in Mr. Mims room I checked the wooden edges of the furniture in his room for possible splintered pieces, I checked his nails and found no clues which would reveal to me how the injury occurred. On the cloth edge of the sitting chair there was a dark area approximately 2 inches by 3 inches which appeared to be damp with blood.

Minimal to no bleeding, no pain felt or at least expressed by Mr. Mims, and easy lengthening of the tissue. The wound was well covered by penile skin tissue when the penis was not being examined.

I spoke to Mr. Mims mother regarding the wound. She wanted to defer the decision to take him home this pm until he was seen by a physician.

Upon Mr. Mims return home, I was notified by Mr. Heatley of treatment rendered. I recommended to Mr. Heatley that Mr. Mims stay at Kensington on Friday night. Let the morning nurse check the wound and if okay with her then client could go to mothers house on Saturday. I asked Mr. Heatley to call Mr. Mims mother, he assured me he would.

5-29-05

It was in the great room
when the incident happened
with Edward Mims.

Mary Glenn

D. Wilson

On Friday doing Acting with Resident
 in guestroom, about also, when Mr. Heatley
 who was assisting Edward Mims in
 his Bedroom on left wing, who was getting
 ready to go home for the weekend.
 When Mr. Heatley returned to Guestroom.
 Stating Mrs. Wilson can you come here
 for a minute, and look at Edward,
 I went to see what was happening
 And this is what I saw, Edward was
 sitting in chair in his Bedroom with
 shirt and sock on with blood in
 the chair. I checked Edward Mims
 for injuries, asked Mr. Heatley, what
 happen where is that blood coming
 from. His response was I don't know
 I continue to check Edward Mims
 for injuries, and noticed that the
 blood was coming from his penis area
 I went and called C. Rivers who was
 talking with Magge Mobley the nurse. Minute
 before, Magge called back and talked with
 Mr. Heatley. I returned to left wing. Edward
 Mims Bedroom, and continued to assist him.

5-27-05



Babcock Center, Inc.

Appendix 1

Accident / Injury Report

Page 1

Edward Mims

Individual's Name

File #

5/27/05

6:50

am/pm

Date

Trales Heatley

Observing Staff

Kensington I

Facility

Location of Incident / Accident

- | | | |
|---|----------------------------------|--|
| ☐ Great Room | ☐ Hallway | ☐ Dining Area |
| ☒ Bedroom | ☐ Outside | ☐ Bathroom/Shower |
| ☐ School | ☐ Work | ☐ Vehicle |
| ☐ Unknown | ☐ Kitchen | |
| ☐ Other (specify) | | |

Reporting Staff

Type of Injury

- ☐ Puncture
- ☐ Animal/Insect Bite/Sting
- ☐ Laceration
- ☒ Cut/Laceration
- ☐ Burn
- ☐ Abrasion/Scrape
- ☐ Human Bite/Scratch
- ☐ Swelling/Bump/Knot
- ☐ Skin Irritation
- ☐ Redness
- ☐ Bruise/Contusion
- ☐ No Apparent Injury

Other (specify)

Cause of Injury

- ☐ Slip/Trip/Fall
- ☐ Allergic Reaction
- ☐ Animal/Insect Bite/Sting
- ☐ Human Bite/Scratch
- ☐ Self-injurious Behavior
- ☐ Restraint (attach Restraint Form)
- ☐ Sexual Behavior
- ☐ Struck, Hit, or Injured By/Against
- ☐ Illegal Drugs / Alcohol
- ☐ Weapon
- ☐ Unknown (Complete Page 2)

Other (specify)

Body Part(s) Involved

- | | | | | | |
|-------|-------------------------------|--------------------------------|----------|-------------------------------|--------------------------------|
| Toe | ☐ left | ☐ right | Finger | ☐ left | ☐ right |
| Foot | ☐ left | ☐ right | Thumb | ☐ left | ☐ right |
| Ankle | ☐ left | ☐ right | Hand | ☐ left | ☐ right |
| Leg | ☐ left | ☐ right | Wrist | ☐ left | ☐ right |
| Knee | ☐ left | ☐ right | Arm | ☐ left | ☐ right |
| Thigh | ☐ left | ☐ right | Elbow | ☐ left | ☐ right |
| Hip | ☐ left | ☐ right | Shoulder | ☐ left | ☐ right |
| Ear | ☐ left | ☐ right | Eye | ☐ left | ☐ right |

- | | | |
|-----------------------------------|--------------------------------|-----------------------------------|
| ☐ Head | ☐ Chin | ☐ Back |
| ☐ Forehead | ☐ Neck | ☐ Abdomen |
| ☐ Face | ☐ Chest | ☐ Genitals |
| ☐ Nose | | |

Other (specify)

Penis

Description of accident/injury in detail including size, color, shape, nature and extent of injury

Staff noticed what appears to be a scratch on the underside of his penis about half an inch across.
Call received from Mr. Heatley stating Edward had scratched a penis + bleeding. On arrival to room 7B, there is a bright red tear involving full depth of tissue, 1/2 inch, a bruise, minimal bleeding. When penis is examined the "tear" becomes lower still no bleeding.

Treatment/Outcome

- ☐ No Injury ☒ Injury Required First Aid ☒ Injury Required Additional Treatment (i.e. x-ray, minor suturing, etc.)

Name of Hospital (if hospitalized): Taken to Doctors Care - Sunset Blvd.

Nurse's Signature (if applicable)

5/27/05
Date

Notifications		
Name	Name of Person Notified	Date and Time Notified
QMRP/Coordinator	Anaela Richardson	5-27 8:00
Administrator/Director	Gilda Williams	
Nurse	Jan Malone	5-27 6:55
Family/Surrogate	Edward Mims	7:30

If Staff are injured, attach copy of SREO

LEXINGTON MEDICAL CENTER
2720 Sunset Blvd-- West Columbia, SC 29169 --(803)791-2360

INSTRUCTIONS FOR << MIMS,E >>

Our doctors and staff appreciate your choosing us for your emergency medical care needs. Read these aftercare instructions carefully. Please call us if you have any questions about your medical problem. We are here to serve you.

LACERATION REPAIR:

Lacerations are cuts that go all the way through the skin. They can be close after they are properly cleaned. Rinsing a cut under a faucet is safe and helps clear away foreign material. A clean wound that is closed as soon as possible is less likely to get infected. These are ways lacerations can be repaired:

- * Stitches (sutures).
- * Staples (often on the scalp).
- * Topical skin adhesive (Dermabond).
- * Sterile tapes.

Cuts that are deep may require several layers of stitches. If the wound is old or there is severe damage to the skin or foreign material, closure may need to be delayed 4-5 days.

- * Your dressing should be changed and wound rechecked in _____ days.
- * Sutures or staples should be removed in 7 days.

However your wound has been closed, you should keep the area clean and dry. Try to rest and elevate the injured part until the pain and swelling are gone. It can take up to a year for a laceration to heal completely, so the area must be protected from further injury. Watch for signs of infection. See your doctor or go to the emergency room right away if your wound has signs of infection:

-
- * Unusual redness, swelling, pain, or tenderness around the wound.
 - * Pus or a foul-smelling drainage.
 - * Red streaks going up your arm or leg from the wound.

Cuts that are not closed with glue or tape may be left open to the air in a few days after they begin to heal. You can then clean the crusts off the wound with soap and water or half-strength peroxide 1-2 times daily. However do not soak your cut in water for long periods, and protect it from further injury with a dressing until it is no longer sensitive. You may need a tetanus booster if you have not had one within the past 5 years.

WOUND CARE:

Good wound care will help reduce pain and prevent infection. Puncture wounds and deep cuts are more likely to cause problems than scrapes and abrasions. General treatment includes:

- * Rest and elevate the injured area until the pain and swelling are better.
- * All foreign material like bits of dirt must be washed off.
- * Wounds should be cleaned daily with tap water and a gentle soap; dressings may be needed to protect the wound from further damage.
- * Watch for signs of infection: increased redness or swelling, pus drainage, or increased pain.
- * A tetanus shot may be needed if you are due for a booster.

Call your doctor or go to the emergency room promptly if you think your wound is infected or if you have any other concern about your injury.

SUTURED WOUND CARE:

Your cut has been cleaned and closed with stitches. Keep the area around your wound clean and dry. Rest and elevate the injured area until all the pain and swelling are gone.

1. If a dressing has been applied, it should be removed in _____ days.
2. See your doctor or return here for stitch removal in _____ days.
3. Watch for signs of wound infection:
 - * Unusual redness or swelling around the wound.
 - * Increasing pain and tenderness.
 - * Pus drainage.
 - * Red streaks going up the arm or leg.

See your doctor or return here at once if your wound looks infected. After your cut has begun to heal, you may leave it open to the air. You can clean the stitch line 1-2 times a day with soap and water or half-strength peroxide. However, be careful not to soak the area in water for long periods. Please wear a dressing to protect your injury while you are at work. You may need a tetanus booster if you have not had one within 5 years.

PRESCRIPTIONS:

Fill all the prescriptions ordered by your doctor and take them as directed.

- * If you have been given an antibiotic, be sure to take all of it.
 - * Keep your drugs out of the reach of children, in a cool, dry, dark place.
 - * Don't give your medicine to other people or use it for other illnesses.
 - * Call us right away if you have problems with drug side-effects or allergy.
- Bring your medicines with you any time you go to emergency for treatment.
-

TOPICAL ANTIBIOTICS:

Your doctor has prescribed a topical antibacterial medicine for you. These creams and ointments are useful in preventing and treating skin infections. Examples of these drugs are: Bactroban, Furacin, Mycitrafin, Neosporin, Polysporin, and Silvadene. You should wash the affected area with a gentle soap and water to remove old medicine and other debris before you put on the new medicine; this should be done 1-2 times daily.

Stop using your medicine and contact your doctor if your infection is getting worse, or if you have symptoms of allergy to the drug (itching, skin rash, redness, or swelling). There is an increased chance of an allergic reaction if you use an antibiotic with neomycin (Neosporin, Mycitrafin, or a triple antibiotic ointment or cream).

ADDITIONAL INSTRUCTIONS:

- 1) FOLLOW-UP WITH DR. STOTZER @ 796-9968
 - 2) SUTURE REMOVAL IN 7 DAYS; KEEP AS CLEAN AND DRY AS POSSIBLE; APPLY ANTIBIOTIC OINTMENT 3 TIMES A DAY
 - 3) RETURN TO ED FOR WORSENING OR CONCERNS
-

FOLLOW-UP CARE:

Your physician today has been DR. M. JOHNSON

For follow-up care you should see your doctor or return here in _____ days. When you see your doctor, bring your medicines and instructions to the office. If you had x-rays, an EKG, or lab tests today, they have been reviewed by your doctor. We will contact you at once if other important findings are noted after further review by our staff. If you do not continue to improve or if your condition worsens, please call your doctor or the emergency room right away.

I acknowledge receipt of these instructions. I understand that my condition may require more care and will arrange for further treatment as recommended.

Staff Signature

Patient or Representative Signature

Discharge Time: _____ Via: () Ambulatory () Self
() Wheelchair With: () Family/Friend
() Other _____ () other _____

IF POSSIBLE, RETURN FOR YOUR RECHECK BETWEEN THE HOURS OF 9AM TO 5PM. IF YOU SHOULD HAVE ANY CONCERNS ABOUT THE SERVICE YOU RECEIVED, YOU MAY CONTACT US AT 936-8127.

Friday, May 27, 2005 - 11:06 PM

Hello

Page 1 of 1

Bradford, Tonya

From: Tracy Kelly [tjkelly@lexhealth.org]
Sent: Saturday, May 28, 2005 3:05 AM
To: 'babcockcenter.org,'; Bradford, Tonya
Subject: Hello

I am writing in an effort to follow up in reference to a patient who was seen this evening at Lexington Medical Center. Mr. Mims who resides at 100 Kensington Rd, Cola, SC 29203 was brought to the ED by Mr. T. Heatley (MRS). Mr. Mims presented with a laceration to his penis (approximately 4 centimeters in length). Mr. Mims was treated and returned home with Mr. Heatley. I am simply writing to follow up and ensure that an incident report was initiated. It is my understanding that Jan McClain, RN initiated and requested treatment for Mr. Mims. I spoke with MRS, Doris Wilson via phone who noted that the incident would be documented but was unable to tell me the policy and/or procedure for follow up. The staff of Lexington Medical Center did not feel as though the patient was in any type of imminent danger. However, since staff was unable to isolate how the incident occurred, Dr. Johnson and I felt the need for further follow up. I attempted to contact the hotline. However, this appeared to be a pager number and I did not feel as though it was necessary to page someone at 2 AM. I have elected to email a few members of the Babcock staff simply because I was unsure as to who would be the appropriate staff to contact. If you have any additional questions, you may contact my cell phone (803) 315-3743 or you may contact me Wed, Thurs or Friday evenings (6pm-6 am) at 791-2301. Thank you for your time.

Tracy J. Kelley, MSW

This email and any files transmitted with it may contain PRIVILEGED or CONFIDENTIAL information and may be read or used only by the intended recipient. If you are not the intended recipient of the email or any of its attachments, please be advised that you have received this email in error and that any use, dissemination, distribution, forwarding, printing, or copying of this email or any attached files is strictly prohibited. If you have received this email in error, please immediately purge it and all attachments and notify the sender by reply email or contact the sender at the number listed above if one is provided.

5/31/2005

0574

Bradford, Tonya

From: Johnson, Dr. Judy
Sent: Tuesday, May 31, 2005 9:47 AM
To: 'Tracy Kelly'; Bradford, Tonya
Cc: Marlow, Gene
Subject: RE: Hello

Thank you for your interest in Mr. Mims. The incident was reported to me this morning and I am the Executive Director of Babcock Center. The incident was also reported to Edward's mother, the Department of Disabilities and Special Needs and the Ombudsman's office. We are in the process of conducting an investigation as to how Edward received the injury.

-----Original Message-----

From: Tracy Kelly [mailto:tjkelly@lexhealth.org]
Sent: Saturday, May 28, 2005 3:08 AM
To: 'babcockcenter.org'; Bradford, Tonya
Subject: Hello

I am writing in an effort to follow up in reference to a patient who was seen this evening at Lexington Medical Center. Mr. Mims who resides at 100 Kensington Rd, Cola, SC 29203 was brought to the ED by Mr. T. Heatley (MRS). Mr. Mims presented with a laceration to his penis (approximately 4 centimeters in length). Mr. Mims was treated and returned home with Mr. Heatley. I am simply writing to follow up and ensure that an incident report was initiated. It is my understanding that Jan McClain, RN initiated and requested treatment for Mr. Mims. I spoke with MRS, Doris Wilson via phone who noted that the incident would be documented but was unable to tell me the policy and/or procedure for follow up. The staff of Lexington Medical Center did not feel as though the patient was in any type of imminent danger. However, since staff was unable to isolate how the incident occurred, Dr. Johnson and I felt the need for further follow up. I attempted to contact the hotline. However, this appeared to be a pager number and I did not feel as though it was necessary to page someone at 2 AM. I have elected to email a few members of the Babcock staff simply because I was unsure as to who would be the appropriate staff to contact. If you have any additional questions, you may contact my cell phone (803) 315-3743 or you may contact me Wed, Thurs or Friday evenings (6pm-6 am) at 791-2301. Thank you for your time.

Tracy J. Kelley, MSW

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5/31/2005

Stanley J. Butkus, Ph.D.
State Director
Robert W. Barfield
Deputy State Director
Administration
Ronald G. Dozier
Associate State Director
Operations
Kathi K. Lacy, Ph.D.
Associate State Director
Policy



3440 Harden Street Ext (29203)
PO Box 4706, Columbia, South Carolina 29240
V/TTY: 803/898-9600, FAX: 803/898-9653
Toll Free: 888/DSN-INFO
Home Page: www.state.sc.us/ddsn/

COMMISSION
Bill G. Alexander
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Lyssa Harvey
Vice Chairman
J. Lewis Stephens
Secretary
Isaac B. Dickson, Jr.
Ronald Forrest
W. Robert Harrell
Edythe C. Dove

MEMORANDUM

To: Mr. Ron Dozier
Associate State Director, Operations

From: Dr. Graeme Johnson
Medical Consultant for SCDDSN

Date: June 2, 2004

Subject: Review of Critical Incident Occurring May 27 at Kensington I House

Question:

Review of medical information for inclusion in investigation data and evaluation

Procedure:

- Review in response to request from Babcock Center
- Arranged June 1, 2005
- Kensington I visited 8:20 a.m. – 10:00 a.m. on June 2, 2005
- Brief examination Edward Mims
- Interviews – Angela Richards (QRMP for house)
Maggie Mobly LPN (house nurse)
Tonya Bradford (Consumer Advocate Babcock Center)
- Notes reviewed:
 - o Medical chart Edward Mims
 - o Current medication, nursing, physical exam notes
 - o Statements of staff present May 27, 2005
 - o Notes received from ER visit

DISTRICT I

8301 Farrow Road, Columbia, SC 29203
Phone: 803/935-7412

Midlands Center - Phone: 803/935-7500
Whitten Center - Phone: 803/833-2733

DISTRICT II

PO Box 3209, Florence, SC 29502-3209
Phone: 843/664-2655

Coe
Pec
Sale



A. Reconstruction of Events:

Edward has profound mental retardation and is non verbal and dependent for most care. He is on medication for hypertension, gastroesophageal reflux, seizure disorder and allergies.

As usual on Friday nights Edward was being prepared for home visit about 6:20 p.m. on May 27, 2005. During check he was found to have changed clothes but had no underpants on. He was standing in his bedroom near a chair against the wall and the caregiver left room very briefly to get clothes and on return caregiver noted Edward to be sitting with his pants around his ankles and blood drops were noted on the chair. Checking found a laceration of the shaft of the penis. This was checked by the nurse and at the time it was reported that the skin tore a little more during the manipulation to examine the cut. It is reported that further extension of the skin laceration occurred when examined in the emergency room. When examined by the nurse at the house no blood or tissue was found under Mr. Mims finger nails. No bruising, ulcers, nor swelling were noted in the area. He was taken for care to Doctors Care which was closing and then he was taken to the ER at Lexington Medical Center and treated there. A 4cm laceration (horizontal, on the ventral surface of the shaft of the penis) was repaired using 7 stitches. From oral reports of doctor notes it appears no foreign bodies or anomalies were noted. Hospital staff was reported by social worker to have assessed the situation as not indicating any danger risk to Mr. Mims and he returned to Kensington I then went home for the weekend with family as usual. Mr. Mims has returned to the cottage and he, is his usual self. The wound has been treated each day with bacitracin ointment without incident.

On examination today Mr. Mims does have a few scalp scratches, acne on his upper back and slightly long finger nails (about 1/2cm with smooth edges and second finger nails either side are dysmorphic but not sharp) . He did not show distress when I explained I was a doctor and needed to look at his injury. No bruising, swelling nor tenderness were noted of scrotum, groin, penis. Urinary meatus and glans have normal circumcised appearance. On ventral surface of shaft of penis is a transverse laceration with sutures present. No swelling, no bruising, no exudates, and no evidence of any other skin irritation of penis noted.

B. Review Other Notes and Evidence:

My examination of chair he was sitting on showed no sharp areas, or protruding objects. No other sharp areas are noted on furniture close by – a rough area is on edge of drawers across room – unlikely to have been accessible in short staff absence. The clothing is reported to have had no tears or zips or button (sweatpants).

There is no history of masturbation. No history of excessive bleeding. No history of past injury to genital area. The demeanor of Mr. Mims today and that reported on by staff on the evening of the incident do not make an aggression on his person a likely explanation. The injury appears to have occurred suddenly and caused immediate bleeding. It is of note that the laceration extended easily with minimal handling. Mr. Mims forearm skin is fairly soft and fragile but groin and genital skin appears firm and have no local irritation, therefore it would not seem to be predictable that he would have trouble in the area. He does scratch himself in the scalp and cause small scratches/lacerations. It is possible minor scratching may have caused a small skin break on the penis, that lead to this laceration.

His medication regimen does not include medications that are anticipated to cause skin sensitivity nor self injurious acts. He appeared to be in a caring, supportative situation when the laceration occurred and appropriate care and follow-up has been provided.

C. Conclusion:

The evidence I have seen, the notes I have reviewed, and interviews I have conducted, lead me to a conclusion that it is unlikely that Edward Mims' laceration was due to abusive or negligent management. It is an unexpected problem that had no antecedents. His local (penile) skin appears to have been fragile at the time and the laceration may have been due to minor trauma such as fingernail scratches. Current care and findings do not however indicate a cause for this skin sensitivity. The current skin healing does not indicate likelihood of recurrence.

Cause for laceration unknown.

State of South Carolina)
) In the Court of Common Pleas
County of Richland)

Edward Mims, by and) C/A No: 07-CP-40-3365
through his legal)
guardian, Margaret Mims,)

Plaintiff(s),) Deposition

vs.) of

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

Defendant(s);)

Deposition of MARGARET MIMS, taken before Jennifer
L. Thompson, CVR, Nationally Certified Verbatim Court
Reporter and Notary Public in and for the State of South
Carolina, scheduled for 10:00 a.m. and commencing at the
hour of 10:06 a.m., Tuesday, June 23, 2009, at the
office of Davidson & Lindemann, P.A., Columbia, South
Carolina.

Reported by:

Jennifer L. Thompson, CVR



1 Q To your knowledge, has Edward or you ever been
2 charged for any services that you have been
3 provided for Edward -- that have been provided for
4 Edward?

5 A No.

6 Q Department of Disabilities never charged you
7 anything?

8 A Huh-uh.

9

10 MR. STEGMAIER: I'm sorry, is that a no?

11

12 Q No. Never been charged, or Edward's never been
13 charged for any of the services?

14 A No.

15 Q Do you know of any false or misleading information
16 that was ever provided to the probate court in
17 South Carolina in regard to Edward?

18 A What you mean?

19 Q Anything that you thought was false or shouldn't
20 have been said in open court?

21 A No, not as I know of.

22

23 MS. HARRISON: Are you asking her if she provided
24 false information or if there was false
25 information provided?



SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident
Part II: Final Report

Agency: Babcock Center

County: Richland, Lexington

☒ District I:
☐ District II:

Region: ☒ Midlands
Region: ☐ Coastal

☐ Piedmont
☐ Pee Dee

Name of Primary Identifier: Edward Mims

(Name of primary person involved. If incident occurred on van or in facility or in a situation where all names are not listed, specify as such)

Date of Incident: 06/10/2005

Time of Incident: 5:00 pm

Location of Occurrence (indicate name of DDSN facility, i.e., unit name in Regional Center, Saleeby Center, provider operated facility, i.e., Sunrise CTH II or address in community, i.e., individual's home or other address, agency van at Joe Doe adult day program, respite caregiver home):

Kensington I

Results of Investigation:

At approximately 4:15pm on June 10, 2005 Patricia Harrison, Attorney for Margaret Mims (Edward Mims' Mother) called the Kensington I facility stating that they were to take Edward home for his weekend visit as scheduled, but that Edward would not be returning to the facility. Dorothy Goodwin, Senior Director of Residential Services, was notified of the conversation. Ms. Goodwin informed DDSN of this information as Edward has been judicially admitted to DDSN for services. Ms. Goodwin then informed Ms. Mims that the staff would not transport Edward to her home for the weekend visit if she did not intend for him to return. At approximately 6:00pm, Ms. Harrison and Ms. Mims arrived at the Kensington facility to pick up Edward. Ms. Harrison and Ms. Mims was informed of the decision made by DDSN not to release him due to the court order stating that he was judicially admitted to DDSN. Ms. Harrison called the police to report the situation. An officer arrived at the facility. Sergeant Modoca of the Columbia Police Department was presented a court order for temporary guardianship for Ms. Mims and also presented with the court order showing that Edward was judicially admitted to DDSN. The officer phoned Judge Amy McCullough regarding the situation. It was decided that Edward be allowed to go home as scheduled returning on Sunday. The judge scheduled a meeting for Sunday June 12, 2005. Babcock Center staff and legal representation appeared at the meeting on June 12, 2005. DDSN staff and legal representation was also present. It was determined that the issue was between DDSN and Ms. Mims due to the two court orders. Judge McCullough advised Ms. Harrison to advise Ms. Mims to return Edward to Kensington as scheduled; however, she asked Mr. Hill (DDSN attorney) not to contact the police if Edward was not returned. Mr. Hill stated that would agree if Judge McCullough would relieve DDSN and Babcock Center of any liability for Edward's care. Judge McCullough agreed. A court hearing had already been scheduled for June 24, 2005 for Ms. Mims to pursue permanent guardianship. Edward did not return to Kensington on Sunday June 12, 2005 as scheduled. Ms. Goodwin made arrangements with the pharmacy to have Edward's medication packaged to last through June 27, 2005.

Describe Action Taken:

A meeting with Judge McCulloch was held on June 12, 2005 regarding visitation and Edward remaining at his Mother's house.

Is this incident a repeat occurrence with this consumer? ☐ Yes ☒ No

What quality assurance actions were taken to prevent the occurrence of an incident like this?
Babcock Center will follow DDSN's instructions regarding Edward Mims placement.

RECEIVED

JUN 29 2005

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SCDDSN Critical Incident Initial Report Form, Page





SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident
Part II: Final Report

Reporting: If the incident was reported to another agency with oversight of the facility/program, please indicate which agency:

Check all that apply:

☒ DDSN ☒ Ombudsman ☐ Service Coordination: _____
☐ DSS ☐ DHEC ☒ Other: Parent/Guardian

Reported by Whom/Title? Dorothy Goodwin, Director

Date: 06/13/2005

Signature of Investigator

6/15/05
Date

Signature of Executive Director/Facility Administrator

6/15/05
Date

This document should be forwarded to the following DDSN staff:

Darlynn Thomas, Director, Quality Assurance/Quality Improvement Division, SCDDSN
PO Box 4706, Columbia, SC 29240 Fax#: 803.898.9656
Sam Davis, Program Coordinator, Abuse/Neglect/Exploitation/Critical Incidents, SCDDSN
8301 Farrow Rd., Columbia, SC 29203 Fax#: 803-935.6170

and

* If the critical incident being reported is a death, then complete the Report of Death form.

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SCDDSN Critical Incident Initial Report Form, Page 5 of 5, Revised February 2005



SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident
Part I: Initial Report

Agency: Babcock Center

County: Richland, Lexington

☒ District I:
☐ District II:

Region: ☒ Midlands
Region: ☐ Coastal

☐ Piedmont
☐ Pee Dee

Date of Incident: 06/10/2005

Time of Incident: 5:00 pm

Type Location of Incident: (check one)

SCDDSN Provider Operated Community Program: ☐ CRCF ☐ CTH ☒ ICF ☐ SLP ☐ Day Program
☐ SCDDSN Regional Center ☐ Other (Specify):

Location of Occurrence (indicate name of DDSN facility, i.e., unit name in Regional Center, Saleeby Center, provider operated facility, i.e., Sunrise CTH II or address in community, i.e., individual's home or other address, agency van at Joe Doe adult day program, respite caregiver home):

Kensington I

☐ Check here if incident occurred on van or in facility or in a situation where all names do not have to be listed.

Specify (as staff, vehicle accident/vandalism/damage, facility incident):

People Involved: (staff, people with disabilities, family members, etc.):

Edward Mims Name of primary person involved (record will be identified by this name)

Name(s) of Others Involved & Involvement: (Check one category for each person)

Mims, Edward James, Consumer ☐ Perpetrator ☐ Other Consumer ☐ Staff ☐ Witness ☐ Family ☐ Other:

Brief Description of Incident:

At approximately 4:30pm on Friday June 10, 2005 the staff at Kensington I ICF/MR received a call from Patricia Harrison, Edward's Mother's legal representative, stating that the staff needed to bring Edward home on Friday evening and that he would not need to be picked up. Dorothy Goodwin, Director of Residential Services, spoke with Margaret Mims, Mother, stating that Edward would have to be picked up on Sunday due to the judicial admittment order limiting Mother to weekend visits. Ms. Mims and Ms. Harrison arrived at the Kensington facility and called the police. The police officer talked with the judge, Amy McCulloch, who had given Ms. Mims temporary guardianship on Friday June 10, 2005. The judge instructed the officer that Edward could be allowed to go home and a meeting would be held in her chambers on June 12, 2005 at 2:00pm. On June 12, 2005 the judge advised Ms. Harrison that Edward should be returned to the facility as originally scheduled at 6:00pm but that if he did not return DDSN would not call the police.

Babcock Center - Confidential Information



SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident
Part I: Initial Report

Type Incident & Category (check all that apply):

Type Incident	Category	Consumer Directly Affected	Consumer to Consumer	Staff	Facility or Program Operations Impacted
☐ Accidents		☐			
☐ Aggression		☐	☐		
☐ Communicable Disease		☐		☐	
☐ Criminal Arrest		☐			
☐ Death		☐			
☐ Elopement		☐			
☐ Exploitation		☐	☐		
☐ Fall		☐	☐		
☐ Fire		☐			☐
☐ Firearms/Weapons/Explosives		☐	☐	☐	
☐ Illegal Substances		☐		☐	
☐ Injury		☐	☐		
☒ Law Enforcement		☒	☐	☐	
☐ Medication Errors		☐			
☐ Motor Vehicle		☐			☐
☐ Property Damage (natural or unusual)		☐	☐	☐	☐
☐ Sexual Assault		☐	☐		
☐ Suicide		☐			
☐ Theft		☐	☐	☐	☐
☐ Other (specify: _____)		☐	☐	☐	☐
Provide detailed information in narrative					

The Investigation

Person Assigned to Investigate: Tonya Bradford, Consumer Advocate

Reporting: If the incident was reported to another agency with oversight of the facility/program, please indicate which agency:

Check all that apply:

☒ DDSN ☒ Ombudsman ☐ Service Coordination:☐ DSS ☐ DHEC ☒ Other: Parent/GuardianReported by Whom/Title? Dorothy Goodwin, DirectorDate: 06/13/2005

Immediate Actions Taken to Protect the Consumer:

A meeting with Judge McCulloch was held on June 12, 2005 regarding visitation and Edward remaining at his Mother's house.

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SCDDSN Critical Incident Initial Report Form, Page 5 of 6, Revised December 2004



SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

Critical Incident
Part I: Initial Report

Immediate Actions to Secure the Chain of Evidence and Assist the Investigator:

[Signature] 6/13/05
Signature of Executive Director/Facility Administrator Date

This document should be forwarded to the following DDSN staff:

Darlynn Thomas, Director, Quality Assurance/Quality Improvement Division, SCDDSN
PO Box 4706, Columbia, SC 29240 Fax#: 803.898.9656 and
Sam Davis, Program Coordinator, Abuse/Neglect/Exploitation/Critical Incidents, SCDDSN
8301 Farrow Rd., Columbia, SC 29203 Fax#: 803-935.6170

Babcock Center - Confidential Information

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SCDDSN Critical Incident Initial Report Form, Page 6 of 6, Revised December 2004

Series of Events Surrounding Edward Mims

On June 10, 2005 at approximately 4:14 p.m., I received a telephone call from Angela Richards, QMRP at Kensington I facility. She stated Mrs. Patricia Harrison called the residence and spoke with a staff member, informing them that it was fine for them to bring Edward Mims home for his weekend visit, however, they would not need to make arrangements to pick him up on Sunday. When the staff reported this to Angela, she became concerned because she was aware of a court order that allowed Edward to go home with his mother for weekend visits and did not know what the mother's plan for returning. I asked Angela to call the mother and ask what her plans were.

Angela called me back to report the mother stated he would not be coming back Sunday and she would not give a date for his return. I then contacted DDSN, since Edward is judicially committed to the Department. I spoke with Bill Barfield and informed him that both Mrs. Harrison and Mrs. Mims have informed us that Edward would not be returning. Bill asked me when would he be returning to which I informed him that the mother refused to say. After speaking with Mr. Barfield and Dr. Butkus, I called Ms. Mims in an attempt to find out her intents as it pertains to Edward's home visit.

Ms. Mims informed me that she did not plan to have Edward return to Kensington on Sunday, June 12. I reminded her that Edward was judicially committed to DDSN and was only approved for weekend visits. I told her we would be happy to bring Edward home, but we would need to pick him up on Sunday. She stated he was not returning on Sunday and that "you'd better bring him home." I told Ms. Mims that I was sorry, but that we would not be bringing Edward home unless she assured me he was returning on Sunday. She asked me to call her back.

I waited 15 minutes and called Ms. Mims a second time. She told me I shouldn't be talking to her and that I should call Mrs. Harrison. I informed her that I would not be calling Mrs. Harrison and that we would not be bringing Edward home. In the meantime, Angela called back to state that Mrs. Harrison called back and stated that she had a court order giving Ms. Mims temporary guardianship and that she, along with Ms. Mims and the police would be coming to Kensington to get Edward. She stated a copy of the order was being delivered to Babcock Center and Kensington. (A copy of the order had not been delivered to Babcock Center before I left to go to Kensington). After speaking with the folks from the Department a second time (Dr. Butkus, Bill Barfield, Jim Hill-attorney), it was advised that the court order to commit Edward superseded the appointment of guardianship and that we were not to allow Edward to leave with Mrs. Harrison and his mom. Dr. Butkus informed me that Jim Hill received an e-mail from Patricia Harrison concerning the mother picking Edward up. Dr. Butkus stated that Jim Hill would respond to Mrs. Harrison's e-mail and sent me copy of the e-mail to share with Ms. Harrison if she showed up at Kensington.

After several attempts to reach Babcock Center's attorney by phone, I sent an e-mail detailing the events surrounding the situation with Edward.

At approximately 6:00, Angela Richards called to report that Mrs. Harrison and Ms. Mims were at Kensington attempting to take Edward home. I informed Angela that she should not release Edward and that I would be there shortly.

I went to Kensington, taking a copy of the court order and the e-mail response to Ms. Harrison from Jim Hill. When I arrived at Kensington, Ms. Harrison met me at the door and informed me that she had a court order giving Ms. Mims temporary custody of Edward and that we had no right to hold him. She continued rehashing events at Babcock Center and that if we did not release Edward, she would call the police. I told Ms. Harrison that she needed to do what she felt she needed to do, but we could not release Edward because it was our understanding that the guardianship appointment did not take precedence over the judicial committal to DDSN. While speaking with Jim Hill by phone, he asked to speak with Mrs. Harrison. Following this conversation, she went outside and spoke on her cell phone. By this time Christian Steigmeir was in collaboration with Jim Hill about the situation.

Shortly thereafter, a law enforcement officer pulled into the Kensington driveway. Mrs. Harrison showed Sgt. Modoca (?) a copy of the court order appointing Ms. Mims temporary guardian. I presented him with the court order showing he was judicially committed to DDSN. Unsure as to what to do, he went to his patrol car, made several calls; one of which was to the Judge McCullough who issued the guardianship order. After some discussion, he returned to state that the judge had spoken with Mr. Hill and wanted to speak with Mrs. Harrison. It was agreed that Edward would go home for his regular weekend visit, returning on Sunday. The judge scheduled a meeting at the Main Courthouse for Sunday, June 12 at 2:00 in the afternoon, to discuss this situation prior to Edward's anticipated return to the Kensington facility. Mr. Harrison showed up at the facility, however he never entered the facility and stood outside with Ms. Mims and Mrs. Harrison and Edward while the officer spoke on the telephone in his patrol car.

By this time, the nurse was gone and the facility agreed to deliver Edward's medication to him Saturday morning.

At approximately 8:20 p.m., Mrs. Harrison left Kensington with Ms. Mims and Edward.

Sunday, Jun 12, 2005

I arrived at the Richland County Court House at approximately 1:30 to meet with Christian Steigmeir and Angela Richards. Christian had brought along Joel Collins. We discussed that the issue at hand was really between Ms. Mims and DDSN. As the provider selected, we would be there to answer any questions we could.

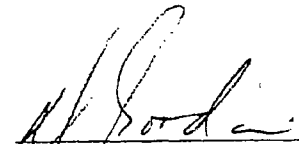
After more than a 1 and ½ hour meeting, it was determined that Mrs. Harrison would advise her client to return Edward to Kensington as scheduled. However, she asked Mr. Hill not to contact the police if Edward was not returned. Mr. Hill stated he would not if

the Judge was relieving DDSN and Babcock Center of any liability for his care. Judge McCullough agrees.

At approximately 5:15 pm., Mrs. Harrison called my cell phone to inform me that Ms. Mims would not be returning Edward to Kensington and asked about additional medication. I informed her that the staff would arrive at Ms. Mims home as scheduled to pick him up. If Ms. Mims refused to allow him to return, the staff would give medication to last through Wednesday. She asked what could be done beyond that. I informed her I would need to speak with the nurse and pharmacist and contact her Monday, June 13.

I spoke with Mike Ross, pharmacist, Kathy Lacy with DDSN and Maggie, the nurse at Kensington to devise a solution to the medication issues. Since the agency will continue to receive funds for the bed for up to 60 day and we would continue to be able to bill Medicaid, it was agreed that we could give medication up to court hearing date.

I called Mrs. Harrison and informed her that we would send Edward's medication to Ms. Mims through June 24. Mrs. Harrison asked if we could send the medication through the 27th since the 24th was a Friday. This was a reasonable request and we agreed to have the pharmacist package Edward's medications through June 27.


Respectfully submitted by

6/13/05
Date

STATE OF SOUTH CAROLINA	)	IN THE PROBATE COURT
	)	
COUNTY OF RICHLAND	)	Case Number: 2003-ES-40-172
IN THE MATTER OF GUARDIANSHIP OF	)	
EDWARD MIMS	)	ORDER APPOINTING
	)	TEMPORARY GUARDIAN

This matter came before the Court on the Petition of Margaret Mims, who is the mother of Edward Mims. In attendance at the emergency hearing held on May 9, 2005 were Margaret Mims and her attorney, Patricia L. Harrison; the Court-appointed Guardian Ad Litem for Edward Mims, Edgar Kneece; and M. Leigh Flynn, who was previously appointed by this Court as Guardian Ad Litem for Edward Mims in another proceeding.

The court-appointed Visitor, Mary Katherine Miller, found the residence of Margaret Mims to be clean and in good condition. She reported that Mrs. Mims was very attentive to the needs of Edward Mims and that he appeared to be familiar and comfortable at home. Examiner Tan Platt reported that Edward Mims is incompetent, and is unable to make daily living and health care decisions. A July 3, 2001 Order of this Court found Edward Mims to be "profoundly mentally retarded." In addition, evidence was presented of six emergency room physicians having reported that Edward Mims is incapacitated by reason of mental retardation.

Based on these findings, I find that Edward Mims is incapacitated and I find that no Guardian has been appointed previously. Evidence was presented that Edward Mims' current residence, Kensington ICF/MR, was decertified by the South Carolina Department of Health and Human Services in April of 2005. On May 27, 2005, Edward Mims was found in the facility to have a serious unexplained injury.

Based on the evidence presented to the Court, I find that the welfare of Edward Mims requires immediate action and that the emergency appointment of a temporary Guardian is appropriate pursuant to S. C. Code Ann. §62-5-310. The Guardian Ad Litem joins in the recommendation to the Court that a temporary Guardian be appointed. I find that Margaret

1 of 2 amc

Mims has priority under S. C. Code Ann. §62-5-311 and that it is in the best interest of Edward Mims to appoint Margaret Mims as his temporary Guardian.

By order dated July 3, 2001, this Court found that Edward Mims was in need of services of the South Carolina Department of Disabilities and Special Needs. I find that services of the South Carolina Department of Disabilities and Special Needs are needed by Edward Mims and that Margaret Mims, as Guardian for Edward Mims, shall have the full authority to exercise all rights to these services which Edward Mims could exercise if he were competent to do so. These services shall be provided in the least restrictive environment as required by state and federal law.

Margaret Mims shall be entitled to the custody of the person of Edward Mims and shall have all statutory powers of a Guardian, including but not limited to the authority to establish his placement. The Guardian shall be authorized to give consents and approvals for Edward Mims to receive medical and other professional care, counsel, treatment and services. In view of the emergency regarding placement, all medical providers shall provide medical records and information as requested by the Guardian.

The South Carolina Department of Disabilities and Special Needs shall be provided with notice of the hearing which has been scheduled in this Court for June 24, 2005. At that time, the Department shall provide the Court with copies of all treatment records of Edward Mims since the date of this Court's July 3, 2001 Order and shall provide the Court with notice of the appointment of a service coordinator and a treatment plan. At that hearing, the Court shall also rule on the Petitioner's request for a permanent Guardian.

IT IS SO ORDERED!

June 10, 2005
Columbia, South Carolina

Amy W. McCulloch
Honorable Amy W. McCulloch
Richland County Judge of Probate

05 JUN 10 PM 2:18
AMY W. McCULLOCH
PROBATE JUDGE
RICHLAND COUNTY, S.C.

FILED

2002 am

Goodwin, Dorothy

From: Hill, Jim [JHill@ddsn.sc.gov]
Sent: Friday, June 10, 2005 5:30 PM
To: Patricia L. Harrison; Charles Lang; Mary S. Leitner; Deirdra Singleton; Gloria Prevost; Ronald Reed
Cc: sbutkus@ddsn.sc.gov; Goodwin, Dorothy
Subject: RE: Edward Mims

Patricia, I called your office this afternoon, but missed you. I believe you were in a meeting and I left a message with your assistant.

I am in receipt of your email below concerning Edward. Please note that Edward was judicially admitted to the Department on July 3, 2001. Part of the Court Order for his admission indicated that he may visit his mother on weekends provided that she provide a safe environment and access for inspections of her home to ensure that it was safe for Edward. Your email indicates that Edward will not be returned to Kensington after visitation this coming weekend. This directly violates the Court Order. Because of your written intentions to violate the Court Order, we have asked Babcock to not allow Edward to visit his mother this weekend and we will attempt to review this matter next week or at the earliest convenient time for all involved.

In your email below, you mentioned that you sent Rivermont (Rich/Lex County DSN Board) a copy of the "Court's Order." This apparently is something new and pertains to Mrs. Mims efforts to seek guardianship of her son, Edward. Please fax me a copy of this Order. We are unaware of its contents. As mentioned, Edward was committed to DDSN, not Rivermont.

With regard to your request to have Edward discharged to his mother's care and admitted to a local daycare with access to other services provided from Rich/Lex, this must be presented and reviewed by Edward's team in accordance with normal procedures for individual habilitation plans and ICF/MR regulations. The items that you mentioned to me and in your email below constitute a significant transition for Edward. It is my understanding that these matters must be reviewed by the team and, therefore, we cannot comment on whether they are appropriate for Edward at this time.

The Babcock staff have appealed the de-certification and depopulation of Kensington and the matter has been deferred until the appeal has been heard. Any issue about alternate placement of individuals at this time based on de-certification is premature pending the appeal. As you know, alternative placements can be considered at anytime as long as it is planned and approved.

I trust this responds to your email below.

Jim Hill
General Counsel, SCDDSN

From: Patricia L. Harrison [mailto:plh.cola@worldnet.att.net]
Sent: Friday, June 10, 2005 4:55 PM
To: Charles Lang; Mary S. Leitner; Deirdra Singleton; Gloria Prevost; Ronald Reed; Hill, Jim
Subject: Edward Mims
Importance: High

6/13/2005

0591

We notified Babcock Center that Edward would not be returning to Kensington on Sunday. I have sent Rivermont a copy of the Court's Order. Babcock called Mrs. Mims today to tell her that they will only send enough medicine home with him for five days. On Wednesday, I asked Mary Leitner that Carol King serve as Edward's service coordinator, but I have heard nothing back from RichLex. Carol has experience with these transitions and does a good job. We need her assistance.

Babcock Center is supposed to be transitioning people from a decertified facility into a placement of their choice. Who is going to handle matters like getting Edward's pharmacy changed (and I expect that we will not be able to get meds from a new pharmacy until next month), getting him into a day program, arranging for necessary transportation, etc?

Trisha Harrison

Jun 28, 2013

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Edward Mims,

Plaintiff,

v

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

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 07- CP- 40-03365

Plaintiff's Response to Defendants Motion
for Summary Judgment and
Motion to Strike

Introduction

The facts of this case have been set forth in Plaintiff's Memorandum of Law filed with his Motion for Summary Judgment. A trial court may properly 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), SCRCPP. *Madison v. Babcock Center*, 638 S.E.2d 650, 655, 371 S.C. 123 (2006). In determining whether any triable issues of fact exist, the court 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 be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues. *Id.* citing *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) .

1. **Objection to Defendants Babcock and Johnson filing memorandum late and without motion for extension of time.**

The Court should not consider the memorandum filed by Babcock Defendants' counsel just minutes before the hearing. The parties were ordered by this Court to file memoranda of law in support of summary judgment motions by May 29, 2013. Plaintiff's counsel, a sole attorney with limited staff complied with that Order. Plaintiff was prejudiced by this memorandum not

being provided prior to the June 4, 2013. hearing. Plaintiff did not have an opportunity to review the memorandum in preparation for oral argument and requests that the Court strike the memorandum of Defendants Babcock Center and Judy Johnson as being filed out of time without an extension or notice to the plaintiff.

1. FIRST CAUSE OF ACTION (Section 1983)

As to paragraph (a), Plaintiff agrees that the Department is not subject to suit under the First Cause of Action, which clearly sues Butkus and Lacy in their individual capacities. As to paragraph (b), Butkus and Lacy are “persons” for purposes of 42 U.S.C. 1983. The Memorandum of Defendants Johnson should not be considered, but she is also sued in the First Cause of Action in her individual capacity and the Babcock Center is not named as a defendant in that count.

As to paragraph (c), it is legal error for defendants to ignore the state statute which tolls the statute of limitations for persons, like Edward, who lack mental capacity. The South Carolina Supreme Court has ruled that the Amended Complaint was properly served on the Defendants and that Court reversed this Court’s improper dismissal of this lawsuit. *Mims v. Babcock Center et. al.*, 399 S.C. 341, 732 S.E.2d 395 (S.C. 2012). SCRCR Rule 15(c) provides that “Whenever the claim or defense 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’ original complaint named Stanley Butkus and Judy Johnson as defendants in the original complaint and the claims in the amended complaint arose out of the same conduct, transactions and occurrences as those in the original complaint. Thus, claims against Butkus and Johnson relate back to the original filing date of May 29, 2007. As to Defendant Lacy, she was not named as an individual defendant in the original complaint, and the claims, as they relate to Lacy, do not relate back to the date of the original complaint.

Therefore, she may be liable for claims arising after May 7, 2001. *Jackson v. Doe*, 342 S.C. 552, 537 S.E.2d 567, 570. (Ct.App.2000).

In making the argument contained in paragraph (c) on page 9, defendants ignore the state statute extending for five years the statute of limitations due to Mims' disability. As the South Carolina Supreme Court discussed in *Harrison v. Bevilacqua*, Section 15-3-40 the statute of limitations is tolled five years when the plaintiff is insane.¹ 354 S.C. 129, 135, 580 S.E.2d 109 (S.C. 2003). That section provides that the statute "cannot be extended" for more than five years. *Id.* It is clear that the Supreme Court has interpreted as the five years being added to the number of years contained in the applicable statute of limitations. Thus, as to Butkus and Johnson, only those claims for injury occurring before May 29, 1999 are barred. As to Lacy, claims for injury are barred only as to those injuries occurring before May 7, 2001.

As plaintiff's counsel mentioned at oral arguments on defendants' motion for summary judgment, the law firms that are now representing both sets of defendants in this case participated as counsel in *Harrison v. Bevilacqua*, representing the plaintiff and the defendant, so the ruling of the Supreme Court as to the statute of limitations should be quite familiar to them. Their argument that only those claims arising after 2005, in complete disregard of the tolling statute, is frivolous and should be dismissed by this Court.

In *Madison*, the Supreme Court further discussed the issue of the statute of limitations and whether the court should consider allegations occurring after Madison's admission to the Babcock Center, but before the period covered by the statute of limitations. *Id.* In order to avoid "future debate and confusion" over whether courts should consider events occurring prior to the starting date of the statute of limitations, the Court held that allegations related to defendants'

¹ In *Harrison v. Bevilacqua*, plaintiff's claim was further limited by the six-year repose provision in South Carolina Code of Laws § 15-3-545, which "constitutes an outer limit beyond which a medical malpractice claim is barred, regardless of whether it has or should have been discovered." *Id.* at 113, citing *Hoffman v. Powell*, 298 S.C. 338, 339, 380 S.E.2d 821, 821 (1989). However, that section is not applicable in this case.

initial evaluation and the admission of plaintiff to the Babcock Center in 1994 were not time-barred. In that case the injury occurred on August 30, 1995, and Madison's lawsuit was filed on August 29, 1997. The Supreme Court ruled that events (which occurred before the statute of limitations) related to her admission and evaluation in 1994 should indeed be considered and that "allegations relating to Department's alleged negligence in connection with Appellant's initial evaluation and admission in 1994 are not time-barred." Thus, facts and events occurring before the start date of the statute of limitations should be considered by this Court in determining whether defendants violated the law during and after the time covered by the statute of limitations.

While Defendant Johnson's memorandum should not be considered at all by this Court, because it was not timely filed, she was named in the original complaint and the time frames which apply to Defendant Butkus also apply to her.

As to the arguments made by Defendants that they had no personal involvement in the wrongful acts alleged in the amended complaint, Mims has alleged that the individual defendants "were aware of the systemic abuse, neglect and exploitation of clients living in Babcock Center facilities" and that they "failed to report these incidents of abuse, neglect and exploitation to appropriate authorities and they have failed to take necessary action to investigate reports of abuse and neglect." Paragraph 14 and 15. He also alleged that these individual defendants have "established a pattern and practice of bringing reprisals against parents who complain about services provided by the Babcock Center." Paragraph 17.

In his deposition, Defendant Butkus admitted that he was made aware that Edward was beaten at Clusters and that it was his practice to contact the Chairman of the Babcock Center and the DDSN Commissioner from his district "to let them know that something happened and that

an investigation was underway.” Mims 1360. Not only does this deposition show that Butkus had knowledge the incident, but he also investigated to see if staff was suspended and that the investigation of the injury was underway. Mims 1361. Butkus testified that, as a matter of practice, he would know about the injury within five days. Id. At his deposition, Butkus testified that he could not remember whether he was told “specifically how he was abused,” but Butkus admitted being informed that “abuse had occurred.” Because Mims was involuntarily committed to the custody and care of DDSN, Butkus himself held the key to Mim’s continued confinement at Clusters and, even more importantly, Butkus held the key to his release from confinement. When asked about the beating of Mims by Carl Anthony, Butkus responded: “Typically, something of that severity, I probably would have been contacted on...and yes, I would very much want to know that that had happened.” Mims 1362. Butkus admitted that he had conversations with Defendant Johnson after CMS and DHEC decertified two units at Clusters. Mims 1363. Johnson told Butkus that “she had concerns about whether the Agency could maintain quality of service needed at the Clusters” and she even asked Butkus to have DDSN take over management at Clusters. Mims 1363. Butkus testified that “We took it over and we closed it.” Mims 1364. Butkus admitted that the standards were not being met at Clusters. Mims 1364. Butkus also admitted that he would have been informed when Mims was beaten with a belt at Clusters and he testified that he had a responsibility to see that this second beating was “thoroughly investigated” because he had a duty to “protect the consumers and users of service.” Mims 1367. Butkus testified that he was “sure” that he would have been notified of “something of that severity.” Mims 1367.

Most importantly, Butkus admitted that he was the individual who made the final

decision to involuntarily commit Mims to DDSN in 2001 and that he made the placement decisions for the agency. Mims 1369. ("The executive of the Agency's responsible for making placement decisions." Id.) When asked if he also was the individual responsible for getting someone out of placement when they were in danger, Butkus responded that "would be a separate determination" and "you need to assess the circumstances carefully to see if it was isolated or a pattern of some kind." Id. He also admitted that it was his job to consider the "mix of staff and mix of behaviors" and to "reassign people where they can best fit." Mims 1369 and 1370.

Butkus testified that reports of critical incidents were made to his agency within 24 hours to Sam Davis, who notified Defendant Kathi Lacy. Mims 1378. According to Butkus, Lacy would then exercised her judgment to determine whether to pass the information on to Butkus or whether the incident was "just an unexplained random event." Mims 1378. As State Director, it was Butkus' job to determine "how did it happen, who's going to take care of it, how are we going to prevent it from occurring again, who's going to do what to deal with it." Mims 1378. As Director of DDSN, he was personally responsible to assure that "corrective measures needed to be taken" to prevent the event from happening again. Butkus testified that he would "learn by exception that there was a problem in the implementation of the corrective measures. In other words, if they aren't done." Mims 1381.

Butkus was informed of the ant bite injury and he "put it in the category of this is a random event, how did it happen, let's correct it," but he did not consider it to "rise to the level of there's a major systemic problem of some type." Mims 1382. He was notified when CMS declared Immediate Jeopardy when Mims' roommate either aspirated (according to Butkus) or

choked and died. Mims 1384.

Butkus was aware that Mrs. Mims had tried to get her son released from involuntary commitment, but he testified that “we felt that had to be routed back through the Court, that we couldn’t override a Court decision that placed him in our care.” Mims 1385 and 1386. But he never informed the Court of Mims’ mothers complaints or her request to have Mims discharged and returned to her care. When the injury to Mims’ penis occurred, Butkus directed a doctor on DDSN’s payroll, Dr. Graeme Johnson, to examine Edward Mims and he relied upon Johnson’s assessment. 1386. Butkus also received information through his agency’s critical injury reporting system. Mims 1387. He “asked Dr. Johnson to take a look at what was involved with it and what his determination of the situation was...” Mims 1387. He testified that the injury of Mim’s penis would have come to the attention of Defendant Lacy and then to him. Mims 1387. It was Butkus’ decision to refer investigation to DDSN’s physician instead of law enforcement. Mims 1387. He did not recall having anyone contact Mims’ treating physician and never obtained an independant examination. Mims 1388.

Butkus could not remember whether he discussed this injury with Defendant Johnson. Mims 1389, 1395 and 1396. According to his prior testimony, his practice was to inform the local provider and the appropriate DDSN commissioner. Mims 1389, 1395 and 1396.

Butkus admitted having contact, either personally, or through his staff, with the director of Babcock Center (before Johnson was hired) when Mims was committed to his custody and care. Mims 1392. According to Butkus, involuntary admissions are “very, very rare.” Mims 1392. Butkus admitted that once Mims was committed, he had “the same responsibility that we’d have toward anybody that we serve, that they’re safe, free from harm, getting the services they’re

supposed to get when they're supposed to get it, that kind of thing." Mims 1393. As state director of DDSN, Butkus testified that he was "responsible for the agency and everything that goes on within the agency in terms of what the code requires, what our contractual commitments are under waivers or ICF/MRs, state-funded programs." Mims 1395. Every time Butkus was notified of allegations of abuse, he was responsible for personally contacting the Chair of the agency providing the service as well as his DDSN Commissioner in the district where the injury occurred. Mims 1395 and 1396. He could not recall if law enforcement was notified of the penis injury or not. Mims 1398. According to Butkus it would "rest in the CEO's hands primarily" to preserve evidence like the bloody chair. Mims 1399. Butkus testified that the police should have been contacted "right off" to preserve evidence when Mims was found to have an injured penis. Mims 1399.

Butkus was informed immediately when Mrs. Mims showed up with a court order to release her son from Kensington. Mims 1400. He made the decision not to allow Mrs. Mims to take him out of Kensington (on a Friday afternoon), because of his "preexisting responsibility of the Court." (Even though Mrs. Mims regularly took her son home on Friday for weekend visits.) Mims 1400. Butkus admitted that he communicated with DDSN counsel when Mrs. Mims presented her court order at Kensington and that he discussed the order with Kathi Lacy. Mims 1400, 1401 and 1403. Butkus talked with Lacy "about the event and so forth, what needed to be done, that kind of thing." Mims 1402. He testified that "Dr. Lacy's a very polished professional and she knows how to prioritize, and she would dig into something right away if that was needed for a day or two." Mims 1403. Butkus admitted that he continued to be involved in the probate court proceedings through his counsel, Jim Hill. Mims 1404.

Butkus admitted that it was “at my direction” that DDSN’s lawyer participated in the guardianship proceedings. Mims 1405. Butkus was involved in a meeting where the decision to oppose Mrs. Mim’s petition for guardianship was discussed. Mims 1408. He testified that he and his staff determined that Mrs. Mims “wasn’t capable” of taking care of her son. Id. Butkus personally made that decision not to allow Mims to return home because the agency determined that the “circumstances were still operating that led to the original involuntary admission” and “We hadn’t seen a change in her capacity.” Mims 1409. Butkus and his staff determined “that she couldn’t provide the level of care that he needed in the home.” Mims 1411. This was because Mims’ mother was working, she didn’t have a lot of resources and her income was limited. Id. He testified that “Our assessment was that he couldn’t get the care he needed.” Mims 1412. Butkus determined **“he was in that facility, we felt that was best for him.”** Mims 1413. At that time, Carolina Medical Review had notified Butkus that Babcock Center ICF/MRs were not in compliance with federal requirements and DHEC had notified Defendant Johnson that Kensington, the facility where Mims was placed by Butkus, would be terminated from the Medicaid program on April 30, 2005. Mims 0253.

By this time, because of the DHEC decision to terminate Kensington’s certification, DHHS had notified Defendant Johnson that she was required to notify all responsible parties via telephone that Kensington failed to meet the federally mandated Medicaid participation requirements. As director of DDSN for a person involuntarily admitted to the custody of DDSN, this notice would have been sent to Defendant Butkus. Mims Vol. 5 p. 82. Letter from DHHS to Defendant Johnson dated April 29, 2005. The notice required Defendant Johnson to place a sign “in visible areas throughout” Kensington advising anyone who entered that “assistance will be

made available for resident transfers to other participating facilities.” Id. Vol. 5 at 83. That letter required Johnson to inform DHHS “on a daily basis” of changes to the patient census. Id.

Butkus was copied on that letter, but instead of getting Mims out of a dangerous situation at Kensington, he took active steps to obstruct his release and back into his mother’s home and custody. Id. Babcock Center was receiving \$236.73 a day for Mims to remain at Kensington. Id. Letter from Hepfer to Harrison dated August 24, 2005.

As to Mims returning home to live with his mother, Butkus testified that “The main thing I knew was that the combination of the mom and the overall environment wasn’t something that we felt, based on our professional assessment, was in his interests to be in.” Mims 1415. He determined that Mrs. Mims “could not provide the care that he needed because of her resources ...not just monetary, psychological resources, certainly financial... We just didn’t think that she would be able to do that.” Mims 1415 and 1416. According to Butkus, “It was our judgment that based on these circumstances at that time for Edward, that it wasn’t in his interest.” Mims 1416. He repeated that “we thought that would be in the best interest of Edward” (for him to remain at Kensington) and to “remain in the involuntary status and stay where he was,” i.e. in a facility that had been decertified and Mims’ roommate had choked to death. Mims 1419. Butkus once again confirmed that he, personally, was responsible for making placement decisions regarding Mims. Mims 1420.

In her deposition, Defendant Lacy admitted to having discussions with Director Butkus about the decision not to allow Mims to leave Kensington. Page 23 of the deposition that begins at Mims 836. Lacy admitted having discussions about Mims’ release with an employee at Babcock Center. Id. at page 27 of Lacy Deposition. Although DDSN was not a party to the

guardianship proceedings in the probate court in 2005, Defendant Lacy involved herself in the attempt to obstruct the probate court from appointing Mrs. Mims as his guardian. This resulted in months of delay and additional costs in having Mrs. Mims appointed as her son's guardian. It is remarkable that even though this government agency had no standing as a party in the probate court (and its employees were eventually barred from the court room and required to wait in the hallway of the court house), DDSN went so far as to file a document captioned "Objections" with the court contesting Mrs. Mims' appointment. Mims 2188. Lacy attended an emergency meeting held in Judge McCulloch's offices on a Sunday afternoon, attempting to block his discharge from Babcock Center. Id. at page 31 of Lacy Deposition. Lacy admitted in her deposition that "I was in the discussions with the judge." Id. at 33. Lacy later attended the hearing on Mrs. Mims' Petition for appointment as permanent guardian. Id. at 48. Lacy claimed not to be involved in the decision to deny eligibility for Adult Day Health Care, but she was the DDSN official who communicated that decision to the probate judge. Id. at page 40 and 43. The decision to deny Mims that service was made by a DDSN employee who reports directly to Lacy. Id. at 44 and 45. That decision was subsequently reversed by DHHS. Id. at 46. Mims has alleged that this was an attempt to force his mother to return him to Babcock Center.

Lacy testified that she was responsible for providing oversight and assuring that abuse policies were being followed in DDSN programs. She was responsible for tracking trends and Butkus testified that she would "dig deeper into the data to get a better idea about why a certain provider might be at the statewide average or below and above." Id. at 66. Lacy was made aware of the findings of Carolina Medical Review that Babcock was out of compliance with federal standards. Id. at 70. She was responsible for "risk management" and "getting the reports of abuse

and neglect.” Id. at 82 and 83. She confirmed that Butkus had the “final authority over where people are placed.” Id.

Defendant Johnson is responsible for the day to day operations of the Babcock Center. Mims 0978. She admitted that audits had found significant problems in protecting the health and safety of Babcock Center residents. Mims 1033. Lacy admitted that a 2006 audit by DHHS found that Babcock Center did not “adequately address or correct all finding in its first corrective action plan” and that significant deficiencies were found. Mims 1035 and 1036. Babcock’s Board Chairman, Sue Slater, testified that Johnson, as director, was responsible for reviewing client beatings and that the ultimate responsibility to make sure employees do what they are supposed to do to protect the health and welfare of residents was Johnson’s. Mims 1578 and 1580. The Chairman of the Babcock Center, Sue Slater, testified that:

Houses were in terrible condition, not only at Clusters, but lots of houses were in terrible condition, broken windows, holes in the floor, all those kinds of things.

Mims 1584. According to the Chairman of the Babcock Center, Clusters closed “Because we felt it was not a good place to give good care,” despite DDSN having given Babcock Center half a million or more dollars to get the facility up to standard. Mims 1587 She testified that Johnson “was always involved” in discussions when an employee beat a consumer. Mims 1593. When asked “Where does the buck stop?” the Babcock’s Chairman responded “With her” (i.e. Judy Johnson). Mims 1593. The Chairman was called when Babcock refused to discharge Mims pursuant to the probate court order that authorized his mother to remove him. Mims 1612. She called Defendant Johnson, who told her “she’d take care of it.” Mims 1613. The Chairman of the Babcock Center admitted that the court-appointed visitor was not allowed into his residence and

she discussed this decision with Johnson. Mims 1616, 1618 and 1619.

The examiner who had been appointed by the probate court to examine Mims, Lennie Mullis, signed a sworn statement that she faxed her court order to Defendant Johnson on June 7, 2005, after being denied access into Mims' facility. Mims 2179. On June 8, 2005, Defendant Johnson left Mullis a message responding to her request to examine Mims. Mims 2179. Johnson's direct report, Dorothy Goodwin, informed Mullis that Mullis would be able to examine Mims at the facility at 6:00 p.m. that evening, but, when she arrived Mullis was again denied access to Kensington, despite having a court order to examine Mims. Mims. 2180.

There is credible and probative evidence in the record that demonstrates Johnson's personal involvement in the wrongful acts alleged by Mims.

Defendants' arguments that there is no "suggestion of direct participation" by these defendants in any of the alleged events at the Babcock Center are contradicted by these records. In any event, the Fourth Circuit has held 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). This liability is not based upon *respondeat superior* but upon "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." *Id.* at 798, citing *Slakan v. Porter*, 737 F.2d 368 (4th Cir.1984), cert. denied, 470 U.S. 1035, 105 S.Ct. 1413, 84 L.Ed.2d 796 (1985); 737 F.2d at 372-73. Indeed, supervisory liability can extend "to the highest levels of state government," and the Fourth Circuit has recognized that supervisory liability ultimately is determined "by pinpointing the persons in the decision making chain whose deliberate indifference permitted the constitutional abuses to continue unchecked."

Id., citing *Slakan*, 737 F.2d at 376. See *Spell v. McDaniel*, 591 F.Supp. 1090, 1109-10 (E.D.N.C.1984) (determining issue on supervisory liability is whether defendant proximately caused a violation of the plaintiff's rights by doing something or failing to do something he should have done). The Fourth Circuit has noted that this issue is ordinarily one of fact, not law, thus, it should not be decided in a motion by defendants for summary judgment. Id. See *Avery v. County of Burke*, 660 F.2d 111, 114 (4th Cir.1981).

The Fourth Circuit has set forth three elements necessary to establish supervisory liability under Sec. 1983: first, the supervisor must have 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; second, 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 finally, there must be an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff. Id. at 799.

In this case, Mims has well documented the personal knowledge of Butkus, Lacy and Johnson of the conduct engaged by subordinates which put Mims and citizens like him at great risk of harm. Audit after audit confirmed the failure of these defendants to protect the health and welfare of residents of DDSN programs, in particular Babcock Center residential programs. Mims 0359, 0416, 0490 and 0583. Indeed, DDSN recognized and reported that Babcock Center had four times the average rate of substantiated cases of abuse and neglect in 2004 (up from double the rate in 2002) and Butkus had ordered Johnson to downsize their residential programs by 50% on December 15, 2004 based on these findings. Mims 1445. Butkus personally made that decision to require half of Babcock's residents to go somewhere else, yet he also personally

decided to exercise his authority to force Mims to remain in a facility that was known to him to be dangerous. He determined that Mims would not be allowed to leave Kensington, even after dangerous conditions had been found to exist in survey after survey of that facility, by both state and federal oversight organizations. Mims 0198, 0208, 0250 and 0252.

A plaintiff may demonstrate deliberate indifference by showing the supervisor's "continued inaction in the face of documented widespread abuses." *Id.* at 373. *Shaw* at 199. A supervisor is not "expected to guard against the deliberate criminal acts of his properly trained employees when he has no basis upon which to anticipate the misconduct." But in this case, the federal Medicaid agency documented, just a few months before the injury to Mims' penis, that his roommate's death had not been thoroughly investigated, that the facility was not adequately staffed and that staff at Kensington was not properly trained. Mims 0204. CMS' finding of Immediate Jeopardy reported that "the facility failed to take appropriate actions to ensure client protections" and Butkus, Lacy and Johnson were all well aware of these findings. *Id.*

A supervisor's continued inaction in the face of documented widespread abuses, provides an independent basis for finding he either was deliberately indifferent or acquiesced in the constitutionally offensive conduct of his subordinates and plaintiff has demonstrated that indifference through repeated surveys and audits of which Butkus, Lacy and Johnson were aware and failed to take action to correct. *Shaw* at 199. The *Unequal Justice* report by Protection & Advocacy documented that these problems were systematic throughout the programs DDSN operated during the time period when Mims penis injury occurred and these individuals attempted to obstruct his release from the facility. Specific problems involving abuse and neglect of Babcock Center residents had consistently been reported since a 2003 audit by DDSN identified serious problems. Mims 0124. A federal survey reported in 2004 revealed widespread theft of funds belonging to Babcock Center residents by Babcock staff (Mims 0151) and horrific

physical injuries that were either unexplained or resulted from assault (Mims 0152 to 0163).

CMS had reported the failure of staff to report abuse and a staff member being fearful of reporting abuse. Mims 0157. CMS substantiated the allegations that Babcock Center failed to protect clients from repeated beatings and failed to report negligent supervision at Clusters. Mims 0164 to 0167. (Ed M. refers to the plaintiff in this report at Mims 0164.) In this report, CMS reported the failure to "ensure clients were not neglected, and placed at risk of harm." Mims 0174. It was substantiated that another client was beaten with a belt and that this client was raped by the same assailant. Mims 0175 and 0177. It was documented that the 78 year old victim was found beating on the walls of his Babcock Center residence and saying "I want out of this hell hole" and "I pray for Jesus to send me to heaven or hell." Mims 0178. It is difficult to imagine a more unconstitutional confinement. After this episode, the elderly resident was found to have a broken finger. Mims 0178. Plaintiff has well documented actual knowledge that subordinates of Butkus, Lacy and Johnson were engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to citizens like the plaintiff and their response was so inadequate that it showed "deliberate indifference to or tacit authorization of the alleged offensive practices." *Slakan*, 737 F.2d at 373.

Plaintiff has established through extensive credible documentation that the risk of harm in Babcock Center residences, in particular those where Butkus placed Mims (Clusters and Kensington) was "pervasive" and "unreasonable" and that not only were other residents harmed, but Mims himself suffered repeated injuries from assaults by others as well as many "unexplained" injuries. *Id.* at 373-74. What makes Mims' case even more egregious was that Butkus had obtained the involuntary committment based on false information provided to the

court-appointed GAL in 2001 and threatening his mother that his home visits would be terminated if she did not agree to the commitment. Mims 2038 and 2074. The event that initiated this action was Mims' mother insisting on prosecuting the Babcock Center employee who was witnessed beating Mims at Clusters. Mims 2038 and 2039. The GAL testified at the probate court hearings in 2007, where Butkus and Lacy attempted to obstruct Mrs. Mims being appointed as his permanent guardian, that she recommended that Mims be involuntarily admitted in 2001 "based on this false information which had been provided to me by employees of the Babcock Center and the Department of Disabilities and Special Needs. Mims 2040. ("After Edward was injured at another Babcock Center facility (Kensington) in 2005, I was provided with evidence showing that Babcock Center employees had intentionally provided false information to me in 2001 in order to prevent Edward from returning to the custody of his mother." Mims 2040). This GAL testified that she had represented "a number of residents of Babcock Center who had been abused or neglected by Babcock Center employees and it was my opinion that Edward was not safe there." Mims 2041.)

While the record is totally devoid of any evidence that Butkus, who acknowledged that he was responsible for placement decisions, made any effort to monitor Edward's health and safety between the date of his involuntary admission in 2001 and the date of the court order giving his mother the authority to remove him from Babcock Center in 2005. But Butkus suddenly became concerned about what would happen to Mims if he returned to live with his mother. Once she was appointed as Mims' permanent guardian, she could pursue litigation against DDSN and Babcock Center. His actions are further evidence of obstruction of justice and intimidation of a witness. (Edward's mother signed a sworn statement stating that she was threatened with her

weekend visits being terminated if she did not agree to the involuntary admission in 2001. Mims 2076.) 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." Mims 2017.

"But for" the fraudulently obtained involuntary admission in 2001, the record shows that Edward would have been removed from the Babcock Center by his mother and would not have suffered any more of these injuries after he was beaten by Carl Anthony. Mims' mother literally begged for his return home in November of 2001, as she had requested in April 2001. Mims 2104. After her request was denied by DDSN, Mims was beaten with a belt two months later, suffering 27 marks all over his body. Mims 2091, 2112 and 2117.

It is undeniable that Defendant Butkus held the key to Mims' release and that, as the holder of the key to his confinement, Butkus was personally responsible for injuries that resulted from his failure to protect Mims from harm. Butkus was not just a supervisor who was removed from the bad acts in this case. Butkus made the decision himself to involuntarily commit Mims to DDSN. Once he obtained the order of commitment, there is no evidence in the record that he did anything to protect Mims, even though he received, personally, multiple reports of serious injuries and abuse. Butkus became personally liable for his care, because he has admitted that he was the person responsible for making placement decisions.

Lacy personally participated in the probate court proceedings attempting to obstruct the appointment of his mother as guardian. Amended Complaint, paragraph 50. Johnson was personally involved in efforts to obstruct the court-appointed examiner from meeting with Mims

at the Kensington facility. As a result of these active efforts of the individual defendants and the agency (which was not a proper party to the proceedings) filing a document captioned "Objections," the appointment of a permanent guardian was delayed for months and the expenses of the guardianship were increased. Then, once they lost the battle to prevent Mrs. Mims from being appointed as Mims' guardian, these individual defendants entered into a conspiracy to deny Adult Day Health Care (operated by a private company that is a qualified provider of Medicaid services) services in an attempt to force Edward back into the Babcock Center day program. Amended Complaint at 51, 52 and 53. Mims has met the third prong of the criteria to show supervisory liability. In *Slakan*, the Fourth Circuit noted that the "proof of causation may be direct ... where the policy commands the injury of which the plaintiff complains ... [or] may be supplied by [the] tort principle that holds a person liable for the natural consequences of his actions." *Slakan*, 737 F.2d at 376 (quoting *Wellington*, 717 F.2d at 936). The injuries Mims suffered were directly caused by the bad acts of these individual defendants. In *Stroud*, the Fourth Circuit held a supervisor liable where he had knowledge of just three incidents where his employee had used excessive force which posed an unreasonable risk of harm to victims. *Supra*. Mims has documented that Butkus, Lacy and Johnson knew of years of unabated violations of the constitutional rights of Mims and other residents of the Babcock Center. In *Stroud*, the Fourth Circuit found that the plaintiff's death was a natural and foreseeable consequence of the supervisor's failure to investigate, or even to address, the pervasive violent propensities of one of his officers. *Supra*. As in *Stroud*, Butkus, Lacy and Johnson were aware of the constant and dangerous threat to Mims' welfare. Mims has presented sufficient evidence to withstand summary judgment on the element of causation and a reasonable jury could find that these defendants, like *Stroud*, acted with deliberate indifference and that a causal link exists *Stroud* at

800.

In *Madison v. Babcock Center*, the South Carolina Supreme Court held that to establish a causal link, defendants' 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. 638 S.E.2d 650, 662, 371 S.C. 123 Citing *Hughes v. Children's Clinic, P.A.*, 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977) . Ordinarily, the question of proximate cause is one of fact for the jury, and it may be resolved either by direct or circumstantial evidence. The trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence. *Childers*, 248 S.C. at 324, 149 S.E.2d at 765; *McNair v. Rainsford*, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct.App.1998) . In this case, Mims argues that the only reasonable inference that can be drawn from the evidence is that the Court should grant his motion for summary judgment and deny defendants' motions for summary judgment. *Id.*

Defendants argue that since *Ashcroft v. Iqbal*, "there is some doubt as to whether a claim for conspiracy can be still viable at all." Defendants' Motion for Summary Judgment at 11. 129 S.Ct. 1937 (2009). The Fourth Circuit has not adopted this reading of *Ashcroft*, and has repeatedly since recognized the existence of such a claim, as recently as April of 2013. *Gandy v. Robey*, Case No. 11-2248 (4th Cir. April 4, 2013). In that case supervisory liability was not found to exist once the court applied the elements set forth in *Stroud*, but the Fourth Circuit did not suggest that claims for supervisory liability have been extinguished in this circuit. In *Bridges v. Keller*, the Fourth Circuit recognized the existence of claims for supervisory liability, or "unconstitutional policy administration," when those elements are met. *Bridges v. Keller*, Case No. 12-7514 (4th Cir. 2013). Plaintiff in this case has proven the existence of "predicate constitutional violations" required to show supervisory liability. *Evans v. Chalmers*, 703 F.3d

2. Plaintiff has stated a claim for relief for conspiracy under 42 U.S.C. 1985

Defendants argue that Mims has failed to show that defendants were “motivated by a specific class-based invidiously discriminatory animus to []deprive the plaintiff[s] of equal enjoyment of rights secured by the law to all.” Defendants’ Memorandum at 16. This argument fails because Mims has clearly stated in his complaint facts showing that he is a member of a class of persons who have historically experienced discrimination, as a person who has mental retardation and other disabilities. In the Bill of Rights of Long Term Care Residents, the South Carolina Code of Laws provides in 44-81-20 that “The General Assembly finds that persons residing within long-term care facilities are isolated from the community and often lack the means to assert their rights fully as individual citizens.” Certainly, the record in this case shows that Mims was stripped of his right of liberty and to be free from abuse and exploitation when he was forced to remain in an institution personally chosen by Butkus. Having committed no offense except being born with a disability, Mims was stripped of his right to live in peace with his mother in the family home, free from government interference. Citizens of South Carolina who do not participate in DDSN programs expect to be provided with protection from assault and theft when they are in their homes or go out into the community. Plaintiff has provided extensive evidence showing that persons who, like Mims, have mental retardation and live in DDSN programs are systemically subjected to physical and sexual assaults without prompt and independent investigation by law enforcement or protection from government and private entities that profit from their presence there. Plaintiff alleges in his complaint that he and other similarly situated persons have been deprived of the equal enjoyment of the right to liberty and freedom

from abuse and exploitation that are secured by the law to all non-disabled persons.

Defendants argue that Mims has not proven that he is a member of a protected class. But, in *Lake v. Arnold I*, the Third Circuit established that “42 U.S.C. S 1985(3) is sufficiently broad to protect the mentally retarded as a class.” 112 F.3d 682 (3d Cir. 1997) (*Lake I*). In that case, Elizabeth Lake, who has mental retardation, was sterilized by doctors at the direction of her father and step-mother. When Elizabeth later learned that she was sterile, she sued her father and step-mother as well as the hospital and doctors involved in her surgery under 42 U.S.C. §§ 1983 and 1985(3) and state law. The Third Circuit ruled that “§§ 1983 and 1985(3) are designed to compensate victims whose federal constitutional or statutory civil rights have been violated and to prevent future abuses of state power[.]” *id.* at 369. In that case, the court determined that mentally retarded persons are a protected class and that forced sterilization exemplified the discrimination against such persons that § 1983 and 1985(3) were designed to remedy. That court held that:

The history of discrimination against individuals with disabilities, while less noted than racial or sex discrimination, is no less a story of a group that has traditionally suffered not only physical barriers but the badge of inferiority emplaced by a society that often shuns their presence.

Id. The Third Circuit recognized that Congress found in enacting the Americans with Disabilities

Act that:

Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to the position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

Id. citing 42 U.S.C. 1201(a)(7).

Defendants argue that “the Fourth Circuit “has rarely, if ever found that a plaintiff has set forth sufficient facts to establish a section 1985 conspiracy.” Defendant’s Memorandum at 16, quoting *Simmons v. Poe*, 47 F.3d. But in *Anthony v. Ward*, the Fourth Circuit upheld a \$510,000 jury verdict for violation of 42 U.S.C. 1985. No. 07-1932 (4th July 7, 2009). That lawsuit was brought against state officials in South Carolina who conspired to terminate Anthony’s employment with the South Carolina Department of Corrections. In a case arising out of the same set of facts, another employee, Henry Pridgen, brought an action for conspiracy against these officials in the state court *Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (S.C.App. 2010). The jury returned a verdict for \$372,000 in favor of Pridgen, finding that the defendant state officials conspired against him. This verdict was affirmed by the South Carolina Court of Appeals. Id.

3. Plaintiff’s claims are not barred by the Tort Claims Act

Plaintiff’s lawsuit is not barred under the Tort Claims Act and the tolling statute contained at South Carolina Code § 15-3-545 extends the liability of the agencies back to May 7, 2000, before DDSN caused Mims to be involuntarily committed and placed at the Babcock Center. 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.

The claims against DDSN are not barred under the Tort Claims Act because they were filed within the statute of limitations. The claims against Babcock Center are brought against a private corporation that is quasi-governmental, having been treated by DDSN as a "local DSN Board. But there is no evidence in the record that Babcock Center is covered by the Tort Claims Act or the Insurance Reserve Fund, although Babcock Center is treated with preference by DDSN as if it is a statutory local DSN Board. Mims has raised an issue of fact about the status of the Babcock Center in regards to the Tort Claims Act which should not be resolved by this Court granting defendants' motions for summary judgment.

4. Defendants are liable for negligent supervision

In *Madison v. Babcock Center*, the South Carolina Supreme Court held that Babcock Center and DDSN both have a duty of care to protect its residents which may be litigated in an action for negligence. 638 S.E.2d 650 (S.C. 2006). In that case, the Court held that a resident of the Babcock Center may succeed in a negligence action against these same defendants, ie. the Babcock Center and DDSN, by showing that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages. *Id.* Plaintiff has pled these elements and has provided this court with extensive credible evidence to support his claims for negligence in this case.

Madison, the plaintiff in that case, alleged causes of action for negligence, gross negligence, and willful indifference against Respondents. In the complaint, Madison alleged:

...among other things, that both Babcock Center and Department owed a duty of care to Appellant, which they breached by *failing to exercise sufficient control and supervision over Appellant and other Babcock Center residents*. Appellant alleges both entities *failed*

to properly supervise facility staff, both failed to heed the previous warnings of Appellant's mother about inappropriate sexual contacts between Appellant and current or former male residents of Babcock Center, and both ignored the requests of her parents that she be released from Babcock Center.

Id 132 and 133. As in Mims' case, the warnings of Madison's mother and her complaints fell on deaf ears at DDSN and the Babcock Center. In that case, Madison contracted a sexually transmitted disease. Id. The South Carolina Supreme Court held that Babcock Center had "a duty to exercise reasonable care in supervising and providing care and treatment to clients in its custody." Id. at 656. The Supreme Court also recognized that under South Carolina common law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger. Id. at 656. But, the Court recognized five exceptions to this rule: (1) where the defendant has a special relationship to the victim; (2) where the defendant has a special relationship to the injurer; (3) where the defendant voluntarily undertakes a duty; (4) where the defendant negligently or intentionally creates the risk; and (5) where a statute imposes a duty on the defendant. *Id. Citing Faile v. S.C. Dept. of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002) (listing cases and authority supporting each proposition). All of these elements are present in Mims' case.

In the *Madison* opinion, the Supreme Court recognized that "An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance. Id. 657. *Jensen v. Anderson County Dept. of Soc. Servs.*, 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991) ; *Miller v. City of Camden*, 317 S.C. 28, 33-34, 451 S.E.2d 401, 404 (Ct.App.1994) .The Supreme Court held that:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise

reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." Restatement (Second) of Torts § 323 (1965) . In addition, "[o]ne who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him." Restatement (Second) of Torts § 324 (1965) .

Id. 136 to 137. The Supreme Court held that Madison fell within the first, third, fourth, and fifth exceptions specified in *Faile*, as well as within the circumstances outlined in Restatement (Second) of Torts § 323 -324 . Id. at 657.

As with Mims, the Babcock Center had a special relationship with Appellant because Madison was a client with special needs and disabilities and was admitted for care and treatment at the center. Id. DDSN has a special relationship with the Babcock Center. Id. The Babcock Center voluntarily undertook the duty of supervising and caring for Mims and Madison as provided in its contractual relationship with Department. Also as in this case: "Babcock Center allegedly acted negligently in creating the risk of injury to Appellant by not properly supervising her and allowing improper sexual contacts between Appellant and men." Also as with Madison, "the center had a statutory duty to exercise reasonable care in supervising Appellant." *See e.g.* S.C.Code Ann. §§ 44-20-30(2), (11), and (16) (2002) (defining client, mental retardation, and residential programs); S.C.Code Ann. §§ 44-20-710 to -1000 (2002) (addressing licensing of facilities and programs for mentally disabled persons); S.C.Code Ann. §§ 44-26-10 to -220 (2002) (rights of mental retardation clients). There defendants also had duties to Mims imposed by federal law in the Medicaid Act and its regulations.

The following statement applies equally to Mims as with Madison: "In short, Babcock Center undertook a duty, for consideration, to render services to Appellant which the center should have recognized as necessary for the protection of Appellant. Thus, Babcock Center had a duty to control Appellant's conduct to the extent necessary to prevent her from harming herself or

to prevent others from harming her while staying at the center.” *Id.* safe environment in actions brought under 42 U.S.C. §§ 1983.” *Id.*

In its memorandum, Defendants ignore the fact that the Supreme Court instructed the defendants and counsel in this case in *Madison* 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. *See Lee v. Dept. of Health and Rehabilitative Servs.*, 698 So.2d 1194, 1199 (Fla.1997) (mentally retarded woman who became pregnant while in custody of state agency stated cause of action for negligence against agency employees who allegedly failed to follow agency's rules and carry out their assigned duties in supervising patients); *Butler v. Circulus, Inc.*, 557 S.W.2d 469, 475 (Mo.App.1977) (mentally retarded minor plaintiff who was resident and student at defendant's licensed institution stated cause of action for negligence against defendant for failing to supervise employees who allegedly physically and mentally abused plaintiff as part of a behavior modification program); Restatement (Second) of Torts §§ 323 -324 ; *cf. Rogers v. S.C. Dept. of Parole & Comm. Corrections*, 320 S.C. 253, 464 S.E.2d 330 (1995) (holding that common law duty to warn arises when a person being released from custody has made a specific threat of harm directed at a specific individual); *Youngberg v. Romeo*, 457 U.S. 307, 319, 102 S.Ct. 2452, 2460, 73 L.Ed.2d 28 (1982) (under substantive component of Fourteenth Amendment's Due Process Clause, state must provide involuntarily committed mental patients with services necessary to ensure their reasonable safety from themselves and others, as well as freedom from undue restraint)...

Id. at 138 to 139.

As in this case, DDSN argued in *Madison* that it was not liable for the torts committed by its independent contractor, the Babcock Center. *Id.* at 660. S.C.Code Ann. § 15-78-60(20) (2005) 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.” But the Supreme Court disagreed “... because Department owes a common law duty of care directly to Appellant” *Id.* The fact that an independent contractor provided services to Madison, or even the fact a third party may have committed a criminal act in harming Appellant, does not affect the existence of Department's duty. *Id.* Where DDSN 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. at 660.

The Supreme Court held in *Madison* that “Gross negligence is ordinarily a mixed question of law and fact.” *Faile*, 350 S.C. at 332, 566 S.E.2d at 545 (citing *Clyburn v. Sumter County School Dist. # 17*, 317 S.C. 50, 451 S.E.2d 885 (1994)). But, in Mims’ case, “ the evidence supports but one reasonable inference,” which is that the defendants acted negligently, carelessly, recklessly and that these actions were willful and wanton, causing injuries over a long period of time to Mims. Thus, this Court should grant Mims’ motion for summary judgment. But, if that motion is not granted, the issues raised by Mims must be resolved by a jury and it would be inappropriate to award summary judgment to these defendants based on the record in this case.

The “care, treatment, and rights of mentally retarded or disabled persons, are governed by a comprehensive scheme of statutes and regulations.” *See e.g.* S.C.Code Ann. §§ 44-20-10 to -1170 (2002 & Supp.2005) (S.C. Mental Retardation, Related Disabilities, Head Injuries, and Spinal Cord Injuries Act); S.C.Code Ann. §§ 44-21-10 to -80 (2002) (Department of Disabilities and Special Needs Family Support Services); S.C.Code Ann. §§ 44-23-10 to -1150 (2002 & Supp.2005) (provisions applicable to both mentally ill and mentally retarded persons); S.C.Code Ann. §§ 44-26-10 to -220 (2002) (rights of mental retardation clients); and 26 S.C.Code Ann. Regs. 88-105 to 88-920 (Supp.2005) (regulations promulgated by Department of Disabilities and Special Needs). The Department's operations and responsibilities also are affected by its own internal standards, policies, and guidelines it has promulgated for particular programs as a result

of statutes or regulations. *Id.* In addition, these programs must comply with all applicable federal laws contained in the Medicaid Act. *Doe v. Kidd I*, 501 F.3d 348 (4th Cir. 2007).

5. Mims claim for violation of the Americans with Disabilities Act is not moot or barred by the statute of limitations.

Mims has alleged violations of the Americans with Disabilities Act because the defendants have failed to provide necessary services in the most integrated setting appropriate to his needs and has operated their programs in such a way to prevent Mims and other persons from remaining in their homes by failing to pay caregivers of home based services commensurate with funding DDSN pays for caregivers who provide institutional services. Amended Complaint at paragraphs 82 to 89. Mims alleges that these practices have caused Plaintiff to be at risk of returning to an institution and that he has suffered serious harm and threats of harm in violation of the Americans with Disabilities Act. *Fisher v. Oklahoma Health Care Authority*, 335 F3d 1175,1185 (10th Cir. 2003) ; *Pashby v. Deliah*, 709 F 3d 307, 322 (4th Cir 2013). He has alleged that DDSN and the Babcock Center have operated their programs so as to keep their institutions and workshops full. Amended Complaint at 86. Mims has alleged that providing the services he has requested would not fundamentally alter the nature of the services, programs or activities of the State. Paragraph 87. *Peter B. v. Sanford*, 6:10-cv-00767-TMC (SCDC Nov 24, 2011); adopted in Entry 95 (SC DC March 7, 2011). Mims alleges that these violations of the Americans with Disabilities Act are subject to repetition, yet they have evaded review.

A violation of the ADA occurs when individuals who have disabilities, who choose to live in the community are not provided services needed to prevent risk of entry into an institution. *Peter B. v. Sanford*, 6:10-cv-007670JMC-BHH, Entry 71 (S.C.D.C. November 24,

2011) adopted in Entry 95, (S.C.D.C. March 7, 2011) and *Pashby v. Delia*, 709 F.3d 307, 322 (4th Cir. 2013). 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 hours outside of an institution. Exhibit 1, Letter from Beverly Buscemi denying request for additional respite hours dated May 7, 2013. Yet, DDSN will provide Mims with an unlimited amount of hours and days of respite care in a DDSN institution, at significantly greater costs.

Mims' claims for violations of the ADA are not time barred, not only because of the tolling statute, but also because they are ongoing.

6. The adjudication of Mims' incapacity does not limit the South Carolina tolling statute.

Defendants argue that "it is clear that he was not adjudicated to be incapacitated until the order of June 14, 2005." Defendants' Brief at 22. The defendants seem to have forgotten that Butkus himself made the decision to have Mims not only adjudicated to be incapacitated in 2001, but to have taken away his mother's right to determine where he would live. Mims 2045 and 2047. A Richland County Probate Court Order that was based on a psychological report of a DDSN psychologist found that Mims is "profoundly mentally retarded and has complex medical needs." Mims 2051. According to his school records, Mims has an age equivalent of a 20 month old child. Mims 2070. See also report of DDSN psychologist, Meredith Cleveland at Mims 2073. Defendants' argument that Mims had "all the rights of citizenship unless and until the person is

adjudicated to be incompetent” at pages 22 and 23 of their Brief demonstrates the bad faith they have exhibited since Mrs. Mims insisted that the Babcock employee who beat her son be held accountable. An emergency appointment was made on June 14, 2005 to authorize Mims’ temporary guardian to secure his release from the Babcock Center. Mims 2184. Due to the delays caused by DDSN and the Babcock Center (see “Objections” at Mims 2188), Mrs. Mims was not appointed as Mim’s full guardian until December 19, 2005. Mims 2195.

Defendants cite no authority for its argument that appointment of a guardian terminates the tolling period provided for in South Carolina Code of Laws 15-3-40. Their reliance on *Stephens v. Draffin* is misplaced. 327 S.C. 1, 5, 488 S.C.2d 307, 309 (1997). In that case, a patient and his wife, who were neither incompetent sued the husband’s doctor for negligence. Nothing in that case discusses the tolling of the statute of limitations required by South Carolina Code of Laws Section 15-3-40 and neither of the plaintiffs were mentally incompetent. Under DDSN’s theory, the agency could Petition the probate court for the appointment of someone who would not bring an action against DDSN or the Babcock Center and simply ride out the statute of limitations, thereby depriving the disabled person, who had no capacity to object to the appointment, of his rights under the tolling statute. While a guardian may bring an action in the courts on behalf of the ward, pursuant to Rule 17(c) of the South Carolina Rules of Civil Procedure, a guardian is charged by the court only to protect his person. South Carolina Code of Laws 62-5-304 authorizes the probate court to appoint a guardian where “the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person.” Only a conservator has a duty to protect the financial interests of an incapacitated person, but nothing in South Carolina law obliges a conservator to do so or

suggests that the tolling statute would be shortened by such appointment. South Carolina Code of Laws 62-5-424. No conservator has ever been appointed for Mims.

In *Lombard v. Eunice Kennedy Shriver Center for Mental Retardation*, the court held that the appointment of a guardian does not remove one's disability, thus the fact that the plaintiff's guardian could have brought the suit earlier did not alter the tolling effect. 556 F. Supp 677 (D. Mass. 1983). Likewise, in *Paavola v. Saint Joseph Hosp. Corp.*, the court held that the state statutory saving provision applicable to plaintiffs who are insane was not removed by the appointment of a guardian. 119 Mich. App. 10, 325 N.W.2d 609 (1982). The court considered defendants' arguments in light of the significant public policy of protecting and preserving the substantive rights of mentally incompetent persons and the absence of evidence of legislative intent to suggest that the exemption from the running of the statute of limitations is to end upon the appointment of a guardian. *Id.* See also *Professional Rehabilitation Associates v. State Farm Mut. Auto. Ins. Co.*, 228 Mich. App. 167, 577 N.W.2d 909 (1998). In *Desert State Life Management Services v. Association of Retarded Citizens*, the Supreme Court confirmed that the tolling statutes preserve the ability of the incapacitated person to bring claims on their own behalf until the disability is removed and that the appointment of a guardian did not have the effect of starting the running of the period of limitation tolled by the virtue of the disability of mental incapacity. 939 F. Supp. 835 (D.N.M. 1996).

There is no evidence that Mrs. Mims was aware of the evidence of records of injuries showing the neglect of these defendants and she did not at the time of her appointment know of the findings later made public through the audit conducted by the South Carolina Legislative Audit Council.

7. Plaintiff has provided expert testimony of the neglect of these defendants.

The Supreme Court of South Carolina established the criteria to determine neglect in a case involving these same defendants in *Madison v. Babcock Center* and nowhere in that case does the Court suggest that the plaintiff must provide expert testimony prior to trial. In any event, plaintiff has provided not only audits conducted by experts from state, federal and private authorities, but at Mims 2262, plaintiff provided the expert opinion of an RN who has extensive experience in critical care, trauma and reviewing medical records to determine whether appropriate services are being provided. This RN signed a sworn statement stating that the likelihood that Mims would be injured was foreseeable and that defendants failed to meet the standard of care by placing him in facilities with physically and sexually aggressive individuals. The record is replete with reports of professionals who have confirmed the failure of these defendants to protect the health and safety of persons living in Babcock Center facilities.

The claims for violation of Mims' civil rights, conspiracy and violation of the Americans with Disabilities Act certainly do not require the "demonstration" defendants require prior to trial.

8. Plaintiff has alleged unjust enrichment and defendants material issues of fact exist for this claim to be presented to the jury.

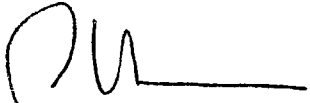
A claim for unjust enrichment requires the showing that the plaintiff has "conferred" a benefit, not that the plaintiff has paid money to the defendant. The records plaintiff has presented document that these defendants were "conferred" benefits through the payment of Medicaid funds allocated to plaintiff and that they failed to provide the services that they were paid to provide. Defendants have failed to prove that there is no material fact to support plaintiff's claim

for unjust enrichment. A review of the audits plaintiff has provided documents that it would be inequitable for these defendants to retain funds for services realized. In the event of a recovery under this claim, DHHS certainly could argue that it is entitled to recoupment, but that is not a question that should be answered at this junction.

Conclusion

For the reasons set forth herein, plaintiff prays that the Court deny defendants' motions for summary judgment, that the memorandum filed by the Babcock Center be stricken from the record and that plaintiff's motion for summary judgment be granted.

Respectfully submitted,

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

Patricia L. Harrison
611 Holly Street
Columbia, South Carolina 29205

June 28, 2013

Columbia, South Carolina

Feb 3, 2014

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
Edward Mims, by and through his legal	)	
guardian, Margaret Mims,	)	Civil Action No. 07-CP-40-3365
	)	
Plaintiff,	)	NOTICE AND
	)	MOTION TO CORRECT CLERICAL
v.	)	ERROR (RULE 60(a))
	)	
Babcock Center, Inc., Judy Johnson,	)	(DEFENDANTS SOUTH CAROLINA
South Carolina Department of	)	DEPARTMENT OF DISABILITIES AND
Disabilities and Special Needs,	)	SPECIAL NEEDS, KATHI LACY AND
Kathi Lacy, and Stanley Butkus,	)	STANLEY BUTKUS)
	)	
Defendants.	)	
_____	)	

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for the Defendants South Carolina Department of Disabilities and Special Needs, Kathi Lacy and Stanley Butkus will move before the Presiding Judge of the Court of Common Pleas for the Fifth Judicial Circuit, County of Richland, at the Richland County Courthouse for an order, pursuant to Rule 60(a), SRCP, correcting a clerical error in the Order granting summary judgment to those Defendants.

The basis for this motion is as follows: On January 21, 2014, the Court issued two Orders, one dismissing the Babcock Defendants, and the other dismissing the DDSN Defendants. These Orders were received by undersigned counsel on January 27, 2014. However, the signature page of the Order dismissing the DDSN Defendants is identical to the signature page of the Order dismissing the Babcock Defendants.

It appears that there was a clerical error, and that the last page of the Order dismissing the DDSN Defendants should be p. 28 of the proposed Order submitted by the DDSN Defendants, rather than the current last page, which is numbered p. 23 and which is identical to p. 23 of the

Order dismissing the Babcock Defendants. Copies of the two Orders as signed, as well as a copy of p. 28 of the DDSN Defendants' proposed Order, are attached.

The requested correction is well within the power of Judge Cooper, the judge who signed the two Orders, to make. Rule 60(a), SCRCF, provides in pertinent part as follows:

(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. . . . The ending of a term of court or departure from the circuit shall not operate to deprive the trial judge of jurisdiction to correct such mistakes. . . .

For the foregoing reasons, the DDSN Defendants respectfully request that the Order dismissing the DDSN Defendants be corrected by removing the current signature page and substituting the signature page numbered 28, attached hereto.

Undersigned counsel hereby certifies that he consulted with opposing counsel, Patricia Harrison, by e-mail of Friday morning, January 31, 2014, regarding her position on this motion, (including the need to proceed by motion rather than informally), but as of mid-day on February 3, 2014, has received no response.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

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ATTORNEYS FOR DEFENDANTS THE SOUTH
CAROLINA DEPARTMENT OF DISABILITIES
AND SPECIAL NEEDS, KATHI LACY AND
STANLEY BUTKUS

Columbia, South Carolina

February 3, 2014

DAVIDSON & LINDEMANN, P.A.

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Steven R. Spreewers
Todd R. Flippin

*Also Admitted In North Carolina
†Certified Mediator

Of Counsel
Kenneth P. Woodington

February 3, 2014

The Honorable Jeanette W. McBride
Clerk of Court, Richland County
Post Office Box 2766
Columbia, South Carolina 29202

RE: Edward Mims, by and through his legal guardian, Margaret Mims v. Babcock Center, Inc.,
Judy Johnson, the South Carolina Department of Disabilities and Special Needs, Kathi Lacy
and Stanley Butkus
Civil Action Number: 07-CP-40-3365
Claim Number: 44654
Date of Incident: 1/04/99?
Our File Number: 104.7785

Dear Ms. McBride:

Please find enclosed for filing the original and one copy of the Notice and Motion to
Correct Clerical Error in the above-referenced matter. Please file the original and return the copy
to me with the filing date stamped thereon in the envelope provided.

By copy of this letter, I am herewith serving a copy of same on all counsel of record.

Very Truly Yours,

DAVIDSON & LINDEMANN, P.A.



Kenneth P. Woodington

KPW/nmb
Enclosures

cc: The Honorable G. Thomas Cooper, Jr.
Ms. Patricia L. Harrison, Esquire
Christian Stegmaier, Esquire

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND)

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

Civil Action No. 07-CP-40-3365

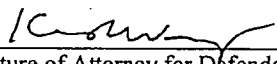
☐ Plaintiff,

v.

**MOTION & ORDER INFORMATION
FORM COVER SHEET**

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

☒ Defendants.

Plaintiff's Attorney: Patricia L. Harrison, Esquire 611 Holly Street Columbia, South Carolina 29205 Phone: 803-256-2017 Fax: 803-256-2213 E-Mail: Plh.cola@att.net		Defendant's Attorney: Kenneth P. Woodington Post Office Box 8568 Columbia, South Carolina 29202-8568 Phone: 803-806-8222 Fax: 803-806-8855 E-Mail: kwoodington@dml-law.com; Other:	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Motion to Correct (Rule 60(a)) Estimated Time Needed: 20 minutes Court Reporter Needed: Yes			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for Defendant		February 3, 2014 Date Submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE _____ CODE: _____ DATE: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Edward Mims, by and through his legal)
guardian, Margaret Mims,)
Plaintiff,)

Civil Action No. 07-CP-40-3365

v.)

NOTICE AND
MOTION TO CORRECT CLERICAL
ERROR (RULE 60(a))

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

(DEFENDANTS SOUTH CAROLINA
DEPARTMENT OF DISABILITIES AND
SPECIAL NEEDS, KATHI LACY AND
STANLEY BUTKUS)

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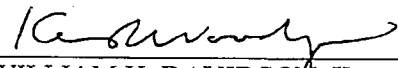
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Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

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ATTORNEYS FOR DEFENDANTS THE SOUTH
CAROLINA DEPARTMENT OF DISABILITIES
AND SPECIAL NEEDS, KATHI LACY AND
STANLEY BUTKUS

Columbia, South Carolina

February 3, 2014

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

CONCLUSION

For the foregoing reasons, the Court concludes that the DDSN Defendants' Motion for Summary Judgment should be granted and that this action should be, and hereby is, dismissed with prejudice in all respects with regard to Defendants South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stanley Butkus.

AND IT IS SO ORDERED.

G. Thomas Cooper, Jr.
Circuit Court Judge
Fifth Judicial Circuit

_____, South Carolina

_____, 2013

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2007CP4003365Margaret MimsBabcock Center IncEdward MimsJudy Johnson

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

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

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 22 January 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Patricia Logan Harrison

Peter Demos Protopapas

Kenneth P. Woodington

Joel W. Collins Jr.

Christian Stegmaier

William H. Davidson II

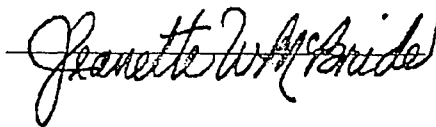
Leslie A. Cotter Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court



SCANNED

SCRPC Form 4C (10/2011)