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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellant Case No. 2014-001373

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

v.

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

Volume V

RECORD ON APPEAL

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

	) C/A No: 07-CP-40-3365
Edward Mims, by and through his legal guardian, Margaret Mims,	)
Plaintiff(s),	) Deposition
vs.	) of
Babcock Center, Inc., Judy Johnson, the South Carolina Department of Disabilities and Special Needs, Kathi Lacy and Stanley Butkus,	) LEIGH FLYNN (Part I)
	) "CONFIDENTIAL, UNDER SEAL BY AGREEMENT OF COUNSEL"
Defendant(s),	)

Deposition of LEIGH FLYNN, taken before Robin Spaniel, 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 10:11 a.m., Wednesday, September 2, 2009, at the office of Davidson & Lindemann, P.A., Columbia, South Carolina.

Reported by:

Robin Spaniel

1 No. 1 for identification.)
2
3 Q And in response to that subpoena, did you bring any
4 documents with you today?
5 **A I did.**
6 Q What did you bring?
7 **A I brought my file in the Mims' case.**
8 Q Could I see it, please, ma'am?
9 **A (Witness Complies)**
10
11 MR. COTTER: And, Mr. Davidson, while you're
12 reviewing that, let me just say on the record
13 that I don't think there are any privileged
14 and confidential documents in there. And I
15 don't know whether you're intending to put
16 this deposition under seal, but I would
17 request that you do put it under seal out of
18 an abundance of caution just so that if there
19 are any privileged documents in there that
20 were inadvertently provided that we would have
21 a chance to reach back and request that the
22 confidential documents be returned. And I
23 hope that would be without objection by any
24 counsel.
25 MS. HARRISON: No objection.

1 MS. NEUSCHAFER: No objection.
2 MR. COTTER: Thank you.
3 MR. DAVIDSON: I don't have a problem with that.
4 MR. COTTER: Thank you, sir.
5 MR. DAVIDSON: Although, it doesn't appear to be
6 anything necessarily in the --
7 MR. COTTER: That was my initial impression as well.
8 Thank you.
9
10 Q Ms. Flynn, and I'm going to mark these as an
11 exhibit in a few minutes to your deposition. Are
12 you presently or have you been involved with any
13 cases prior to this one with Ms. Harrison?
14 **A Yes, I have.**
15 Q What role?
16 **A Sometimes I've been attorney; sometimes I've been**
17 **guardian ad litem.**
18 Q What are the nature of those cases?
19 **A Usually I am appointed by the court to act as**
20 **guardian ad litem for individuals who have been**
21 **called before the court in some fashion.**
22 Q Okay. Do you know if Ms. Harrison has ever
23 recommended you to the court to be?
24 **A I think she has.**
25 Q All right. And you know how many times that is?

1 else with Department of Disabilities and Special
2 Needs?
3 A **Don't remember.**
4 Q Now, you had made a statement that I -- in
5 (By Mr. Davidson) paragraph 12 of your affidavit, "That I made
6 recommendations to the probate court to involuntary
7 commit Edward to the Babcock Center based on this
8 false information which had been provided to me by
9 employees of the Babcock Center and the Department
10 of Disabilities and Special Needs." See that
11 statement?
12 A **Uh-huh.**
13 Q Ms. Flynn, is it your position that Mr. Hill
14 provided you false information in regard to Mr.
15 Mims?
16 A **Mr. Hill, no.**
17 Q Is it your position that Ms. Colleen Honey provided
18 you false information?
19 A **No.**
20 Q Okay. To your knowledge, do you know anyone at the
21 Department of Disabilities and Special Needs that
22 provided you any information that was false in
23 regard to Edward Mims and the probate hearing?
24 A **Well, if I may, I think a more accurate phrasing of**
25 **that -- I should have said there was a lack of**

1 **information.**
2 Q Well, you understand what an affidavit is.
3 A **I do.**
4 Q Okay. You don't remember speaking to Dr.
5 Christian, okay, correct, about Edward Mims?
6 A **I don't specifically remember talking to him --**
7 Q All right. Do you recall --
8 A **-- about Edward Mims.**
9 Q -- Dr. Christian providing you false information in
10 regard to Edward Mims which was part and parcel of
11 your report to the probate court in 2001?
12 A **No.**
13 Q Okay. Do you recall Mr. Hill providing you any
14 false information regarding Mr. Mims and your
15 recommendations to the court in 2001?
16 A **No.**
17 Q Do you recall Ms. Honey providing you any false
18 information regarding Mr. Mims in your
19 recommendation in 2001 to the probate court?
20 A **No.**
21 Q Do you recall Dr. Butkus ever providing you any
22 false information in 2001 regarding Mr. Mims?
23 A **No.**
24 Q Do you recall Dr. Lacy providing you any false
25 information regarding Ms. Mims -- Mr. Mims?

1 A **No.**

2 Q Okay. Anyone else at the Department that you claim

3 provided you false information about Mr. Mims upon

4 which you made your recommendations to the probate

5 court?

6 A **No.**

7 Q Would you agree with me -- I think you indicated

8 you helped prepare this document.

9 A **I did.**

10 Q You signed it under oath.

11 A **I did.**

12 Q Would you now admit to me that you have no

13 information whatsoever in regarding false

14 information provided to you by the Department

15 concerning Mr. Mims?

16 A **I do not recall any information provided to me that**

17 **was false by the Department of Disabilities and**

18 **Special Needs.**

19 Q I appreciate you saying, you don't recall, okay.

20 You didn't say, I don't recall in your affidavit,

21 do you?

22 A **That's correct.**

23 Q Okay. Do you believe you would recall if someone

24 at the Department of Disabilities, anyone,

25 including Mr. Hill, Dr. Christian, Dr. Lacy, Dr.

1 Butkus, Ms. Honey provided you false information
2 you would remember that today?
3 A **Probably so.**
4 Q Would you have remember it in May 2009, when you
5 signed this affidavit under oath subject to
6 perjury?
7 A **Probably.**
8 Q Okay. Would you agree with me that your statement
9 under oath is incorrect and false in regard to
10 false information being provided to you by
11 employees of the Department of Disabilities and
12 Special Needs which made part and parcel of your
13 recommendation to involuntary commit Mr. Mims?
14
15 MR. COTTER: I'm going to object to the form of the
16 question, and I'm going to instruct the
17 witness not to answer that question.
18 MR. DAVIDSON: Basis?
19 MR. COTTER: You're asking her matters of perjury.
20 MR. DAVIDSON: Is she going to take the Fifth
21 Amendment?
22 MR. COTTER: I'm going to object to the question and
23 instruct her not to answer the question. I
24 think in one of her previous answers -- I'm
25 not sure she had completed her answer. She

1 was about to say, and I think the --
2 MR. DAVIDSON: Mr. Cotter, over the rules you may
3 note your objection. If you'd like to go out
4 and speak with Ms. Flynn about her Fifth
5 Amendment rights in regard to criminal charges
6 of perjury, you may go ahead and do so. The
7 conference room is open.
8 MR. COTTER: I will do that.
9 MR. DAVIDSON: I'm not going to have you put a
10 speaking objection on the record.
11 MR. COTTER: I will do that. But I wanted you to
12 finish your questions because I think you
13 interrupted her mid-sentence when she was
14 saying she should have said lack of
15 information and then you asked the next
16 question before I could object.
17 MR. DAVIDSON: That's fine.
18 MR. COTTER: I want that objection on the record
19 that --
20 MR. DAVIDSON: That's fine. That's fine. Do you
21 want to go talk to her about her rights under
22 the Fifth Amendment?
23 MR. COTTER: I'll be glad to do that.
24 MR. DAVIDSON: Okay. Go ahead and take her out and
25 talk with her about it.

1

2 (Short Break)

3

4 MR. COTTER: Mr. Davidson, thank you for letting us
5 take an opportunity to go out in the hall and
6 discuss the implications of taking the Fifth
7 Amendment privilege. Ms. Flynn and I have
8 discussed that in the hall with reference to
9 your last question posed. And I believe that
10 she's prepared to go forward and answer your
11 question, but I would like for the court
12 reporter to please repeat the last question
13 just so we're absolutely clear on what was
14 asked by you. And you may want to revise that
15 question. I don't know, but I'll leave that
16 up to you since you're in charge of the
17 deposition questions.
18 MR. DAVIDSON: Thank you, Mr. Cotter.

19

20 (The last question was read back)

21

22 MR. COTTER: Thank you for rereading it.

23

24 Q Ms. Flynn, obviously you're an attorney, correct?
25 A **Correct.**

1 Q You understand the importance of an affidavit that
2 is provided to the court in regard to a legal
3 matter.
4 A **Correct.**
5 Q You're also aware, are you not, that by signing an
6 affidavit under oath there are certain consequences
7 if the affidavit is inaccurate or false, are you
8 not?
9 A **Yes.**
10 Q Now, I asked you earlier if, in fact, you had
11 provided information that was in this affidavit,
12 and you indicated that you had, correct?
13 A **Correct.**
14 Q To your knowledge, it was prepared by Ms.
15 Harrison's office, correct?
16 A **Correct.**
17 Q Was it prepared in conjunction with Ms. Harrison,
18 your discussions with Ms. Harrison?
19 A **I do not recall discussing the affidavit with Ms.**
20 **Harrison except in so far as she asked me if I**
21 **would be willing to sign an affidavit as to certain**
22 **facts.**
23 Q In 2005, it says in paragraph 19, that -- it says,
24 After Edward was injured at the Babcock Center
25 facility, Kensington, in 2005 -- Do you happen to

1 recall what that injury was?
2 A **I do not.**
3 Q I was provided with evidence that showed Babcock
4 Center employees had intentionally provided false
5 information to me in order to prevent Edward from
6 returning to the custody of his mother. You see
7 that statement?
8 A **I do.**
9 Q Now, obviously, you indicated that you were
10 provided information. Who provided you that
11 information?
12 A **The people who provided me the information were**
13 **caregivers at The Clusters.**
14 Q Who provided you --
15
16 MR. COTTER: I'm going to object to you interrupting
17 her when she's mid-sentence --
18 MR. DAVIDSON: That's fine.
19 MR. COTTER: -- in answering the question.
20
21 Q Go ahead. Finish answering the question and I'm
22 going to go back and re-ask it.
23
24 MR. COTTER: Because I neglected to do that earlier
25 and I tried to preserve it because you asked

1 her another question right after. But I'm
2 going to have to object to the form of the
3 question.
4 MR. DAVIDSON: That's fine. Object and --
5
6 Q Just answer your question and I'll come back and
7 correct it. I think we're on different
8 wavelengths.
9
10 A **Okay. The --**
11
12 MR. COTTER: I object to the statement, counselor.
13 You may answer it.
14
15 A **The people at Clusters that I spoke with they were**
16 **present at Clusters. There were some caregivers**
17 **and there were some administration type people who**
18 **met with me in an office. I don't remember their**
19 **names. But I did ask them about specific**
20 **information and asked them to provide me with the**
21 **information that they had on Edward and I asked**
22 **them if that was everything, as I recall. And they**
23 **said this was what they had. This was everything.**
24 **They presented to me that this was all the**
25 **information on Edward.**

1 Q Okay.

2 A **And then I found out later that the info -- that**
3 **that statement that that was every bit of the**
4 **information on Edward was not the case.**

5 Q Okay. And not the case was the Carl Anthony
6 matter, from your understanding?

7 A **That was a portion of it.**

8 Q All right. Now, listen to my question. You said
9 in your affidavit, paragraph 19, I was provided
10 with evidence showing that Babcock employees had
11 intentionally provided false information to me in
12 2001 in order to prevent Edward from returning to
13 the custody of his mother. Okay. I'm asking
14 about, I was provided with evidence. Who provided
15 you with evidence that indicated to you that the
16 individuals at Babcock had provided you false
17 information?

18 A **As I recall, that was the CMS report.**

19 Q All right. The CMS report being -- dealing with
20 Kensington?

21 A **I don't remember.**

22 Q Okay. To your knowledge, Exhibit No. 3, which is
23 the chronology with backup documentation, is that
24 some of the information that you were provided?

25 A **Yes, it is.**

1 Q That proved -- showed to you that you had not been
2 provided correct information?
3 **A That's some of the information, yes.**
4 Q And that was provided totally by Ms. Harrison,
5 correct?
6 **A I believe so.**
7 Q Now, am I not correct that your statement in
8 paragraph 12 dealing with false information which
9 was provided to me by employees of the Department
10 of Disabilities and Special Needs is incorrect?
11
12 MR. COTTER: Object to the form. You may answer if
13 you understand the question.
14
15 **A I'm not sure, and here's why. I was provided**
16 **information that said to me this is everything, and**
17 **it wasn't everything. And that information that**
18 **was originally provided to me that said this is**
19 **everything about Edward was provided to me by the**
20 **people I spoke to at Clusters. My assumption is**
21 **that the people I spoke to at Clusters were**
22 **employed by the Babcock Center or DDSN, so I don't**
23 **know who the people were specifically that I spoke**
24 **to. And I'm sorry that I don't, but I don't.**
25 Q Ms. Flynn, is it your testimony that you don't know

1 who the employees at The Clusters work for? Is
2 that your testimony?
3 A **I'm not sure whether these were employees of**
4 **Clusters or not. Some of them I'm sure were, but I**
5 **did not ask them who their employer was when I**
6 **talked --**
7 Q How many --
8 A **-- to them that I recall.**
9 Q How many times have you been to the Babcock Center,
10 to Clusters, Kensington or any of their facilities?
11 A **Many.**
12 Q Have you ever appeared before the Babcock board?
13 A **I think so.**
14 Q Are you aware that the Babcock provides staff that
15 mans various facilities that are under their
16 control, such as The Clusters, Kensington and other
17 facilities?
18 A **I'm aware that Babcock provides staff to**
19 **facilities.**
20 Q All right. To your knowledge, do you know of any
21 employee of the Department of Disabilities and
22 Special Needs who provided you any false
23 information?
24
25 MR. COTTER: Object to the form of the question.

1
2 A **I'm troubled because I don't know all the employees**
3 **of DDSN. The specific people that you designated**
4 **earlier: Stan Butkus, Jim Hill, Kathi Lacy, Dr.**
5 **Christian, Colleen Honey, I do not believe any of**
6 **them provided me with false information.**
7 Q And to your knowledge --
8
9 MR. COTTER: I'm not sure she's completed her
10 answer.
11
12 Q Have you completed your answer?
13 A **There are other people that I don't know where they**
14 **work.**
15 Q You can't provide me any names, can you?
16 A **I cannot.**
17 Q Okay. To your knowledge, do you know of anyone
18 else at the Department of Disabilities by name that
19 you have talked to about Edward Mims?
20 A **I do not recall the names.**
21 Q Okay. Do you recall ever speaking with anyone at
22 the Department of Disabilities and Special Needs
23 other than the people that we have listed?
24
25 MR. COTTER: Object to the form.

1

2 A **I don't remember.**

3 Q Would you agree with me that accusing individuals

4 of providing you false information to essentially

5 mislead you in your testimony in front of a probate

6 judge is a very serious allegation?

7 A **I would agree. Yes. I think that providing**

8 **misinformation is very serious.**

9 Q Okay. Not just misinformation; false information,

10 correct?

11

12 MR. COTTER: Object to the form of the question.

13

14 Q Correct?

15

16 MR. COTTER: Same objection.

17

18 A **I guess I'm not understanding what you're getting**

19 **at.**

20 Q Misinformation is a little bit different than false

21 information, isn't it?

22

23 MR. COTTER: Object to the form.

24

25 Q Or you consider them both?

1

2 MR. COTTER: Object to the form.

3

4 A **Well, I think it depends. I'm not sure because I**

5 **don't understand the context of what you're saying.**

6 Q Well, you used the term false information. This is

7 your affidavit.

8 A **Yes, sir.**

9 Q Okay. You swore to it. You understood the perjury

10 potential in regard to giving a false affidavit,

11 correct?

12 A **Yes.**

13 Q And sitting here today you cannot provide me the

14 name of any employee at the Department of

15 Disabilities and Special Needs that provided false

16 information, correct?

17

18 MR. COTTER: Object to the form of the question.

19

20 Q Can you today provide me the name of anyone at the

21 Department of Disabilities that provided you false

22 information?

23

24 MR. COTTER: Object to the form.

25

1 **A** **I can't provide a name.**
2 Q Now, in June 26, 2001, there was a hearing in
3 regard to Edward Mims and whether he should be
4 committed to the Department and vis-a-vis Babcock
5 Center, correct?
6 **A** **I don't recall the date, but there was a hearing**
7 **about that hearing -- about that time.**
8 Q I don't mind you looking at your affidavit because
9 it's in there. P11.
10
11 MR. COTTER: Paragraph 11 of the affidavit?
12 MR. DAVIDSON: No, in the documents, the exhibits.
13 MR. COTTER: The attachment --
14 MR. DAVIDSON: P11.
15 MR. COTTER: The attachments to it -- okay.
16
17 Q Second paragraph.
18 **A** **Uh-huh.**
19 Q It indicates a hearing was on the 26th of June,
20 correct?
21 **A** **Correct.**
22 Q The order was actually entered into on July 3,
23 2001, and I believe all the parties consented to
24 it, correct?
25 **A** **I believe so.**

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

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

Plaintiff(s),

vs.

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

Defendant(s),

) C/A No: 07-CP-40-3365

Deposition

of

MARGARET MIMS

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?

1 MR. DAVIDSON: I've asked her the question.
2 MS. HARRISON: You need to clarify that, Will.
3 MR. DAVIDSON: You can note your objection. Well,
4 you don't even get to object, so don't worry
5 about it.
6
7 Q To your knowledge, has Edward been maintained in
8 the least restrictive environment while he was
9 either at your house or at Babcock, either at
10 Clusters or Kensington or, for that matter, United
11 Cerebral Palsy?
12 **A What you mean restrictive?**
13 Q Least restrictive. In other words, as far as you
14 know, he's able to do things while he's there.
15 **A Yeah.**
16 Q Okay. Have you ever attempted to have him
17 institutionalized?
18 **A No.**
19 Q Do you believe that he is appropriate to be in a
20 house with four other consumers?
21 **A If it's -- If there's enough of staff to look after**
22 **him.**
23 Q Other than a question about adult day services and
24 some argument over respite care, have they ever --
25 to your knowledge, has Edward ever been denied

File Corresp. 9/28/Order

State of South Carolina

Department of Health and Human Services

Mark Sanford
Governor

Robert M. Kerr
Director

March 7, 2006

CERTIFIED MAIL

Patricia L. Harrison
Attorney At Law
611 Holly Street
Columbia, South Carolina 29205

RE: Administrative Decision in the Appeal Matter of Edward Mims v. SCDHHS
Appeals' Case #05-MISC-034 ()
Family Medicaid #

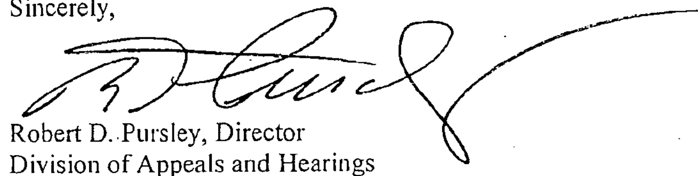
Dear Ms. Harrison:

The Administrative Decision in the referenced appeal matter is set forth in the enclosure.

Any party has the right to petition for further review of this Decision, as provided in the Administrative Procedures Act [S.C. Code Ann. Section 1-23-310, et seq., (1976, as amended)]. To request a review, a Notice of Appeal must be filed with the Administrative Law Court, 1205 Pendleton Street, Brown Building - 2nd floor, Columbia, South Carolina 29201 within thirty (30) days of receipt of the Decision/Order from which the appeal is taken. The Notice of Appeal must be submitted in accordance with the Rules of Procedure for the S.C. Administrative Law Court, including Rule 33 which establishes specific requirements for the contents of a Notice of Appeal. For a copy of the ALC rules, you may contact the Administrative Law Court at (803) 734-0550.

If an appeal to the Administrative Law Court is filed, a copy of the Petition should also be provided to the DHHS Office of General Counsel. Also, please see the enclosed copy of Rule 71 the Rules of Procedure for the ALC requiring a filing fee for an appeal.

Sincerely,



Robert D. Pursley, Director
Division of Appeals and Hearings

RDP/msj
Enclosures (2)

Division of Appeals and Hearings
Post Office Box 8206 • Columbia, South Carolina 29202-8206
(803) 898-2600 • Fax (803) 255-8206

cc: Dr. Kathi Lacy, Ph.D., Associate
State Director, Policy, SCDDSN
Kara Lewis, Bureau of Community Long Term Care Services, SCDHHS
Office of General Counsel, DHHS
Jennifer Duell, Lead Coordinator, SCDDSN
James R. Hill, Esquire, Office of General Counsel, SCDDSN

71. Filing Fee.

A. Cases for which Fee Required. Each request for a contested case hearing, notice of appeal, or request for injunctive relief before the Court must be accompanied by a filing fee in the amount set forth in Rule 71(C). A case will not be deemed filed and will not be processed until the filing fee has been paid or a waiver has been granted pursuant to Rule 71(B). This fee is not required for contested cases, appeals, or requests for injunctive relief brought by the State of South Carolina or its departments or agencies. For appeals brought pursuant to Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000), the fee will be assessed only for the seventh and subsequent appeals filed by an inmate during a given calendar year.

B. Request for Waiver. A party who is unable to pay the filing fee may request a waiver of the fee by filing a completed Request for Waiver form with the Clerk of the Court at the same time the request for a contested case, notice of appeal, or request for injunctive relief is filed with the Court. Request for Waiver forms shall be issued by the Clerk of the Court. If the filing fee is not waived, the party must pay the filing fee within ten days of the date of receipt of the order denying waiver of the filing fee. If the filing fee for a case is waived on behalf of a party, any motions filed by that party in that case are exempt from the motion fee as provided in Rule 71(D).

C. Schedule of Filing Fees. The filing fee will be assessed according to the following schedule:

Case Type Fee

Dept. of Health and Human Services $25

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 Harrision 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, Clonodine 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 in not convinced that the Petitioner's condition changed so dramatically from the date his physician completed the MR/RD Form AA and MR/RD Form15-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 bases on responses given to non-bolded questions in this section.***

I. <u>Functional Ability</u> *(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 catherterizations for specific problems).

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

____ This person requires nasograstric 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

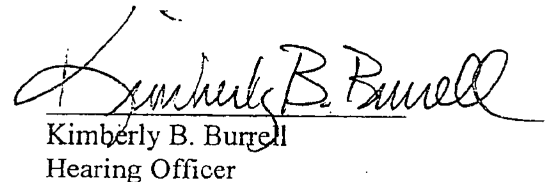
Based on the above Findings of Fact and the testimony and evidence put forth in this case, I conclude the following as a matter of law:

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 deeded 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.

Form 4 RECEIVED OCT 17 2008

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2007CP4003365

RICHLAND COUNTY FILED 2008 OCT 14 AM 10:00 BARBARA A. SCOTT C.C.C.P. & G.S.

Margaret Mims vs. **Babcock Center Inc**

Plaintiff — Defendant

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), SCRCP; ☐ Rule 41(a) SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ 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; ☑ Statement of Judgment by the Court:

Continued one of the parties attorneys is before the SC court of appeals this afternoon.

Dated at Columbia, South Carolina, this 9th day of October, 2008.

[signature]
PRESIDING JUDGE

This judgment was entered on the ______ day of ______________, 2008, and a copy mailed first class this 15th day of October, 2008, to attorneys of record or to parties (when appearing pro se) as follows:

Patricia Logan Harrison

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

s/BARBARA A. SCOTT

Clerk of Court

SCRCP APP-24/FORM 4

STATE OF
SOUTH CAROLINA

NOTICE OF MOTION SCHEDULING

May 08, 2013

Motion "MSUMJM - Motion For Summary Judgment" for Case: 2007CP4003365 - Margaret Mims , plaintiff, et al vs Babcock Center Inc , defendant, et al has been added to the following Motions Roster:

512 - MOTION ROSTER JUNE 4, 2013 COURTROOM 3-A

This hearing of this motion has been scheduled for 6/4/2013 at 9:30 AM.

The above referenced case is scheduled for an Motion Hearing before Judge G. Thomas Cooper, Jr. The Plaintiff's Attorney is to notify the Defendant in writing of the time and date of all Default and Damages Hearings. All requests for continuances must be in writing with a $25.00 filing fee and received by the Chief Administrative Judge prior to the hearing. A request for a continuance does not guarantee that a case will be continued. Please notify the Court in writing if the Motions are resolved prior to the hearing. Please file any briefs or memorandum the Wednesday before the week of the hearing. ALL ATTORNEYS MUST SEND A PROPOSED ORDER OR MEMORANDUM OF LAW BY Wednesday, May 29, 2013 FOR THE MOTION HEARING THAT IS BEING HEARD ON HARD COPY AND DISK: OR IT CAN BE SENT BY EMAIL TO GCooperLC@sccourts.org.

Mail Notice To:	Court Info:
Peter Demos Protopapas PO Box 5640 Columbia, SC 29250	Richland County Common Pleas Richland County Judicial Center 1701 Main Street Columbia, SC 29201-9201

Calendared 5-13-2013 NCL

256-2213

Judge L. Casey Manning
Chief Administrative Judge
Fifth Judicial Circuit

DAVIDSON & LINDEMANN, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

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

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

*Also Admitted In North Carolina
†Certified Mediator

Daniel C. Plyler
Joel S. Hughes
Justin T. Bagwell
David A. DeMasters

Of Counsel
Kenneth P. Woodington

May 28, 2013

VIA US MAIL AND EMAIL cmanningj@sccourts.org
The Honorable L. Casey Manning
Circuit Court Judge, Fifth Judicial Circuit
Post Office Box 192
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 Judge Manning:

You will recall that on May 8, counsel for the parties were present at a status conference in your chambers concerning the above case. The two groups of Defendants have filed motions for summary judgment on April 12 (DDSN Defendants) and April 23 (Babcock Defendants). As a result of the May 8 status conference, you set those two motions to be heard on June 4 by Judge Cooper.

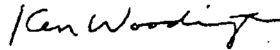
Plaintiff's counsel had not previously suggested that she might be filing a motion for summary judgment on behalf of the Plaintiff. However, this past Friday afternoon, May 24, she served counsel for the Defendants with a motion for summary judgment of her own. The motion was accompanied by a stack of exhibits nearly a foot high and totaling almost 2,300 pages. I was out of the office when that motion arrived, and it came at the start of the three-day Memorial Day weekend.

I am writing to ask for confirmation that Plaintiff's motion will not be heard by Judge Cooper on June 4. The scheduled hearing was not one on "all pending motions," but was limited specifically to the two motions that the Defendants had already filed. Those motions are based primarily on legal issues, particularly the statute of limitations, and if they are granted in whole or even in part, the burden on the Court and on the parties to address Plaintiff's motion and the 2,300 pages accompanying it would be greatly reduced, if not eliminated. I would therefore ask that if it becomes necessary for Plaintiff's motion to be heard at all, such hearing be set for a later date after resolution of the Defendants' motions. This request is made not only because of the possibility that Plaintiff's motion will not need to be considered at all, but also because that motion is so voluminous that it would be difficult for defense counsel to prepare an adequate response in the short time between now and the previously-scheduled June 4 hearing. Counsel for the Babcock Defendants also joins in this request.

I appreciate any consideration you can give to this request.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Kenneth P. Woodington

KPW:nmb

cc: **VIA US MAIL AND EMAIL**
Patricia L. Harrison, Esquire (Plh.cola@att.net)
Christian Stegmaier, Esquire (cstegmaier@collinsandlacy.com)
Peter D. Protopapas, Esquire (pdp@rplegalgroup.com)
Mr. Paul Gunter (gunterp@rcgov.us)

Kenneth P. Woodington

From:	Nancy Bouknight
Sent:	Tuesday, May 28, 2013 2:51 PM
To:	Manning, L. Casey Law Clerk (Adam Ribock) (CManningLC@sccourts.org); plh.cola@att.net; 'cstegmaier@collinsandlacy.com'; 'pdp@rplegalgroup.com'; 'gunterp@rcgov.us'
Subject:	Mims (CA # 07-CP-40-3365)
Attachments:	LTR-05-28-13(Manning) (00500018).PDF

Letter from Ken Woodington

Patricia L Harrison

From: "Manning, L. Casey Law Clerk (Adam Ribock)" <CManningLC@sccourts.org>
Date: Wednesday, May 29, 2013 3:48 PM
To: "Kenneth P. Woodington" <kwoodington@DML-LAW.com>; "'Patricia L Harrison'" <plh.cola@att.net>
Cc: <cstegmaier@collinsandlacy.com>; <gunterp@rcgov.us>
Subject: RE: Mims v. Babcock 07-CP-40-3365

Judge Manning has stated the Motions will be scheduled normally, and only those currently scheduled will be heard on June 4th. As the other recently filed Motions, Judge Manning has stated if they needed to be heard after the 4th but before trial, he will set up a status conference. Thank you.

Adam Ribock
Law Clerk to The Honorable L. Casey Manning
Fifth Judicial Circuit
Richland County Judicial Center
1701 Main Street, Room 214
Columbia, SC 29201
Office: (803) 576-1774
Fax: (803) 576-1744

From: Kenneth P. Woodington [mailto:kwoodington@DML-LAW.com]
Sent: Tuesday, May 28, 2013 4:48 PM
To: 'Patricia L Harrison'; Manning, L. Casey Law Clerk (Adam Ribock)
Cc: cstegmaier@collinsandlacy.com; gunterp@rcgov.us
Subject: RE: Mims v. Babcock 07-CP-40-3365

Patricia, my secretary sent this, but her e-mail indicates that it went to you and all other counsel. Apologies if for some reason it did not. I only objected to Plaintiff's motion being heard, for the reasons stated in the letter.

From: Patricia L Harrison [mailto:plh.cola@att.net]
Sent: Tuesday, May 28, 2013 4:45 PM
To: cmanninglc@sccourts.org
Cc: Kenneth P. Woodington; cstegmaier@collinsandlacy.com; gunterp@rcgov.us
Subject: Re: Mims v. Babcock 07-CP-40-3365

I was out of the office last week, but I have not seen a letter from Ken Woodington objecting to next week's hearing on their motion to dismiss, which his office scheduled several weeks ago. I would very much appreciate being provided with copies of all communications with the court when they occur. I have been preparing for next week's hearing on Defendant's motion for summary judgment, which we agreed in chambers would be heard in May. We received a notice indicating that Mims' case is on the Roster for June 17 and I believe it is #2 on that Roster.

If the hearing is not going to go forward on June 4 and/or if we are not going to be #2 on the docket for June 17, please so advise. It is very difficult for Mrs. Mims to find someone to keep Edward and those arrangements must be made ahead of time. I realize that date certain trials are rarely scheduled, but it would seem that providing a day certain in this case would be a reasonable accommodation of Edward's disability. Also, some of DDSN's witnesses may now be out of state and I expect that the agency would join in a request for a day certain.

Thank you for your consideration of this request.

Patricia L. Harrison

(to be followed with letter sent via mail)

From: Jo Boyd
Sent: Tuesday, May 28, 2013 3:33 PM
To: cmanninglc@sccourts.org
Cc: Patricia Harrison ; kwoodington@DML-LAW.com ; cstegmaier@collinsandlacy.com ; gunterp@rcgov.us
Subject: Mims v. Babcock 07-CP-40-3365

****

Jo-Elaine Boyd, Paralegal
RIKARD & PROTOPAPAS
1329 Blanding Street
Columbia, South Carolina 29201
Telephone: 803.978.6111
Facsimile: 803.978.6112
Email: jboyd@rplegalgroup.com
Website: www.rplegalgroup.com

Mailing Address:
Post Office Box 5640
Columbia, South Carolina 29250

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2007-CP-40-03365

Margaret Mims	Babcock Center Inc.
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: ____________	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

2013 JUN -6 PM 2:50
RICHLAND COUNTY FILED
JEANETTE W. McBRIDE C.C.P., G.S.

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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _Dismissed without prejudice_______________

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ 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:

MUA-Proposed Orders due within 28 days from P and D attorney.

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
		$
		$
		$

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 [signature] **Judge Code** 2126 **Date** 6-5-13

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 6 day of June, 20 13 to attorneys of record or to parties (when appearing pro se) as follows:

Patricia Logan Harrison, Peter Protopapas	Joel Collins, Leslie Cotter, William Davidson, Kenneth Woodington, Christian Stegmaier
ATTORNEY(S) FOR THE PLAINTIFF(S)	**ATTORNEY(S) FOR THE DEFENDANT(S)**

Court Reporter LaToya Perry

Clerk of Court [signature: Jeanette W. McBride]

SCRCP Form 4C (10/2011)

SCANNED

Kenneth P. Woodington
PO Box 8568
Columbia, SC 292028568

CP14

Patricia L Harrison

From: "Manning, L. Casey Law Clerk (Adam Ribock)" <CManningLC@sccourts.org>
Date: Wednesday, May 29, 2013 3:48 PM
To: "Kenneth P. Woodington" <kwoodington@DML-LAW.com>; "'Patricia L Harrison'" <plh.cola@att.net>
Cc: <cstegmaier@collinsandlacy.com>; <gunterp@rcgov.us>
Subject: RE: Mims v. Babcock 07-CP-40-3365

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Adam Ribock
Law Clerk to The Honorable L. Casey Manning
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1701 Main Street, Room 214
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Office: (803) 576-1774
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Sent: Tuesday, May 28, 2013 4:48 PM
To: 'Patricia L Harrison'; Manning, L. Casey Law Clerk (Adam Ribock)
Cc: cstegmaier@collinsandlacy.com; gunterp@rcgov.us
Subject: RE: Mims v. Babcock 07-CP-40-3365

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Sent: Tuesday, May 28, 2013 4:45 PM
To: cmanninglc@sccourts.org
Cc: Kenneth P. Woodington; cstegmaier@collinsandlacy.com; gunterp@rcgov.us
Subject: Re: Mims v. Babcock 07-CP-40-3365

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Patricia L. Harrison

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From: Jo Boyd
Sent: Tuesday, May 28, 2013 3:33 PM
To: cmanninglc@sccourts.org
Cc: Patricia Harrison ; kwoodington@DML-LAW.com ; cstegmaier@collinsandlacy.com ; gunterp@rcgov.us
Subject: Mims v. Babcock 07-CP-40-3365

****

Jo-Elaine Boyd, Paralegal
RIKARD & PROTOPAPAS
1329 Blanding Street
Columbia, South Carolina 29201
Telephone: 803.978.6111
Facsimile: 803.978.6112
Email: jboyd@rplegalgroup.com
Website: www.rplegalgroup.com

Mailing Address:
Post Office Box 5640
Columbia, South Carolina 29250

Christian Stegmaier | Direct Dial: 803.255.0454 | E-Mail: cstegmaier@collinsandlacy.com

July 19, 2013

VIA UNITED STATES MAIL
The Honorable G. Thomas Cooper, Jr.
Post Office Box 192
Columbia, SC 29202-0192

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

Dear Judge Cooper:

Please find enclosed for your review and consideration the original and one copy of the proposed Order Granting Motion for Summary Judgment of Defendants Babcock Center, Inc. and Judy Johnson in the above-referenced matter. If the proposed Order meets with your approval, please execute the same and return it to me in the envelope provided herewith. However, should you have any questions or concerns, please do not hesitate to contact me.

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

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

Respectfully,

Christian Stegmaier

CBS:lcc
Enclosures
cc: Patricia L. Harrison, Esquire
Kenneth P. Woodington, Esquire

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS BABCOCK CENTER, INC. AND JUDY JOHNSON

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) (identified in this order collectively as the "Babcock Defendants), as well as the South Carolina Department of Disabilities and Special Needs, Stanley Butkus (former DDSN director), and Kathi Lacy (a DDSN official during the relevant timeframe) (identified in this order collectively as the "DDSN Defendants").

The Babcock Defendants and the DDSN Defendants separately moved for summary judgment in this action. Their respective motions were premised upon arguments relating to

[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.

statute of limitations (for most claims) and on other grounds for the remaining claims. For the reasons stated herein, this Court grants summary judgment to the Babcock Defendants.

FACTS/PROCEDURAL BACKGROUND

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.

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. This incident, as far as can be told, occurred while Plaintiff was by himself at a Babcock Center facility for a moment while his caregiver went to get clothing for him prior to his going home for the weekend. The record reveals the tear lengthened somewhat as it was examined by a nurse, and lengthened still further upon examination by a doctor. Eventually, it was four centimeters long and required seven stitches. The clinicians at the hospital did not believe that the injury was the result of abuse or neglect. As a result, they permitted Plaintiff to return to Babcock Center that same evening. A medical consultant from DDSN, Dr. Graeme Johnson, examined Plaintiff several days later. He concluded that the cause for the laceration was unknown, but that it did not appear to have resulted from abuse or neglect. The injury apparently healed quickly and without incident.

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, p. 5, Par. 44.

The Babcock Defendants moved this Court for summary judgment, as did Defendants South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stanley Butkus ("DDSN Defendants") in a separate filing. The parties' respective dispositive motions were heard on June 4, 2013, by this Court.

STANDARD OF REVIEW

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

LAW/ANALYSIS

Plaintiff has sued the Babcock Defendants, along with the DDSN Defendants. 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 individual defendants, including Defendant Judy Johnson)
    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.

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 limitation.

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.

   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. Plaintiff's Five Causes of Action

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

A review of the pleadings reveals it is 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 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"). In her response to the Babcock Defendant's motion for summary judgment, Plaintiff maintains it was her intention to pursue Defendant Johnson in her individual capacity on this ground. Accordingly, the analysis continues.

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.[3]

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 Defendant Judy Johnson actually inflicted the injury. Likewise, Plaintiff cannot show any other personal involvement of Defendants Johnson in that alleged incident. Defendant Judy 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

[3] Plaintiffs' likely arguments about tolling are addressed under the last point in this Memorandum.

direct participation on the part of the individual defendants in any alleged events occurring while the Plaintiff resided at a Babcock Center facility. 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 Defendant 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). The standard for asserting a valid claim for Section 1983 supervisory liability has become so strict that there is some doubt as to whether such claims are still viable at all:

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

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

It is readily apparent that Plaintiff cannot satisfy the third part of this test (an "affirmative causal link"), and such failure in and of itself is sufficient to defeat Plaintiff's claim based on the small laceration of the penis. This was a factually unique incident. Its cause was found to be simply unknown. Plaintiff offers no evidence or argument at all that disputes the random nature or this event or that points to any action that Defendant Johnson wrongfully took or wrongfully failed to take. It was not foreseeable, and therefore no action by a supervisor can logically be said to have been necessary to prevent it. As the Court of Appeals held in Shealy v. Doe, 370 S.C. 194, 204, 634 S.E.2d 45, 50 (Ct. App. 2006), "[f]or circumstantial evidence to be sufficient to warrant the finding of a fact, the circumstances must lead to the conclusion with reasonable certainty and must have sufficient probative value to constitute the basis for a legal inference, not for mere speculation." Applying this standard to the nonexistent evidence to support this claim, there can be no doubt that there is nothing to show an "affirmative causal link" between some act

or omission of the defendants and the penis injury. As a result, this incident, like the others discussed above, cannot serve as the basis for a Section 1983 claim by Plaintiff.

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, such delay as did occur was attributable to this failure of communication by Plaintiff's counsel, and not to any wrongful act of the Babcock Defendants.

The Court notes that summary judgment is frequently granted in favor of defendants in § 1983 supervisory liability cases when a plaintiff's showing in opposition to summary judgment fails to satisfy one or more of the Shaw v. Stroud tests. See, e.g., Tigrett v. Rector and Visitors of University of Virginia, 290 F.3d 620, 630 (4th Cir. 2002) (affirming grant of summary judgment to defendants in §1983 supervisory liability case); Carter v. Morris, 164 F.3d 215, 218 (4th Cir. 1999) (same; also noting that "rigorous standards of culpability and causation" apply in such cases, as opposed to "scattershot accusations of unrelated constitutional violations"); Estate of Cuffee ex rel. Cuffee v. Newhart, 498 Fed.Appx. 233, 237, 2012 WL 5954679, 3 (4th Cir. 2012) (summary judgment granted for defendants where record did not contain any evidence of causation); Peter B. v. Sanford, 2012 WL 2149784, 9 (D.S.C. 2012) (summary judgment granted for defendant where the Amended Complaint "fail[ed] to make any allegations which reveal the presence of the required elements for supervisory liability").

Therefore, all of the Plaintiff's § 1983 personal injury claims against these defendants - whether arguably time-barred or not - should be dismissed with prejudice.

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

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, 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).[4]

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[4] 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), SCRCP, "retains the Code Pleading standard . . . rather than the more lenient notice pleading standard found in the

C. Third Cause of Action (Negligent Supervision)

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

With some exceptions, residential and treatment services to persons with disabilities and special needs in South Carolina are largely delivered by DDSN rather than contractors. That is not the case in Richland and Lexington Counties. DDSN has detailed the substantial portion of this responsibility to Babcock Center.[5] By virtue of its provision of residential and vocational supports to DDSN in Richland and Lexington Counties, Defendant Babcock Center is a "means," "agency," "agent," "medium," or "intermediary" employed by DDSN to deliver these services in those areas. Based on this proposition, Defendant Babcock Center is an "instrumentality" of the state, which brings it into the aegis of § 15-78-30 concerning entities covered by the Tort Claims Act. See also Frady v. Student Loan Processing Center, 313 S.C. 561, 443 S.E.2d 580 (Ct. App. 1994) (upholding the Circuit Court's finding the "Student Loan Processing Center" was a "governmental agency" for purposes of the Tort Claims Act). To that

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> 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).

[5] In Madison v. Babcock Center, 371 S.C. 123, 638 S.E.2d 650 (2006), the Supreme Court described Babcock Center and its relationship with DDSN in the following manner:

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

Id. at 131, 638 S.E.2d at 654.

end, Defendant Babcock Center is entitled to the protections of the South Carolina Tort Claims Act, where applicable, including provisions relating to the statute of limitations. Accordingly, the statute of limitations that applies to the state law claims is found in S.C. Code Ann. § 15-78-110. That section provides for a two year statute of limitations after the "date the loss was or should have been discovered." There is no question that the last act that even arguably damaged Plaintiff occurred or on about June 10, 2005. Amended Complaint, Par. 47.[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 Defendant Babcock Center are therefore clearly barred by § 15-78-110.

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:

[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."

> 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 Defendant 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 Defendant 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]

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

[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 Defendant, 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.

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 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)

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." That record occurred in 2005.

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

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

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

Carolina addressed the applicable statutes of limitations in ADA and Rehabilitation Act cases and applied the one-year statute of limitations found in the South Carolina Human Affairs Law (SCHAL), S.C. Code Ann. §§ 1–13–10, et. seq. See Cockrell v. Lexington 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 in the case at bar 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 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 the Babcock 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. Deposition of Margaret Mims, p. 84. Accordingly, Plaintiff's cause of action for unjust enrichment must be dismissed.[8]

II. 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 asserts 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 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 Plaintiff's Amended Complaint relate to incidents that occurred between 1999 until May 2005. Therefore, it is clear that all of the causes of actions alleged by the Plaintiff accrued prior to the adjudication of his incompetence. See Stephens v. Draffin, 327 S.C. 1, 5, 488 S.E.2d 307, 309 (1997) ("A cause of action accrues at the moment when the plaintiff has a legal right to sue on it."). Because the Plaintiff had not been adjudicated incompetent at the time that the allegations contained within his Amended Complaint arose, he 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), SCRCP.

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

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

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

115 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 foregoing reasons, the Court concludes that the Babcock Defendants are entitled to a grant of summary judgment in the case at bar, which thereby dismisses Plaintiff's claims against them.

AND IT IS SO ORDERED.

____
The Honorable G. Thomas Cooper, Jr.
Judge of the Fifth Judicial Circuit

________________, South Carolina

________________, 2013

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July 19, 2013

The Honorable G. Thomas Cooper, Jr.
Post Office Box 192
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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: 2007-CP-40-3365
Claim Number: 44654
Date of Incident: 1/04/99
Our File Number: 104.7785

Dear Judge Cooper:

Enclosed is the proposed Order of the DDSN Defendants in the above case. I appreciate the extra time which you allowed for the preparation of it. If an electronic copy is needed, please advise, and I will e-mail it to your law clerk.

The non-DDSN Defendants (Babcock Center and Johnson) will probably file a proposed Order that will be similar in many respects to this one. If the Court elects to rule in favor of the Defendants, I would be happy to combine the two proposed Orders to eliminate duplication.

There is one issue that I need to call to the Court's attention. Plaintiff's counsel has argued in her June 28, 2013 response to the Defendants' Motions for Summary Judgment as follows:

> The GAL testified at the probate court hearings in 2007 [sic—should be 2005], 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. [This is a reference to the Affidavit of Leigh Flynn, ¶ 12]

(Emphases added.) On pp. 16-17 of the memorandum, it is similarly stated that "Butkus had obtained the involuntary commitment based on false information provided to the court-appointed GAL in 2001. . ."

When the deposition of Ms. Flynn was subsequently taken, she testified that she could not recall any false information having been provided to her by Defendants Butkus or Lacy or anyone else at DDSN. Copies of the pertinent pages of the Flynn deposition are enclosed in a sealed envelope for the Court's information. Those pages are being sent to you this way in an abundance of caution, because the deposition was taken under seal in order to protect against possible disclosure of medical records of third parties. The pages that I am sending (pp. 50-65) do not involve such records, so I would ask that I be permitted to file those pages with the Clerk of Court. I can file a motion to that effect if necessary.

Plaintiff's counsel has also alluded to Mrs. Mims' Affidavit (M. 2076) as providing support for similar allegations, but at her deposition, Mrs. Mims replied in the negative when asked whether she knew of "any false or misleading information that was ever provided to the probate court in South Carolina in regard to Edward," or that she "thought was false or shouldn't have been said in open court." Mims Deposition, 6/23/09, p. 84, lines 15-21.

I called these matters to Ms. Harrison's attention in a letter yesterday morning, asking her to withdraw any claims that DDSN presented false information to the Court, and to reply to me by 1:00 this afternoon. I have heard nothing at all from her, so feel that these matters should be called to the Court's attention in light of the apparent lack of candor with the Court that is involved. This issue is discussed at p. 14 of the proposed Order.

If I can provide anything further, please let me know.

With highest regards, I am

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Kenneth P. Woodington

KPW:nmb

Enclosures

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cc: (with enclosures)

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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 **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS, KATHI LACY, AND STANLEY BUTKUS**

This case was heard on June 4, 2013, by this Court on the Defendants' motions for summary judgment. For the reasons set forth herein, the Court grants the Motion for Summary Judgment filed by Defendants South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stanley Butkus (DDSN Defendants). A review of the DDSN Defendants' motion and Plaintiff's response indicates that there is no genuine issue as to any material fact, and that the DDSN Defendants are entitled to judgment as a matter of law. As discussed herein, this conclusion is based on lack of substantive merit for all of Plaintiff's claims, and is alternatively, for most of Plaintiff's claims, based on the statute of limitations as well.

STATEMENT

This action was commenced with the service of the Summons and Amended Complaint on May 12, 2008.[1] 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

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

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 both on the basis of the statute of limitations and on other grounds as well.

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 395 (2012).

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

The Amended Complaint contains allegations about a variety of different alleged events. These include (a) several alleged physical injuries between 2000 and 2005, during which time Plaintiff was a resident at Babcock Center facilities, Amended Complaint, pp. 4-8; (b) a delay of several hours in permitting Plaintiff to go home as scheduled for a weekend visit on June 10, 2005, after Plaintiff's counsel had advised DDSN that Plaintiff would not be returning at the end of that weekend; *see* Amended Complaint, p. 9, ¶ 10; (c) an administrative denial of certain Medicaid services in 2005; Amended Complaint, p. 10, ¶ 52; and (d) certain other claims relating to Medicaid financing, which are devoid of any allegation of financial loss to Plaintiff. Amended Complaint, pp. 10-12. Because of the diverse factual claims, each set of facts will be discussed herein separately, with respect to each separate claim.

SUMMARY OF CLAIMS AND DEFENSES

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. The claims of the Plaintiff and defenses of the DDSN Defendants can be outlined as follows:

1. First cause of action (42 U.S.C. § 1983)(failure to monitor Plaintiff's condition and treatment needs)(applies only to individuals).

   Defenses:

   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 under Section 1983 have been pled or proven as to the any of the alleged physical injuries.

c. Plaintiff has not contended that he was damaged in any way by the short delay of a weekend trip home on June 10, 2005, so it is unnecessary to consider any claim he makes as a result of that event.

2. Second cause of action (conspiracy under 42 U.S.C. § 1985))(applies only to individuals).

Defenses:

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; in addition, the Amended Complaint is conclusory, and lacks the kind of specificity that is necessary for allegations of conspiracy.

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)

Defenses:

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 supervised by DDSN created an undue risk of harm to Plaintiff.

d. To the extent that Plaintiff seeks to expand this cause of action to include negligence other than negligent supervision, Plaintiff makes only conclusory allegations, and has not shown that there is a triable issue of fact on such claims.

4. Fourth cause of action (Americans with Disabilities Act and Rehabilitation Act)

   Defenses:

   a. This claim became moot in 2006.

   b. To the extent that Plaintiff now seeks to allege incidents that occurred after the Amended Complaint was filed, such allegations are beyond the scope of the pleadings, and are only vaguely asserted in any event.

   c. 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)

   Defense:

   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.

DISCUSSION

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.

Plaintiff has conceded that the agency, DDSN, was not intended to be subject to suit in the First Cause of Action, i.e., the claim made pursuant to 42 U.S.C. §1983. This concession is well taken, because there is no doubt 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).

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.

Plaintiff apparently has also not 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. 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 accordingly bars any Section claims against the individual Defendants in their individual capacities arising before May 12, 2005, given that this action was commenced no earlier than May 12, 2008.[2]

d. Plaintiff's claims under Section 1983 lack substantive merit, because Plaintiff has neither pled nor proven facts that would establish liability of supervisory personnel under Section 1983.

In response to the Defendants' motions for summary judgment on the Section 1983 claims, Plaintiff's memorandum in response dated June 28, 2013 (hereinafter "Pl. Mem.") refers only to a few incidents. Only those incidents will be considered by the Court, because Plaintiff's Memorandum contains no argument with respect to any other incidents referenced in the Amended Complaint.[3] The specific incidents discussed in Plaintiff's June 28, 2013 response to Defendants' motion for summary judgment are as follows:

1. An occasion on August 13, 2000, when Plaintiff was residing at the Clusters facility and was beaten by Carl Anthony, an employee of Babcock Center. Pl. Mem. 5-6.[4]

2. An occasion on July 27, 2004, when Plaintiff was residing at the Kensington facility and was found to have a number of ant bites. Pl. Mem. 6.

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[2] Issues pertaining to tolling are addressed under the last point in this Order.

[3] Plaintiff seeks in passing to refer to the statement of facts set forth in a May 29, 2013, memorandum filed by Plaintiff in support of his own motion for summary judgment. Pl. Mem. at 1. That motion, which was filed well after Defendants' motions, was not set for hearing when Defendants' motions were heard on June 4, 2013. The Court declines to consider Plaintiff's May 29, 2013, memorandum, because it does not pertain to any of the legal contentions and standards by Defendants in support of their motions for summary judgment.

[4] Plaintiff's Memorandum also briefly mentions, but does not discuss, an alleged "second beating." Pl. Mem. at 5, 18.

3. An occasion on May 27, 2005, when Plaintiff was residing at the Kensington facility and was found with an unexplained penis injury which was not regarded by the treating physician as indicative of abuse or neglect. Pl. Mem. 7.

Plaintiff does not suggest that Defendants Lacy or Butkus themselves actually inflicted any of the three physical injuries referenced above. Likewise, Plaintiff has not alleged, and cannot show, any other personal involvement of Defendants Lacy and Butkus in any of the alleged physical injury incidents. It is undisputed that Lacy and Butkus hold administrative and supervisory positions. They were not personally involved with the care of Plaintiff.

It is well settled that there is no *respondeat superior* liability in connection with claims made pursuant to Section 1983 claim. *Monell v. Department of Social Services*, 436 U.S. 658 (1978). In other words, it is clear that a necessary element of a § 1983 claim against a government official in his individual capacity is some showing of personal participation by the official. *See, e.g., Wright v. Collins,* 766 F.2d 841, 849-850 (4th Cir. 1985)(defendant in a Section 1983 action must be affirmatively shown to have acted personally in the deprivation of the plaintiff's rights).

The only exception to this requirement of personal participation occurs when the claim is brought as a supervisory claim. To the extent that the Plaintiff is attempting to assert Section 1983 liability against Defendants Lacy and Butkus under a theory of failure to supervise, that claim also fails. Such claims require 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 v. Stroud*, 13 F.3d 791 (4th Cir. 1994),, the Fourth Circuit set forth three elements that must be shown to establish the theory of supervisory liability under Section 1983. All three must be pled and proven:

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

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

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

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

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.[5] For that reason alone, any Section 1983 claims against the DDSN Defendants must be dismissed. *See, e.g., Payne v. CCOH,* 2012 WL 6801387, 5 (D.S.C.

[5] The Court assumes for the sake of argument 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).

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 been alleged, it is readily apparent that Plaintiff cannot satisfy the third element (an "affirmative causal link") for any of the incidents of physical injury discussed by Plaintiff in opposition to summary judgment. Such failure to show an "affirmative causal link" is sufficient in and of itself to defeat Plaintiff's Section 1983 supervisory liability claims, whether they occurred within three years of the filing of this case or not.

The first incident cited by Plaintiff in opposition to Defendants' motions involved a beating of Plaintiff in 2000 by a Babcock employee at the Clusters facility. Plaintiff cites several instances of deficiencies having been found at Clusters, but Plaintiff fails to mention that those findings occurred in 2003, several years after the August 13, 2000 incident involving Plaintiff at Clusters, and more than a year after Plaintiff had been moved from Clusters in 2002. Mims 2141-2142 (November 2003 CMS letter pertaining to Clusters); as to Plaintiff having been moved from Clusters in 2002, see Amended Complaint, Par. 28. Plaintiff has shown nothing prior to 2000 that would amount to a factual or logical connection between the August 2000 incident and any acts or omissions of Defendants Butkus or Lacy. As a result, no Section 1983 claim can be based on the 2000 incident.[6]

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[6] In fact, when this event occurred 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). (Unless otherwise indicated, all references in this Order to exhibits are intended to refer to the exhibits attached to the DDSN Defendants' Motion for Summary Judgment.)

The second incident involved a number of ant bites on occasion in July 2004 at Kensington, the Babcock facility to which Plaintiff had been moved two years earlier. Plaintiff points to no other incident involving insect bites at Kensington. Defendant Butkus testified at his deposition that that incident was the only one of its kind of which he was aware in his 40 years of working in the field of disabilities. Butkus deposition 46-47, Mims 1381-1382. Plaintiff offers no evidence or argument at all that disputes the random nature or this event or that points to any action that Defendants Butkus or Lacy wrongfully took or wrongfully failed to take. As a result, this event cannot form the basis for a Section 1983 claim alleging failure to supervise.

With regard to the third incident, the penis injury on May 27, 2005, Plaintiff has provided no evidence whatsoever as to how that injury might have been caused, much less evidence of how Defendants Butkus or Lacy might have done anything to prevent this incident. This injury consisted of a tear of unknown origin on the bottom of the Plaintiff's penis that occurred on May 27, 2005. Exhibit 1 (Incident Report for May 27, 2005 incident). The incident 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 2. The injury apparently healed quickly and without incident. *Id.*

This 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. As the Court of Appeals has held in *Shealy v. Doe*, 370 S.C. 194, 204, 634 S.E.2d 45, 50 (Ct. App. 2006), "[f]or circumstantial evidence to be sufficient to warrant the finding of a fact, the circumstances must lead to the conclusion with reasonable certainty and must have sufficient probative value to constitute the basis for a legal inference, not for mere speculation." Applying this standard to the nonexistent evidence to support this claim, there can be no doubt that there is nothing to show an "affirmative causal link" between some act or omission of the defendants and the penis injury. As a result, this incident, like the others discussed above, cannot serve as the basis for a Section 1983 claim by Plaintiff.

While it is probably not even necessary to discuss the other two elements of the supervisory liability tests, it is obvious from the discussion above that Plaintiff has not shown anything that would satisfy either of them. No pertinent showing has been made of a history of widespread abuse by subordinates, or deliberate indifference to conduct by the subordinates. *Shaw, supra.* There has simply been no showing of anything at all that would have provided prior notice to Butkus or Lacy that the 2000 beating was likely to occur, or that the 2004 ant bite incident was likely to occur, or that the 2005 penis incident was likely to occur. In other words, Plaintiff has not provided any evidence that these Defendants were on notice of a problem which affirmatively caused an injury to Plaintiff and responded inadequately to it. All Plaintiff has cited, without trying to argue a logical connection to any injury, is that other events of other

kinds occurred at Babcock facilities, often at times after the events involving Plaintiff, and in any event not connected to the kinds of injuries that occurred with respect to Plaintiff.

Plaintiff also claims that Defendant Butkus is in some way liable for the 2001 Probate Court Order admitting Plaintiff to DDSN facilities. Plaintiff asserts, Pl. Mem. 17, that that Order was "based on this <u>false information</u> which had been provided to me by employees of the Babcock Center <u>and the Department of Disabilities and Special Needs</u>." Mims 2040. [This is a reference to the Affidavit of Leigh Flynn, ¶ 12](emphases added). Plaintiff has also alluded to Mrs. Mims' Affidavit (M. 2076) as providing support for similar allegations. Pl. Mem. 16-17. Counsel for the DDSN Defendants has provided the Court with excerpts from the depositions of both the GAL and Mrs. Mims indicating that both of those individuals stated that they were unaware of any false information having been provided to the Probate Court by DDSN or its employees (Flynn deposition), or by anyone (Mims deposition) notwithstanding statements to that effect in their respective affidavits. Flynn Deposition, 9/2/09, pp. 50-65 and p. 52, lines 16-18; Mims Deposition, , 6/23/09, p. 84, lines 15-21.[7] Under these circumstances, the Court need not consider the contentions of Plaintiff's counsel pertaining to alleged false information provided by DDSN to the Probate Court in 2001, because those contentions are based solely on portions of affidavits that the affiants later contradicted in their depositions.

The Court would note that summary judgment is frequently granted in favor of defendants in Section 1983 supervisory liability cases when a plaintiff's showing in opposition to summary judgment fails to satisfy one or more of the *Shaw v. Stroud* tests. *See, e.g., Tigrett v. Rector and Visitors of University of Virginia,* 290 F.3d 620, 630 (4th Cir. 2002)(affirming grant

[7] The Flynn deposition was conducted under seal in order to protect against possible disclosure of medical records of third parties. The portions of it referenced above, pp. 50-65, do not involve such records, and may be filed with the Clerk.

of summary judgment to defendants in §1983 supervisory liability case); *Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999)(same; also noting that "rigorous standards of culpability and causation" apply in such cases, as opposed to "scattershot accusations of unrelated constitutional violations"); *Estate of Cuffee ex rel. Cuffee v. Newhart*, 498 Fed.Appx. 233, 237, 2012 WL 5954679, 3 (4th Cir. 2012)(summary judgment granted for defendants where record did not contain any evidence of causation); *Peter B. v. Sanford*, 2012 WL 2149784, 9 (D.S.C. 2012)(summary judgment granted for defendant where the Amended Complaint "fail[ed] to make any allegations which reveal the presence of the required elements for supervisory liability"). Many other cases to the same effect could be added to this list.

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 injury claims against these Defendants, whether arguably time-barred or not, should be, and hereby are, dismissed with prejudice.[8]

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

[8] The Amended Complaint, p. 9, Paragraphs 46 and 47, references an alleged refusal of the Defendants to permit Plaintiff to go home for a weekend visit on a Friday night (June 10, 2005). In opposition to Defendants' motions for summary judgment, Plaintiff offers no suggestion as to how he was damaged by that incident. Moreover, Plaintiff has not disputed 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). As a result, this claims by Plaintiff cannot survive Defendants' summary judgment motion.

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.[9]

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,

[9] Plaintiff notes, Pl. Mem 22 that some cases have held that mentally retarded persons can be regarded as a class under certain circumstances. However, Plaintiff has failed to show any specific animus against him based on his mental retardation or anything else.

> [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. [10] Plaintiff asserts (Pl. Mem. 23) that in *Anthony v. Ward*, 336 Fed.Appx. 311, 2009 WL 1931192, (4th Cir. 2009), the Fourth Circuit affirmed a verdict for a violation of 42 U.S.C. § 1985, but this is clearly not so. The very first sentence of the opinion in that case notes that the basis of liability was a state law conspiracy claim. Plaintiff also cites *Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (Ct. App. 2010), but that was also a state law case that did not involve Section 1985 in any way.

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

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[10] 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), SCRCP, "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).

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." Likewise, Plaintiff's June 28, 2013 Memorandum contains no discussion at all with respect to any specific conspiratorial acts of the Defendants.

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

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.[11]

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

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[11] 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."

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.

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, Plaintiff has neither alleged in the Amended Complaint, nor provided 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.[12] Because all actions by Defendants Lacy and Butkus were done

[12] Plaintiff makes only conclusory references to the need to show actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. Pl. Mem. at 23, 28. Neither of these vague references provides any reason for the Court to deny summary judgment to the individual DDSN Defendants under the Tort Claims Act.

within the scope of their official duties, they are entitled to immunity under the Tort Claims Act and any state law claims against them must be dismissed.[13]

c. Even if not time-barred, the claim for negligent supervision is without merit, because Plaintiff has cited no specific evidence to support it.

Even if Plaintiff's negligent supervision claim against the agency 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 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 injures 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).

Plaintiff apparently tries to argue that the Third Cause of Action, labeled "Negligent Supervision," should be extended to include negligent acts in general. *See* Pl. Mem. at 24. While

[13] 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.

the Court is not necessarily persuaded that this cause of action may validly be read so broadly, Plaintiff has in any event failed to make the showing necessary to defeat the DDSN Defendants' motion for summary judgment. As with other claims, Plaintiff sets forth a lengthy version of the facts on the one hand, coupled with a general discussion of legal principles on the other hand, but Plaintiff completely fails to connect the two. Plaintiff's response simply does not set forth how the alleged acts or failure to act of the DDSN Defendants amounted to actionable torts that proximately caused injury to Plaintiff. Essentially, the only argument made by Plaintiff is this:

> . . . the defendants acted negligently, carelessly, recklessly and that these actions were willful and wanton, causing injuries over a long period of time to Mims.

Pl. Mem. at 28.[14]

Such a conclusory showing falls well short of the requirement that a party opposing summary judgment must "present evidence of <u>specific facts</u> from which the finder of fact could reasonably find for him." *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 225, 616 S.E.2d 722, 732 (Ct. App. 2005)(emphasis added). Rule 56(e), S.C.R.C.P., contains the same requirement that the party opposing summary judgment must set forth "must set forth specific facts showing that there is a genuine issue for trial." The concept of "specific facts" does not refer to mere conclusory statements. Thus, in such cases as *Shupe v. Settle*, 315 S.C. 510, 516-517, 445 S.E.2d 651, 655 (Ct. App. 1994) it has been held that "[a] conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment." Plaintiff has made no showing other than the conclusory statements of counsel that

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[14] Similarly, Plaintiff lists the elements of a negligence claim and then concludes that "Plaintiff has pled these elements and has provided this court with extensive credible evidence to support his claims for negligence in this case." Pl. Mem. 24. While it is not clear that Plaintiff has even pled these elements, there is in any event no question that conclusory statements such as the ones quoted herein fail to cite "specific facts" in opposition to the motion for summary judgment.

the facts set forth in the brief support Plaintiff's claims in some unspecified way. However, in considering a plaintiff's showing in opposition to a motion for summary judgment, "the court should not be expected to pore through the record of the case to find what might be the factual basis of a particular allegation in the complaint." *North Creek Farm, Inc. v. Town of Phippsburg*, 2009 WL 73796, *12 (D. Me. 2009). The courts of this state have frequently granted summary judgment to defendants in cases where negligence is claimed, but not supported. *See, e.g., Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 252, 734 S.E.2d 161, 164 (2012); *Hoard ex rel. Hoard v. Roper Hosp., Inc.*, 387 S.C. 539, 547, 694 S.E.2d 1, 5 (S.C. 2010).

Based on all of the reasons set forth above, the Court therefore concludes that the all of the DDSN Defendants, that is, the individuals and the agency, are entitled to summary judgment on Plaintiff's Third Cause of Action.

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." That event occurred in 2005. Exhibit 5.

The DDSN Defendants do not dispute that DDSN in June 2005 found that Plaintiff was not eligible for Adult Day Health Services. However, that decision was appealed by Plaintiff to

the DHHS Hearing Officer, who reversed DDSN's decision by order dated March 7, 2006. Exhibit 5. 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.

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

Plaintiff has not articulated a damage claim based on the June 2005 denial of services, but in any event, 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 Plaintiff cannot establish that any of the Defendants inequitably obtained payments or anything else of value from Plaintiff. Although Plaintiff alleges that the Defendant DDSN 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 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). Plaintiff cites neither facts nor law in opposition to the DDSN Defendants' motion on this cause of actions. *See* Pl. Mem. 33-34. Plaintiff's cause of action for unjust enrichment must therefore be dismissed.[15]

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 argues 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 actually adjudicated to be incapacitated until the Probate Court 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 incompetent.[16] However, all of the allegations contained in the Plaintiff's

[15] 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.

[16] Plaintiff claims otherwise, Pl. Mem. 30-31, but the 2001 Probate Court order clearly contains no mention of an adjudication of incapacity.

complaint relate to incidents that occurred between 2000 and 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 (a) more than five years by any such disability, except infancy; nor (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.[17] 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 § 15-3-40(2). While cases from other jurisdictions have reached conflicting results on this issue, see Annot., 111 A.L.R.5th 159 (2003), the Court concludes 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

[17] The Order appointing Mrs. Mims as guardian is part of Exhibit 7.

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 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 <u>not</u> 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 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

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Of Counsel
Kenneth P. Woodington

February 14, 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: 2007-CP-40-3365
Claim Number: 44654
Date of Incident: 1/04/99
Our File Number: 104.7785

Dear Ms. McBride:

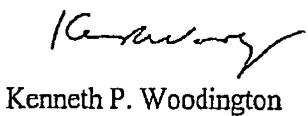
Enclosed for filing is a copy of pages excerpted from the deposition of Leigh Flynn, taken in the above case on September 2, 2009, in the above case. The pages consist of the cover page, reporter's certificate, and pp. 50-65. Please file the original and return the copy to me with the filing date stamped thereon in the envelope provided.

The entire deposition was originally under seal, but Judge Cooper in his Order filed on January 21, 2014, p. 14, n.7, authorized these pages to be filed.

By copy of this letter, I am herewith serving a copy of same on all counsel of record.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Kenneth P. Woodington

KPW:nmb

Enclosures

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

) C/A No: 07-CP-40-3365

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

Plaintiff(s),

vs.

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

Defendant(s),

Deposition

of

LEIGH FLYNN
(Part I)

"CONFIDENTIAL, UNDER SEAL BY AGREEMENT OF COUNSEL"

Deposition of LEIGH FLYNN, taken before Robin Spaniel, 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 10:11 a.m., Wednesday, September 2, 2009, at the office of Davidson & Lindemann, P.A., Columbia, South Carolina.

Reported by:

Robin Spaniel

1 else with Department of Disabilities and Special
2 Needs?
3 A Don't remember.
4 Q Now, you had made a statement that I -- in
5 paragraph 12 of your affidavit, "That I made
6 recommendations to the probate court to involuntary
7 commit Edward to the Babcock Center based on this
8 false information which had been provided to me by
9 employees of the Babcock Center and the Department
10 of Disabilities and Special Needs." See that
11 statement?
12 A Uh-huh.
13 Q Ms. Flynn, is it your position that Mr. Hill
14 provided you false information in regard to Mr.
15 Mims?
16 A Mr. Hill, no.
17 Q Is it your position that Ms. Colleen Honey provided
18 you false information?
19 A No.
20 Q Okay. To your knowledge, do you know anyone at the
21 Department of Disabilities and Special Needs that
22 provided you any information that was false in
23 regard to Edward Mims and the probate hearing?
24 A Well, if I may, I think a more accurate phrasing of
25 that -- I should have said there was a lack of

1 information.
2 Q Well, you understand what an affidavit is.
3 A I do.
4 Q Okay. You don't remember speaking to Dr.
5 Christian, okay, correct, about Edward Mims?
6 A I don't specifically remember talking to him --
7 Q All right. Do you recall --
8 A -- about Edward Mims.
9 Q -- Dr. Christian providing you false information in
10 regard to Edward Mims which was part and parcel of
11 your report to the probate court in 2001?
12 A No.
13 Q Okay. Do you recall Mr. Hill providing you any
14 false information regarding Mr. Mims and your
15 recommendations to the court in 2001?
16 A No.
17 Q Do you recall Ms. Honey providing you any false
18 information regarding Mr. Mims in your
19 recommendation in 2001 to the probate court?
20 A No.
21 Q Do you recall Dr. Butkus ever providing you any
22 false information in 2001 regarding Mr. Mims?
23 A No.
24 Q Do you recall Dr. Lacy providing you any false
25 information regarding Ms. Mims -- Mr. Mims?

1 A No.
2 Q Okay. Anyone else at the Department that you claim
3 provided you false information about Mr. Mims upon
4 which you made your recommendations to the probate
5 court?
6 A No.
7 Q Would you agree with me -- I think you indicated
8 you helped prepare this document.
9 A I did.
10 Q You signed it under oath.
11 A I did.
12 Q Would you now admit to me that you have no
13 information whatsoever in regarding false
14 information provided to you by the Department
15 concerning Mr. Mims?
16 A I do not recall any information provided to me that
17 was false by the Department of Disabilities and
18 Special Needs.
19 Q I appreciate you saying, you don't recall, okay.
20 You didn't say, I don't recall in your affidavit,
21 do you?
22 A That's correct.
23 Q Okay. Do you believe you would recall if someone
24 at the Department of Disabilities, anyone,
25 including Mr. Hill, Dr. Christian, Dr. Lacy, Dr.

1 Butkus, Ms. Honey provided you false information
2 you would remember that today?
3 A **Probably** so.
4 Q Would you have remember it in May 2009, when you
5 signed this affidavit under oath subject to
6 perjury?
7 A **Probably.**
8 Q Okay. Would you agree with me that your statement
9 under oath is incorrect and false in regard to
10 false information being provided to you by
11 employees of the Department of Disabilities and
12 Special Needs which made part and parcel of your
13 recommendation to involuntary commit Mr. Mims?
14
15 MR. COTTER: I'm going to object to the form of the
16 question, and I'm going to instruct the
17 witness not to answer that question.
18 MR. DAVIDSON: Basis?
19 MR. COTTER: You're asking her matters of perjury.
20 MR. DAVIDSON: Is she going to take the Fifth
21 Amendment?
22 MR. COTTER: I'm going to object to the question and
23 instruct her not to answer the question. I
24 think in one of her previous answers -- I'm
25 not sure she had completed her answer. She

1 was about to say, and I think the --
2 MR. DAVIDSON: Mr. Cotter, over the rules you may
3 note your objection. If you'd like to go out
4 and speak with Ms. Flynn about her Fifth
5 Amendment rights in regard to criminal charges
6 of perjury, you may go ahead and do so. The
7 conference room is open.
8 MR. COTTER: I will do that.
9 MR. DAVIDSON: I'm not going to have you put a
10 speaking objection on the record.
11 MR. COTTER: I will do that. But I wanted you to
12 finish your questions because I think you
13 interrupted her mid-sentence when she was
14 saying she should have said lack of
15 information and then you asked the next
16 question before I could object.
17 MR. DAVIDSON: That's fine.
18 MR. COTTER: I want that objection on the record
19 that --
20 MR. DAVIDSON: That's fine. That's fine. Do you
21 want to go talk to her about her rights under
22 the Fifth Amendment?
23 MR. COTTER: I'll be glad to do that.
24 MR. DAVIDSON: Okay. Go ahead and take her out and
25 talk with her about it.

1
2 (Short Break)
3
4 MR. COTTER: Mr. Davidson, thank you for letting us
5 take an opportunity to go out in the hall and
6 discuss the implications of taking the Fifth
7 Amendment privilege. Ms. Flynn and I have
8 discussed that in the hall with reference to
9 your last question posed. And I believe that
10 she's prepared to go forward and answer your
11 question, but I would like for the court
12 reporter to please repeat the last question
13 just so we're absolutely clear on what was
14 asked by you. And you may want to revise that
15 question. I don't know, but I'll leave that
16 up to you since you're in charge of the
17 deposition questions.
18 MR. DAVIDSON: Thank you, Mr. Cotter.
19
20 (The last question was read back)
21
22 MR. COTTER: Thank you for rereading it.
23
24 Q Ms. Flynn, obviously you're an attorney, correct?
25 A Correct.

1 Q You understand the importance of an affidavit that
2 is provided to the court in regard to a legal
3 matter.
4 A Correct.
5 Q You're also aware, are you not, that by signing an
6 affidavit under oath there are certain consequences
7 if the affidavit is inaccurate or false, are you
8 not?
9 A Yes.
10 Q Now, I asked you earlier if, in fact, you had
11 provided information that was in this affidavit,
12 and you indicated that you had, correct?
13 A Correct.
14 Q To your knowledge, it was prepared by Ms.
15 Harrison's office, correct?
16 A Correct.
17 Q Was it prepared in conjunction with Ms. Harrison,
18 your discussions with Ms. Harrison?
19 A I do not recall discussing the affidavit with Ms.
20 Harrison except in so far as she asked me if I
21 would be willing to sign an affidavit as to certain
22 facts.
23 Q In 2005, it says in paragraph 19, that -- it says,
24 After Edward was injured at the Babcock Center
25 facility, Kensington, in 2005 -- Do you happen to

1 recall what that injury was?
2 A I do not.
3 Q I was provided with evidence that showed Babcock
4 Center employees had intentionally provided false
5 information to me in order to prevent Edward from
6 returning to the custody of his mother. You see
7 that statement?
8 A I do.
9 Q Now, obviously, you indicated that you were
10 provided information. Who provided you that
11 information?
12 A The people who provided me the information were
13 caregivers at The Clusters.
14 Q Who provided you --
15
16 MR. COTTER: I'm going to object to you interrupting
17 her when she's mid-sentence --
18 MR. DAVIDSON: That's fine.
19 MR. COTTER: -- in answering the question.
20
21 Q Go ahead. Finish answering the question and I'm
22 going to go back and re-ask it.
23
24 MR. COTTER: Because I neglected to do that earlier
25 and I tried to preserve it because you asked

1 her another question right after. But I'm
2 going to have to object to the form of the
3 question.
4 MR. DAVIDSON: That's fine. Object and --
5
6 Q Just answer your question and I'll come back and
7 correct it. I think we're on different
8 wavelengths.
9
10 A Okay. The --
11
12 MR. COTTER: I object to the statement, counselor.
13 You may answer it.
14
15 A The people at Clusters that I spoke with they were
16 present at Clusters. There were some caregivers
17 and there were some administration type people who
18 met with me in an office. I don't remember their
19 names. But I did ask them about specific
20 information and asked them to provide me with the
21 information that they had on Edward and I asked
22 them if that was everything, as I recall. And they
23 said this was what they had. This was everything.
24 They presented to me that this was all the
25 information on Edward.

1 Q Okay.
2 A **And then I found out later that the info -- that**
3 **that statement that that was every bit of the**
4 **information on Edward was not the case.**
5 Q Okay. And not the case was the Carl Anthony
6 matter, from your understanding?
7 A **That was a portion of it.**
8 Q All right. Now, listen to my question. You said
9 in your affidavit, paragraph 19, I was provided
10 with evidence showing that Babcock employees had
11 intentionally provided false information to me in
12 2001 in order to prevent Edward from returning to
13 the custody of his mother. Okay. I'm asking
14 about, I was provided with evidence. Who provided
15 you with evidence that indicated to you that the
16 individuals at Babcock had provided you false
17 information?
18 A **As I recall, that was the CMS report.**
19 Q All right. The CMS report being -- dealing with
20 Kensington?
21 A **I don't remember.**
22 Q Okay. To your knowledge, Exhibit No. 3, which is
23 the chronology with backup documentation, is that
24 some of the information that you were provided?
25 A **Yes, it is.**

1 Q That proved -- showed to you that you had not been
2 provided correct information?
3 A That's some of the information, yes.
4 Q And that was provided totally by Ms. Harrison,
5 correct?
6 A I believe so.
7 Q Now, am I not correct that your statement in
8 paragraph 12 dealing with false information which
9 was provided to me by employees of the Department
10 of Disabilities and Special Needs is incorrect?
11
12 MR. COTTER: Object to the form. You may answer if
13 you understand the question.
14
15 A I'm not sure, and here's why. I was provided
16 information that said to me this is everything, and
17 it wasn't everything. And that information that
18 was originally provided to me that said this is
19 everything about Edward was provided to me by the
20 people I spoke to at Clusters. My assumption is
21 that the people I spoke to at Clusters were
22 employed by the Babcock Center or DDSN, so I don't
23 know who the people were specifically that I spoke
24 to. And I'm sorry that I don't, but I don't.
25 Q Ms. Flynn, is it your testimony that you don't know

1 who the employees at The Clusters work for? Is
2 that your testimony?
3 A I'm not sure whether these were employees of
4 Clusters or not. Some of them I'm sure were, but I
5 did not ask them who their employer was when I
6 talked --
7 Q How many --
8 A -- to them that I recall.
9 Q How many times have you been to the Babcock Center,
10 to Clusters, Kensington or any of their facilities?
11 A Many.
12 Q Have you ever appeared before the Babcock board?
13 A I think so.
14 Q Are you aware that the Babcock provides staff that
15 mans various facilities that are under their
16 control, such as The Clusters, Kensington and other
17 facilities?
18 A I'm aware that Babcock provides staff to
19 facilities.
20 Q All right. To your knowledge, do you know of any
21 employee of the Department of Disabilities and
22 Special Needs who provided you any false
23 information?
24
25 MR. COTTER: Object to the form of the question.

1
2 A I'm troubled because I don't know all the employees
3 of DDSN. The specific people that you designated
4 earlier: Stan Butkus, Jim Hill, Kathi Lacy, Dr.
5 Christian, Colleen Honey, I do not believe any of
6 them provided me with false information.
7 Q And to your knowledge --
8
9 MR. COTTER: I'm not sure she's completed her
10 answer.
11
12 Q Have you completed your answer?
13 A There are other people that I don't know where they
14 work.
15 Q You can't provide me any names, can you?
16 A I cannot.
17 Q Okay. To your knowledge, do you know of anyone
18 else at the Department of Disabilities by name that
19 you have talked to about Edward Mims?
20 A I do not recall the names.
21 Q Okay. Do you recall ever speaking with anyone at
22 the Department of Disabilities and Special Needs
23 other than the people that we have listed?
24
25 MR. COTTER: Object to the form.

1

2 A I don't remember.

3 Q Would you agree with me that accusing individuals

4 of providing you false information to essentially

5 mislead you in your testimony in front of a probate

6 judge is a very serious allegation?

7 A I would agree. Yes. I think that providing

8 misinformation is very serious.

9 Q Okay. Not just misinformation; false information,

10 correct?

11

12 MR. COTTER: Object to the form of the question.

13

14 Q Correct?

15

16 MR. COTTER: Same objection.

17

18 A I guess I'm not understanding what you're getting

19 at.

20 Q Misinformation is a little bit different than false

21 information, isn't it?

22

23 MR. COTTER: Object to the form.

24

25 Q Or you consider them both?

1

2 MR. COTTER: Object to the form.

3

4 A Well, I think it depends. I'm not sure because I

5 don't understand the context of what you're saying.

6 Q Well, you used the term false information. This is

7 your affidavit.

8 A Yes, sir.

9 Q Okay. You swore to it. You understood the perjury

10 potential in regard to giving a false affidavit,

11 correct?

12 A Yes.

13 Q And sitting here today you cannot provide me the

14 name of any employee at the Department of

15 Disabilities and Special Needs that provided false

16 information, correct?

17

18 MR. COTTER: Object to the form of the question.

19

20 Q Can you today provide me the name of anyone at the

21 Department of Disabilities that provided you false

22 information?

23

24 MR. COTTER: Object to the form.

25

1 A I can't provide a name.
2 Q Now, in June 26, 2001, there was a hearing in
3 regard to Edward Mims and whether he should be
4 committed to the Department and vis-a-vis Babcock
5 Center, correct?
6 A I don't recall the date, but there was a hearing
7 about that hearing -- about that time.
8 Q I don't mind you looking at your affidavit because
9 it's in there. P11.
10
11 MR. COTTER: Paragraph 11 of the affidavit?
12 MR. DAVIDSON: No, in the documents, the exhibits.
13 MR. COTTER: The attachment --
14 MR. DAVIDSON: P11.
15 MR. COTTER: The attachments to it -- okay.
16
17 Q Second paragraph.
18 A Uh-huh.
19 Q It indicates a hearing was on the 26th of June,
20 correct?
21 A Correct.
22 Q The order was actually entered into on July 3,
23 2001, and I believe all the parties consented to
24 it, correct?
25 A I believe so.

State of South Carolina)
)   CERTIFICATE
County of Lexington

Be it known that the foregoing Deposition of LEIGH FLYNN was taken by Robin Spaniel;

That I was then and there a notary public in and for the State of South Carolina-at-Large;

That by virtue thereof I was duly authorized to administer an oath;

That the witness was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, concerning the matter in controversy aforesaid;

The foregoing transcript represents a true, accurate and complete transcription of the testimony so given at the time and place aforesaid to the best of my skill and ability;

That I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.

Witness my hand and seal 18 DAY OF SEPTEMBER, 2009

Robin Spaniel

Notary Public for South Carolina

My Commission Expires: 6/02/2015

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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 **CERTIFICATE OF SERVICE**

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 **EXCERPTS FROM DEPOSITION OF LEIGH FLYNN (pages 50-65)** 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 14th day of February 2014:

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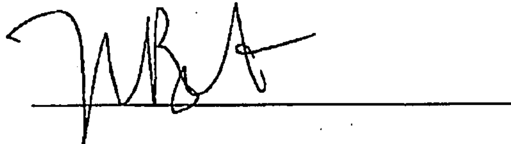

NOTICE

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE COURT OF COMMON PLEAS

Honorable G. Thomas Cooper, Jr.

Case No.: 2007-CP-40-03365

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

vs.

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

NOTICE OF APPEAL

Edward Mims, through his guardian, Margaret Mims, appeals the order of the Honorable G. Thomas Cooper, Jr. dated May 29, 2014, and filed June 3, 2014, in Richland County, South Carolina, which was received by Appellant on June 7, 2014.

June 24, 2014

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SC Court of Appeals

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