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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 I

RECORD ON APPEAL

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ORDERS, JUDGMENTS, DECISIONS

RECEIVED MAR 16 2009 Form 4

PLEADINGS

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF RICHLAND

CASE NO: 2007CP4003365

IN THE COURT OF COMMON PLEAS

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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy: ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other:

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☐ See attached order;

☐ Statement of Judgment by the Court:

Plaintiff's Motion for continuance granted

Dated at Columbia, South Carolina, this 10 day of March, 2009.

[Signature]
PRESIDING JUDGE

This judgment was entered on the 13th day of March, 2009, and a copy mailed first class this 13th day of March, 2009, to attorneys of record or to parties (when appearing pro se) as follows:

Patricia Logan Harrison

ATTORNEY(S) FOR THE PLAINTIFF(S)

SCRPC APP-24/FORM 4

Kenneth P. Woodington
Joel W Collins Jr
Christian Stegmaier

ATTORNEY(S) FOR THE DEFENDANT(S)

[Signature]
Clerk of Court

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

FORM 4

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

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 and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other Dismissed without prejudice
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court.

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

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 _____ day of _____, 20____ 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

Jeannette W. McBride

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2007CP4003365

Margaret Mims

Babcock Center Inc

ward Mims

Judy Johnson

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 22 January 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Patricia Logan Harrison

Peter Demos Protopapas

Joel W. Collins Jr.
Leslie A. Cotter Jr.

Christian Stegmaier

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. Aguirre

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,)

Civil Action No. 2007-CP-40-3365

Plaintiff,)

v.)

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

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

Defendants.)

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).

GZ
#2

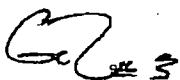
The Amended Complaint also sought certain injunctive relief; however, as articulated within this pleading, such claims have long been moot, and are barred for other reasons as well.

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), SCRPC, 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.").

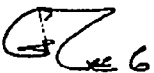
LAW/ANALYSIS

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.

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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

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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.

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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

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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 of 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

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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

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), SCRPC, “retains the Code Pleading standard . . . rather than the more lenient notice pleading standard found in the

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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

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.”

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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.

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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.

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

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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.

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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), SCRPC.

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

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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.

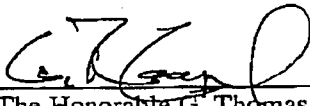
As applied to the facts of the present case, the appointment of the guardian in June 2005 extended the statute of limitations by one year for all of the older claims. §15-3-40(b). In other words, for any claim for which the statute would otherwise already have run as of June 2005, Mrs. Mims had until 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

COLUMBIA, South Carolina

JANUARY 21, 2014

Original Order dated January 21, 2014,
signed by
Judge G. Thomas Cooper, Jr.

Jan 21, 2014 DDSN

Rec'd Jan 25, 2014

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FORM 4

JUDGMENT IN A CIVIL CASE

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

CASE NUMBER: 2007CP4003365

Margaret Mims

Babcock Center Inc

Edward Mims

Judy Johnson

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 22 January 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Patricia Logan Harrison

Peter Demos Protopapas

Kenneth P. Woodington

Joel W. Collins Jr.

Christian Stegmaler

William H. Davidson II

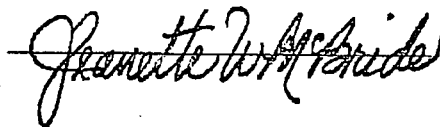
Leslie A. Cotter Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court



IN THE COURT OF COMMON PLEAS

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**

Defendants.

STATEMENT

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.

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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.

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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.

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- 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.

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- 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.

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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).

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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

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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.

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.

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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).

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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

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 of 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.*

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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

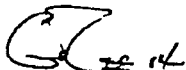


kinds occurred at Babcock facilities, often at times after the events involving Plaintiff, and in any event not connected to the kinds of injuries that occurred with respect to Plaintiff.

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 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). 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.

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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.

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[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

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), SCRCRCP, “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).

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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

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.”

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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.

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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 injuries of which Plaintiff complains, there can be no liability for negligent supervision. *See Brockington v. Pee Dee Mental Health Center*, 315 S.C. 214, 433 S.E.2d 16 (Ct. App. 1993). Moreover, as already discussed above, there is no question that Babcock Center employees are not employees of DDSN. *Young v. South Carolina Dept. of Disabilities and Special Needs*, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007).

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.

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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 specific facts 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

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.

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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

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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

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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

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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.

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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.

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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 not run as of

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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

COLUMBIA, South Carolina

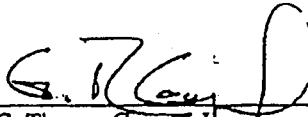
JANUARY 21, 2014

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

CONCLUSION

For the foregoing reasons, the Court concludes that the DDSN Defendants' Motion for Summary Judgment should be granted and that this action should be, and hereby is, dismissed with prejudice in all respects with regard to Defendants South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stanley Butkus.

AND IT IS SO ORDERED.


G. Thomas Cooper, Jr.
Circuit Court Judge
Fifth Judicial Circuit

COLUMBIA, South Carolina

January 21, 2014

DLSCN 03/28/14

Connected orders received 2-10-14

FORM 4

JUDGMENT IN A CIVIL CASE

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

CASE NUMBER: 2007-CP-40-3365

Iward Mims

Babcock Center, Inc., et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Other Dismissed without prejudice ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendants' Motion to Correct Clerical Error is GRANTED. Signature page corrected.

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

G. L. [Signature]

Judge Code 2176

Date 2-4-14

For Clerk of Court Office Use Only

This judgment was entered on the 16 day of Feb, 2014 and a copy mailed first class or placed in the appropriate attorney's box on this 16 day of Feb, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Patricia L. Harrison

ATTORNEY(S) FOR THE PLAINTIFF(S)

Kenneth P. Woodington

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court

Janette W. McBride

May 29, 2014

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
IN THE FIFTH JUDICIAL CIRCUIT

Case No. 2007-CP-40-03365

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

vs.)

**ORDER DENYING PLAINTIFF'S MOTION
FOR RECONSIDERATION**

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

RICHLAND COUNTY
FILED
JUN - 3 AM 10:24
JANETTE W. HERRIDGE
C.C.P. & G.S.

This matter comes before the Court by way of Plaintiff Edward Mims's Motion to Reconsider pursuant to Rule 59(e), SCRCF. Specifically, Plaintiff asks this Court to reconsider its Order Granting Judgment to Defendants Babcock Center, Inc. and Judy Johnson and its Order Granting Summary Judgment to Defendants South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stanley Butkus filed January 21, 2014.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby **DENIES** Plaintiff's Motion under Rule 59(e), SCRCF to Reconsider this Court's Orders filed January 21, 2014. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

IT IS SO ORDERED.

Columbia, South Carolina
May 29, 2014


G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

SCANNED

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

CASE NUMBER: 2007CP4003365

Margaret Mims

Tonya Bradford

Edward Mims

Craig Stoxen

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 3 June 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Patricia Logan Harrison

Peter Demos Protopapas

Kenneth P. Woodington

Leslie A. Cotter Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court



STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

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

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
IN THE FIFTH JUDICIAL CIRCUIT

Case No. 2007-CP-40-03365

**ORDER DENYING PLAINTIFF'S MOTION
FOR RECONSIDERATION**

RICHLAND COUNTY
FILED
JUN -3 AM 10:24
JANETTE W. HERRIDGE
C.C.P. & C.S.

This matter comes before the Court by way of Plaintiff Edward Mims's Motion to Reconsider pursuant to Rule 59(e), SCRCF. Specifically, Plaintiff asks this Court to reconsider its Order Granting Judgment to Defendants Babcock Center, Inc. and Judy Johnson and its Order Granting Summary Judgment to Defendants South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stanley Butkus filed January 21, 2014.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby **DENIES** Plaintiff's Motion under Rule 59(e), SCRCF to Reconsider this Court's Orders filed January 21, 2014. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

IT IS SO ORDERED.

Columbia, South Carolina
May 29, 2014


G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

PLEADINGS

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Edward Mims, through his guardian)
Margaret Mims,)
Plaintiff)
)
vs.)
)
Babcock Center, Inc., Judy Johnson,)
Tonya Bradford, Craig Stoxen, Sue Slater,)
Stanley Butkus, Susan Bowling, the)
South Carolina Department of Health)
and Human Services,)
Defendant)
)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

COMPLAINT

(Jury Trial Demanded)

BARBARA A. SCOTT
C.C.C. & G.S.

2007 MAY 29 PM 4:54

FILED

Plaintiff, complaining of the Defendants herein, would show unto the Court as follows:

1. Plaintiff brings these actions pursuant to South Carolina Code §§ 15-5-90, 15-15-10, et. seq., 33-56-180, 43-35-5, et. seq. 42 U.S.C. §§ 1983, 1396a(a)(8), 1396a(a)(23) other provisions of the Medicaid Act and the Medicare Act and the common law of South Carolina.

THE PARTIES

2. Plaintiff is a person who has profound mental retardation and physical disabilities who is a resident of Richland County, South Carolina.
3. Defendant Babcock Center, Inc. (hereafter "Babcock Center"), is a corporation which does business in Richland County, South Carolina.
4. Individual defendant, Judy Johnson, is the director of the Babcock Center.
5. Individual defendant, Tonya Bradford, is an employee of the Babcock Center who, upon information and belief, is the "consumer advocate" for persons served by the Babcock



Center.

6. Individual defendants Craig Stoxen and Sue Slater are members of the Board of Directors of the Babcock Center, Inc.
7. Individual defendant, Stanley Butkus is the State Director of the South Carolina Department of Disabilities and Special Needs (DDSN).
8. The South Carolina Department of Health and Human Services is the state agency which is responsible for the operation of the Medicaid program pursuant to the Medicaid Act.
9. Individual defendant, Susan Bowling is the Director of the South Carolina Department of Health and Human Services.

FACTUAL BACKGROUND

10. Edward Mims is a person who has profound mental retardation and severe physical disabilities who was admitted to the Babcock Center in 1999.
11. Edward was placed at Clusters, Babcock Center's largest residential facility and when his mother complained that Edward was being beaten by a staff member at Clusters, DDSN brought an action to terminate the rights of Edward's mother, thereby involuntarily committing Edward to DDSN custody.
12. Edward was repeatedly beaten with a belt by another resident on or about January 25, 2002 after experiencing many "unexplained" injuries which required medical treatment during the time he was a resident at Clusters.
13. In early 2002, Edward was transferred to Kensington ICF/MR, which was also operated by the Babcock Center.
14. While at Kensington, Edward continued to experience unexplained injuries and

behavioral signs of being fearful of harm.

15. On or about July 27, 2004, Edward's bed and room at Kensington were found to be infested with ants and he was treated at the emergency room for "ant bites all over."
16. On October 13, 2004, Kensington was cited to CMS (the federal Medicaid Agency) for Immediate Jeopardy which threatened the life and health of residents there after Edward's roommate choked to death at the facility.
17. CMS cited Kensington for posing a threat to the health and safety of clients resulting from inadequate staff training, understaffing, failure to conduct thorough investigations and failure to take appropriate action to ensure client protections.
18. In October 2004, Clusters was closed after CMS (the federal Medicaid Agency) cited Babcock for Immediate Jeopardy due to inadequate staffing, understaffing, failure to conduct thorough investigations and failure to protect residents from physical harm at that facility.
19. Edward continued to be subjected to neglect and unexplained injuries while at Kensington and at the Babcock Center workshop he attended and Kensington was cited by the South Carolina Department of Health and Environmental Control for a Violation of Life Safety Code on or about November 23, 2004.
20. In January of 2005, Kensington was cited by Carolina Medical Review for failure to meet federal standards of participation in the Medicaid program and the Director of SCDHHS notified Judy Johnson, Stanley Butkus and CMS of these deficits.
21. On March 8, 2005, the South Carolina Department of Health and Environmental Control (SCDHEC) found that the deficiencies cited on November 23, 2004 had not been corrected and Kensington was decertified on April 29, 2005.

22. On or about May 27, 2005, Edward was found in his room at Kensington to have a 4 cm "laceration on the undersurface of his penis" with blood oozing from the wound.
23. The injury required six or more stitches to repair and Edward was returned to Kensington from the hospital instead of being taken to his mother's home as had been planned before the injury.
24. Babcock Center failed to make a timely report of this or other injuries to the Ombudsman or to law enforcement.
25. On June 6, 7 and 8, Babcock Center refused to admit a court-appointed visitor into the facility to examine Edward and to report back to the Court.
26. On June 9, 2007, the Richland County Probate Court issued an emergency temporary order authorizing Edward's mother to take physical custody of him and to determine his placement.
27. On June 10, 2005, officials at DDSN and Babcock refused to allow Edward's guardian to remove him from Kensington so that she could provide services for him at home.
28. Edward was finally taken into the custody of his mother after law enforcement was called and the probate judge became involved in securing his release from Kensington.
29. Babcock Center and its officials failed to investigate this and other injuries and failed to protect Edward from harm.
30. After Edward was removed from the Babcock Center by his mother, Defendants conspired to keep Edward's mother from being appointed as his permanent guardian.
31. Defendants have subsequently denied services to Edward as a reprisal for his mother reporting abuse and neglect and removing him from the custody of DDSN.

PLAINTIFF'S CLAIMS

FOR A FIRST CAUSE OF ACTION

NEGLIGENCE

32. Plaintiff restates and realleges all of the allegations set out above in paragraphs 1 through 31 as if fully set forth herein.
33. Defendant Babcock Center, Judy Johnson, its director, Craig Stoxen and Sue Slater, members of the Babcock Center Board of Directors and Tonya Bradford, Babcock Center's consumer advocate, failed to exercise due care in the provision of services to Edward and the investigation of injuries after the incident which occurred on or about May 27, 2007.
34. All Defendants failed to protect Edward from harm prior to and after the incident which occurred on May 27, 2007.
35. All Defendants failed to exercise due care in providing for the training of staff at the Babcock Center before and after this incident;
36. All Defendants failed to exercise due care in protecting Edward from harm and failed to hold the Babcock Center and its management accountable for protecting the health and welfare of Edward Mims both before and after this incident.
37. Defendant the South Carolina Department of Health and Human Services failed to assure the health and safety of Edward Mims at all times when he was in receiving ICF/MR services.
38. All Defendants failed to provide services necessary to maintain the health and safety of a vulnerable adult, as mandated in the Omnibus Adult Protection Act, S.C. Code § 43-35-5, et. seq., the Medicaid Act and the common law duty of care of the Babcock Center and DDSN.

39. Plaintiff requests actual and punitive damages in an appropriate amount.
40. Plaintiff requests legal fees and costs pursuant to 42 U.S.C. § 1983 for violation of federal law.

FOR A SECOND CAUSE OF ACTION

VIOLATION OF 1396a(a)(8) and 1396a(a)(23) and 1983.

41. Plaintiff restates and realleges all of the allegations set out above in paragraphs 1 through 40 as if fully set forth herein.
42. Defendants have failed to provide Plaintiff with requested services with reasonable promptness from a provider chosen by Plaintiff.
43. Plaintiff requests an order providing Plaintiff injunctive relief requiring Defendants to provide Plaintiff with services with reasonable promptness from a qualified Medicaid provider chosen by Plaintiff.
44. Plaintiff requests legal fees and costs as provided by 42 U.S.C. § 1983 for violation of Plaintiff's rights under the Medicaid Act.

FOR A THIRD CAUSE OF ACTION

VIOLATION OF DUE PROCESS RIGHTS OF PLAINTIFF

45. Plaintiff restates and realleges all of the allegations set out above in paragraphs 1 through 44 as if fully set forth herein.
46. Defendants have violated Plaintiff's right to a fair hearing and a final decision to be provided within ninety days, causing Plaintiff to incur legal expenses and costs to exercise his constitutional right to due process.
47. Defendants have violated Plaintiff's due process rights under the United States Constitution.

48. Plaintiff requests injunctive relief and payment of costs and legal fees pursuant to 42 U.S.C. § 1983.

FOR A FOURTH CAUSE OF ACTION

VIOLATION OF SOUTH CAROLINA CODE OF LAWS § 44-81-1 et. seq. AND FEDERAL
LAWS PROTECTING DISABLED PERSONS

49. Plaintiff restates and realleges all of the allegations set out above in paragraphs 1 through 48 as if fully set forth herein.
50. Defendants have violated Plaintiff's rights to be free from retaliation as provided in the South Carolina Bill of Rights of Long Term Care Residents contained at South Carolina Code of Laws §§ 44-81-10 and 70 as well as federal laws including 42 U.S.C. §§ 1395i-3(c)(1)(A)(vi); 1396r(c)(1)(A)(vi) and 42 C.F.R. 483.10(f).
51. Defendants violated 42 U.S.C. §§ 1395i-3(c)(1)(C); 1396r(c)(1)(C) and 42 C.F.R. 483.10(a)(3) which require the Defendants to recognize the rights of a person appointed by State law to act on the behalf of an incompetent person.
52. As a result of the violation of these rights by the Defendant, Plaintiff has suffered physical and emotional injuries.
53. Plaintiff requests actual and punitive damages in an appropriate amount.
54. Plaintiff also requests injunctive relief and payment of costs and legal fees pursuant to 42 U.S.C. § 1983.

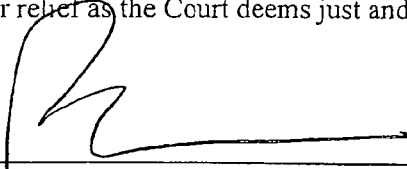
PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays unto the Court for the following relief:

- A. Actual and punitive damages in an appropriate amount.
- B. Payment of legal fees and costs pursuant to 42 U.S.C. § 1983.

C. Injunctive relief to provide Plaintiff services with reasonable promptness from providers chosen by Plaintiff.

D. Such other and further relief as the Court deems just and proper.



Patricia L. Harrison
Attorney for Plaintiff
611 Holly Street
Columbia, South Carolina 29205
(803) 256-2017

May 29, 2007
Columbia, South Carolina

nen	STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
		)	FIFTH JUDICIAL CIRCUIT
	COUNTY OF RICHLAND	)	
		)	
	Edward Mims, by and through his	)	
	legal guardian, Margaret Mims,	)	AMENDED COMPLAINT
	Plaintiff	)	
		)	2007 CP 4003365
	vs.	)	
		)	
	Babcock Center, Inc., Judy Johnson,	)	(Jury Trial Demanded)
	the South Carolina Department of	)	
	Disabilities and Special Needs,	)	
	Kathi Lacy and Stanley Butkus,	)	
	Defendants	)	

2008 MAY -7 PM 4:41
 BARBARA A. SCOTT
 C.C.C. & G.S.

The Plaintiff, complaining of the Defendants, alleges as follows:

PARTIES

1. Plaintiff, Edward Mims is a resident of Richland County who has severe mental and physical disabilities, including profound mental retardation, which have existed from birth and are lifelong. Plaintiff is unable to speak, but he makes squawking sounds when he is in distress. He is incontinent and requires close supervision to prevent choking.
2. This complaint is brought on behalf of Edward Mims by Margaret Mims, who is the natural parent and the duly appointed guardian for Edward Mims.
3. The South Carolina Department of Disabilities and Special Needs (SCDDSN) is the state agency responsible for the administration and oversight of the MR/RD Medicaid waiver and ICF/MR Medicaid programs

which provide services to persons who have mental retardation and other disabilities.

4. The Babcock Center, Inc. is a private corporation which receives state, federal and private funds to provide services to persons who have mental retardation and related disabilities.
5. The Babcock Center has provided these services to Plaintiff in Richland County and Lexington County, however, the most substantial part of the alleged acts giving rise to the causes of action herein occurred in Richland County.
6. Individual Defendants Kathi Lacy and Stanley Butkus are employees of the South Carolina Department of Disabilities and Special Needs.
7. Defendant Judy Johnson is the Director of the Babcock Center, Inc.

JURISDICTION AND VENUE

8. Plaintiff brings this action pursuant to South Carolina Code §§ 15-15-10, 15-53-20, 15-77-50, 15-78-10, 43-33-530, 42 U.S.C. §§ 1983, 1985, 1988, the South Carolina Constitution, the United States Constitution, the Americans with Disabilities Act, the Rehabilitation Act and the common law of South Carolina.
9. Venue is in Richland County where the most substantial part of the alleged

acts giving rise to the causes of action occurred.

FACTUAL BACKGROUND

10. Plaintiff was admitted to a Babcock Center residential facility in 1999 when his mother became ill and was temporarily unable to provide for his care.
11. In accepting Plaintiff as a patient and resident, Babcock Center and SCDDSN undertook a duty and responsibility of providing care, treatment and services for Plaintiff and had the duty to exercise reasonable care in supervising Plaintiff and providing appropriate oversight, care and treatment to him.
12. Further, Babcock Center, as the caregiver for a vulnerable adult, had the duty to provide the services necessary to maintain the health and safety of the vulnerable adult.
13. Soon after Plaintiff was admitted to the Babcock Center, he began to be subjected to physical assaults and batteries, which resulted in physical injuries and psychological abuse to Plaintiff.
14. Employees of the Babcock Center, Kathi Lacy, Stanley Butkus and other employees of the SCDDSN were aware of the systemic abuse, neglect and exploitation of clients living in Babcock Center facilities.
15. SCDDSN officials failed to report these incidents of abuse, neglect and

exploitation to the appropriate authorities and they have failed to take necessary action to investigate reports of abuse and neglect.

16. When Plaintiff's mother complained of the treatment Plaintiff was receiving, as a reprisal, Babcock Center employees and employees of SCDDSN accused his mother of neglecting and/or abusing Plaintiff at home.
17. The Defendants have established a pattern and practice of bringing reprisals against parents who complain about services provided by the Babcock Center.
18. As a reprisal for making these reports to law enforcement, the Babcock Center and DDSN terminated Plaintiff's week-end home visits and falsely accused his mother of neglect.
19. Plaintiff was never injured during his week-end visits to his home, but he experienced repeated injuries while living in Babcock Center facilities.
20. When Plaintiff's mother reported to the Office of the South Carolina Attorney General that Plaintiff was being assaulted at Clusters, employees of the Babcock Center and SCDDSN caused Plaintiff to be involuntarily committed to the custody of the Department.
21. Defendants threatened Plaintiff's mother that she would not be able to see

her son if she contested the involuntary commitment.

22. Employees of the Babcock Center and SCDDSN falsely informed the Probate Court and the court-appointed guardian ad litem that Plaintiff's mother was neglecting him and that she was unable to care for Plaintiff in her home.
23. Despite these reprisals, Plaintiff's mother persisted in having this crime investigated and a Babcock Center employee confessed to beating Plaintiff.
24. After this conviction, the Babcock Center did not advise Plaintiff's mother that her allegations had been substantiated and DDSN continued to refuse the requests of Plaintiff's mother that he be released back into his mother's custody and control.
25. On or about December 16, 2001, Plaintiff was again beaten at the Babcock Center and his mother attempted to secure his release from the Babcock Center.
26. SCDDSN sent a letter on December 27, 2001 to Plaintiff's mother stating:
"We understand that you wish it were possible for him to live at home again. All of us agree that one single person is not enough people to

provide care for Edward. It is impossible because of his conditions and the fact that several different people have to be awake and around him all the time.”

27. On or about January 24, 2002, Plaintiff was repeatedly beaten at Clusters by another resident with a belt, suffering abrasions and contusions requiring treatment in the emergency room.
28. In 2002, having assumed custody and control of Plaintiff, SCDDSN transferred him to Kensington ICF/MR, a nursing facility which was also operated by the Babcock Center Plaintiff continued to experience unexplained injuries and behavioral signs indicating that he was being abused.
29. On or about July 27, 2004, Plaintiff and his bed were found to be infested with ants and he was treated at the emergency room for “ant bites all over.,” however, his mother was not informed that his room at Kensington had become infested with ants.
30. On October 13, 2004, CMS, the Federal Medicaid Agency, cited the Babcock Center for Immediate Jeopardy at Kensington after finding conditions there that threatened the life and safety of clients residing there.
31. At that time, CMS cited Babcock Center for posing a threat to the health

and safety of clients living at Kensington due to inadequate training, understaffing, failure to conduct thorough investigations and failure to take appropriate actions to assure client protections.

32. During the last year that Plaintiff was at Kensington, the facility received additional Immediate Jeopardy citations for violation of health and safety standards which placed Plaintiff and other residents at risk of serious harm.
33. According to SCDDSN, during fiscal year 2004, the rate of substantiated cases of abuse, neglect and exploitation at the Babcock Center was four times the state average.
34. During this time, CMS and the South Carolina Department of Health and Human Services closed Clusters, the facility where Plaintiff had been forced to live during the first years of his involuntary confinement, for violation of health and safety standards.
35. Plaintiff continued to be subjected to neglect and unsubstantiated injuries while at Kensington and at the Babcock Center workshop he attended during the daytime hours.
36. In January of 2005, Carolina Medical Review reported that Babcock Center failed to meet federal standards for participant in the Medicaid program at Kensington and other facilities under its control.

37. Defendants Johnson, Butkus and Lacy and were advised of these violations and deficits and failed to take appropriate action to protect the health and well being of Plaintiff and other residents.
38. On March 8, 2005, the South Carolina Department of Health and Environmental Control (SCDHEC) determined that violations previously cited at Kensington had not been corrected and the facility was decertified on April 29, 2005.
39. On or about May 27, 2005, Plaintiff was found in his room at Kensington with a 4 cm laceration on his penis which was not self inflicted.
40. This injury required six or more stitches to repair and Plaintiff was returned to Kensington, a decertified facility, from the hospital instead of being taken immediately to his mother's home.
41. Defendant Johnson and the Babcock Center failed to make a timely report to law enforcement and the State Ombudsman of this sexual assault.
42. Between the time that SCDDSN assumed responsibility for the involuntary commitment of Plaintiff to the agency's care and custody and the injury which occurred on or about May 27, 2005, no one at the agency monitored the condition of Plaintiff.
43. Upon information and belief, Defendants Lacy and Butkus were informed of

this assault and they failed to make appropriate reports to law enforcement or to thoroughly investigate the incident.

44. On June 6, 7, and 8, 2005, the Babcock Center refused to allow the court-appointed Visitor into Kensington to examine Plaintiff as ordered by the Probate Court.
45. Upon information and belief, Defendant Johnson was aware of the attempts made by the court-appointed Visitor to examine the Plaintiff and she instructed Babcock Center staff not to allow the Visitor into the facility.
46. On June 9, 2007, the Richland County Probate Court issued an emergency order authorizing Plaintiff's mother to take physical custody of Plaintiff.
47. On June 10, 2005, officials at SCDDSN and the Babcock Center refused to allow Plaintiff's mother to remove him from the facility.
48. The Babcock Center and SCDDSN failed to adequately investigate the report that Plaintiff had been sexually assaulted at Kensington.
49. The Babcock Center and SCDDSN and the individual Defendants failed to investigate this and other injuries to Plaintiff and violated their duty of care to protect Plaintiff from harm.
50. After Plaintiff's mother finally succeeded in removing him from Kensington, the Defendants attempted to obstruct the proceedings for the

appointment of a guardian.

51. The individual Defendants entered into a conspiracy to deprive Plaintiff of his civil rights and his right to receive services.
52. As a reprisal, SCDDSN and Defendant Lacy denied Plaintiff's request for adult health care services, requiring Plaintiff to appeal eligibility for these services.
53. During the time Plaintiff was denied these services, the Babcock Center was allowed to retain the funding that was allocated to Plaintiff for these services.
54. Plaintiff's guardian, through her legal representative, repeatedly requested that Plaintiff's Medicaid funding be moved from the Babcock Center but SCDDSN continued to pay the Babcock Center even when services were not being provided by the Babcock Center.
55. SCDDSN has allowed the Babcock Center to pay inadequate rates to respite caregivers, while requiring higher rates of pay to caregivers working in facilities operated by the Babcock Center.
56. SCDDSN allows the Babcock Center to retain funds which are provided for these in-home services when families are unable to locate caregivers due to inadequate payment for services.

57. Upon information and belief, SCDDSN and the Babcock Center failed to pay fica taxes of respite and companion caregivers while paying these taxes for caregivers working at facilities operated by the Babcock Center.
58. Upon information and belief, SCDDSN and the Babcock Center pays in-home caregivers lower wages and requires these caregivers to pay for background checks, driving reports, TB tests and other prerequisites of employment which are paid by the Babcock Center for employees who provide services in more restrictive settings.
59. Upon information and belief, the Babcock Center pays for employees who work in more restrictive settings to attend mandatory training, but does not pay for hours spent in mandatory training of respite and adult companion caregivers.
60. Through these practices, Defendants have administered the MR/RD Medicaid waiver program so as to force individuals who have disabilities into more restrictive residential and congregate day programs in violation of the Americans with Disabilities Act.
61. Defendants have charged Plaintiff for services in excess of the cost of those services.
62. Defendants have received payments for services which failed to meet

established standards or the needs of Plaintiff to receive treatment in the least restrictive setting.

FOR A FIRST CAUSE OF ACTION
VIOLATION OF 42 U.S.C. §§ 1983 and 1988

63. Each and every allegation above, not inconsistent herewith, is realleged in full as if set forth below.
64. Individual Defendants Lacy, Butkus and Johnson, in their individual capacities, acted, as alleged herein, under color of South Carolina and federal statutes, ordinances, regulations, customs or usage.
65. Defendant SCDDSN failed to monitor Plaintiff's condition and treatment needs after involuntarily committing him to the custody of the State.
66. Through their acts, the individual Defendants, in their individual capacities, subjected Plaintiff or caused him to be subjected to deprivation of his rights, privileges or immunities secured by the Constitution and laws of the United States, which include, but are not limited to, the right to liberty and the pursuit of happiness, the right to equal protection of the laws and the right to be secure in one's person and property against unreasonable seizure.
67. Through their acts, the individual Defendants, in their individual capacities violated Plaintiff's rights granted under the Americans with Disabilities Act.

68. The acts of the individual Defendants that deprived Plaintiff of his rights, privileges and immunities secured by the Constitution or the laws of the United States, proximately caused great harm to Plaintiff for which he is entitled to recover damages.
69. In violating Plaintiff's federally-protected rights, individual Defendants Johnson, Butkus and Lacy were motivated by evil motives and intent and showed reckless and callous indifference to the federally protected rights of Plaintiff; therefore the Plaintiff is entitled to recover punitive damages.
70. The Plaintiff is entitled to recover reasonable attorney's fees and expenses of this action in accordance with 42 U.S.C. § 1988.

FOR A SECOND CAUSE OF ACTION
VIOLATION UNDER 42 U.S.C. §§ 1985 and 1988

71. Each and every allegation above, not inconsistent herewith, is realleged in full as if set forth below.
72. Individual Defendants, in their individual capacities, entered into a conspiracy.
73. The purpose of this conspiracy was to deprive, either directly or indirectly, Plaintiff of services in violation of the equal protection of the Constitution or laws of the United States or of equal privileges and immunities under the Constitution or laws of the United States.

74. The individual Defendants' acts in furtherance of this conspiracy injured Plaintiff in his person and deprived him of his rights, privileges or immunities as a citizen of the United States for which the Plaintiff is entitled to recover actual damages.
75. In injuring Plaintiff in his person and in depriving him of his rights, privileges or immunities as a citizen of the United States, the individual Defendants were motivated by evil motives and intent and showed reckless and callous indifference to Plaintiff's federally-protected rights; therefore the Plaintiff is entitled to recover punitive damages.
76. The Plaintiff is entitled to recover the reasonable attorney's fees and expenses of this action in accordance with 42 U.S.C. § 1988.
77. Plaintiff demands a trial by jury.

FOR A THIRD CAUSE OF ACTION
NEGLIGENT SUPERVISION

78. Each and every allegation above, not inconsistent herewith, is realleged in full as if set forth below.
79. The Defendants owed Plaintiff a duty of protecting the health and welfare of Plaintiff.

80. The Defendants, through the acts of individual Defendants and the officers, agents and employees of the agency and corporate Defendants, breached their duty to Plaintiff and were negligent, negligent *per se*, grossly negligent, careless, reckless, wilful and wanton in the following particulars, with each subparagraph sufficient to support the relief sought:
- a. In failing to provide proper supervision to protect Plaintiff from assault, battery and sexual assault;
 - b. In failing to provide supervision to protect Plaintiff from injury;
 - c. In failing to properly monitor Plaintiff's condition and treatment needs after initiating involuntary commitment proceedings;
 - d. In failing to provide adequate staffing needed to assure the health and welfare of Plaintiff and other residents;
 - e. In failing to thoroughly investigate reports of abuse, neglect and exploitation of Plaintiff and other residents at his facility;
 - f. In failing to discharge Plaintiff to the care of his mother;
 - g. In failing to provide services in the least restrictive setting;
 - h. In obstructing Plaintiff's discharge from the Babcock Center;
 - i. In failing to report incidents which a reasonable person would suspect might have resulted from abuse or neglect;

j. In obstructing the attempts of Plaintiff's guardian to establish the guardianship;

k. In providing false and misleading information to the Probate Courts in order to prevent his discharge from the Babcock Center and the enforcement of Plaintiff's civil rights.

81. Such negligence, gross negligence, carelessness, recklessness, wilful and wanton conduct on the part of the Defendants proximately caused injury to Plaintiff for which the Plaintiff is entitled to recover actual and punitive damages, attorney fees, expert witness fees, costs and expenses.

FOR A FOURTH CAUSE OF ACTION
VIOLATION OF THE AMERICANS WITH DISABILITIES ACT
AND THE REHABILITATION ACT

82. Each and every allegation above, not inconsistent herewith, is realleged in full as if set forth below.
83. Defendants Johnson, Lacy and Butkus and SCDDSN have not provided Plaintiff with needed services in the most integrated setting appropriate to the needs of Plaintiff and have thereby violated the Rehabilitation Act and Americans with Disabilities Act.
84. Defendant DDSN has operated its programs in such a way as to prevent Plaintiff and other disabled persons from remaining in their homes by

failing to provide payment to caregivers of home-based services which is commensurate with funding provided for institutional services.

85. Defendants' official practices have caused Plaintiff to be unnecessarily segregated and at risk of returning to an institution operated by the Defendants where Plaintiff has suffered serious harm and threats of harm.
86. Defendants SCDDSN, the Babcock Center, Johnson, Butkus and Lacy have operated these programs so as to keep its institutions and workshops full.
87. Providing needed services to Plaintiff would not fundamentally alter the nature of the services, programs or activities of the State.
88. These violations of federal law are subject to repetition yet they have evaded review.
89. Plaintiff is entitled to injunctive relief and to recover for damages, including legal fees, expert fees, other litigation and court costs and such other damages, including punitive damages, occasioned by such deprivation of services.

FOR A FIFTH CAUSE OF ACTION
UNJUST ENRICHMENT

90. Each and every allegation above, not inconsistent herewith, is realleged in full as if set forth below.
91. The Defendants have received payment for staffing which was not provided

to Plaintiff.

92. These Defendants received payment for treatment which was not provided in a safe and effective manner.
93. The Defendants, Judy Johnson, the Babcock Center, Inc. and SCDDSN have realized a benefit from the payments made for these services.
94. It would be unjust and inequitable to allow the Defendants Judy Johnson, the Babcock Center, Inc. and SCDDSN to keep the payments which have been charged to Plaintiff.
95. Plaintiff is entitled to recover for damages, including legal fees, expert fees, other litigation and court costs and such other damages, including punitive damages, occasioned by Defendants' unjust enrichment.

DAMAGES

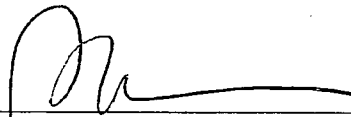
96. As the direct and proximate result of Defendants' acts and omissions set forth above, Plaintiff has experienced conscious pain and suffering and severe emotional distress.
97. Plaintiff has been deprived of needed services and has been charged with the costs of services which have not been provided, have been inappropriately and negligently provided or have been overcharged.
98. Plaintiff has been deprived of services in the least restrictive environment.

99. Plaintiff has experienced a violation of his civil, constitutional and statutory rights and is entitled to attorney fees, costs, expenses.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays unto the Court for the following relief:

100. Actual damages in an appropriate amount.
101. Punitive damages in an appropriate amount.
102. An order requiring Defendants to provide services in the least restrictive environment appropriate to the needs of the Plaintiff.
103. An order prohibiting the State from charging Plaintiff for services.
104. Attorney fees, expert witness fees, costs and expenses.
105. Such other and further relief as the Court deems just and proper.

BY: 

Patricia L. Harrison
S.C. Bar No. 11309
Attorney for Plaintiff
611 Holly Street
Columbia, South Carolina 29205
(803) 256 2017

May 7, 2008

Attorney for Plaintiff

RECEIVED APR 13 2009

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND)

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

Civil Action No. 07-CP-40-3365

Plaintiff,

v.

ANSWER OF THE SOUTH CAROLINA
DEPARTMENT OF DISABILITIES AND
SPECIAL NEEDS,

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

KATHI LACY AND STANLEY BUTKUS
(JURY TRIAL REQUESTED)

Defendants.

The Defendants South Carolina Department of Disabilities and Special Needs ("DDSN"), Kathi Lacy and Stanley Butkus, not waiving but expressly reserving all rights under all pending motions and their Motion to Strike served contemporaneously herewith, answering the Amended Complaint herein, allege the following:

FOR A FIRST DEFENSE

1. Any allegation of the Amended Complaint not hereinafter specifically admitted, qualified or explained is denied.
2. Answering Paragraph 1, it is admitted that Plaintiff Edward Mims suffers from certain developmental disabilities, but these Defendants would refer the Court to his medical records for a more precise description of those disabilities and their consequences. The remainder of Paragraph 1 is denied as stated.
3. Paragraph 2 is admitted on information and belief.

4. Answering Paragraph 3, these Defendants would refer the Court to the statutes creating the Department of Disabilities and Special Needs, as well as to any other applicable legal authorities, for the most accurate description of the powers and duties of the agency.

5. Paragraph 4 is admitted on information and belief.

6. Paragraph 5 is denied for lack of information as to where the "most substantial part of alleged acts" therein referenced occurred, or what is meant by "the most substantial part."

7. Answering Paragraph 6, it is admitted that Defendant Stanley Butkus was the Director of the Department of Disabilities and Special Needs through February 27, 2009, and that Defendant Kathi Lacy is Associate State Director for Policy.

8. Paragraph 7 is admitted on information and belief.

9. The allegations of Paragraph 8 are merely descriptive of this action and require neither admission nor denial. Insofar as such allegations attempt to establish liability on the part of these Defendants, these Defendants would deny same and demand strict proof thereof.

10. Paragraph 9 is denied for lack of information as to where the "most substantial part of alleged acts" therein referenced occurred, or what is meant by "the most substantial part."

11. Only so much of Paragraph 10 is admitted as alleges that Plaintiff was admitted to a Babcock Center residential facility in approximately 1999.

12. The allegations of Paragraph 11 set forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of these Defendants, these Defendants would deny same and demand strict proof thereof.

13. Paragraph 12 does not pertain to these Defendants. However, to the extent that such allegations attempt to establish liability on the part of these Defendants, these Defendants would deny same and demand strict proof thereof.

14. Paragraph 13 is denied as stated.

15. Paragraphs 14 through 18 are denied.

16. Paragraph 19 is denied as stated, and is denied for lack of information as to whether Plaintiff was injured during his weekend visits to his home.

17. Answering Paragraph 20, these Defendants would show that on July 3, 2001, a Consent Order of the Richland County Probate Court, consented to by counsel for DDSN, by Plaintiff's guardian ad litem, by Plaintiff's attorney, and by Plaintiff's mother's attorney, ordered that Plaintiff be judicially admitted to the South Carolina Department of Disabilities and Special Needs, with weekend home visits pursuant to conditions set forth in that Order, to which these Defendants would refer the Court. Any remaining allegations of Paragraph 20 are denied.

18. Paragraph 21 is denied.

19. Paragraph 22 is denied. Moreover, these Defendants would show that in 2001, when the Probate Court Order was entered that judicially admitted Plaintiff to DDSN, that Order noted that Plaintiff's guardian ad litem, based on personal visits to Plaintiff's mother's home, among other things, "felt that [Plaintiff] could not safely be discharged to his mother's home." Consent Order, 7/3/01 at 2.

20. The portion of Paragraph 23 referring to "reprisals" is denied. The remainder of Paragraph 23 is denied for lack of information, no specific crime being therein referenced.

21. The allegation of Paragraph 24 referring to Babcock Center does not pertain to these Defendants. However, to the extent that such allegations attempt to establish liability on the part of these Defendants, these Defendants would deny same and demand strict proof thereof. Answering the remainder of Paragraph 24, these Defendants are not aware of which requests Plaintiff is referring to, but would show that as long as the 2001 Probate Court Order was in

effect, Plaintiff could not be released to his mother's custody and control for anything other than weekend visits, and even those visits could only occur if certain conditions were first met, as set forth in that Order.

22. Answering Paragraph 25, it is admitted that the Babcock nurse's notes for December 16, 2001 state that Plaintiff was hit in the right eye by another Babcock resident, but these Defendants have no first hand knowledge of that event. The remaining allegations of Paragraph 25 are denied for lack of information.

23. Answering Paragraph 26, these Defendants would refer the Court to the document referenced therein for the best evidence of its terms.

24. Paragraph 27 is denied as stated.

25. Only so much of Paragraph 28 is admitted as alleges that in approximately 2002, Plaintiff was transferred to a facility named Kensington that is part of the Babcock Center. The remaining allegations of Paragraph 28 are denied as stated.

26. The allegations of Paragraph 29 are denied for lack of information.

27. Answering Paragraphs 30 through 32, these Defendants would refer the Court to pertinent documents from CMS for the best evidence of their contents and with respect to the allegations of Paragraphs 30 through 32. To the extent that the allegations of Paragraphs 30 through 32 attempt to establish liability on the part of these Defendants, these Defendants would deny that anything alleged therein is a basis for imputing liability to these Defendants.

28. Answering Paragraph 33, these Defendants would refer the Court to a document prepared by DDSN, dated February 25, 2005, and entitled "Report to the Babcock Center Board of Directors," for complete information relating to the allegations of Paragraph 33.

29. Answering Paragraph 34, it is admitted that Babcock closed the Clusters facility on October 14, 2004, but these Defendants would refer the Court to documents pertaining to that closure for the most accurate description of the reasons for the closure.

30. Paragraph 35 is denied and denied as stated. These Defendants would note that this Paragraph alleges that Plaintiff was subjected to "unsubstantiated" injuries, a fact that in itself indicates that denial of such allegations is appropriate.

31. Answering Paragraph 36, these Defendants would refer the Court to the January 2005 report by Carolina Medical Review for the best evidence of the correctness of the allegations set forth in Paragraph 36.

32. Answering Paragraph 37, it is admitted on information and belief that Defendants Butkus and Lacy were aware of the January 2005 report by Carolina Medical Review. The remaining allegations of Paragraph 37 are denied.

33. Answering Paragraph 38, these Defendants would refer the Court to the appropriate DHEC documents for the best evidence of the allegations of that paragraph.

34. Answering Paragraphs 39 and 40, these Defendants would refer the Court to the appropriate medical records for the best evidence of the events described in that paragraph.

35. Paragraph 41 does not pertain to these Defendants. However, to the extent that such allegations attempt to establish liability on the part of these Defendants, these Defendants would deny same and demand strict proof thereof.

36. Paragraph 42 is denied.

37. Answering Paragraph 43, it is admitted that a report prepared by a DDSN physician was issued regarding the event described in Paragraphs 39 and 40. The report was dated June 4, 2004 (correct date was undoubtedly 2005). The conclusion of the report was that it was unlikely

that the event was caused by abusive or negligent management. The report ended by noting "Cause for laceration unknown." Any remaining allegations of Paragraph 43 are denied.

38. Paragraphs 44 and 45 do not pertain to these Defendants. However, to the extent that such allegations attempt to establish liability on the part of these Defendants, these Defendants would deny same and demand strict proof thereof.

39. Answering Paragraph 46, which presumably refers to an Order allegedly issued on June 9, 2005, instead of June 9, 2007, as alleged, these Defendants would allege that there was a hearing held before Probate Judge McCulloch on June 9, 2005, but none of these Defendants were notified of the hearing or were present at it, either in person or through counsel. That hearing resulted in an Order dated the following day, June 10, 2005, appointing Plaintiff's mother as his temporary guardian. That Order was not immediately provided to counsel for DDSN. These Defendants would refer the Court to that Order for the best evidence of its terms.

40. Answering Paragraph 47, these Defendants would allege that DDSN was advised by counsel for Plaintiff on June 10, 2005 (a Friday), that Plaintiff would not be returning to Babcock Center following his court-permitted weekend visit to his mother that weekend. Counsel for DDSN was concerned that to release Plaintiff under those representations would amount to acquiescence in an apparent violation of the 2001 Order of the Probate Court judicially admitting Plaintiff to DDSN except on weekends. On information and belief, counsel for Plaintiff and counsel for DDSN had a telephone discussion with Judge McCulloch, either jointly or separately, and that as a result of that discussion, it was agreed that Plaintiff could go home with his mother that Friday. At the same time, Judge McCulloch scheduled a hearing to occur before her on Sunday, June 12, 2005. As a result of that hearing, Judge McCulloch issued another Order dated June 14, 2005, to which these Defendants would refer the Court. At the same time, on

information and belief, Judge McCulloch in essence advised Plaintiff's counsel and counsel for DDSN that if Plaintiff's mother elected not to return Plaintiff to Babcock that Sunday, June 12, 2005, the Probate Court would regard that as a permissible action under the Order that was to be issued as a result of the June 12, 2005 hearing. On information and belief, Plaintiff has never returned to any Babcock facility since leaving on June 10, 2005.

41. Paragraphs 48 through 52 are denied.

42. Paragraph 53 is denied as stated.

43. Paragraphs 54 and 55 are denied.

44. Paragraph 56 is denied as stated.

45. Answering Paragraphs 57 and 58, it is denied that DDSN has any duty with respect to the matters alleged therein. Any remaining allegations of Paragraphs 57 and 58 are denied.

46. Paragraph 59 does not pertain to these Defendants. However, to the extent that such allegations attempt to establish liability on the part of these Defendants, these Defendants would deny same and demand strict proof thereof.

47. Paragraphs 60 through 62 are denied.

48. Answering Paragraph 63, these Defendants reiterate and reallege each and every paragraph and affirmative defense of this Answer as if set forth herein.

49. The allegations of Paragraph 64 set forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of these Defendants, these Defendants would deny same and demand strict proof thereof.

50. Paragraphs 65 through 70 are denied.

51. Answering Paragraph 71, these Defendants reiterate and reallege each and every paragraph and affirmative defense of this Answer as if set forth herein.

52. Paragraphs 72 through 76 are denied.
53. Paragraph 77, requesting a jury trial, requires neither admission nor denial.
54. Answering Paragraph 78, these Defendants reiterate and reallege each and every paragraph and affirmative defense of this Answer as if set forth herein.
55. The allegations of Paragraph 79 set forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of these Defendants, these Defendants would deny same and demand strict proof thereof.
56. Paragraphs 80 and 81 are denied.
57. Answering Paragraph 82, these Defendants reiterate and reallege each and every paragraph and affirmative defense of this Answer as if set forth herein.
58. Paragraphs 83 through 85 are denied.
59. Paragraph 86 is denied as stated.
60. Answering Paragraph 87, these Defendants deny that its allegations are relevant to Plaintiff's situation, because Plaintiff is being provided with any or all services to which he has shown entitlement. Any remaining allegations of Paragraph 87 are denied.
61. Paragraphs 88 and 89 are denied.
62. Answering Paragraph 90, these Defendants reiterate and reallege each and every paragraph and affirmative defense of this Answer as if set forth herein.
63. Paragraphs 91 through 99 are denied.
64. To the extent that any allegations of the prayer for relief, including Paragraphs 100 through 105, attempt to establish liability on the part of these Defendants, these Defendants would deny same and demand strict proof thereof.

FOR A SECOND DEFENSE

65. With respect to one or more of these Defendants, the Amended Complaint fails to state facts sufficient to constitute a cause of action against upon which relief may be granted.

FOR A THIRD DEFENSE

66. The Court lacks personal jurisdiction over one or more of these Defendants.

FOR A FOURTH DEFENSE

67. This action should be dismissed because of insufficiency of service of process, because no process was served on these Defendants until well over 120 days after the filing of the action.

FOR A FIFTH DEFENSE

68. This action should be dismissed because of insufficiency of process.

FOR A SIXTH DEFENSE

69. This action should be dismissed on the ground that it was never properly commenced by the service of the original Summons and Complaint on these Defendants. As a result, there was no pending action in which Plaintiff could amend her original Complaint.

FOR A SEVENTH DEFENSE

70. The Amended Complaint is a nullity, and this action should be dismissed, for the additional reason that the Amended Complaint did not comply with the requirements of Rule 15 for the amendment of pleadings.

FOR A EIGHTH DEFENSE

71. Defendants Lacy and DDSN were not properly added to this action by the mere service of a Summons and Amended Complaint more than 120 days after this action was originally filed.

FOR A NINTH DEFENSE

72. This Court lacks subject matter jurisdiction over this action.

FOR A TENTH DEFENSE

73. Some or all claims against some or all of these Defendants are barred by applicable statutes of limitations.

FOR AN ELEVENTH DEFENSE

74. Insofar as Plaintiff is alleging a claim for damages under state law, such claims are barred by the terms, conditions and immunities set forth in *S.C. Code Ann. §§ 15-78-10, et seq.* (Supp. 2008).

FOR A TWELFTH DEFENSE

75. Plaintiff has failed to exhaust all appropriate and available administrative remedies.

FOR A THIRTEENTH DEFENSE

76. Plaintiff has suffered no damage or injury as a result of any act of these Defendants.

FOR A FOURTEENTH DEFENSE

77. This action is barred by the Doctrine of Sovereign Immunity.

FOR A FIFTEENTH DEFENSE

78. Some or all of Plaintiff's claims are barred by the doctrines of claim preclusion or issue preclusion, or both.

FOR A SIXTEENTH DEFENSE

79. Some or all of Plaintiff's claims for injunctive relief are moot.

FOR A SEVENTEENTH DEFENSE

80. Plaintiff has waived or abandoned her right to pursue some or all of the claims for injunctive relief alleged in the Amended Complaint.

FOR AN EIGHTEENTH DEFENSE

81. Plaintiff lacks standing to pursue some or all of the claims for injunctive relief alleged in the Amended Complaint.

FOR A NINETEENTH DEFENSE

82. No justiciable controversy exists between these parties with respect to some or all of Plaintiff's claims.

FOR A TWENTIETH DEFENSE

83. Some or all of Plaintiff's claims are barred by laches.

FOR A TWENTY-FIRST DEFENSE

84. The individual Defendants would allege that insofar as those Defendants were exercising their discretion in good faith, that such actions are an absolute bar to any claims by the Plaintiffs.

FOR A TWENTY-SECOND DEFENSE

85. The individual Defendants at no time violated any clearly established statutory or constitutional rights that were known or should have been known to them and, therefore, they are entitled to immunity.

FOR A TWENTY-THIRD DEFENSE

86. The individual Defendants, to the extent they are sued in their official capacity, are not "persons" amenable to suit under 42 U.S.C. § 1983, and therefore, are not proper parties to any claims under that statute.

FOR A TWENTY-FOURTH DEFENSE

87. Punitive damages are not properly recoverable against these Defendants pursuant to the Constitutions of the United States and South Carolina.

FOR A TWENTY-FIFTH DEFENSE

88. Some or all of the actions or inactions alleged to have been taken or not taken by these Defendants were mandated by valid court orders, including the July 2001 Order of the Richland County Probate Court, to which these Defendants would refer the Court.

FOR A TWENTY-SIXTH DEFENSE

89. Some or all of the actions or inactions alleged to have been taken or not taken by these Defendants were mandated by statutes or regulations, or both, of the State of South Carolina, or statutes or regulations, or both, of the United States, to which these Defendants would refer the Court.

WHEREFORE, having fully answered the Amended Complaint of the Plaintiff, the Defendants DDSN, Butkus and Lacy pray that the Amended Complaint be dismissed with prejudice, for the costs of this action, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY:



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ATTORNEYS FOR DEFENDANTS THE SOUTH
CAROLINA DEPARTMENT OF DISABILITIES
AND SPECIAL NEEDS,
KATHI LACY AND STANLEY BUTKUS

Columbia, South Carolina

April 10, 2009

TRANSCRIPTS

1	STATE OF SOUTH CAROLINA	)	IN COMMON PLEAS
2	<u>COUNTY OF RICHLAND</u>	)	COURT
3		)	
4	EDWARD MIMS &	)	
5		)	
6	-V-	)	TRANSCRIPT OF
7	BABCOCK CENTER AND	)	
8	JUDY JOHNSON	)	2007-CP-40-03365
9	<u>DEFENDANTS.</u>	)	

10

11 MARCH 9TH, 2009

12 RICHLAND, SOUTH CAROLINA

13

14 B-E-F-O-R-E:

15 HONORABLE LEE CASEY MANNING, JUDGE;

16

17 A-P-P-E-A-R-A-N-C-E-S:

18 FOR THE PLAINTIFF:

19 PATRICIA HARRISON, ESQ.

20

21 FOR THE DEFENDANT:

22 KENNETH WOODINGTON, ESQ.

23 CHRISTIAN STEGMAIER, ESQ.

24

25

1 I-N-D-E-X

2 PG.

3 MOTIONS: 3

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7 CERTIFICATE OF REPORTER: 10

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1 (The following proceedings were
2 held on March 9th, 2009.)

3 THE COURT: Motion to dismiss, let me guess, this
4 is your motion?

5 MR. WOODINGTON: Yes, sir -- representing
6 different clients, Your Honor. I don't know if the
7 plaintiff has something that she wants to address with court
8 first or not but --

9 THE COURT: I don't know, she can speak for
10 herself though.

11 Yes, ma'am.

12 MS. HARRISON: Yes, sir, I do. Your Honor, I'm
13 Patricia Harrison. This is Edward Mims.

14 Edward, could you say hello to the, Judge?

15 Edward Mims was a resident at the Babcock Center.

16 This is his mother, Margeart Mims, and this is Ms.
17 Carol, his care giver.

18 THE COURT: All right.

19 MS. HARRISON: Your Honor, we have a couple of
20 issues to bring up with the court. First of all, Your
21 Honor, one of the plaintiffs, I mean, one of the defendants
22 isn't here today and I don't believe is represented by
23 counsel, Dr. Stan Butkus.

24 MR. WOODINGTON: Excuse me, I filed a motion of
25 dismissal on behalf of Dr. Stan Butkus.

1 MS. HARRISON: He is no longer employed by the
2 Department of Disabilities and Special Needs and, Your
3 Honor, either resigned or removed by the commissioner;
4 there's four new commissioners. And after a lot of
5 publicity he is no longer there. So I don't believe that
6 counsel for the agency may represent Dr. Butkus. So I will
7 bring it to your attention. I mean, I just don't want to
8 argue this again for him to say that he wasn't represented
9 because I believe there will be a conflict.

10 THE COURT: Well, if the -- like you can speak for
11 yourself Mr. Woodington can speak for himself.

12 Mr. Woodington, will be happy to hear your
13 position on this.

14 MR. WOODINGTON: Your Honor, Dr. Butkus -- well,
15 we've got a motion to dismiss which I will get into in a
16 minute. But our position in this case that doesn't --
17 wasn't properly served, never served at all really until,
18 until, after a year -- almost a year after it was filed.
19 But it pertains to things that Dr. Butkus allegedly did
20 while he was in office. So I think still covered by -- I
21 still think we have a right to be here representing him.

22 THE COURT: All right.

23 MR. WOODINGTON: I'm not even sure Your Honor
24 should reach that issue today.

25 THE COURT: Beg your pardon?

1 MR. WOODINGTON: I'm not even sure Your Honor
2 needs to reach that issue today on whether -- on the grounds
3 for a motion to dismiss.

4 THE COURT: Well, I'm hear to --

5 MR. WOODINGTON: I can argue it.

6 THE COURT: All right.

7 MR. WOODINGTON: In five minutes if you want.

8 THE COURT: Well, I'm here to hear whatever y'all
9 have to bring to my attention.

10 MR. WOODINGTON: Okay.

11 THE COURT: Yes, sir.

12 MR. WOODINGTON: If you would just like, I can
13 argue the motion to dismiss and let you know what the
14 grounds are.

15 THE COURT: All right. Are y'all ready to
16 proceed?

17 MR. STEGMAIER: Judge, the reason why we wanted
18 to -- Ms. Harrison to stand up and talk to the court for a
19 minute, there is a pending motion to recuse Your Honor from
20 hearing any matters pertaining to this case.

21 THE COURT: Why is that?

22 MR. STEGMAIER: Well, I'll let Ms. Harrison --
23 I'll provide --

24 THE COURT: Is it a written motion?

25 MS. HARRISON: Yes, sir. It was filed I believe

1 in September, there's a motion to recuse Your Honor, with
2 all do respect, because you are a former employee of the
3 Babcock Center.

4 THE COURT: I worked for Babcock Center when I was
5 in law school. I was a bus driver. Is that the reason?

6 MS. HARRISON: Yes, sir. I mentioned in my motion
7 to recuse that -- and a number of cases in which I have sat
8 in on Your Honor has expressed a fondness and that those
9 were the best days of your life and that --

10 THE COURT: You have that quotes and you have a
11 record of that or something?

12 MS. HARRISON: You're so -- Your Honor, the
13 transcripts are there and I have, I have, witnesses who
14 would --

15 THE COURT: So wait a minute. I was a bus driver
16 for Babcock Center for the retard when I was in law school
17 for like I think a year, maybe, two semesters, and on that
18 basis 30 years ago you're saying I should recuse myself from
19 this case?

20 MS. HARRISON: Well, Your Honor, the motion also
21 refers to a number of cases that have been dismissed with
22 Babcock Center is -- as a defendant. And it also refers to
23 a statement made in the Davenport case disagreeing with the
24 South Carolina Supreme --

25 THE COURT: First of all, I don't care whether I

1 hear this case or not. I just walked in, picked up the
2 file. Now, if you have some legitimate reason -- let me
3 hear your motion for me to recuse myself first and I'll hear
4 their responses. Go ahead make it -- you say it's a written
5 motion?

6 MS. HARRISON: Yes, sir.

7 THE COURT: May I see a copy of it please?

8 And I played basketball in high school, I guess I
9 should never hear any high school cases either. I went to
10 the University of South Carolina, I guess I should never
11 hear any South Carolina cases either. I, I, broadcast for
12 the University of South Carolina Basketball Team, I guess I
13 should never hear any broadcast cases.

14 I looking for your motion, ma'am.

15 And I'm African American, I guess I shouldn't hear
16 any cases involving African Americans.

17 May I see your motion?

18 MS. HARRISON: Your Honor, I never made any --

19 THE COURT: No, I'm just saying --

20 MS. HARRISON: Motion as to --

21 THE COURT: I'm just pointing some things out, it
22 goes back 40 years.

23 MS. HARRISON: You're right.

24 THE COURT: I was born in December, I was born in
25 December, on Pearl Harbor Day, maybe, I shouldn't hear any

1 cases involving Pearl Harbor Day.

2 I'm looking for your motion, ma'am.

3 MR. STEGMAIER: Judge, I have it here for you.

4 THE COURT: All right. Thank you.

5 I tell you what, I'll make it easy for everybody,

6 I'll recuse myself. Y'all all leave. Next case. You know,

7 if there's any question I don't need to hear these cases,

8 Lord have mercy. This will be reset, I'll make sure it's

9 reset before another judge.

10 Take your motion, ma'am, y'all leave. Thank you.

11 MS. HARRISON: Your Honor, there's a number of
12 papers.

13 THE COURT: I'll straighten them out and make sure
14 you get them. Thank you all so very much.

15 Whose the next case on this docket?

16 MR. STEGMAIER: Judge, may I place on the record,
17 sir --

18 THE COURT: May it please, sir.

19 MR. STEGMAIER: For the purpose of the record,
20 sir, the defendant, Babcock Center and defendant Judy
21 Johnson, had no difficult with Your Honor hearing this
22 motion.

23 THE COURT: I understand.

24 MR. WOODINGTON: And I was under the understanding

25 --

1 THE COURT: I know you do. But if somebody wants
2 to raise -- let somebody hear it. I got plenty to do, it's
3 nothing personal against anyone.

4 I apologize to all. But, I mean, if I would have
5 known about this ahead of time, I would have taken care of
6 it ahead of time, so.

7 MR. WOODINGTON: Thank you, Your Honor.

8 THE COURT: We'll make sure some other judge that
9 has never worked for Babcock Center hears this mater.

10 MR. WOODINGTON: Yes, sir.

11 THE COURT: But I've got enough to do, I don't
12 have time to get involved with something like this.

13 Thank you all for coming.

14 MR. WOODINGTON: Thank you, Judge.

15 END OF PROCEEDINGS

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1 COUNTY OF RICHLAND)

2 CERTIFICATE OF REPORTER

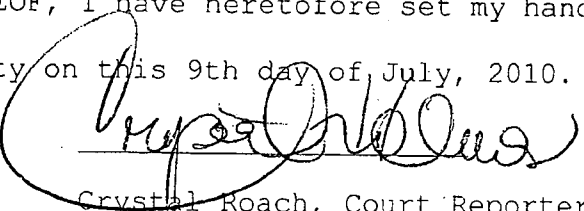
3 I, Crystal Holmes, hereby certify that I reported
4 the preceding case entitled Edward Mims Vs. Babcock Center
5 and Judy Johnson, Case No. 2007-CP-40-03365, at the Richland

6 County Courthouse, March 9th, 2009.

7 I FURTHER CERTIFY that the foregoing pages 1
8 through 10 constitute a true, accurate and full transcript
9 of said hearing.

10 I FURTHER CERTIFY that I am not employed by any of
11 the parties hereto and I have no financial interest in the
12 outcome of said case.

13 IN WITNESS WHEREOF, I have heretofore set my hand
14 and seal at Richland County on this 9th day of July, 2010.

15 
16 Crystal Roach, Court Reporter
17 and Notary Public for the
18 State of South Carolina my
19 Commission Expires:
20 April 21, 2014
21
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COUNTY OF RICHLAND

ORIGINAL
COURT OF COMMON PLEAS
07-CP-40-3365

VS.

BABCOCK CENTER, ET AL.,
DEFENDANT

)TRANSCRIPT OF RECORD

BEFORE:

APPEARANCES:

CHRISTIAN STEGAMIER, ESQ.
Attorney for Babcock Center, et al

0116

1 THE COURT: Margaret Mims versus the Babcock Center.

2 MR. PROTOPAPAS: Yes, Your Honor and I want to
3 apologize for this confusion and I wanted to raise to the
4 court.

5 THE COURT: I'm not confused yet.

6 MR. PROTOPAPAS: No, I mean, I made a mistake that --
7 Well, it's a confusion for me. To clarify, Your Honor,
8 there are currently filed four motions. Two defendant's
9 motions for summary judgment and a plaintiff's motion for
10 summary judgment. And I also have a motion to be relieved
11 as counsel which was filed back in April. I understand
12 the court doesn't want to hear my motion to be relieved as
13 counsel or may not have made up its mind. But I just
14 wanted to clarify. We are not hearing it today and that's
15 fine. If we are hearing it today, that's fantastic.

16 THE COURT: All I have today on my roster are two
17 motions for summary judgment. I have a defendant Babcock
18 Center and Judy Johnson's memorandum in support of summary
19 judgment. And South Carolina DDSN and Kathy Lacy and
20 Stanley Butkis motion for summary judgment. That's all I
21 have on my roster. How do you wish to proceed?

22 MR. PROTOPAPAS: If there's no objection from
23 anybody, I would like, if the court would entertain it,
24 I'd like my motion to be relieved to be heard today, if
25 possible.

1 THE COURT: Any objection?

2 MS. HARRISON: Yes, sir, Your Honor. There's five
3 pending motions. Years ago, we filed --

4 THE COURT: You're Ms. Harrison.

5 MS. HARRISON: Yes, Your Honor, I'm sorry. I'm
6 Patricia Harrison. Years ago, we filed a motion for Judge
7 Manning to recuse himself. There was a hearing heard on
8 that motion. And from the bench, Judge Manning recused
9 himself. When the order arrived in the clerk of court's
10 office, order to recuse was whited out and it said the
11 continuance was granted. But we hadn't asked for a
12 continuance. So that old order, and we repeatedly asked
13 for that to be heard, but in this case, our motions don't
14 seem to be heard. We have twice come up to the court,
15 been summoned up here on the same day as defendants
16 motion, they bring a motion to the court and it's heard
17 sometimes that day. Our motion for recusal is very old
18 now. And that motion for recusal is the sole reason why
19 Mr. Protopapas feels that he needs to withdraw from the
20 case. That's the only conflict is that he's concerned
21 about the implications of not withdrawing that motion. So
22 we would ask --

23 THE COURT: Who moved that he be recused?

24 MS. HARRISON: I moved that he be recused, Your
25 Honor.

1 THE COURT: He agreed from the bench?

2 MS. HARRISON: And he agreed from the bench; yes,
3 sir. And I have the transcripts.

4 THE COURT: So he's no longer involved in this case;
5 is that correct?

6 MS. HARRISON: Well, if that's the case, then
7 Mr. Protopapas has no grounds -- We very much need Mr.
8 Protopapas. Edward Mims is a profoundly disabled person
9 and he needs the expertise of Mr. Protopapas. And the
10 only reason Mr. Protopapas -- This is the --

11 THE COURT: Mr. Protopapas, how did you get in it?

12 MR. PROTOPAPAS: Your Honor, in February of 2012, the
13 matter was on appeal to the South Carolina Supreme Court.

14 THE COURT: What was?

15 MR. PROTOPAPAS: This case. And there was an oral
16 argument schedule on March of 2012. I was hired to handle
17 the oral argument.

18 THE COURT: Hired by?

19 MR. PROTOPAPAS: By the plaintiffs.

20 THE COURT: Edward Mims?

21 MR. PROTOPAPAS: Yes, sir. And the Supreme Court
22 reversed and remanded. When it came back down, I have
23 interest in the case, of course, and the interest in the
24 client, I agreed I would continue on the with the case.
25 It got to a point, though, Your Honor, I do not believe

1 the counsel had different views of the case on strategy.

2 I sat with my client. We discussed the alternatives.

3 Ms. Mims, helpful lady sitting right here, she made a
4 choice. The choice was hers as the client to make. The
5 repercussion, of course, is I step back from the case.

6 THE COURT: What was her decision?

7 MR. PROTOPAPAS: Was to continue with Ms. Harrison's
8 strategy as opposed to mine.

9 MS. HARRISON: If the only issue, Your Honor, was
10 whether or not to withdraw, Judge Manning put pressure on
11 me several times to withdraw my motion to recuse. And
12 when I wouldn't do that, that is the only issue --
13 Mr. Protopapas is one of the best trial lawyers, in my
14 opinion, in this state. And Edward very much needs him.
15 The sole disagreement that we've had is whether or not to
16 withdraw that motion as Judge Manning has pressured us to
17 do for his recusal.

18 THE COURT: I don't understand why he would pressure
19 you to withdraw the motion when he's already agreed to the
20 motion.

21 MR. PROTOPAPAS: I think there may be, Your Honor,
22 and I apologize, there may be some confusion on that
23 issue. I do not believe Judge Manning has actually
24 granted the motion to recuse. I believe it was very clear
25 to us in the status conference that he had not ruled on

1 the issue --

2 THE COURT: Well, in one sense, he can't. He can
3 recuse himself from the trial of this case or any motions
4 in this case. But in his position as chief administrative
5 judge, I don't think he recuse his responsibility for
6 scheduling and status conferences, things of that nature.

7 MS. HARRISON: That's the sole issue that I've worked
8 with Mr. Protopapas and he's done excellent work. But as
9 a trial lawyer, he appears here a lot and I think there's
10 some concern about --

11 THE COURT: Well, Judge Manning is not here. I'll
12 take it up with him.

13 MS. HARRISON: Your Honor, what's frustrating to
14 Edward. He has no money. He's a Medicaid client.
15 Attempts were made by these defendants to take a lot of
16 documents to SLED to have me disciplined by the bar. And
17 then on the eve of the Supreme Court hearing, they
18 pressured Dawes Cook. Dawes Cook came in to assist in all
19 this when we were at the Supreme Court and counsel called
20 Dawes Cook and threatened that if he proceeded with the
21 case, he may be at risk of losing his insurance reserve
22 cases. So this would be the third time that Edward Mims'
23 counsel is threatened by the bullying of these defendants.
24 And we would just ask -- I have tremendous respect for
25 Mr. Protopapas. Edward needs --

1 THE COURT: I am not going to address the issue
2 today.

3 MR. PROTOPAPAS: Thank you, Your Honor.

4 THE COURT: Because the two motions that are in front
5 of me, it's a 2007 case. Obviously, it needs to moved
6 along. It matters not to me in what order the defendants
7 argue their motions.

8 MR. WOODINGTON: Your Honor, I'm Ken Woodington for
9 the DDSN defendants Lacy and Butkis from the agency. And
10 we've agreed among the defendants that my motion would go
11 first to be heard.

12 THE COURT: All right. You got DDSN.

13 MR. WOODINGTON: DDSN, Lacy and Butkis; that's
14 correct.

15 THE COURT: You have Lacy and Butkis.

16 MR. WOODINGTON: They are DDSN officials and I have
17 the agency also. Mr. Stegmaier has the Babcock
18 defendants.

19 MR. STEGMAIER: I also have Judy Johnson, sir, who is
20 the executive director.

21 THE COURT: Why is Davidson here?

22 MR. WOODINGTON: Window dressing. Just simply for
23 appearance.

24 MR. DAVIDSON: Just because I love being in a
25 courtroom with you, Judge.

1 THE COURT: You may proceed, Mr. Woodington.

2 MR. WOODINGTON: May it please the court. This --

3 Even before I start on the summary judgment motion, I do
4 want to say I deny everything she said except I did have a
5 conversation with Dawes Cook. It's my understanding
6 you're not going to hear that motion, but still.

7 This is a case that was filed in 2007, but not
8 served. And then we filed a motion to dismiss on the
9 ground of we haven't been served within 120 days that was
10 served and sort of amended and so forth. Amended
11 complaint was served in 2008. This is not before you
12 today because we took it to the Supreme Court arguing that
13 it should have been dismissed for failure to serve within
14 120 days. The Supreme Court said no. The way they
15 construed the court rule and the 120 day statute put
16 together, that the case still could be brought and
17 remanded it for further consideration. So we are back
18 here now on motions summary judgments.

19 I'd like to go into the facts just a little bit and
20 then the law. We have a fairly lengthy brief. A lot of
21 issues that were raised by the complaint; the amended
22 complaint. I am not sure this case is really susceptible
23 to the comprehensive oral argument presentation. That's
24 why I'm careful to try to get our brief filed with you.
25 And that reminds me. Ms. Harrison has asked to be able to

1 file supplemental briefs after this hearing is over with
2 which we communicated with your law clerk. It's fine with
3 us. I'm not going to file a reply after that. But be
4 that as it may, Mr. Mims was committed, well, wasn't
5 originally committed, but he was in the Babcock Center
6 from 1999 through 2005. The complaint alleges a number of
7 incidents that happened prior to May 2005 in which
8 physical injury was alleged and so forth.

9 Without trying to minimize what may have happened in
10 May 2005, our main position on anything that happened
11 before May '05 is that, by several different statute of
12 limitations. The only claim that we would submit is still
13 alive are two federal, well, two claims based on an injury
14 to his penis in May of 2005 and a small tear where he was
15 sent to the ER or sent to Doctor's Care, but they were
16 closed and they went to the ER in Lexington. He was
17 treated and released and doctors sent him back to Babcock
18 Center finding there was nothing to indicate any great
19 problem. And then a couple weeks later, Ms. Harrison
20 showed up at DDSN with an order purporting to allow Edward
21 to go home and stay home. And there was some question
22 about whether or not that was a valid order of a probate
23 judge. Judge McCullough. This was a Friday afternoon.
24 Thereby, they got Judge McCullough on the phone. There is
25 some incident reports that they filed. And Judge

1 McCullough said, Come in on Sunday afternoon and we'll
2 decide then whether to make him come back on Sunday
3 afternoon. There was a slight delay of an hour or two of
4 Mr. Mims going home that Friday night. Because of the
5 confusion, I would submit, was brought by Ms. Harrison not
6 presenting all the information to people that are to make
7 a decision.

8 Be that as it may, everything that happened, the case
9 was actually filed was served -- The amended complaint was
10 filed and served in May of 2008. That's the time that we
11 would say started the statute. It is the time of filing.
12 Because this case has so many facets, what I would like to
13 do is pass out a little skinny that just summarizes the
14 arguments that we have, if I may approach with it. It's
15 not easy to follow. I've been on it for awhile.

16 The brief explains this in much more detail, but 1983
17 claim, the federal 1983 claim, the three-year statute
18 applies. This case was served on May '08. So we would
19 say that the three-year statute applies to anything before
20 May '05. There's a two-year statute as Your Honor is well
21 aware that applies to tort claim. That, in terms, bars a
22 state law claims of negligence supervision which was the
23 third cause of the action. The federal claim are first
24 and second causes of action. There's a one-year statute
25 that bars the ADA Rehabilitation Act claim which is the

1 fourth cause of action. And there is a fifth and final
2 cause of action, but that doesn't have anything in it that
3 ought to be barred from the statute which I'll address in
4 a minute.

5 No doubt, plaintiff's counsel will contend that
6 there's tolling because Mr. Mims is a disabled person.
7 Our position on the tolling is this: That basically the
8 background is the mentally retarded person bill of rights
9 says that a mentally disabled person has all the rights a
10 citizen to do anything until he's declared incompetent.
11 He wasn't declared incompetent until June '05. The
12 appointment of a the guardian -- The appointment of a
13 guardian, we would submit, ended any tolling that
14 occurred. It's confusing. So the tolling statute says
15 you get a year after your disability ceases. She was
16 appointed his guardian in June of '05. That's when the
17 disability ceased. For any claim that was already barred
18 or tolled, she had one more year after June of '05 to
19 bring those claims. That is until June 2006. No claim,
20 no action was filed before. No action was filed really at
21 all until '07 and not served until '08. It wasn't filed
22 in '06. So it was barred.

23 Your Honor, that is it, in a nutshell. The tolling
24 statute which 15-3-40(2) says that your actions are tolled
25 until, if your disabled -- Tolling occurs until the

1 disability ceases and then for one more year after that
2 which, again, is June of 2006. Nothing was filed by June
3 2006. Basically tolling has no effect at all. Even if
4 there was tolling, which we don't necessarily concede that
5 if there had been tolling, that it ended, effective ended
6 June of '06. So basically what's left, and that takes me
7 to my next point.

8 On the skinny, what's not barred from the statute of
9 limitations. Well, there's a 1983, federal 1983 claim for
10 negligent supervision. There's a federal 1985 claim for
11 conspiracy which entails racial or class-based animus.
12 Those happened to be two of the hardest federal claims to
13 successfully assert. The negligence supervision claim is
14 so hard to assert that the minority the Supreme Court has
15 said, doesn't even exist. The civilly 1985 conspiracy
16 claim requires allegation of proof of a race or
17 class-based animus. No such showing has been alleged or
18 proven.

19 Back to the negligence supervision claim, just a
20 minute, you have to show the court three things to show a
21 1983 negligence supervision claim. I would submit to Your
22 Honor that none of those three are present. Which the
23 three are actual constructive knowledge of a sub-ordinance
24 conduct being pervasive and unreasonable, the deliberate
25 indifference to harm being done. And thirdly, some

1 affirmative, quote/unquote, causal thing between whatever
2 the negligent acts were if there were any and the injury.
3 None of that has been alleged nor has it been proven. It
4 hasn't been alleged at all. It certainly hasn't been
5 proven. So there's no 1983 claim. There's no suggestion
6 class-based animus that was before 1985 claim. So that
7 applies to the laceration, the May '05 laceration of the
8 penis which was a minor injury at best. It applies to the
9 delay in going home that afternoon for a couple of hours.
10 And basically all we are left with is what happens if the
11 statute doesn't apply. That's in the brief. I can
12 address that now or I can just rely on the brief or I can
13 wait to reply.

14 THE COURT: All right.

15 MR. WOODINGTON: With that, we just submit that
16 really there's simply no surviving claim in this case that
17 should be addressed by this court. A summary judgment
18 should be granted to DDSN and the defendant's favor.

19 THE COURT: All right. Mr. Harrison.

20 MS. HARRISON: Thank you. May it please the court.
21 Your Honor, as to the statute of limitations, if there's
22 any attorneys in the State of South Carolina who should be
23 familiar with the law in that case, it should be these
24 three sitting at this table. Because they represented me
25 in Harrison versus Bevilacqua where the South Carolina

1 Supreme Court discussed the tolling statute as it applies
2 to a person who, like Edward Mims, does not have mental
3 capacity. And in that statute, the Supreme Court told the
4 Court of Appeals you got it wrong. Because they had just
5 extended it by five years. And what the Supreme Court
6 said is no, it is extends five years past where it was.
7 So the state was a party in that action. These three
8 lawyers sitting at this table, in fact on Mr. Stegmaier's
9 firm represented me in that case and he was arguing the
10 statute of limitation issue.

11 Now, the second time the statute of limitation issue
12 was addressed by the court in South Carolina was in a case
13 where these three attorneys who are sitting at counsel
14 table. And that case is Madison versus Babcock Center and
15 DDSN. And in that case, a person with mental retardation
16 who had far more capacity than Edward Mims, in that case,
17 the Supreme Court discusses the tolling issue and the five
18 years that is extended. So I agree with him that the
19 statute of limitation for these issues is three years, but
20 it's tolled for five years because of Edward's disability.

21 And I'm glad Edward could be here in the courtroom
22 with us so that you can see that Edward disability has not
23 ceased. This is Ms. Mims and this is Edward. Edward, can
24 you say hello?

25 (No response.)

1 MS. HARRISON: Edward, can you say hello?

2 (No response.)

3 MS. HARRISON: So clearly Mr. Mims is a person who's

4 not able to take care of his legal affairs. And I do

5 have, Your Honor, several cases here on the tolling issue.

6 And this is, while the only discussion I'm aware of with

7 this tolling issue is in these two cases which involved

8 these attorneys. There are cases from other states that

9 deal with the issue of whether tolling ceases when a

10 guardian is appointed. And the general rule on that issue

11 is that the disability does not terminate upon the a

12 appointment of a guardian. And I have some cases here.

13 Let me pull them together. I'm sorry, Your Honor. I just

14 got this brief on Wednesday evening. So I am not as

15 prepared as I normally try to be. But we do have -- These

16 are two of the cases of many. May I approach the bench,

17 sir?

18 THE COURT: Certainly.

19 MS. HARRISON: Where the tolling issue is discussed.

20 And what the courts have said is that it's like minority.

21 If you have a guardian appointed for a minor, the right

22 belongs to Edward. So that if he has a guardian who

23 doesn't proceed, that doesn't stop the tolling. What the

24 courts around the country has said is that the issue is a

25 disability; has it ceased. And the appointment of a

1 guardian simply is not an act that causes the disability
2 to cease. And I have, if I'll be allowed to do a reply
3 brief, I can have a number of other cases that I'd like to
4 bring to the court's attention.

5 THE COURT: All right. I'll consider it.

6 MS. HARRISON: Okay. So that's just not the rule.

7 As to the idea that Edward Mims was considered by the
8 world to have all the rights of a competent person until
9 his mother was finally able and she was -- She was
10 appointed a temporary guardian in June. But these
11 defendants named in this action actually filed an objection
12 in the probate court saying that Edward didn't need a
13 guardian and it took months for Edward to have a guardian
14 appointed.

15 But what's very important is that when Ms. Mims
16 voluntarily admitted Edward in 1999 to the Babcock Center,
17 Edward, soon thereafter, was beaten severely by an
18 employee that was witnessed. So contrary to what the
19 defendant saying in their brief, the entities, DDSN and
20 Babcock did not report it to law enforcement. Ms. Mims
21 persisted in prosecuting that and went all the way to the
22 attorney general. And it was in between the time that
23 Edward was beaten and the time that the man was finally
24 arrested over a year later that what these parties did,
25 they involuntarily committed him to the Babcock Center.

1 In the six volumes that we have submitted, Your Honor,
2 have evidence that Ms. Mims rights were taken away from
3 her. And the idea that he wasn't adjudicated incompetent,
4 they caused him to be adjudicated incompetent when they
5 involuntarily admitted him in 2000. So that argument just
6 simply can't fly.

7 As to the minimization of the small injury, Edward
8 had a four centimeter laceration to his penis. I don't
9 think any man on the jury would consider a four, almost a
10 one inch, gaping, oozing, laceration on the penis to be
11 considered a minor injury. But that, Your Honor, I would
12 say is an issue for the jury --

13 THE COURT: It's not in front of me.

14 MS. HARRISON: -- to determine. So the relation back
15 issue, Your Honor, rule, I believe it's 15(c) says that
16 the amended complaint relates back to the first complaint.
17 The first complaint was filed in 2007. It appears in
18 their brief that they're attempting to re-litigate the
19 issue they lost in the Supreme Court. The Supreme Court
20 said that the brief -- I'm sorry. The amended complaint
21 was timely filed. And under Rule 15(c), it relates back.
22 I just, I don't know of any exception to that. So I don't
23 know how they are attempting to use the 2008 rule.

24 The other issue we have, Your Honor, is that the
25 discovery. What was the time of discovery of the

1 injuries. We knew that Edward had the four centimeter
2 laceration on his penis. We knew that his bed had been
3 infested with ants and that he had to be taken to the
4 emergency room with his body covered with ants. What we
5 didn't know after Ms. Mims was appointed as guardian and
6 it took months and months to get records was that, and we
7 describe these in detail in the six volumes we provided,
8 Edward was being regularly injured; over and over and over
9 and over. He was beaten when he was at Clusters not only
10 by Carl Anthony, but he was also beaten and there are
11 paragraphs, I think there maybe some color photographs,
12 with lashes across his face, lashes across his back. So
13 that Ms. Mims didn't discover these ongoing injuries
14 until after her appointment.

15 The other thing that she didn't discover until after
16 her appointment was deals with the foreseeability. In
17 their brief, they say, Well, these injuries weren't
18 foreseeable. Well, what we've provided the court with,
19 Your Honor, Babcock Center first put Edward in a facility
20 called Clusters. And what we have provided the court with
21 is audit after audit after audit by the federal agency,
22 CMS, by DHEC, by DDSN finding that the facility that
23 Edward was in were not meeting federal standards, that
24 Edward and others were being placed at risk because there
25 were people like Edward were being placed with violent

1 aggressive people. Edward was suppose to have a
2 one-on-one. They were getting funding for one-on-one when
3 all of these injuries occurred. So the foreseeability,
4 they were repeatedly sited for getting funding for
5 one-on-one and not having it and people getting hurt.

6 We also have provided the court, Your Honor, as to
7 the foreseeability issue in their brief with audit after
8 audit by the South Carolina of Disabilities and Special
9 Needs, the South Carolina Department of Health and Human
10 Services, by a group called Carolina Medical Review. By,
11 the legislative audit counsel which go from 2003 to 2008
12 where they are repeatedly saying, DDSN, you are not
13 protecting these people. You are not protecting. There
14 are unexplained injuries. There are beatings. There are
15 unreported sexual assaults. When Edward was assaulted,
16 it's important to know that it was not reported to law
17 enforcement until Ms. Mims reported it just like she
18 reported the beatings. And they say in their brief that
19 Well, the hospital didn't think anything was wrong. We
20 have, Your Honor, and while they are arguing, I'll pull it
21 out, we have a report that was made in which the social
22 worker reported -- You don't report if you don't have a
23 suspicion of neglect or abuse. But we do have a report
24 there. So --

25 THE COURT: All right.

1 MS. HARRISON: As to the 1983 issues, Butkis and Lacy
2 and Johnson are clearly persons. And we have provided to
3 six volumes, multiple examples of where they were
4 personally involved in this care. When the
5 court-appointed examiner went to Edward's facility after
6 the penis injury, Judy Johnson was contacted. And the
7 court-appointed examiner made three trips to the facility
8 and was not allowed to see Edward. But she was intimately
9 involved in that. And we have the deposition of Sue
10 Slater saying the buck stops with her. We have that
11 affidavit of Kathy Lacy who not only was involved, she was
12 there at that Sunday afternoon court hearing and she is
13 involved every step of the way. We have Dr. Butkis'
14 deposition which talks about one of her jobs is tracking
15 abuse and neglect and letting him know when serious
16 injuries occur. So we have these particular defendants.

17 We also have, in the 1983 case, I can't imagine
18 anymore conscious indifference. Not only do we have audit
19 after audit, we have injury after jury. And the only
20 person Ms. Mims is repeatedly asking, I want my son out of
21 there. Please let me take my son out of there. I want my
22 son out. And every time, they say no. And it was Stan
23 Butkis who was the only person, as the director of DDSN,
24 who could get him out.

25 THE COURT: All right. Let me try to move this

1 along. You know, I can't try the case here today,
2 Ms. Harrison. I need you to wind it up.

3 MS. HARRISON: Okay. The class-base animus issue, I
4 have cases, Your Honor, where the courts have said that
5 mental retardation is a class that is covered under 1985
6 just like a black person would be. And I'm looking for --
7 Courts have said that mental retardation is a class that
8 is covered under the class-based animus criteria under
9 1985. And, Your Honor, we have, I've heard my opposing
10 counsel talk about how hard it is and about conspiracy and
11 how difficult that is to prove. I bring to the court's
12 attention, Your Honor, Prigeon v. Ward and Anthony v.
13 Ward. In both of these cases -- Let me find them.
14 Prigeon v. Ward and Anthony v. Ward -- And I apologize. I
15 just forget -- Okay. Prigeon v. Ward and Anthony v. Ward
16 are important cases because they do find that conspiracy
17 horrific than what happened to Edward Mims, that the
18 employees was participating in a conspiracy, that it met
19 all the criteria for conspiracy and also those cases are
20 important when you talk about the scope of employment
21 under the Tort Claims act. What those cases are saying is
22 that those people are personally liable. And I think we
23 have the same issues here.
24 Your Honor, as I said, I just got this Wednesday
25 afternoon. The briefs were due on the 29th and I worked

1 very hard to get mines done by then. And Mr. Stegmaier
2 just provided his brief to me this morning. So it would
3 really be difficult to address --

4 THE COURT: But as I said, I'll allow you to
5 supplement your argument with a memorandum following this.
6 Mr. Woodington.

7 MR. WOODINGTON: Your Honor, I don't really want to
8 make another argument at this point. But I'd just like to
9 submit a practical suggestion. She does want more time to
10 file supplemental brief. I'm fine with that. I'm on
11 vacation next week and the following week. As far as I'm
12 concern, she can have all that time if that's all right
13 with, Your Honor, and give me 10 days after that to file a
14 reply if necessary.

15 THE COURT: All right. That will be fine.

16 MR. WOODINGTON: Thank you, Your Honor.

17 THE COURT: Mr. Stegmaier.

18 MR. STEGMAIER: Good morning, sir. I've seen your
19 roster and I know you got a busy day ahead of you. So
20 I'll be brief, sir. Again, for purposes of the record,
21 Christian Stegmaier and I'm representing Babcock Center
22 and Judy Johnson in this case. The pleadings reflect that
23 the allegations raised in this case as to the DDSN
24 defendants are identical to the ones raised against
25 Babcock Center and Dr. Johnson. Babcock Center, as this

1 court probably knows, is a provider of residential and
2 vocational support of persons with mental retardation and
3 other disabilities here in this midlands. They are
4 special contracted -- They are government contracted
5 entity that provide services with DDSN. Stated
6 succinctly, sir, we incorporate by reference the argument
7 and brief raised by the DDSN defendants that is applicable
8 to Babcock Center. Of course, we filed our brief to this
9 as well.

10 The only thing I would say or add on to, Your Honor,
11 is this court knows from its many years of hearing motions
12 similar to this that being well acquainted with standard
13 review that governs Rule 56, argument of counsel is not
14 substituted evidence in the case lieu. The case law is
15 clear in that matter in Brown versus Johnson as well as
16 Trevellas versus the Department of Transportation. As
17 well, Rule 56 itself says that the judgment sought shall
18 be rendered forthwith with the pleadings, depositions,
19 answers to interrogatories and admissions on file together
20 with the affidavits. So respectfully, notwithstanding
21 Ms. Harrison's advocacy today, none of what she said,
22 which is not supported by affidavit, is applicable or
23 governs in this case with regard to the disposition.

24 Again, Your Honor, we've file brief with this court
25 that further articulates our basis for summary judgment.

1 This court knows that there are five causes of action in
2 this case. In similarly to DDSN, we take the same
3 positions concerning the governance of 1983 as it relates
4 to Dr. Johnson being sued in her official capacity. She's
5 not subject to suit in that circumstance. The 1983 claims
6 against Dr. Johnson in this case in her individual
7 capacity are barred by the three year statute of
8 limitations which governs in these types of actions. Any
9 claims under 1983 that were less than three years old at
10 the time the amended complaint was served are
11 un-meritorious because of lack of personal involvement by
12 Dr. Johnson for other reasons. Just because Ms. Harrison
13 believes that Dr. Johnson was intimately involved with
14 whatever was going on with Mr. Mims, that does not make it
15 evidence, sir. And for that reason, she, the plaintiff
16 does not survive summary judgment.

17 Mr. Woodington has gone into, at length, in both his
18 briefs as well as arguments as has we concerning the
19 deliberate indifference analysis, the conscious knowledge
20 of the supervisor concerning pervasive and unreasonable
21 risk. And of course, we just incorporate by reference on
22 brief in this case for purposes of this argument.

23 The second cause of action, Your Honor, involves
24 conspiracy under 1985. The elements of this claim have
25 not been alleged, sir, nor do they exist in fact. Of

1 course, we outline that in our brief as well. The third
2 cause of action, Your Honor, relates to negligent
3 supervision. We take the position, Your Honor, that the
4 Tort Claims Act applicable to the Babcock Center by virtue
5 of its position as being a lead provider to DDSN in
6 Richland and Lexington Counties and many of the other
7 counties in the state. As the court probably knows, DDSN
8 does not only service coordination but the service
9 provision. Special circumstances largely exist in the
10 history of Babcock Center then providing the residential
11 support as well as the vocational support on behalf of
12 DDSN. So by virtue of that relationship --

13 THE COURT: Any case law to support that?

14 MR. WILSON: Your Honor, I thought about that this
15 morning on the way over here. I would like -- I've got
16 about a three-page concise brief that would support that
17 argument. If I can send that to chambers as well as to
18 opposing counsel, I'd appreciate that. But of course, the
19 courts can consider that. But by virtue of that we
20 argument, Your Honor, we believe the Tort Claims Act
21 applies. And, therefore, the statute of limitations would
22 bar the negligent supervision claim against the Babcock
23 Center. We also believes the Tort Claims Act renders the
24 individual defendants including Dr. Johnson immune from
25 suit of a negligent supervision claim.

1 Finally, Your Honor, a little bit different from or
2 in addition to the argument raised by the DDSN defendants
3 in this case, and certainly we can hear from Ms. Harrison
4 in her response to brief about this, at this point in
5 time, the especially as we talk about the alleged
6 May 22nd, 2005 personal injury to plaintiff's penis. We
7 would say that at this point, all we've got is -- There's
8 an injury, but there's never been a definitive finding of
9 any sort of abuse or neglect. There hasn't been any
10 production in the course discovery to demonstrate that.

11 And probably more importantly than that, Your Honor,
12 I cite to the City of York versus Turner Murphy and
13 Company which is on page 16 of our brief and it cite other
14 cases. We would liken this by virtue of the
15 sophistication of the operation of the Babcock Center to
16 being a professional negligence case. And this court
17 would well understand the standard that governs in
18 professional negligence cases, you have to establish a
19 duty of care. You have to establish as well that the
20 breach of that duty of care approximately caused damages.
21 And most importantly, you have to do that by way of expert
22 testimony. In this case, Your Honor, as we sit here
23 today, Rule 56 that governs this analysis, there is no
24 affidavit, there is no testimony by any expert that
25 demonstrate either the equivocal standard of care or the

1 fact that it was breached as it relates to the May 27,
2 2005 alleged personal injury to the plaintiff. And I
3 can't emphasize that enough, Your Honor.

4 The fourth cause of action relates to the ADA, the
5 rehabilitation act. We believe, as does the DDSN
6 defendants, that these claims are moot and/or barred by
7 one year's statute of limitations that we believe apply in
8 this case. And finally, the fifth cause of action relates
9 to unjust enrichment. And our sole argument to that, the
10 main argument there is the amended complaint fails to
11 state facts sufficient to cause a cause of action for
12 unjust enrichment. As stated by Ms. Mims when she was
13 deposed in this case, Your Honor, question that was asked
14 directly to her, What have you paid as it relates to your
15 care and treatment on behalf or given to Edward by DDSN
16 and by Babcock Center? The answer to those questions was
17 nothing. Babcock Center nor DDSN has done anything to
18 unjust enrich itself. Furthermore, nothing of any sort of
19 value that can be quantitative or calculated has been taken
20 from Edward and his family. So by virtue of that, we
21 believe that cause of action fails as a matter of law.

22 And of course, this court has heard at length the
23 arguments already by Mr. Woodington and the response by
24 Ms. Harrison concerning the tolling argument. And we
25 won't get into that. I would state, Your Honor, two

1 things, number one, we've never represented Ms. Harrison.
2 And we didn't appear and we didn't represent any party in
3 Madison versus Babcock Center. But notwithstanding those
4 fundamental truths and the accuracy in this equation,
5 neither Bevilacqua or Madison versus Babcock Center case
6 sustains the propositions that are articulated by Ms.
7 Harrison as it relates to tolling. And a clear reading,
8 unambiguous reading of those cases would demonstrate the
9 same.

10 We appreciate this court's time today. We know that
11 was a lot of to toss to the court. And certainly, I will
12 provide, pursuant to the court's invitation, just a brief
13 memorandum concerning the applicability of the Torts
14 Claims Act and Babcock Center. But for reasons stated
15 today as well as within our brief, we respectfully request
16 that you grant the summary judgment, sir.

17 THE COURT: Thank you, very much.

18 MR. STEGMAIER: Thank you, sir.

19 THE COURT: Ms. Harrison, I'm going to have to limit
20 you because I do have a full schedule.

21 MS. HARRISON: Thank you. Your Honor, and I
22 appreciate the opportunity to respond because, as I said,
23 we didn't get their briefs until Wednesday afternoon and I
24 didn't get Mr. Stegmaier briefs until a few minutes ago.

25 The relationship of the DSM board is discussed in the

1 volumes that we provided. They are covered under the
2 insurance reserved fund. They are, for purposes of 1983,
3 they are a state act because they are treated as a DSM
4 Board in the way the money is passed onto them. And we
5 talk about that in our motion for summary judgment. But
6 they are not -- I don't know of any cases that's allowed
7 them to have any kind of immunity under the Tort Claims
8 Act. I might have missed something. There's a lot of
9 lawsuits against them. But I'm not aware of any. And
10 under Anthony v. Ward and Prigeon v. Ward, whereas in this
11 case, you have officials acting outside the scope of their
12 duties, that immunity goes away anyway.

13 They said that there's no professional that has
14 rendered an opinion. Your Honor, I call your attention to
15 the affidavit of the RN that we submitted with our motion
16 for summary judgment that we'll mention in our brief that
17 said that they violated the standard of care. I would
18 also call your attention, Your Honor, to Madison versus
19 Babcock Center which is the case which these same
20 defendants said we have no duty of care to protect people
21 who have mental retardation from sexual assault. And the
22 Supreme Court certainly held differently. These parties
23 went back and asked to reargue and the Supreme Court for
24 the second time said, No, you do have a common law duty of
25 care. So that act is not -- That argument doesn't apply.

1 As to the conscious knowledge and risk, Your Honor,
2 we have provided audit after audit after audit. In fact,
3 during this time, Babcock was required by DDSN, by
4 Dr. Butkis, to downsize its residential programs by
5 50 percent because of the extent of the abuse and neglect.
6 And Dr. Butkis testified that his office found that they
7 had four times the statewide average of abuse and neglect.

8 I want to correct Mr. Stegmaier on one thing. He
9 said Babcock Center provides service coordination. They
10 do not.

11 The duty of care, here again, Madison v. HHS. The
12 ABA issue, Your Honor, our allegation is that they have
13 not provided services that he has needed and that that has
14 been ongoing. And in fact, just recently, we have got a
15 letter saying they're denying certain services that he
16 needed when Ms. Mims went into the hospital. So that
17 issue is ongoing. We've also raised in our ADA claim the
18 issue of how they treat respite workers differently from
19 the people who work in the institution. And I won't go
20 all that ADA elements, but, because I know you're short on
21 time, I'll go into that in our brief.

22 The issue of the unjust enrichment, the statute, Your
23 Honor, does not say that Ms. Mims has to pay these
24 defendants money for their to be an unjust enrichment
25 claim. What the statute says is that there was conferred

1 upon the defendant a benefit. And by reason of the
2 Medicaid benefits, by reason of Edward being a Medicaid
3 participant, that conferred upon them money. They get a
4 van payment and they got money for these services. They
5 were getting money for one-on-one care that was not being
6 provided to him when he was repeatedly getting beaten at
7 Clusters when he was sexually abused at Pennington.

8 So there is unjust enrichment here. We believe it
9 depends on what the word confer means and that doesn't
10 mean pay. When you look at the word confer and how it
11 relates here, if Edward has any money, if he is successful
12 in this lawsuit and he has money, the state will come back
13 and will recover that money on his death so that we do
14 believe that under the unjust enrichment statute, he has
15 conferred a benefit on them by reason of his eligibility
16 for Medicaid and they will be -- In fact, when he settles
17 a lawsuit, they will be going after him to require him to
18 pay them back for those benefits. So we believe that he's
19 met those criteria.

20 I very much appreciate, Your Honor, you allowing us
21 to respond because the time short time that we've had
22 since these briefs were filed. And I understand this is a
23 complicated issue. I understand we have provided and we
24 would ask the court to consider in our defense against the
25 motion for summary judgment this six volumes that we

1 provided which show extensive abuse. And I just can't
2 imagine more conscious indifference to someone like Edward
3 who is totally unable to take care of himself.

4 THE COURT: All right. Let me ask -- I am going, due
5 to Mr. Woodington's absence, I'll give you until the end
6 of the month, that will be 28th, to submit any
7 supplemental material you is to submit.

8 MS. HARRISON: And Your Honor, we would ask that when
9 our motion for summary judgment be scheduled, that our
10 motion for recusal be scheduled because if Judge Manning
11 has recused himself, then we don't have a conflict with
12 Mr. Protopapas. I think he's one of the best lawyers in
13 state. We never had a conflict.

14 MR. PROTOPAPAS: We'll, take up motion of recusal
15 separately with the coordinator. If it does get
16 rescheduled --

17 THE COURT: Let me ask a procedural matter. You said
18 you filed a motion for summary judgment?

19 MS. HARRISON: We filed a motion for summary
20 judgment; yes, sir, more than 10 days before the hearing;
21 yes, sir.

22 THE COURT: Before this hearing?

23 MS. HARRISON: Yes, sir.

24 MR. WOODINGTON: And Your Honor, what I did was ask
25 Judge Manning last week. Talking about not getting much

1 notice, she served six volumes of stuff on me 10 days ago.

2 But --

3 MS. HARRISON: We filed it within the 10 days ago.

4 MR. WEDDINGTON: Right before the holiday. Be that

5 as it may, I asked Judge Manning not to schedule her

6 motion until ours had been heard because if the statute

7 applies to bar some of her claims, then a lot of her

8 motions would be off the table. And that's where it was.

9 Judge Manning agreed to do that. So her motion is not up.

10 And I would submit doesn't need to be up until our is

11 resolved.

12 THE COURT: All right. I understand.

13 MR. WOODINGTON: Do you mind if I take 10 or 15 days

14 to respond to her.

15 THE COURT: Ten days.

16 MR. WEDDINGTON: I don't really have a specific -- I

17 have the complaint which is kind of vague. But I've never

18 really had a specific -- I've never had her specifically

19 address our motion really until when she filed that brief.

20 THE COURT: How much time do you need, Ms. Harrison?

21 MS. HARRISON: For?

22 MR. WOODINGTON: Well, you've given her to til the

23 end of the months.

24 THE COURT: Well, I only did that because you were

25 not going to be available.

1 MR. WOODINGTON: Oh.

2 THE COURT: That will be fine. Let's just do it that
3 way.

4 MS. HARRISON: We would ask that our motions -- Our
5 motions don't seem to get scheduled. But we would ask
6 that our motions be heard in order because it could moot
7 out some other --

8 THE COURT: I understand that. I'll take it up with
9 the chief administrative judge.

10 MS. HARRISON: And another issue we've requested,
11 Your Honor, Ms. Mims has very few people who can take care
12 of Edward. He has PICA. So he puts things in his mouth
13 that he shouldn't. It take someone who really knows him
14 and its very difficult for her to find someone who can
15 take care of him for a week and especially on short
16 notice. So we would respectfully ask the court to
17 consider a day certain in this case because of the
18 hardship on her in finding someone. Our only other option
19 is to have Edward come and sit through the trial all day
20 everyday for a week.

21 THE COURT: I'll take it up with the chief
22 administrative judge.

23 MR. STEGMAIER: Sir, would you, once the reply is
24 filed, would the court entertain proposed orders?

25 THE COURT: Yes.

1 MR. STEGMAIER: Thank you, sir.

2 THE COURT: All right. Thank you very much, counsel.

3 MR. WOODINGTON: Thank you, Your Honor.

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END OF TRANSCRIPT

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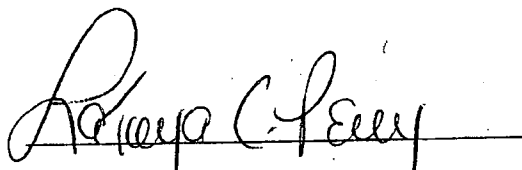
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF FAIRFIELD)

I, LaToya C. Perry, Official Court Reporter for the
Sixth Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of Common Pleas for
Richland County, South Carolina, on the 4th day of June,
2013.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto.

September 24, 2014



LaToya C. Perry, Court Reporter

My Commission Expires: 06-27-2016