THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2007-CP-40-3365
Appellate 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.

PETITION FOR REHEARING

The Respondents South Carolina Department of Disabilities and Special Needs, Stan Butkus and Kathi Lacy, (that is, all Respondents) petition the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *Estate of Edward Mims, etc., v. South Carolina Department of Disabilities and Special Needs, et. al,* Op. No. 2017-UP-422 (S.C. Ct. App. filed November 8, 2017).

The grounds for the Respondents' petition for rehearing and the specific relief requested are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

This petition for rehearing is based on the Court's decision in *Estate of Edward Mims, etc., v. South Carolina Department of Disabilities and Special Needs, et. al,* Op. No. 2017-UP-422 (S.C. Ct. App. filed November 8, 2017), the supporting memorandum filed herewith; the briefs and Record on Appeal and subsequent filings with this Court; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

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MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Respondents South Carolina Department of Disabilities and Special Needs, Stan Butkus and Kathi Lacy, (that is, all Respondents) have petitioned for a rehearing of this Court's recent decision in *Estate of Edward Mims, etc., v. South Carolina Department of Disabilities and Special Needs, et. al,* Op. No. 2017-UP-422 (S.C. Ct. App. filed November 8, 2017). Respondents request that this Court reconsider its opinion and affirm the decision of the circuit court for the reasons set forth herein.

1. The opinion's holding on the statute of limitations overlooked the unnecessary disadvantage to defendants in defending against stale claims that could have been filed much earlier by the guardian.

Defendants respectfully submit that the opinion overlooked the unwarranted prejudice to defendants that occurs when plaintiffs such as this one are given as many as seven or eight years in which to file a claim. It is well settled that "[s]tatutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs," *Stokes–Craven Holding Corp. v. Robinson*, 416 S.C. 517, 526, 787 S.E.2d 485, 490 (2016), and that "[o]ne purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his or her rights." *Id.*

In the present case, there is no question that Plaintiff's mother, who was appointed his guardian in June 2005, was aware of the injuries Plaintiff is alleged to have sustained between 2000 and 2005, although she did not file and serve a lawsuit until May 2008. In addition, Plaintiff's attorney, Ms. Harrison, was representing the guardian at least as early as the time of the guardian's appointment in June 2005. *See* R. III, 525. Nevertheless, this action was not properly instituted until May 2008, almost three years after the appointment of the guardian, and one year after the original Complaint was filed but not served.

This case therefore represents a paradigm example of a situation in which a guardian charged with protection of the rights of a disabled person slept on those

rights. The Defendants should not be penalized by having to defend these extremely stale claims in light of this years-long inaction by the guardian and her counsel, especially when there was even a false start in the form of a case filed and inexplicably never served for a year.

For reasons such as this, some courts have held that the appointment of a guardian ends the tolling of a limitations period for a disabled person. In South Carolina, this means that the action would need to be filed within one year after the disability ceased with the appointment of the guardian. S.C. Code Ann. § 15-3-40(b). The fairness of this rule has been recognized in such cases as *Stewart v. Robinson*, 115 F.Supp.2d 188, 195 (D.N.H. 2000), which held that such a rule "gives effect to society's compelling interest in effectively protecting the rights of those who are disabled . . ., while also serving the important interests underlying statutes of limitations." The same case further holds that this rule serves several interests:

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

115 F.Supp.2d at 197. *See also,* cases cited in the Order below, R. I, 56-57. This Court has previously noted, admittedly in dicta, that those same authorities were

"persuasive," although the Court ultimately did not reach the issue. *Sims v. Amisub of South Carolina*, 408 S.C. 202, 217, 758 S.E.2d 187, 195 (Ct. App., Feb. 12, 2014. (The Supreme Court reviewed that decision, but also did not reach the issue.)

The opinion simply holds that "[w]e hold Mims' disability did not end when his mother was appointed guardian." Slip op. at 6 (citing cases). Defendants respectfully submit that in adopting this rule without explaining its rationale or why the rule adopted by the lower court is no longer "persuasive," as *Sims* had suggested, the Court overlooked the policy considerations set forth above. As a result, Defendants request that that conclusion be vacated, and the decision of the lower court affirmed on this issue.

2. The opinion misapprehended or overlooked certain issues related to the alleged liability of Defendants Butkus and Lacy for "fraud, actual malice, or an intent to cause harm" when the only state law claims were founded in negligence.

Defendants respectfully submit that in holding that "fraud, actual malice, or an intent to cause harm" might be present, slip op. at 10-11, quoting S. C. Code Ann. § 15-78-60(17), the opinion overlooked decisions of the South Carolina Supreme Court which have rejected those bases for liability when they are not elements of the cause of action. In the seminal case of *Eldeco, Inc. v. Charleston County School District*, 372 S.C. 470, 642 S.E.2d 726 (2007), the Supreme Court determined that "[n]one of the elements required for either cause of action . . . include 'intent to harm.'" Consequently, where "intent to harm" is not an element

of the cause of action, the immunity exception in that situation is inapplicable. *Accord, Swicegood v. Lott*, 379 S.C. 346, 665 S.E.2d 211 (Ct. App. 2008)(because "intent to harm" was not an element of the abuse of process claim, that claim could proceed against the entity). Fraud and actual malice are also not elements of Plaintiff's cause of action based on negligence.[1]

Defendants have contended that Plaintiff's Third Cause of Action, labeled "Negligent Supervision," alleged nothing more than that. This Court concluded otherwise, holding that that cause of action could also be regarded as including negligence and gross negligence. Even under that holding, however, neither fraud, malice, nor intent to harm are part of the causes of action for negligence, gross negligence, or negligent supervision, as discussed in the footnote.[2] Indeed, fraud, malice and intent to harm are logically inconsistent with the concept of negligence, which involves neglect, rather than intent. It is well settled under South Carolina law that intentional torts "cannot be committed in a negligent manner." *State Farm*

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[1] As discussed in Point 5 below, the Amended Complaint, consistent with the negligence claim it makes, did not even allege "fraud, actual malice or an intent to cause harm."

[2] The four elements of a negligence claim, set forth in such cases as *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002), do not include fraud, malice or intent to harm. Gross negligence adds the requirement of a showing of failure to exercise a slight degree of care. *Moore by Moore v. Berkeley Cty. Sch. Dist.*, 326 S.C. 584, 591, 486 S.E.2d 9, 13 (Ct. App. 1997) Negligent supervision is a type of ordinary negligence which holds a supervisor or employer liable when that person knows or should know of the need to exercise control over an employee. *Degenhart v. Knights of Columbus*, 309 S.C. 114, 117, 420 S.E.2d 495, 496 (1992).

Fire and Cas. Co. v. Barrett, 340 S.C. 1, 530 S.E.2d 132, 137 (2000). Likewise, in *Wannamaker v. Traywick*, 136 S.C. 21, 134 S.E. 234 (1926), the Supreme Court explained that the term "negligence" is "ordinarily used in common-law terminology to express the foundation for civil liability for injury to person or property, when such injury is not the result of premeditation and formed intention." 134 S.E. at 235. Thus, intent and negligence are mutually exclusive, and no claim of negligence can flow from intentionally tortious conduct. Accordingly, there is no exception under § 15-78-70(b) that applies, and Defendants Butkus and Lacy respectfully submit that the Court should hold that those Defendants are entitled to employee immunity under Section 15-78-70(a).

Defendants Butkus and Lacy also submit, in the alternative, that the opinion was in error in holding that even a scintilla of evidence of fraud, malice, or intent to harm might be present, when the opinion does not set forth any specific instances of such evidence. Slip op. at 10-11. Those Defendants would also reiterate that the court below correctly held that Plaintiff neither alleged nor proved any of those exceptions. R. I, 49. The Amended Complaint is completely devoid of any reference to fraud, malice, or intent to harm. Even on summary judgment, Plaintiff in the lower court made "only conclusory references to the need to show actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." *Id.* n. 12, citing Pl. Mem. at 23, 28, R. III, 615, 620.

3. With regard to the three alleged injuries addressed by the circuit court, the opinion also overlooked the total absence of specific proof of cause and effect sufficient to create a jury question.

If this were a case involving a single injury, the opinion could be expected to set forth the specific evidence that the appellate court held to create a factual issue. The present case involves more than one claimed injury, but each alleged incident of injury still warrants a discussion of the specific evidence as to each. Otherwise, if the case is indeed remanded, the parties and the circuit court will not know what has been held to constitute a scintilla of evidence.

Plaintiff had a number of medical encounters, but Plaintiff never specifically identified more than a few such encounters for which some liability was claimed. And even for those incidents, whether limited to the three discussed by the court below or extending to others, there was no evidence of disputed facts that could give rise to a jury question. In effect, the opinion holds that the mere existence of a medical encounter renders the Defendants strictly liable, or liable as a matter of res ipsa loquitor, for the occurrence of the condition that led to the encounter. This is clearly not the law.[3]

The court below examined Plaintiff's response to Defendants' Motion for Summary Judgment to determine those injuries for which Plaintiff alleged there

[3] The opinion, p. 9, makes a passing reference to alleged "systemic problems," but neither Plaintiff nor the opinion have discussed a cause and effect relationship between any such alleged problems and any specific injury.

was a jury issue, concluding that there were only three. R. I, 38-39. The court accordingly held that it would consider only those three incidents. *Id.* This Court held that there was evidence to submit those three injuries (as well as others, discussed below) to a jury, but for each of the three injuries considered by the lower court, this Court did not identify the evidence supporting its conclusions. In fact, it is logically and legally impossible for any of the three injuries to have led to liability on the part of any of the Defendants under either state or federal law. Each incident will be briefly discussed below:

a. The August 13, 2000, beating by a Babcock employee.[4]

There was no evidence at all that Butkus or Lacy had actual or constructive knowledge that the conduct of Carl Anthony, a Babcock employee, was a "pervasive and unreasonable risk" to anyone. *Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994).[5] To the contrary, there was no evidence that Anthony had ever done anything wrong before the Mims beating in August 2000. This was noted at p. 16 of the Brief of Respondents. Likewise, the order below held that "Plaintiff has

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[4] In light of this Court's holding on the statutes of limitation, this claim could only be pursued under 42 U.S.C. § 1983.

[5] *Shaw*, 13 F.3d at 799, holds that the plaintiff in a Section 1983 negligent supervision case must plead and prove: (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.

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." R. I, 41. As a result, it would be impossible as a matter of law for a jury to conclude that Butkus or Lacy had knowledge of a risk presented by the employment of Anthony, or that they were indifferent to or impliedly authorized any action by Anthony, or that there was any kind of a causal link between their alleged inaction and the injury by Anthony, much less an "affirmative causal link." *Shaw, supra.* For these reasons, there is simply not even a scintilla of evidence. much less more than a scintilla (as required in Section 1983 cases of this kind) that would permit this claim to go to a jury. The opinion does not specifically discuss this incident, and cites no evidence in support of its conclusion that there was a triable issue of fact on this point. In effect, the opinion holds the Defendants to a standard of either strict liability or res ipsa loquitor, a basis not recognized in South Carolina. *Merch. v. Columbia Coca-Cola Bottling Co.*. 214 S.C. 206, 208, 51 S.E.2d 749, 750 (1949).

b. The 2004 ant bite incident.

The court below held that Plaintiff had not established a Section 1983 claim based on this incident, because Plaintiff "point[ed] to no other incident involving insect bites at Kensington" and "offer[ed] 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." R. I, 42.

As the Order below further noted, 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. *Id.*, citing R. X, 2579-80. This testimony was uncontroverted.

On appeal, Plaintiff made no reference to this incident in the course of the argument pertaining to either Section 1983 or negligence, except to refer to post-incident events. Br. of Appellant at 42. Plaintiff argued elsewhere that the court below should not have dismissed the claim based on this incident, Br. of Appellant at 15-16, but that argument was based only on certain very general statements about sanitation in reports dated 2007 and 2005, that is, one to three years after the ant bite incident. (Plaintiff's brief misstated the dates of both of those reports as being 2004, when in fact they were issued in 2007 (USC School of Public Health), R. VII, 1617, and 2005 (Carolina Medical Review). R. VI, 1409.) In any event, the reports only referred to kitchen sanitation issues, and not to a situation where ants got into a bedroom. As with the Carl Anthony incident, the opinion does not specifically discuss this incident, and cites no evidence in support of its conclusion that there was a triable issue of fact on this point. There is no suggestion that this situation was even caused by the act of a subordinate, much less that Butkus or Lacy knew of a "pervasive and unreasonable risk" caused by the unknown or nonexistent subordinate and impliedly authorized it. Given that there was no known act by any known subordinate, there could not have been an affirmative causal link or

proximate cause between any action or inaction by Butkus or Lacy and the ant bite event. As with the Anthony incident, the opinion effectively holds the Defendants to strict liability or res ipsa loquitor liability.

c. The 2005 penis injury.

The lower court held "Plaintiff has provided no evidence whatsoever as to how [the 2005 penis] injury might have been caused, much less evidence of how Defendants Butkus or Lacy might have done anything to prevent this incident." R. I, 42. The court also noted that this injury was viewed by the clinicians at Lexington Medical Center as not appearing to be the result of abuse or neglect. R. I, 42, citing R. III, 470. The court below further concluded that Plaintiff had produced "nothing to show an 'affirmative causal link' between some act or omission of the defendants and the penis injury." R. I, 43. As with the aforementioned two incidents, the opinion does not specifically discuss this incident, and cites no evidence in support of its conclusion that there was a triable issue of fact on this point.[6]

It should also be noted that this was the only injury that occurred after the

[6] The opinion, p. 3, apparently quotes from an *ex parte* Probate Court order, R. III, 525, which noted that on May 25, 2005, Plaintiff was found to have a "serious unexplained injury." This reference to the penis injury was obviously an adoption of Plaintiff's counsel's characterization, unsupported by any evidence. As noted above, the examining physician determined the injury to have been "superficial." Regardless of the whether the injury was serious or not, however, there was no evidence of how it was caused.

Kensington facility was decertified in the previous month, April 2005. In other words, if the opinion concluded that that April 2005 decertification of Kensington put DDSN on notice that something needed to be done there, the only incident that occurred after the decertification was this one for which there was no evidence of causation, so the decertification could not serve as basis for liability. [7]

As for the state law negligence claims based on this incident, it is axiomatic that "[w]hen the evidence leaves the cause of the injury unproved, it cannot be attributed to the defendant's negligence." *Bush v. Weston & Brooker Quarry Co.*, 105 S.C. 509, 90 S.E. 158, 159 (1916). Since Plaintiff unquestionably did not establish the cause of this injury, then as a matter of law, no negligence could be ascribed to these Defendants. Again, the only way Plaintiff's proof on this point would be sufficient would be if liability were to be based on strict liability or res ipsa loquitor, neither of which is a permissible basis for liability.

4. In citing other medical encounters not pled or proven by Plaintiff, the opinion impermissibly reversed the circuit court on grounds that were never presented by the Plaintiff, either in the Amended Complaint (with one exception) or at any time thereafter.

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[7] On appeal, the portion of Plaintiff's brief pertaining to the Section 1983 claim, Br. of Appellant at 25-40, did not even refer specifically to the Carl Anthony incident. Plaintiff also made no reference to the ant bite incident in the Section 1983 argument, except to refer to post-incident actions. Br. of Appellant at 42. Finally, the penis injury incident was only briefly mentioned at pp. 33-34 of the Brief of Appellant, but Plaintiff offered nothing to rebut the court's conclusion that there was no evidence that the injury was the result of an assault by anyone. The failure of Plaintiff to argue anything else on appeal is discussed in the Brief of Respondents at 31-32.

At p. 2, the opinion also referred to several other medical encounters, as follows:

1. "Bruises on his groin." Slip op. at 2. Defendants' counsel, even with word searching of the entire Record on Appeal and both of the briefs of the Appellant, has not been able to find any reference to "bruises on his groin." If the opinion was referring to a Babcock report at R. XI, 3254, that report, dated January 16, 2001, noted only the existence of a bruise on the inner right thigh, with no evidence whatsoever of causation that could support a finding of negligence.

2. "Severe vomiting." *Id.* There is only one document in the record, aside from the unsworn and unsupported chronology by Plaintiff's counsel, and that is an ER report referencing one day of vomiting on July 19, 2000. R. XI, 3318-19. One day of vomiting obviously does not establish liability under federal law. (This incident was outside the two-year statute for state law claims.)

3. Loss of 28 pounds of weight. *Id.* There is no record evidence of this, other than the unsworn and unsupported chronology by Plaintiff's counsel, R. XI, 3277, 3279, which refers only to "BC" documents from August 2000 or earlier which were not before the court below.

4. "Swollen and bruised hand." *Id.* There is no record evidence of this, other than the unsworn and unsupported chronology by Plaintiff's counsel, R. XI, 3284, which refers only to "BC" documents which were not before the court below.[8]

5. "Elevated blood pressure." *Id.* There is one actual medical record from January 2003 indicating that on one occasion the Babcock Center had Plaintiff taken to the ER because "his blood pressure was a little elevated. It was 130/108." R. XI, 3326. At the time of the report, it had returned to normal. R. XI, 3327. There is no evidence of causation, and this event, which is not even an injury, therefore cannot

[8] There is a frequent reference in the chronology to an "Exhibit 4," apparently consisting of ER and perhaps physician records, but no exhibit with that number that was presented to the court below consisted of medical records.

possibly serve as the basis for liability of any kind.

7. "Pain." *Id.* This appears to be a reference to Ms. Mims taking Plaintiff to the emergency room on November 30, 2003 (a Sunday and a day on which he was at home). It was noted the "Mother is under the impression that [Plaintiff] is in a mild degree of pain, otherwise unspecified." R. IX, 3329. Nothing was found, and the examining physician concluded that "The entire course was very uneventful and encouraging." R. IX, 3331. This encounter contains no evidence of an injury.

8. A beating by a Clusters employee in 2001. The opinion referred elsewhere (slip op. at 3) to this as being one of the three incidents considered by the circuit court, although that event occurred in 2000, not 2001. A 2001 beating was referenced in Paragraph 25 of the Amended Complaint, R. I, 77, but there is no evidence in the record pertaining to it, and it was not mentioned in Appellant's brief on appeal. The order below noted that Plaintiff had mentioned, but did not discuss, an unspecified alleged "second beating." R. I, 38 n.4.[9]

Except for Event 8 above, none of these events were even pled in the Amended Complaint. Nor were they argued in the circuit court by Plaintiff. Nor were they argued on appeal by Plaintiff. Even if the opinion had not

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[9] The Court may have relied to some extent on an unsworn "chronology" prepared by Plaintiff's counsel, which refers almost exclusively to documents numbered "BC___." As noted in the Brief of Respondents, p. 31, no such documents were presented to the court below. Accordingly, for the claimed injuries that are based only on a cite to "BC" documents not in the record, there is literally no evidence in the record to support those claims.

In fact, the 3372-page record contains only 26 pages of documentation of medical encounters over the 6-year period from 2000 through 2005, other than documentation pertaining to three incidents discussed by the lower court. Those pages are all in Vol. XI of the Record on Appeal, and are at pp. 3042-44; 3048; 3254; 3257; 3259-64; and 3318-3331. The amount of irrelevant or duplicative material in the record may have given rise to an impression that there were more documented medical encounters than that in the record, but there were not.

misapprehended Plaintiff's total failure to plead (except for Event 8) or otherwise present evidence pertaining to the events listed above, there was still literally no evidence in the record that would support a finding of liability on the part of any of Butkus, Lacy or DDSN. This absence of proof of causation includes, to the extent not already mentioned herein, the allegations referenced on p. 10 of the oinion.

There is no question that there is "nothing in our precedents that would permit us to reverse on a ground that was not properly argued to us." *Town of Mt. Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830, 845 (2012)(Hearn, J., dissenting). (Emphasis in original). Likewise, it is well settled that "[t]he same ground argued on appeal must have been argued to the trial judge." *McKissick v. J.F. Cleckley & Co.,* 325 S.C. 327, 479 S.E.2d 67, 75 (Ct. App. 1996). The opinion appears to have misapprehended that it was reciting alleged injuries that were neither pled, nor argued in the circuit court, nor argued on appeal. Those references to the eight events listed above should therefore be deleted for those reasons.

Finally, to cite the mere fact of a medical encounter as constituting an event that can take a case to a jury is to hold the Defendants to either strict liability or res ipsa loquitor, as has already been noted with regard to the three events discussed by the lower court. In permitting this action to go forward without a showing by Plaintiff of actionable conduct by Defendants, the opinion overlooked the fact that Plaintiff's arguments, both on appeal and in the court below, failed to comply with Rule 56(e), which provides that:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

(Emphasis added.) Nothing in Plaintiff's filings in the lower court or in this Court suggested in any way that such "specific facts showing that there is a genuine issue for trial" were present in this case. Plaintiff sets forth a number of largely non-specific claims events at Babcock and usually involving others, but fails to show causation for any of his medical encounters. As the court below held, Plaintiff's assertions simply do not set forth how the alleged acts or failure to act of the Defendants amounted to actionable torts that proximately caused injury to Plaintiff. R. I, 51-52. As a result, Plaintiff's arguments and the opinion do not set forth specific facts as required by Rule 56(e).

5. Certain actions of Defendants referenced in the opinion could not have given rise to liability.

The opinion at pp. 8-9 refers to three allegations by Plaintiff relating to acts by Butkus, Lacy or DDSN. None of them, as a matter of law, could have resulted in liability of any of these Defendants, because none of those acts caused injury to Mims as a matter of law. As stated in the opinion, these allegations were that those two Defendants

> were responsible for the harm resulting from Mims' unconstitutional confinement and substandard care because they either [1] petitioned to have Mims confined,

> [2] refused to release Mims back to Ms. Mims' custody or reassign him to an alternate facility, and [3] ultimately worked to obstruct Ms. Mims' custodianship over Mims, all while knowing about the ongoing substandard care at the facilities.

Slip op. at 8-9. [10] The first of these, the petition to have Mims confined, was filed by another DDSN official, James Christian, who is not a party to this case. R. XI, 3242-43. The opinion overlooked this in apparently concluding that Butkus or Lacy filed the petition, which neither of them did. In addition, the petition and Probate Court order were consented to by Mims' mother, counsel, and his guardian ad litem. R. XI, 3245-47; Order, R. I, 44. Secondly, the claim that either Butkus or Lacy should have released Mims back to Ms. Mims' custody also fails as a matter of law, because the 2001 Probate Court Consent Order, not DDSN, ordered Mims into DDSN's custody, and anyone acting in Mims' behalf would have needed to have that Order amended or vacated, rather than asking DDSN officials to release Mims; in addition, Plaintiff has never shown that the alleged failure to release Mims or reassign him to another facility was the proximate cause of any of his injuries.[11] Finally, the opinion overlooked that the alleged "obstruction" of Ms.

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[10] The opinion also misapprehended that Plaintiff had made a claim of "unconstitutional confinement." Slip op. at 8. The Amended Complaint alleged only involuntary confinement, R. I, 76, and even that is not an accurate statement, because all of Plaintiff's representatives, including his mother, consented to his commitment to a facility. R. XI, 3245-47.

[11] As discussed at pp. 21-22 of the Brief of Respondents, the alleged failure to reassign would establish only "but for" causation, i.e., causation in fact, rather than legal causation, i.e., proximate cause. The opinion overlooked this distinction.

Mims' custodianship over Mims could not, as a matter of law and logic, have caused injury to Mims, because the alleged "obstruction" occurred after Mims was released from Babcock by Probate Court order in June 2005 and did not have any effect on the Probate Court.[12]

The opinion also cited "reports from CMS regarding certification of the facilities, as well as affidavits and depositions of Ms. Mims, Lacy, Butkus, and the affidavit of Mims' Guardian ad Litem." Sip op. at 9. However, no specific connection is made between anything in those matters cited and any alleged injury.

6. The opinion misapprehended that the discretionary relaxing of procedural rules in this appeal would not benefit a disabled person, and that the deceased disabled person's rights were capable of being protected by his guardian and his counsel.

In holding that arguably-unpreserved issues (and for that matter, issues neither pled nor otherwise raised below, much less on appeal) should nevertheless be addressed because the Plaintiff was held to be a person under legal disability, the opinion overlooked several factors.

First, by the time this action was filed and served, Plaintiff had had a guardian appointed for three years, and was also represented by counsel throughout that three-year period. Whether the appointment of a guardian technically removed

[12] The alleged "obstruction" was actually nothing more than an effort to have another person, Mims' sister, appointed. That effort not only occurred after Mims was no longer at a Babcock facility, it also made no difference, because Ms. Mims was appointed his guardian anyway. No injury whatsoever flowed from this event.

the disability or not, the fact is that Plaintiff's interests were represented by a responsible adult, that is, his guardian, as well as by counsel. As a result, there is nothing about Plaintiff's situation that would require relaxing the rules.

Moreover, even a person under legal disability is not entitled to argue unpreserved issues when his interests have been represented at all times by counsel who could have raised the issues The opinion relied on *Caughman v. Caughman*, 247 S.C. 104, 109, 146 S.E.2d 93, 95 (1965), but in that case the infant defendants were not represented in the Supreme Court (only the competing spouses were represented by counsel). Where a disabled person is represented by counsel, the Supreme Court applies normal error preservation rules, even in a criminal case. *See, e.g., In Interest of Antonio H.*, 324 S.C. 120, 477 S.E.2d 713 (1996). That rule should apply here as well, since the interests of awarding damages to the estate of the deceased plaintiff are of a far lesser order than in a criminal case.

Thirdly, this case now involves only money damages, and there is no suggestion that the money would go to a minor or disabled person, the disabled Plaintiff himself having passed away almost ten years after leaving DDSN custody. The disabled person's rights are therefore not actually the rights being protected. Relaxation of the rules is also highly prejudicial to the Defendants in this case, who were given no opportunity to address issues not actually raised by Plaintiff.

Defendants are not aware of any case in this jurisdiction in which discretionary relaxation of error preservation rules occurred in favor of awarding

damages to the non-disabled heirs of a deceased disabled person, especially when the heirs were represented by counsel. Most such cases involve the future status or treatment of a living disabled person, not a claim by his non-disabled heirs for money damages.

The case of *Cogan v. KAL Leasing, Inc.*, 546 N.E.2d 20, 25 (Ill. App. 1989), while not a South Carolina case, spells out the limits that must be placed on any relaxation of rules in favor of disabled persons (in the cited case, the person involved was actually disabled, as opposed to being non-disabled heirs):

> [P]rocedures are now available to ensure that the rights and interests of minors and incompetents are well protected. The best way for a court to fulfill its duty to protect these rights and interests is to appoint guardians for the minor or incompetent. The guardians, in turn, should hire competent counsel to vigorously protect or defend the minor's or incompetent's rights. In the present case, this is precisely what happened.

The court in that case further noted that "[s]kewing the rules of evidence or procedure merely because one party to the litigation happens to be a minor or an incompetent loses sight of the purposes those rules are to fulfill. To be more specific, the defendants in this case, [defendants] are no less entitled to a fair trial consistent with all applicable rules of procedure and evidence" than was the

disabled plaintiff. *Id.*[13]

Finally, in not requiring issue presentation and preservation, the opinion misapprehended the effect of *Spence v. Wingate*, 381 S.C. 487, 674 S.E.2d 169 (2009). That case held that a party who clearly raised an issue in the circuit court but did not prevail in that court did not need to file a Rule 59(e) motion in order to preserve the clearly-raised issue. In the present case, however, Plaintiff not only failed on appeal to claim injuries other than the three referenced, Plaintiff also failed to make any such other claims in the circuit court, as discussed herein and in the Brief of Respondents. The opinion, unless amended in this regard, would not only reverse the lower court based on an issue not expressly raised on appeal, it would also amount to a reversal on a ground not even presented in the lower court.

7. **The opinion overlooked the unpled and/or conclusory nature of most of Plaintiff's assertions.**

As noted in the Order below, R. I, 40-41, and in the Brief of Respondents at 15, Plaintiff did not plead the elements of a Section 1983 supervisory liability

[13] Two Justices of the Supreme Court have concluded in a case similar to this one that they would decline to relax the preservation requirement when the plaintiff "was at all times well-represented by counsel," coincidentally including Plaintiff's counsel in the present case. *Doe v. S.C. Dep't of Health & Human Servs.*, 398 S.C. 62, 83, 727 S.E.2d 605, 616 (2011)(Hearn and Pleicones, JJ, dissenting)(the majority did not in fact relax procedural requirements with regard to the matters decided by the majority).

claim set forth in *Shaw v. Stroud, supra.*[14] Even if Plaintiff had actually spelled out those elements in opposing summary judgment, which in fact did not happen, it is well settled that a plaintiff must formally raise his claims in the complaint rather than through other means. *See, e.g., Lyman v. CSX Transp., Inc.*, 364 F. App'x 669, 701 (2d Cir.2010) ("An opposition to a summary judgment motion is not the place for a plaintiff to raise new claims."); *Smith v. Books–A–Million*, 398 F. App'x 437, 437 (11th Cir.2010) (rejecting, on summary judgment, claim of retaliatory conduct that was not alleged in the complaint); *Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 39, 530 S.E.2d 369, 374 (2000)(summary judgment properly granted to defendant where plaintiff failed to state a cause of action). In holding otherwise, the opinion grants plaintiffs open-ended opportunities to assert anything, anytime.

Pleading aside, the elements of a Section 1983 claim, if asserted at all, were asserted only in conclusory fashion, as discussed in detail at pp. 15-22 of the Brief of Respondents. For all intents and purposes, the facts to support a Section 1983 claim were simply not pled, nor asserted in the lower court, and likewise were not

[14] The opinion held that Plaintiff can plead "ultimate facts" in a Section 1983 case, slip op. at 7, n. 5, but there is no suggestion as to how the conclusory Section 1983 cause of action in the Amended Complaint could be read to allege the facts needed to show the three parts of such a claim, set forth in n. 5, *supra.* As the Supreme Court held in *Spencer v. Miller,* 259 S.C. 453, 458, 192 S.E.2d 863, 865 (1972), "statements of ultimate facts and conclusions are not sufficient to make a genuine issue of trial."

presented on appeal.

While the Amended Complaint did at least make a reference to negligent supervision, R. I, 87, it did not include the irreducible element of the naming of a specific person who was negligently not supervised. *Bank of New York v. Sumter County*, 387 S.C. 147, 156, 691 S.E.2d 473, 478 (2010).[15] Nor did Plaintiff's filings in opposition to summary judgment name a specific employee who was not properly supervised. The opinion overlooked all of these omissions, concluding only that "[w]e find Mims presented at least a scintilla of evidence to support these [state law] claims." Slip op. at 10.

Although the Amended Complaint did not contain causes of action for ordinary negligence and gross negligence, the opinion summarily concluded that "we find Mims sufficiently pled his causes of action for negligent supervision, negligence, and gross negligence." Slip op. at 10. In so holding, the opinion misapprehended that the Amended Complaint did not contain causes (plural) of action on those three theories, but only the single cause of action for negligent supervision, with passing reference to other theories. The Amended Complaint contained only two conclusory references (each) to negligence and gross negligence. R. I, 87, 88 (Paragraphs 80, 81). There was no connection between the

[15] The Amended Complaint did not even name Carl Anthony (a Babcock employee), whose acts in any event occurred outside the applicable statute of limitations for a state law claim.

few specific allegations of injury and any specific acts or omissions of any of the Defendants. It has long been settled that "[t]o constitute a cause of action for negligence, the complaint must not only show that the defendant was negligent, but that the negligence of the defendant was the proximate cause of the injury." *Branham v. Camden Cotton Mill*, 61 S.C. 491, 39 S.E. 708, 709 (1901). The Amended Complaint contains no such allegations, and the opinion was in error in holding that it was anything other than conclusory with regard to any of its claims.

8. The opinion overlooked the absence of a supervisory connection between the Defendants and Babcock Center.

Plaintiff has not shown the existence of a supervisory connection between DDSN officials and Babcock Center employees. In the absence of a showing of such a connection, it was not necessary to give any further consideration to issues regarding supervisory liability. *See, e.g., Abbott v. Yurcina,* 2013 WL 4806223, at *13 (N.D.W. Va. 2013) report and recommendation adopted in part, 2013 WL 4806391 (N.D.W. Va. 2013)(prison warden was not a supervisor of employees of medical care contractor). *See* Brief of Respondent at 13 n.12. The court below held that "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). R. I, 40."

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court rehear its decision and issue an opinion affirming the decision of the circuit court on one or more of the bases set forth above.

DAVIDSON & LINDEMANN, P.A.

BY: _____

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November 21, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2007-CP-40-3365
Appellate Case No. 2014-001373

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

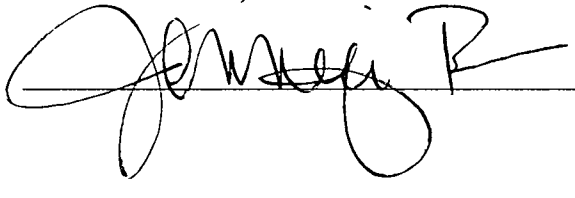
v.

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

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondents, does hereby certify that service of the **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** in the above-captioned matter was made upon Appellant's counsel placing a copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 21st day of November 2017:

Patricia L. Harrison, Esquire
611 Holly Street
Columbia, South Carolina 29205



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November 21, 2017

Hand Delivered
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Estate of Edward James Mims, Laura M. Cole, Personal Representative v. The South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stan Butkus
Appellate Case Number: 2014-001373
Civil Action Number: 2007-CP-40-3365
Claim Number: 44654
Our File Number: 104.7785

Dear Ms. Kitchings:

Please find enclosed for filing the originals and seven copies each of the **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** in the above referenced matter. Please file the originals and return a clocked-in copy of each document to me by way of my courier. I have not enclosed a the filing fee since the Respondents are exempt pursuant to Rule 203(d)(1)(B)(iii), SCACR.

By copy of this letter, I am serving copies on all counsel of record. Thank you for your assistance in this matter.

With highest regards, I am

Sincerely yours,

DAVIDSON & LINDEMANN, P.A.

Kenneth P. Woodington

KPW/jmb
Enclosures

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cc: (w/ Enclosures)

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