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.

REPLY 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) submit this Reply Memorandum in support of their Petition for Rehearing. As set forth below, and with the exception of its Point 1, Appellant's Return to the Petition fails to make a specific response to practically all of the points made in the Petition, and to the extent it does address those points, offers only a conclusory response. The Return makes only one specific reference to this Court's opinion. Return at 14.

1. Statute of limitations.

Defendants' contentions on the statute of limitations were set forth in full in connection with the present Petition and in the briefs. Plaintiff refers to a case cited by Defendants as involving "a single district judge," Return at 2, but Defendants and the Order below cited other cases as well. R. I, 56-57.

Plaintiff also mistakenly states that the Supreme Court of South Carolina "declined . . . to adopt" the rule that the tolling period would terminate when a guardian was appointed. Return at 2, citing *Sims v. Amisub of South Carolina,* 414 S.C. 109, 777 S.E.2d 379 (2015). That is an inaccurate characterization of what the Court did in *Sims.* The defendants in the case had argued in the alternative that the rule terminating tolling when a guardian or conservator was appointed should apply. However, the Supreme Court, like this Court in that case, did not reach that issue, because the case was barred by a different statute of limitations, § 15-3-545. 414 S.C. at 117 and 117 n. 9, 777 S.E.2d at 383, 384 n. 9.

Interestingly, the Supreme Court took note of one of the cases cited by the Defendants in this case:

> There is authority for the proposition that the appointment of a conservator who is vested with authority to bring an action on the ward's behalf effectively removes the disability. *See Stewart v. Robinson*, 115 F.Supp.2d 188 (D.N.H.2000) (holding that the medical malpractice statute of limitations is tolled on the basis of insanity only until the appointment of a capable guardian who is authorized to take possession of the disabled ward's estate and bring all related actions

necessary).

414 S.C. at 117 n.9, 777 SE.2d. at 384. *Stewart* was one of the cases this Court held in the same case to be "persuasive," although this Court, like the Supreme 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. 2014.) The Supreme Court in *Sims* also appeared to speak disparagingly of the plaintiff's effort "to create an effective eight-year statute of limitations due to insanity. . . ." *Id.*

2. Plaintiffs have offered no response to Defendants' contention that 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 have contended 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 the liability of individuals when those bases are not elements of the cause of action. Memorandum in Support of Petition for Rehearing at 4-6, citing *Eldeco, Inc. v. Charleston County School District*, 372 S.C. 470, 642 S.E.2d 726 (2007) and *Swicegood v. Lott*, 379 S.C. 346, 665 S.E.2d 211 (Ct. App. 2008). As the holdings of those cases and others suggest, 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*

Fire and Cas. Co. v. Barrett, 340 S.C. 1, 530 S.E.2d 132, 137 (2000). *See also, Wannamaker v. Traywick*, 136 S.C. 21, 134 S.E. 234 (1926)(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.

Plaintiffs' response to this contention by Butkus and Lacy with regard to state law claims was to make no response, except for one footnote on an inapposite point. Return at 11 n. 4.[1] None of the cases or concepts referenced above are mentioned at all in Plaintiff's Return. Defendants respectfully submit that the Court should regard this point involving individual liability of Butkus and Lacy under state law as effectively conceded, and that a minimum, the opinion should be modified in that regard, that is, by affirming the dismissal of the state law claims against Butkus and Lacy individually.

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[1] In that footnote, Plaintiff cites *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2006), which holds that liability can arise when a defendant where the defendant "negligently or intentionally creates the risk. . . ." (emphasis added). At most, this merely supports the point Defendants have been making, which is that negligence and intent are disjunctive concepts, as the cases cited above hold.

3. Even if intentional acts and negligence were not mutually exclusive, Plaintiff's claims regarding intentional acts by Butkus and Lacy are completely conclusory, or unsupported by any evidence, or both.

Defendants Butkus and Lacy have contended that "fraud, actual malice, or an intent to cause harm" were not pled in connection with the state law claims, and that no evidence was offered in opposition to Defendants' summary judgment motion regarding such claims. Memorandum in Support of Petition for Rehearing at 5 n. 5, 6 (the reference in n. 5 to "Point 5" should have been a reference to p. 6). Even if Plaintiff could overcome the inherent inconsistency in claiming both intentional wrongdoing and negligence at the same time, Plaintiff continues to make nothing more than conclusory allegations or claims that lack record support.

Plaintiff makes a one-sentence argument that this Court correctly ruled in Plaintiff's favor on this point, Return at 14, but has not cited any evidence in the voluminous record that shows any act of Butkus or Lacy amounting to "fraud, actual malice, or an intent to cause harm." Nor are those words to be found in the Amended Complaint. This failure to provide evidence comes in spite of the fact that Plaintiff's counsel deposed both Butkus and Lacy, as well as a number of other persons. Plaintiff does continue to cite two disavowed affidavits, as discussed in the footnote. That argument goes beyond the pale in its persistent

misrepresentation of the record.[2] This Court should not countenance the retention of a claim whose only basis is demonstrably absent and instead is being misrepresented to this Court by Plaintiff's counsel. Plaintiff also recklessly asserts that "Mims has shown that Defendants Butkus and Lacy had personal, non-employment reasons for covering up the abuse Mims suffered . . .," Return at 14, but there has never been the slightest suggestion that the record contains evidence of such personal animosity.

Plaintiff also does not contest the fact that the 2001 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, and not by Butkus or Lacy. Nor does Plaintiff contest that the 2001 judicial admission was the result of a Probate Court order, with the consent of Mims' mother (who was represented by counsel), the appointed counsel for Mims, and his guardian ad litem. R. III, 530-532. In effect, two attorneys and a guardian ad litem were representing the interests of Mims at that hearing. The

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[2] Plaintiff asserts that "DDSN initiated proceedings to prevent his discharge, maliciously informing the probate court that he was being abused or neglected at home. R. 189-190, 219. See also affidavit of GAL at R. 291-293." Return at 9. Those citations to the record are to the affidavits of Mrs. Mims and Leigh Flynn, the GAL. The circuit court held, in a conclusion that Plaintiff has never addressed, much less rebutted, that "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." R. I, 44. The affiants testified 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). *Id.*

Probate Court order held that "Upon agreement of all the parties, it appears that Ms. Mims will be unable to care are for her son in her home." R. III, 531. That court also held that "all parties have Mr. Mim's best interest in mind with proposing this Consent Order." *Id.*

Again, Plaintiff essentially does not uncontest that Plaintiff's claims of malicious acts by Butkus or Lacy cannot consistently stand alongside Plaintiff's claims that those individuals were negligent. As a result, Plaintiffs' failure to allege or prove such acts does not need to be considered, but such failure is nevertheless present, as shown above.

4. Plaintiff cites nothing in the Amended Complaint to rebut the Defendants' contention, and the holding in the circuit court, that non-supervisory negligence and gross negligence were not pled.

Plaintiff's Point 2, which runs from p. 4 through p. 13 of the Return, asserts that "Plaintiff's amended complaint pled all necessary elements of neglect, negligent supervision and gross negligence." Return at 4. However, the ensuing 10 pages do not contain a single cite to the Amended Complaint. As a result, the point that negligence and gross negligence were not pled is also an uncontested point.

5. Plaintiff's Return is devoid of any discussion of most of the incidents for which liability is claimed.

In the course of contending that there was no evidence in the record that would create a question of fact with regard to any of the incidents cited in this Court's opinion, Defendants' Petition for Rehearing set forth a detailed review of

each and every incident cited by this Court's opinion. Memorandum in Support of Pet. for Rehearing at 7-18. Plaintiff's response does not even purport to respond to most of those contentions. Instead, Plaintiff presents only a confusing mishmash of conclusory allegations. In light of the bloated record in this case and the broad, non-specific arguments put forth by Plaintiff's counsel, the overall effect may have been to create an impression that there was actually evidence to support Plaintiff's claims, when the record in fact is devoid of such evidence, as shown by the failure of the Return to cite evidence pertaining to specific incidents.

For instance, Plaintiff asserts that Butkus kept Mims in facilities where Butkus allegedly knew of abuse and neglect. Return at 15-16. However, the only cite to the record for this is a reference to pp. 2605-2611 (Vol. X), which pertains only to DDSN's objections to Ms. Mims' appointment as guardian in 2005, after Mims was no longer in a Babcock facility. Those objections, which made no difference because Ms. Mims was appointed guardian in 2005 anyway, could not have caused any injury to Mims, because he was already living at his mother's home by then. In another example, Plaintiff cites the decertification of the Clusters facility, Return at 6, but Plaintiff's own exhibits make it clear that that decertification occurred in November 2003, R. XI, 3271, ¶ 27, and that Mims had been transferred away from Clusters almost two years earlier, in March 2002. R. II,

211.[3]

The Return also offers nothing to controvert the following contentions made in the Petition for Rehearing:

a. The Return does not discuss proximate causation at all, aside from a conclusory assertion (without citation) that proximate causation was pled. Return at 10-11. Even if pled, the allegations of a pleading are insufficient to oppose a motion for summary judgment.

b. The Return does not contest Defendants' assertion that there was no evidence to indicate that Carl Anthony, who beat Mims in 2000, might commit such an act.

c. The Return does not contest Defendants' assertion that Plaintiff had not shown that the ant bite incident was proximately caused by any act or

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[3] While not desiring to make this Reply overly lengthy, Defendants are constrained to point out still another misrepresentation in the Return. At p. 7, it is asserted that Butkus and Lacy "decided not to allow Mims to be released when his mother appeared at Kensington with a court order for his release." This is a reference to a short delay of an hour or two of the start of Mims' normal weekend release from Kensington one Friday evening in June 2005. First of all, the court below held that Plaintiff had made no showing regarding this incident that would survive Defendants' summary judgment motion. R. I, 45 n. 8. Defendants pointed out that this issue was abandoned on appeal, Br. of Respondents at 6 n.6, and Plaintiff has not shown otherwise. Finally, and most egregiously, it is undisputed that the "court order for his release" was not initially communicated by Plaintiff's counsel to Butkus and Lacy—in fact, this failure by Ms. Harrison to provide DDSN with a copy of the order was the entire reason for the short delay in Mims' release that night. See R. III, 591, where DDSN's General Counsel advised Ms. Harrison that any such order was "something new" and that "we are unaware of its contents."

omission by Defendants.

d. The Return does not contest Defendants' assertion that the cause of the penis injury was unknown. In lieu of that showing, the Return instead makes the highly misleading statement that "DDSN's physician, Dr. Johnson, determined that the injury to Mims' penis was not self inflicted. R. at 3064." Return at 19 n. 8 (the reference to p. 3064 of the record appears to be in error). In fact, Dr. Johnson concluded that "[i]t is possible minor scratching [by Mims himself] may have caused a small skin break on the penis, that lead to this laceration." R. III, 577. Dr. Johnson further concluded that it was unlikely that the laceration was due to abusive or negligent management. R. III, 578. His final conclusion was "Cause for laceration unknown." *Id.*

e. The Return does not discuss a single one of the other medical encounters referenced in this Court's opinion and discussed in detail in the Memorandum in Support of Pet. for Rehearing at pp. 13-15.

f. With specific regard to the federal § 1983 claim, the Return does not mention, much less discuss, the need to show "that there was an 'affirmative causal link' between the supervisor's inaction and the <u>particular</u> constitutional injury suffered by the plaintiff." *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994)(emphasis added). Despite being provided many chances, Plaintiff simply has not been able to show any specific acts of specific individuals (either supervisors or persons allegedly supervised) that led to specific injuries. The

Return is just one more instance of this failure to provide specific proof.

g. Nor does the Return address the need, unmet by Plaintiff in this case, to plead the elements set forth in *Shaw*, including an "affirmative causal link." *See, e.g., Payne v. CCOH,* 2012 WL 6801387, 5 (D.S.C. 2012)(dismissing supervisory liability in part because "none of the three elements for such liability have been pled"). All told, the Return barely mentions the § 1983 claim at all.

Finally, in many instances, the Return cites only the Amended Complaint. *See, e.g.,* Return at 17-20. The contents of the Amended Complaint, however, cannot be relied upon in opposing a motion for summary judgment, and that is the purpose for which the Return cites the Amended Complaint.

6. Plaintiff has effectively not contested Defendants' contentions regarding the inapplicability of relaxing procedural rules.

The final point in the Return is an argument that procedural rules should be relaxed because, it is claimed, Plaintiff was acting as a "private attorney general." Return at 20-21, citing *Newman v. Piggie Park Enterprises,* 390 U.S. 400 (1968). However, that attorney fee case is completely irrelevant to the issue preservation issues raised by Defendants in the present case.

Piggie Park was an attorney fees case. It simply held that counsel for a private plaintiff could recover fees under the 1964 Civil Rights Act, noting that "[w]hen a plaintiff brings an action under [Title II of that Act], he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a

'private attorney general,'. . . ." 390 U.S. at 402. Unlike the present case, *Piggie Park* was not a damage action. Nor did it have anything to do with relaxing procedural rules in favor of disabled persons, who were not involved in that case, and who would not benefit from the damage award in this case. This final point is therefore one more to which Plaintiff has effectively provided no response.

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.

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BY: /s/

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December 18, 2017

THE STATE OF SOUTH CAROLINA
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The South Carolina Department of Disabilities and
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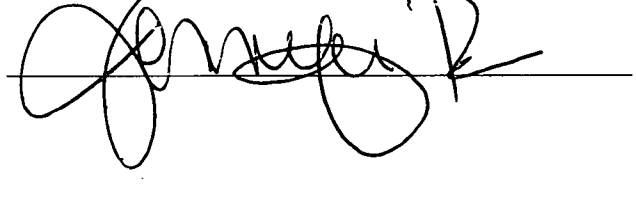
CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondents, does hereby certify that service of the **Reply Memorandum in Support of Petition for Rehearing** in the above-captioned matter was made upon Appellant's counsel by placing a copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 18th day of December 2017:

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



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December 18, 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 original and seven copies of the **Reply Memorandum in Support of Petition for Rehearing** in the above referenced matter. Please file the original and return a clocked-in copy to me by way of my courier. 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

cc: Patricia L. Harrison, Esquire *(w/ Enclosure)*