

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

**RECEIVED**

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

MAR 08 2018

SC Court of Appeals

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.

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**SECOND PETITION FOR REHEARING**

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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 one newly-added portion of Part III of the Court's recent decision in *Estate of Edward Mims, etc., v. South Carolina Department of Disabilities and Special Needs, et. al.* (S.C. Ct. App. filed February 21, 2018), Op. No. 5539, which was substituted for the original opinion, Op. No. 2017-UP-422 (S.C. Ct. App. filed November 8, 2017).

The grounds for this second 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 Estate of Edward Mims, etc., v. South Carolina Department of Disabilities and Special Needs, et. al*, (S.C. Ct. App. filed February 21, 2018), Op. No. 5539, the original opinion, 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.

DAVIDSON, WREN & PLYLER, P.A.

BY: 

WILLIAM H. DAVIDSON, II #1558  
KENNETH P. WOODINGTON #6213  
1611 Devonshire Drive  
Post Office Box 8568  
Columbia, South Carolina 29202  
(803) 806-8222

*Counsel for Respondents*

Columbia, South Carolina

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**MEMORANDUM IN SUPPORT OF  
SECOND PETITION FOR REHEARING**

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The Respondents South Carolina Department of Disabilities and Special Needs, Stan Butkus and Kathi Lacy, (that is, all Respondents) have petitioned this Court for a rehearing of one newly-added portion of Part III of the Court's recent decision in *Estate of Edward Mims, etc., v. South Carolina Department of Disabilities and Special Needs, et. al.* (S.C. Ct. App. filed February 21, 2018), Op. No. 5539, which was substituted for the original opinion, Op. No. 2017-UP-422 (S.C. Ct. App. filed November 8, 2017).

This petition is filed because Part III of the Court's second opinion added a new, substituted holding with regard to what appears to be a new theory of liability under 42 U.S.C. § 1983. This petition is filed in an abundance of caution, lest the Supreme Court conclude that the points raised herein concerning Part III of the second opinion was required to be presented to this Court.<sup>1</sup> Defendants submit that it is manifestly unfair to the Defendants for a theory of the case to be set forth for the first time in the second appellate opinion in the case, when that theory was never raised in the Plaintiff's Amended Complaint.

### **ARGUMENT**

This Court's original opinion was filed on November 8, 2017. Respondents filed a timely Petition for Rehearing, which was granted in part and denied in part on February 21, 2018, on which date a substituted opinion was filed. The present Petition is addressed only to the newly-added theory of Section 1983 liability that is to be found in Part III of the February 21, 2018 opinion.

Part III of the original opinion concluded that Mims alleged that he was "unconstitutionally" confined at two DDSN facilities. 11/8/17 opinion at 8. That original opinion also summarized Mims' Section 1983 claim as follows:

[W]hile there, he received multiple personal injuries due

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<sup>1</sup> Also as a precaution, in case the filing of the present petition should be deemed not to stay the time for seeking certiorari in the Supreme Court, the DDSN Defendants intend to file a petition for certiorari on or before March 23, 2018, the due date for such a petition.

to substandard care and neglect. Mims claims Respondents Lacy and Butkus were responsible for the harm resulting from Mims' unconstitutional confinement and substandard care because they either petitioned to have Mims confined, refused to release Mims back to Ms. Mims' custody or reassign him to an alternate facility, and ultimately worked to obstruct Ms. Mims' custodianship over Mims, all while knowing about the ongoing substandard care at the facilities.

*Id.* at 8-9.

The second opinion deleted practically all of the above language, and changed the first opinion's conclusion, holding instead that Mims alleged that he was "unlawfully" confined the two facilities, "because while there, he received multiple personal injuries due to substandard care and neglect." 2/21/18 opinion ("second opinion") at 10. The second opinion also added the following language, practically all of which was not in the first opinion:

Mims asserts Lacy and Butkus had actual and constructive knowledge Mims' confinement at Clusters and Kensington posed a "pervasive and unreasonable risk" of constitutional injury because they knew or should have known of the ongoing substandard care and neglect occurring at Clusters and Kensington, including beatings, insect infestations, and sexual assaults; that Lacy's and Butkus's response to the knowledge was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices"; and finally, that there was an "affirmative causal link" between [ ] Lacy's and Butkus's inaction and the particular injury of unlawful confinement suffered by Mims—namely, that while Mims' confinement to DDSN's care was justified by his need for safe, one-on-one supervision at all times, Lacy and Butkus failed to ensure this level of care was provided to Mims, resulting

in multiple personal injuries to Mims over a period of years.

Second opinion at 10 (emphasis added). The second opinion added a new holding that “Mims alleges his § 1983 injury was the unlawful confinement he experienced while in DDSN care.” *Id.* (emphasis added). Finally, the second opinion held that “a jury must determine whether an affirmative causal link exists between Lacy’s and Butkus’s inaction and Mims’ alleged unlawful confinement.” *Id.* at 11.

Defendants respectfully submit that this new, altered characterization of Plaintiff’s § 1983 claim bears no resemblance to the allegations in the Amended Complaint with regard to § 1983. The § 1983 cause of action provided in its entirety as follows:

#### 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. (Emphasis added.)

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. (Emphasis added.)

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 Plaintiffs 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.

R. I, 84-85. The Amended Complaint's only reference to "confinement" is in Paragraph 34, where confinement is mentioned only in passing, as follows:

34. During this time [fiscal year 2004], 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 [sic] confinement, for violation of health and safety standards.

R. I, 79.

Thus, while the second opinion held that the "§ 1983 injury was the

unlawful confinement,” there is no allegation in the Amended Complaint that the confinement itself was caused by Lacy or Butkus, as opposed to DDSN. It is undisputed that DDSN cannot be subject to the § 1983 claim.<sup>2</sup> The only allegations that even arguably relate to the original 2001 confinement order (which, again, was a Probate Court order entered with consent) are in Paragraphs 20 (“employees of the Babcock Center and SCDDSN caused Plaintiff to be involuntarily committed to the custody of the Department”); 24 (“DDSN continued to refuse the requests of Plaintiff’s mother that he be released back into his mother’s custody and control”); and 42 (. . . SCDDSN assumed responsibility for the involuntary [sic] commitment of Plaintiff to the agency’s care and custody. . . .”). None of these allegations specifically assert that Butkus or Lacy, as opposed to the agency, were responsible for initiating the commitment process, and therefore cannot be held to allege a § 1983 claim against those individuals. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)(“a plaintiff must plead that each

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<sup>2</sup> As the circuit court held, it was uncontested that the other Defendant, i.e., DDSN itself, was not subject to the § 1983 claim:

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).

R. I, 37. Plaintiff has never suggested otherwise.

Government-official defendant, through the official's own individual actions, has violated the Constitution”(emphases added). *See also, e.g., Lucien v. Peters*, 840 F. Supp. 591, 595 (N.D. Ill. 1994)(“reference to ‘employees of the Department of Corrections’ cannot lead to an inference of the necessary personal involvement by [two specific individual defendants]”); *Marks v. Bush*, 2014 WL 28710, at \*4 (D. Kan. 2014)(repeated reference to “the defendant” throughout the complaint did not provide any individual defendant with notice as to the basis for plaintiff’s lawsuit against him); *Wells v. Brown*, 891 F.2d 591, 593 (6th Cir. 1989)(passing reference to corrections officials’ “personal involvement in this complaint” did not sufficiently alerts those officials that they may be personally accountable damages).

In addition, as previously contended by the Defendants, 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. Moreover, the action that resulted in Mims’ confinement was a court order, the 2001 Probate Court Consent Order, the existence of which could not give rise to a cause of action against Butkus or Lacy. *See, e.g., Argoe v. Three Rivers Behavioral Health, L.L.C.*, 392 S.C. 462, 473, 710 S.E.2d 67, 73 (2011)(plaintiff who was “lawfully taken into custody and detained pursuant to valid probate court orders” had no claim for unlawful confinement against probate court petitioners). The confinement could not have been accomplished or maintained if the Probate Court had declined to issue that Order.

To the extent that Plaintiff might have made passing reference in later filings to a claim that Butkus or Lacy were responsible for his confinement, such late assertions of new claims are routinely disallowed. *See, e.g., Cloaninger v. McDevitt*, 555 F.3d 324, 336 (4th Cir. 2009) (“[w]e have previously held, along with the Fifth, Sixth, Seventh, and Eleventh Circuits, that a plaintiff may not raise new claims after discovery has begun without amending his complaint.”); *Harris v. Reston Hosp. Ctr., LLC*, 523 Fed. Appx. 938, 946 (4th Cir. 2013) (disallowing a “constructive amendment of the complaint” by raising new arguments for the first time at summary judgment); *Hexion Specialty Chems., Inc. v. Oak-Bark Corp.*, 2011 WL 4527382, 7 (E.D.N.C. 2011) (citing many cases and holding that “[n]otably, a party may not use its briefs in support of or opposition to summary judgment to amend a complaint”).

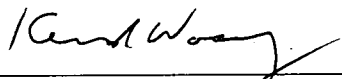
The second opinion appears to hold that the § 1983 injury was the confinement itself, rather than the injuries occurring during the confinement. If, however, the second opinion also intended to hold that either Butkus or Lacy could be held liable for Plaintiff’s alleged personal injuries during the court-ordered confinement, such a conclusion would be untenable. Because Butkus and Lacy were not charged in the Amended Complaint with causing Plaintiff’s confinement to DDSN facilities in the first place, it also follows that the Amended Complaint also did not allege that either of them should be held liable for any alleged personal

injuries said to have been caused by the court-ordered confinement.<sup>3</sup> And as noted in the preceding paragraph, any post-Amended Complaint reference by Plaintiff to such a theory cannot be raised in opposition to summary judgment or in the brief of appellant.

### CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court rehear its second opinion and issue an opinion dismissing the § 1983 claim in its entirety.

DAVIDSON, WREN & PLYLER, P.A.

BY:   
WILLIAM H. DAVIDSON, II #1558  
KENNETH P. WOODINGTON #6213  
Post Office Box 8568  
1611 Devonshire Drive  
Columbia, South Carolina 29202  
(803) 806-8222

*Counsel for Respondents*

Columbia, South Carolina

March 8, 2018

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<sup>3</sup> As Defendants have previously contended, Brief of Respondent at 21-22), the original commitment and alleged failure to reassign would establish only “but for” causation, i.e., causation in fact, rather than legal causation, i.e., proximate cause. *See also*, First Petition for Rehearing at 17 n.10. Proximate cause requires proof of both causation in fact and legal cause. *See, e.g., Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 804 (1993).

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson, Wren & Plyler, P.A., counsel for the Respondents, does hereby certify that service of the **Second Petition for Rehearing** and **Memorandum in Support of Second Petition for Rehearing** in the above-captioned matter was made upon all counsel of record 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 8<sup>th</sup> day of March, 2018:

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


Franchelle Millender, Esquire  
Millender Elder Law LLC  
1441 Main Street - Suite 725  
Columbia, South Carolina 29201

Certificate of Service-Second Petition for Rehearing and Memorandum in Support  
of Second Petition for Rehearing  
Appellate Case No. 2014-001373  
Page Two

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Kathleen A. Warthen, Esquire  
Protection and Advocacy for  
People with Disabilities, Inc.  
3710 Landmark Drive - Suite 208  
Columbia, South Carolina 29204

Andrew J. Atkins, Esquire  
Millender Elder Law LLC  
1441 Main Street - Suite 725  
Columbia, South Carolina 29201

  
Melissa S. Segear

DAVIDSON, WREN & PLYLER, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

William H. Davidson, II  
Michael B. Wren  
Daniel C. Plyler

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

David A. DeMaster's  
Brandon M. Briggs

Of Counsel  
Kenneth P. Woodington

March 8, 2018

Hand Delivered

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

RECEIVED

Writer's Email: [kwoodington@dml-law.com](mailto:kwoodington@dml-law.com)

MAR 08 2018

SC Court of Appeals

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 (7) copies each of the **Second Petition for Rehearing** and **Memorandum in Support of Second 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/mss  
Enclosures

The Honorable Jenny Abbott Kitchings

March 8, 2018

Page 2

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cc: *(w/ Enclosures)*

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

Kathleen A. Warthen, Esquire  
Protection and Advocacy for  
People with Disabilities, Inc.  
3710 Landmark Drive - Suite 208  
Columbia, South Carolina 29204

Andrew J. Atkins, Esquire  
Millender Elder Law LLC  
1441 Main Street - Suite 725  
Columbia, South Carolina 29201

Franchelle Millender, Esquire  
Millender Elder Law LLC  
1441 Main Street - Suite 725  
Columbia, South Carolina 29201