

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

Op. No. 5539
(S.C. Ct. App. filed February 21, 2018)

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S.C. SUPREME COURT

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

v.

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

APPENDIX

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INDEX

<i>Estate of Edward James Mims, et al., v. South Carolina Department of Disabilities and Special Needs, et. al,</i> Op. No. 5539 (S.C. Ct. App. filed February 21, 2018)	1
Second Petition for Rehearing.....	15
Memorandum in Support of Second Petition for Rehearing.....	17
Order Ruling on [First] Petition for Rehearing.....	26
<i>Estate of Edward James Mims, et al., v. South Carolina Department of Disabilities and Special Needs, et. al,</i> Op. No. 2017-UP-422 (S.C. Ct. App. filed November 8, 2017).....	28
[First] Petition for Rehearing	40
Memorandum in Support of [First] Petition for Rehearing.....	42
Appellant's Return in Response and Opposition to Respondents' [First] Petition for Rehearing and Memorandum.....	67
Reply Memorandum in Support of [First] Petition for Rehearing.....	91

THE STATE OF SOUTH CAROLINA
In The 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.

Appellate Case No. 2014-001373

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5539
Heard June 8, 2017 – Filed November 8, 2017
Withdrawn, Substituted and Refiled February 21, 2018

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Patricia Logan Harrison, of Columbia, for Appellant.

William H. Davidson, II and Kenneth P. Woodington, of
Davidson & Lindemann, PA, of Columbia, both for
Respondents.

HILL, J: Edward James Mims, a severely disabled adult,¹ sued Respondents South Carolina Department of Disabilities and Special Needs (DDSN) and two of DDSN's

¹ While this case was pending on appeal, Mims passed away. His estate continues as appellant.

employees, Kathy Lacy and Stan Butkus, alleging violations of the Americans with Disabilities Act (ADA) and the Rehabilitation Act; negligent supervision, gross negligence, and negligence; and civil rights violations under 42 U.S.C § 1983. After a hearing, the circuit court granted Respondents' motion for summary judgment. We affirm in part, reverse in part, and remand to the circuit court.

I.

Like the circuit court, we are required to view the record in the light most favorable to Mims, construing all ambiguities and inferences in his favor. *Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 228, 797 S.E.2d 387, 390 (2016). In light of this standard, the facts presented at summary judgment are as follows:

Mims was born prematurely and, as a result, suffered both physical and mental disabilities. At age twenty-one, an evaluation found him to have the cognitive ability of a twenty-month-old child. During the first twenty-seven years of his life, Mims lived with and was cared for by his mother, Margaret Mims. In 1999, Ms. Mims fell ill, and Mims was voluntarily committed to full-time DDSN care in a residential facility known as "Clusters." While at Clusters, Mims experienced several ailments, including bruises on his groin, vomiting, and a twenty-eight pound weight loss. In 2000, Mims was beaten by a Clusters employee. Several months after the beating, Ms. Mims requested Mims be returned to her care. In response, DDSN petitioned the probate court to have Mims committed to the residential facility. After a hearing, the probate court judicially admitted Mims to DDSN's care, concluding he was profoundly mentally retarded with complex medical needs.² After the Clusters employee was arrested and charged with assault and battery as a result of beating Mims, Ms. Mims wrote a letter to DDSN again requesting he be returned to her care.

In response, Ms. Mims received a letter from DDSN's Director of Government and Community Relations that stated:

It is obvious Ms. Mims, that you love your son very much and took care of him in your home for many years. We understand that you wish it were possible for him to live

² The order that followed the hearing was signed by Mims' Guardian *ad Litem* (GAL), as well as the attorneys representing Ms. Mims and DDSN. However, in her affidavit, Ms. Mims stated, "My lawyer agreed to the petition to commit [Mims] because people from the [DDSN] said that if I did not agree to their petition, they would terminate my weekend visitation with [Mims]."

at home again. All of us agree that one single person is not enough people to provide care for [Mims]. It is impossible because of his conditions and the fact that several different people have to be awake and around him all the time.

In January 2002, Mims was repeatedly hit by another resident with a belt. The State Long Term Care Ombudsman reviewed the incident and concluded that:

It is substantiated that resident-to-resident abuse occurred. The [Omnibus Adult Protection Act] states that physical abuse does not include altercations or acts of assault between vulnerable adults. However, the incident should have been reported to the Ombudsman because of its serious nature. Although the Ombudsman Program does not have the statutory authority to investigate resident-to-resident abuse, it would investigate to determine if adequate supervision was provided. Lack of Supervision was also substantiated based on the above findings.

In March 2002, Mims was transferred from Clusters to another residential facility under contract with DDSN called "Kensington." In 2003, the Department of Health and Human Services Centers for Medicare and Medicaid Services (CMS) investigated Clusters and found the facility failed to consistently provide the staffing or training necessary to protect residents.

Between 2002 and 2004, Mims was treated for a swollen and bruised hand, elevated blood pressure, suspected pain, and an incident where he was discovered to have a large number of ant bites.³ In late 2004, one of Mims' co-residents died after choking on insufficiently pureed food, precipitating another investigation by CMS. In April

³ Respondents contend Mims' allegations of these injuries, as well as the vomiting, weight loss, bruised groin and hand, and pain were not pled or otherwise before the circuit court. We disagree. Among other allegations that encompassed these health complaints, Mims referenced "systemic abuse, neglect, and exploitation of clients" living in Clusters and Kensington in his amended pleading. In support, Mims cited to the six-volume record he filed without objection in the case—consisting of news articles, medical records, sworn affidavits, and depositions—during the hearing on Respondents' motion and in his memorandum in response to Respondents' motion for summary judgment.

2005, CMS terminated Kensington's certification. As a result, some of Kensington's residents were relocated to other facilities; however, DDSN did not relocate Mims.

A month later, on May 27, 2005, Mims presented to the emergency room with a four centimeter laceration to the undersurface of his penis. Although the emergency-room doctor's notes described the injury as a "[s]uperficial laceration to penis," the laceration was repaired with seven sutures. An internal investigation of the injury concluded "the origin remains unexplained." Upon learning of the injury, Ms. Mims initiated proceedings to become Mims' guardian.

An emergency hearing was held on Ms. Mims' petition for guardianship. Based on evidence presented indicating Kensington was decertified in April 2005 and Mims sustained a "serious unexplained injury" on May 27, 2005, the probate court appointed Ms. Mims as her son's guardian and custodian.

On May 29, 2007, Ms. Mims filed a complaint on Mims' behalf, suing DDSN for various torts and statutory violations. However, that complaint was never served. On May 7, 2008, Mims filed an amended complaint, adding Respondents Lacy and Butkus to the lawsuit and pleading the current allegations. The amended complaint was served on May 12, 2008.

Respondents filed a motion to dismiss for untimely service, which was originally denied but then granted after a hearing on the motion to reconsider. *Mims ex rel. Mims v. Babcock Ctr., Inc.*, 399 S.C. 341, 343–44, 732 S.E.2d 395, 396 (2012). Mims appealed the dismissal, and the South Carolina Supreme Court found the amended complaint was timely served. *Id.* (holding Rule 15(a), SCRPC, allows for filing and service of an amended complaint without leave of court, even if the original complaint was not served).

The case was remanded, and Respondents moved for summary judgment. After a hearing, the circuit court granted summary judgment, finding: (1) Mims' lawsuit was limited in scope to potential liability for three incidents of personal injury: the 2000 beating by a Clusters employee, the 2004 "ant-bite incident," and the 2005 penis injury; (2) the majority of Mims' causes of actions were time-barred; and (3) the remaining causes of action either failed as a matter of law because they were insufficiently pled or because Mims failed to satisfy his summary judgment burden.

II.

The circuit court ruled the statute of limitations barred most of Mims' claims,

including: (1) the § 1983 claims that arose before May 12, 2005, and (2) the state tort claims that arose before May 12, 2006. In so ruling, the circuit court found Mims' lawsuit commenced on May 12, 2008, the day his amended complaint was served. The circuit court additionally found Mims was not entitled to disability tolling under section 15-3-40 of the South Carolina Code (2005) because he was not "insane" for purposes of the statute when his causes of action accrued and, alternatively, even if he was "insane," his disability ceased when Ms. Mims was appointed his guardian. We reverse.

Initially, we find Mims' lawsuit commenced on May 7, 2008, the day Mims' amended complaint was filed. S.C. Code Ann. § 15-3-20(B) (2005) ("A 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." (emphasis added)); Rule 3(a), SCRPC ("A civil action is commenced when the summons and complaint are *filed* with the clerk of court" (emphasis added)).

While this reading of section 15-3-20(B) and Rule 3(a), SCRPC, is a departure from pre-2004 jurisprudence,⁴ it is the only logical way to interpret and apply the current version of Rule 3(a)(2), SCRPC, which explicitly permits commencement of a lawsuit when a pleading has been served after the statute of limitations has run. *See Mims*, 399 S.C. at 346, 732 S.E.2d at 397–98 ("[Section 15-3-20(B)] and [Rule 3(a), SCRPC], read together, provide that (1) an action is commenced upon filing the summons and complaint, if service is made within the statute of limitations, and (2) if filing but not service is accomplished within the statute of limitations, then service must be made within 120 days of *filing*."); *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 369 S.C. 150, 154, 631 S.E.2d 533, 535 (2006) (stating that whenever possible, legislative intent should be found in the plain language of the statute itself).⁵

⁴ In 2002, the Legislature amended section 15-3-20(B) of the South Carolina Code, and, in 2004, the South Carolina Supreme Court correspondingly amended Rule 3(a), SCRPC. Before the 2004 amendment, Rule 3(a), SCRPC, stated, "A civil action is commenced by filing and service of a summons and complaint," and lawsuits were found to have commenced on the day of service. *See, e.g., First Palmetto State Bank & Trust Co. v. Boyles*, 302 S.C. 136, 139, 394 S.E.2d 313, 315 (1990) (holding that because Rule 3(a), SCRPC, stated a civil action is commenced by the filing and service of a summons and complaint, the action was commenced on the date of service, not the earlier filing date).

⁵ We reject Mims' argument that under the relation-back doctrine of Rule 15(c), SCRPC, his lawsuit commenced on the day the original complaint was filed. The

Next, we find that under section 15-3-40, Mims is entitled to tolling of the statute of limitations. Section 15-3-40 permits tolling if a claimant is "insane." In *Wiggins v. Edwards*, 314 S.C. 126, 442 S.E.2d 169 (1994), the South Carolina Supreme Court defined the term "insane" for purposes of the tolling statute by stating:

Insanity or mental incompetency that tolls the statute of limitations consists of a mental condition which precludes understanding the nature or effects of one's acts, an incapacity to manage one's affairs, an inability to understand or protect one's rights, because of an over-all inability to function in society, or the mental condition is such as to require care in a hospital.

314 S.C at 129, 442 S.E.2d at 170 (quoting 54 C.J.S. *Limitations of Actions* § 117). We find there is no material fact in dispute regarding the severe mental disabilities Mims experienced since birth. Uncontroverted evidence presented to the circuit court demonstrates Mims was never able to manage his own affairs or protect his rights, and Mims required consistent one-on-one care to accomplish daily tasks of living. We therefore find Mims was entitled to the statutory tolling protection of section 15-3-40. See *Wiggins*, 314 S.C at 129, 442 S.E.2d at 170.

Additionally, we find the circuit court erred in ruling section 44-26-90 of the South Carolina Code (2018),⁶ permits tolling for only those who were declared legally incapacitated by a formal court order before their actions accrued. There is no explicit language in section 44-26-90 that restricts the effect of the disability tolling

original complaint was never served. We find nothing in the language of Rule 15(c), SCRCP, that allows relation-back to an unserved pleading, and applying the rule in that way would have the undesirable consequence of permitting litigants to extend the statute of limitations for several of their causes of actions by choosing to wait until the conclusion of their longest statute of limitations to file and serve an amended complaint. See *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct. App. 2010) ("One 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 rights.'" (quoting *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996))).

⁶ Section 44-26-90(8) states, "Unless a client has been adjudicated incompetent, he must not be denied the right to . . . exercise rights of citizenship in the same manner as a person without intellectual disability or a related disability."

statute in this way, and both statutes were passed by the Legislature to protect vulnerable people. To interpret section 44-26-90 as removing the protections created by section 15-3-40 for someone who meets the definition of "insane" from *Wiggins*, but who has not yet been declared incompetent by a probate court, is contrary to the general policy in South Carolina of affording special protection to the mentally disabled, especially in civil legal proceedings. See *Lancaster Cty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) ("In construing a statute, [an appellate court] will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the [L]egislature." (citing *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 663 S.E.2d 484 (2008))); see, e.g., *Caughman v. Caughman*, 247 S.C. 104, 109, 146 S.E.2d 93, 95 (1965) ("[T]he duty to protect the rights of incompetents has precedence over procedural rules otherwise limiting the scope of review.").

We further find Mims' disability did not cease when Ms. Mims was appointed his guardian. See S.C. Code Ann. § 15-3-40 ("[T]he time of the disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended . . . in any case longer than one year after the disability ceases."). The question of whether a disability ceases when a legal guardian is appointed is novel in South Carolina. However, the vast majority of jurisdictions with similar tolling statutes hold the appointment of a guardian does not end the disability when the tolling statute is unambiguous and does not suggest a legislative intent to end the disability when a guardian is appointed. See *Barton-Malow Co., Inc. v. Wilburn*, 556 N.E.2d 324, 325 n.1, 326 (Ind. 1990) (citing cases from jurisdictions holding "the appointment of a guardian over an incompetent [person] does not remove the disability" for purposes of the running of the statute of limitations); *Paavola v. Saint Joseph Hosp. Corp.*, 325 N.W.2d 609, 610–11 (Mich. Ct. App. 1982) (noting nothing in Michigan's tolling statute "suggests legislative intent that an insane person's exemption from the running of periods of limitation is to end upon the appointment of a guardian"); see also Michele Meyer McCarthy, Annotation, *Effect of Appointment of Legal Representative for Person Under Mental Disability on Running of State Statute of Limitations Against Such Person*, 111 A.L.R. 5th 159 (2003).

We find South Carolina's tolling statute is clear and unambiguous. Nothing in the statute suggests a Legislative intent to end a disability when a guardian is appointed. Therefore, along with the majority of jurisdictions, we hold Mims' disability did not end when his mother was appointed guardian.

Accordingly, we find section 15-3-40 extended the time allowed for the

commencement of each of Mims' causes of action by five years. *Harrison v. Bevilacqua*, 354 S.C. 129, 140 n.5, 580 S.E.2d 109, 115 n.5 (2003) ("The express language of the statute allows the time for commencement of an action to be 'extended' by a maximum of five years.").

In South Carolina, § 1983 claims are subject to a three-year statute of limitations. *See Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (holding that courts must adopt a "personal injury" statute of limitations period for § 1983 actions) *abrogated on other grounds by Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004); S.C. Code Ann. § 15-3-530(5) (2005) (providing a three-year limitations period for personal injury actions). Because Mims' lawsuit commenced on May 7, 2008, and he is entitled to a five-year extension of the statute of limitations under section 15-3-40, we find Mims' § 1983 claims are not time-barred unless they accrued before May 7, 2000.

Next, there is no dispute DDSN is a government entity within the definition of the Tort Claims Act (TCA) and, at the time Mims' causes of action accrued, Respondents Lacy and Butkus were employees of DDSN. *See* S.C. Code Ann. § 15-78-30(d) (2005). Because the TCA provides the exclusive remedy for torts committed by governmental entities and their employees, absent tolling, the two-year statute of limitations from the TCA applies to Mims' state tort claims. S.C. Code Ann. § 15-78-110 (2005) (providing a two-year statute of limitations for claims subject to the TCA); *Flateau v. Harrelson*, 355 S.C. 197, 209, 584 S.E.2d 413, 419 (Ct. App. 2003). Therefore, because Mims' lawsuit commenced on May 7, 2008, and he is entitled to a five-year extension of the statute of limitations under section 15-3-40, we find Mims' state tort claims against Respondents are not barred unless they accrued before May 7, 2001.

III.

In granting Respondents' motion for summary judgment, the circuit court dismissed Mims' § 1983 causes of action for failure to state a claim⁷ and additionally found

⁷ We find the circuit court erred in evaluating the sufficiency of Mims' pleadings at summary judgment. Respondents did not move for dismissal under Rule 12(b)(6), SCRPC; rather, Respondents moved for summary judgment under Rule 56, SCRPC. However, for clarity on remand, we find Mims' § 1983 causes of action were sufficiently pled. *Hotel & Motel Holdings, LLC v. BJC Enters., LLC*, 414 S.C. 635, 650, 780 S.E.2d 263, 271 (Ct. App. 2015) ("If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff,

Mims did not satisfy his summary judgment burden of proving Respondents Lacy and Butkus violated Mims' civil rights. We reverse.

We find the circuit court erred in limiting the scope of Mims' lawsuit to three incidents of personal injury: the beating by a Clusters employee, the ant-bite incident, and the penis injury.

Respondents argue we may not reach the issue of whether the circuit court erred in limiting the scope of the lawsuit, asserting Mims has not appealed the finding. We disagree. Mims has appealed the sections of the order where the circuit court limited the scope of Mims' lawsuit, and he has consistently alleged and argued his theory of the case—from his pleadings to his arguments at summary judgment, and now on appeal. *See Spence v. Wingate*, 381 S.C. 487, 489, 674 S.E.2d 169, 170 (2009) (finding that because the circuit court's order granted respondents' motion for summary judgment on precisely the grounds argued by respondents at the summary judgment hearing, the ruling was sufficient to preserve petitioner's argument on appeal).⁸

The three elements of a § 1983 supervisory liability cause of action are:

- (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so

would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." (citing *Clearwater Tr. v. Bunting*, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006)); *see, e.g., Moore v. City of Columbia*, 284 S.C. 278, 282–83, 326 S.E.2d 157, 160 (Ct. App. 1985) (liberally construing the complaint to find plaintiff pled ultimate facts to support § 1983 cause of action).

⁸ Even if we were to find the issue was not preserved, we would still address it. *See Caughman*, 247 S.C. at 109, 146 S.E.2d at 95 (holding it is the duty of the court to protect the interests of those under legal disability, and therefore, the court will take notice of any error prejudicial to them even though not raised appropriately); *Ramage v. Ramage*, 283 S.C. 239, 244, 322 S.E.2d 22, 25 (Ct. App. 1984) (choosing to address inadequately appealed issues when the arguments were reasonably clear from the brief and the issues were ruled upon by the circuit court).

inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices"; and (3) that there was an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.

Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994).

Mims maintains that between 2001 and 2005, he was unlawfully confined at Clusters and Kensington, because while there, he received multiple personal injuries due to substandard care and neglect. 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 the 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.

We find the record does not support the circuit court's conclusion that Mims referred only to the beating by a Clusters employee, the ant-bite incident, and the penis injury in alleging and arguing Respondents Lacy and Butkus are subject to § 1983 liability. Accordingly, we reverse the circuit court's finding that Mims' lawsuit is limited to these three discrete incidents, and instead find Mims alleges his § 1983 injury was the unlawful confinement he experienced while in DDSN care.

We also find the circuit court erred in finding Mims presented no evidence of widespread abusive conduct at Clusters and Kensington and no evidence that Respondents Lacy and Butkus knew of and ignored systemic problems. At summary judgment, Mims cited to evidence to support his theory of § 1983 liability, including reports from CMS regarding certification of Clusters and Kensington, as well as affidavits and depositions of Ms. Mims, Lacy, Butkus, and the affidavit of Mims' GAL. Accordingly, viewing all reasonable inferences in the light most favorable to Mims' theory of the case, Mims has presented more than a scintilla of evidence to demonstrate there are material facts in dispute regarding his § 1983

claims. *Hancock v. Mid-S. Mgmt. Co., Inc.*, 381 S.C. 326, 330–31, 673 S.E.2d 801, 803 (2009) ("[I]n cases applying federal law, the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment."); *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) ("Since it is a drastic remedy, summary judgment 'should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.'" (quoting *Watson v. Southern Ry. Co.*, 420 F.Supp. 483, 486 (D.S.C. 1975))).⁹

We do not find Mims has proved his § 1983 case as a matter of law, and we reject Respondents' contention that to find Mims' case survives summary judgment is to find Lacy and Butkus strictly liable for any harm Mims received while in DDSN custody. Instead, we adhere to the rule that proximate cause is ordinarily an issue resolved by the fact finder, and it may be resolved by direct or circumstantial evidence. *Madison*, 371 S.C. at 147, 638 S.E.2d at 662–63. As the South Carolina Supreme Court stated in *Madison*, the court's sole function regarding the issue of proximate cause at summary judgment is "to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." *Id.* We find there are multiple inferences that could be drawn from the evidence presented at summary judgment; therefore summary judgment is not appropriate. Rather, a jury must determine whether an affirmative causal link exists between Lacy's and Butkus's inaction and Mims' alleged unlawful confinement.

IV.

In granting summary judgment, the circuit court dismissed Mims' causes of action for negligent supervision, negligence, and gross negligence for failure to state a

⁹ On appeal, Mims cites to *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006), in asserting the circuit court erred by failing to consider any event that occurred before the start date of the statute of limitations in evaluating whether there are material facts in dispute regarding his causes of action. We decline to address this issue. At no point in his Rule 59(e), SCRCF motion, or on appeal, has Mims cited a particular example of this error, and we are unable to locate such an occurrence. See, e.g., *Doe v. Doe*, 370 S.C. 206, 217 n.7, 634 S.E.2d 51, 57 n.7 (Ct. App. 2006) (finding issue was abandoned for appeal when wife merely stated in her brief, "the accountant's fee was incorrect" but did not explain why it was incorrect).

claim.¹⁰ The circuit court additionally found Mims did not satisfy his summary judgment burden of proving negligent supervision. We reverse.

In his amended complaint, Mims alleged Respondents committed these torts when they failed to provide proper supervision to protect Mims from assault, battery, sexual assault, and injury; failed to properly monitor Mims' condition and treatment needs after initiating involuntary commitment proceedings for him; failed to discharge Mims to the care of his mother; and obstructed the attempts of Mims' mother to establish the guardianship. We find Mims presented at least a scintilla of evidence to support these claims against DDSN at summary judgment.¹¹ See

¹⁰ We again find the circuit court erred in evaluating the sufficiency of Mims' pleadings at summary judgment. See *supra* note 5. However, for clarity, we find Mims sufficiently pled his causes of action for negligent supervision, negligence, and gross negligence. See *Hotel & Motel Holdings, LLC*, 414 S.C. at 650, 780 S.E.2d at 271 ("If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." (citing *Clearwater Tr.*, 367 S.C. at 343, 626 S.E.2d at 335)).

¹¹ Mims did not allege any state law torts that involve elements of fraud, malice, or an intent to harm against Respondents, and there is no evidence Respondents Lacy and Butkus were not acting within the scope of their official duties in relationship to the torts alleged by Mims in his amended complaint. See *Madison*, 371 S.C. at 135, 638 S.E.2d at 656 (2006) (delineating elements of negligence); *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 331–32, 566 S.E.2d 536, 544 (2002) (delineating elements of gross negligence); see also, *Flatueau*, 355 S.C. at 204–06, 584 S.E.2d at 416–17 (holding, under the TCA, board members of a public entity were not acting outside the scope of their official duties in a lawsuit involving their actions at a board meeting, despite the fact that board members may have been acting outside of their authority when the alleged torts occurred). Accordingly, under the TCA, there can be no liability against Respondents Lacy and Butkus in their individual capacities. See S.C. Code Ann. § 15-78-70 (2005) ("An employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor except . . . if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude."); see, e.g., *Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 479–81, 642 S.E.2d 726, 731–32 (2007) (holding that a public entity's immunity under the TCA cannot be based on the "intent to harm" exception found in section 15-78-60(17) of the South Carolina Code (2005) if "intent to harm"

Hancock 381 S.C. at 330, 673 S.E.2d at 803 (2009) ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."); *see also supra* Part III (describing the evidence presented by Mims at summary judgment).

V.

We find the circuit court properly granted summary judgment to Respondents on Mims' claims for violations of the ADA and the Rehabilitation Act. Mims alleged Respondents violated these Acts by systematically failing to provide Mims and others like him with needed services in the least restrictive setting. *See Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581, 607 (1999) (holding that to be in compliance with the ADA, treatment for disabilities is to be provided in the most integrated, least restrictive setting possible). Mims' allegations appear to be based on a theory that DDSN structured its provision of services to skew in favor of residential facility placements and away from in-home care services by, for example, paying employees at residential facilities more than DDSN pays at-home caregivers.

Mims failed to provide evidence to support this theory of liability. *See Singleton v. Sherer*, 377 S.C. 185, 197–98, 659 S.E.2d 196, 203 (Ct. App. 2008) ("Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. The nonmoving party must come forward with specific facts showing there is a genuine issue for trial." (citation omitted)). While Mims cited to a single instance of a denial of requested services at summary judgment, we find this one example does not constitute more than a mere scintilla of evidence that Respondents systematically violated the ADA and the Rehabilitation Act in an ongoing manner. *See Hancock*, 381 S.C. at 330–31, 673 S.E.2d at 803 (2009) ("[I]n cases applying federal law . . . the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment."). Accordingly, we affirm the circuit court's grant of summary judgment as to this cause of action.

was not an element of the tort alleged); *see also Smith v. Ozmint*, 394 F. Supp. 2d 787, 792 (D.S.C. 2005) (finding there can be no liability against public-entity employees in their individual capacities under section 15-78-70(b) of the South Carolina Code when the elements of the torts alleged did not include "intent to harm or actual malice").

VI.

In conclusion, we affirm the grant of summary judgment on Mims' claims for violations of the ADA and Rehabilitation Act. However, we reverse the circuit court's dismissal and grant of summary judgment on Mims' claims for violations of § 1983 against Respondents Lacy and Butkus, as well as his claims for negligence, gross negligence, and negligent supervision against DDSN. Mims' lawsuit commenced on the date his amended complaint was filed, May 7, 2008, and he may receive the benefit of a five-year tolling of the statute of limitations for each of his claims under section 15-3-40 of the South Carolina Code. Finally, we find the circuit court erred in limiting the scope of Mims' lawsuit. The case is remanded for proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GEATHERS and MCDONALD, JJ., concur.

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

RECEIVED

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.

SECOND 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 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.

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March 8, 2018

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

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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.

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

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.¹ 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

¹ 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.² 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 Plaintiffs 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

² 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”).

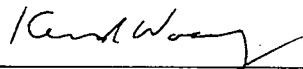
The second opinion appears to hold that the § 1983 injury was the confinement itself, rather than the injuries occurring during the confinement. If, however, the second opinion also intended to hold that either Butkus or Lacy could be held liable for Plaintiff’s alleged personal injuries during the court-ordered 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.³ 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.

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March 8, 2018

³ 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).

The South Carolina Court of Appeals

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

v.

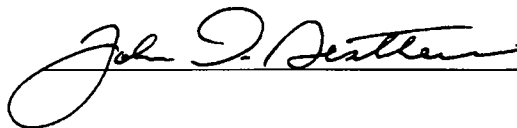
The South Carolina Department of Disabilities and
Special Needs, Kathi Lacy, and Stan Butkus,
Respondents.

Appellate Case No. 2014-001373

ORDER

Appellant moved for this court to publish its November 8, 2017 opinion (2017-UP-422) in the above captioned case. The Protection and Advocacy for People with Disabilities, Inc. and the National Academy of Elder Law Attorneys together moved for leave to file an *amici curiae* brief in support of Appellant's motion to publish. We grant the motion for leave to file an *amici curiae* brief and accept the *amici curiae* brief, as well as Respondents' brief in response.

Respondents have petitioned for rehearing. We grant Respondents' petition for rehearing in part.¹ We dispense with further briefing and argument. The attached opinion is substituted for 2017-UP-422, which is withdrawn. In light of our decision to withdraw 2017-UP-422 and publish the attached opinion, Appellant's motion to publish 2017-UP-422 is moot.

 J.

¹ We grant the petition for rehearing as to Section 2, Respondents' contention that Respondents Lacy and Butkus cannot be liable for Appellant's allegations of negligence, gross negligence, and negligent supervision as a matter of law. The remainder of the petition is denied.

Stephanie P. McDonald

J.

D. Han Li

J.

Columbia, South Carolina

cc:

Patricia Logan Harrison, Esquire
Kenneth P. Woodington, Esquire
William H. Davidson, II, Esquire
Kathleen Ashley Warthen, Esquire
Andrew Jefferson Atkins, Esquire
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FILED

2/21/18

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The 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.

Appellate Case No. 2014-001373

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Unpublished Opinion No. 2017-UP-422
Heard June 8, 2017 – Filed November 8, 2017

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Patricia Logan Harrison, of Columbia, for Appellant.

William H. Davidson, II and Kenneth P. Woodington, of
Davidson & Lindemann, PA of Columbia, both for
Respondents.

PER CURIAM: Edward Mims, a severely disabled adult,¹ sued Respondents South Carolina Department of Disabilities and Special Needs (DDSN) and two of DDSN's employees, Kathy Lacy and Stan Butkus, alleging violations of the Americans with Disabilities Act (ADA) and the Rehabilitation Act; negligent supervision, gross negligence, and negligence; and civil rights violations under 42 U.S.C. § 1983. After a hearing, the circuit court granted Respondents' motion for summary judgment. We affirm in part, reverse in part, and remand to the circuit court.

I.

Mims was born prematurely and, as a result, suffered both physical and mental disabilities. At age twenty-one, an evaluation found him to have the cognitive ability of a twenty-month-old child. During the first twenty-seven years of his life, Mims lived with and was cared for by his mother, Margaret Mims. In 1999, Ms. Mims fell ill, and Mims was voluntarily committed to full-time DDSN care in a residential facility known as "Clusters." While at Clusters, Mims experienced several ailments, including bruises on his groin, severe vomiting, and a twenty-eight pound weight loss. In 2001, Mims was beaten by a Clusters employee. Several months after the beating, Ms. Mims requested Mims be returned to her care. In response, DDSN petitioned the probate court to have Mims judicially committed to the residential facility. After a hearing, the probate court judicially admitted Mims to DDSN's care, concluding he was profoundly mentally retarded with complex medical needs.

In 2002, Mims was transferred from Clusters to another residential facility under contract with DDSN called "Kensington." In 2003, the Department of Health and Human Services Centers for Medicare and Medicaid Services (CMS) investigated Clusters and found the facility failed to consistently provide the staffing or training necessary to protect residents.

Between 2002 and 2004, Mims was treated for a swollen and bruised hand, elevated blood pressure, pain, and an incident where he was discovered to have a large number of ant bites. In late 2004, one of Mims' co-residents died after choking on insufficiently pureed food, precipitating another investigation by CMS. In April 2005, CMS terminated Kensington's certification. As a result, some of Kensington's residents were relocated to other facilities; however, DDSN did not relocate Mims.

A month later, on May 27, 2005, Mims presented to the emergency room with a four

¹ While this case was pending on appeal, Mims passed away. His estate continues as appellant.

centimeter laceration to the undersurface of his penis. Although the emergency-room doctor's notes described the injury as a "[s]uperficial laceration to penis," the laceration was repaired with seven sutures. An internal investigation of the injury concluded "the origin remains unexplained." Upon learning of the injury, Ms. Mims initiated proceedings to become Mims' guardian.

An emergency hearing was held on Ms. Mims' petition for guardianship. Based on evidence presented indicating Kensington was decertified in April 2005 and Mims sustained a "serious unexplained injury" on May 27, 2005, the probate court appointed Ms. Mims as her son's guardian and custodian.

On May 29, 2007, Ms. Mims filed a complaint on Mims' behalf, suing DDSN for various torts and statutory violations. However, that complaint was never served. On May 7, 2008, Mims filed an amended complaint, adding Respondents Lacy and Butkus to the lawsuit and pleading the current allegations. The amended complaint was served on May 12, 2008.

Respondents filed a motion to dismiss for untimely service, which was originally denied but then granted after a hearing on the motion to reconsider. *Mims ex rel. Mims v. Babcock Ctr., Inc.*, 399 S.C. 341, 343–44, 732 S.E.2d 395, 396 (2012). Mims appealed the dismissal, and the South Carolina Supreme Court found the amended complaint was timely served. *Id.* (holding Rule 15(a), SCRCP, allows for filing and service of an amended complaint without leave of court, even if the original complaint was not served).

The case was remanded, and Respondents moved for summary judgment. After a hearing, the circuit court granted summary judgment, finding: (1) Mims' lawsuit was limited in scope to potential liability for three incidents of personal injury: the 2001 beating by a Clusters employee, the 2004 "ant-bite incident," and the 2005 penis injury; (2) the majority of Mims' causes of actions were time-barred; and (3) the remaining causes of action either failed as a matter of law because they were insufficiently pled or because Mims failed to satisfy his summary judgment burden.

II.

The circuit court ruled the statute of limitations barred most of Mims' claims, including: (1) the § 1983 claims that arose before May 12, 2005, and (2) the state tort claims that arose before May 12, 2006. In so ruling, the circuit court found Mims' lawsuit commenced on May 12, 2008, the day his amended complaint was served. The circuit court additionally found Mims was not entitled to disability

tolling under section 15-3-40 of the South Carolina Code (2005) because he was not "insane" for purposes of the statute when his causes of action accrued and, alternatively, even if he was "insane," his disability ceased when Ms. Mims was appointed his guardian. We reverse.

Initially, we find Mims' lawsuit commenced on May 7, 2008, the day Mims' amended complaint was filed. S.C. Code Ann. § 15-3-20(B) (2005) ("A 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." (emphasis added)); Rule 3(a), SCRPC ("A civil action is commenced when the summons and complaint are *filed* with the clerk of court . . . " (emphasis added)).

While this reading of section 15-3-20(B) and Rule 3(a), SCRPC, is a departure from pre-2004 jurisprudence,² it is the only logical way to interpret and apply the current version of Rule 3(a)(2), SCRPC, which explicitly permits commencement of a lawsuit when a pleading has been served after the statute of limitations has run. See *Mims*, 399 S.C. at 346, 732 S.E.2d at 397-98 ("[Section 15-3-20(B)] and [Rule 3(a), SCRPC], read together, provide that (1) an action is commenced upon filing the summons and complaint, if service is made within the statute of limitations, and (2) if filing but not service is accomplished within the statute of limitations, then service must be made within 120 days of *filing*."); *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 369 S.C. 150, 154, 631 S.E.2d 533, 535 (2006) (stating that whenever possible, legislative intent should be found in the plain language of the statute itself).³

² In 2002, the Legislature amended section 15-3-20(B) of the South Carolina Code, and, in 2004, the South Carolina Supreme Court correspondingly amended Rule 3(a), SCRPC. Before the 2004 amendment, Rule 3(a), SCRPC, stated, "A civil action is commenced by filing and service of a summons and complaint," and lawsuits were found to have commenced on the day of service. See, e.g., *First Palmetto State Bank & Trust Co. v. Boyles*, 302 S.C. 136, 139, 394 S.E.2d 313, 315 (1990) (holding that because Rule 3(a), SCRPC, stated a civil action is commenced by the filing and service of a summons and complaint, the action was commenced on the date of service, not the earlier filing date).

³ We reject Mims' argument that under the relation-back doctrine of Rule 15(c), SCRPC, his lawsuit commenced on the day the original complaint was filed. The original complaint was never served. We find nothing in the language of Rule 15(c), SCRPC, that allows relation-back to an unserved pleading, and applying the rule in that way would have the undesirable consequence of permitting litigants to extend the statute of limitations for several of their causes of actions by choosing to wait

Next, we find that under section 15-3-40, Mims is entitled to tolling of the statute of limitations. Section 15-3-40 permits tolling if a claimant is "insane." In *Wiggins v. Edwards*, 314 S.C. 126, 442 S.E.2d 169 (1994), the South Carolina Supreme Court defined the term "insane" for purposes of the tolling statute by stating:

Insanity or mental incompetency that tolls the statute of limitations consists of a mental condition which precludes understanding the nature or effects of one's acts, an incapacity to manage one's affairs, an inability to understand or protect one's rights, because of an over-all inability to function in society, or the mental condition is such as to require care in a hospital.

314 S.C. at 129, 442 S.E.2d at 170 (quoting 54 C.J.S. Limitations of Actions § 117). We find there is no material fact in dispute regarding the severe mental disabilities Mims experienced since birth. The uncontroverted evidence presented to the circuit court demonstrates Mims was never able to manage his own affairs or protect his rights, and Mims required consistent one-on-one care to accomplish daily tasks of living. We therefore find Mims was entitled to the statutory tolling protection of section 15-3-40. See *Wiggins*, 314 S.C. at 129, 442 S.E.2d at 170.

Additionally, we find the circuit court erred in ruling section 44-26-90 of the South Carolina Code (2018),⁴ permits tolling for only those who were declared legally incapacitated by a formal court order before their actions accrued. There is no explicit language in section 44-26-90 that restricts the effect of the disability tolling statute in this way, and both statutes were passed by the Legislature to protect vulnerable people. To interpret section 44-26-90 as removing the protections created by section 15-3-40 for someone who meets the definition of "insane" from *Wiggins*, but who has not yet been declared incompetent by a probate court, is contrary to the

until the conclusion of their longest statute of limitations to file and serve an amended complaint. See *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct. App. 2010) ("One 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 rights." (quoting *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996)).

⁴ Section 44-26-90(8) states, "Unless a client has been adjudicated incompetent, he must not be denied the right to . . . exercise rights of citizenship in the same manner as a person without intellectual disability or a related disability."

general policy in South Carolina of affording special protection to the mentally disabled, especially in civil legal proceedings. See *Lancaster Cty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) ("In construing a statute, [an appellate court] will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the [L]egislature." (citing *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 663 S.E.2d 484 (2008))); see, e.g., *Caughman v. Caughman*, 247 S.C. 104, 109, 146 S.E.2d 93, 95 (1965) ("[T]he duty to protect the rights of incompetents has precedence over procedural rules otherwise limiting the scope of review.").

We further find Mims' disability did not cease when Ms. Mims was appointed his guardian. See S.C. Code Ann. § 15-3-40 ("[T]he time of the disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended . . . in any case longer than one year after the disability ceases."). The question of whether a disability ceases when a legal guardian is appointed is novel in South Carolina, and there is a split in authority among jurisdictions with similar tolling statutes. We hold Mims' disability did not end when his mother was appointed guardian. See *Barton-Malow Co. v. Wilburn*, 556 N.E.2d 324, 325 n.1, 326 (Ind. 1990) (citing cases from jurisdictions holding "the appointment of a guardian over an incompetent person does not remove the disability" for purposes of the running of the statute of limitations); *Paavola v. Saint Joseph Hosp. Corp.*, 325 N.W.2d 609, 610-11 (Mich. Ct. App. 1982) (same); see also Michele Meyer McCarthy, Annotation, *Effect of Appointment of Legal Representative for Person Under Mental Disability on Running of State Statute of Limitations Against Such Person*, 111 A.L.R. 5th 159 (2003).

Accordingly, we find section 15-3-40 extended the time allowed for the commencement of each of Mims' causes of action by five years. *Harrison v. Bevilacqua*, 354 S.C. 129, 140 n.5, 580 S.E.2d 109, 115 n.5 (2003) ("The express language of the statute allows the time for commencement of an action to be 'extended' by a maximum of five years.").

In South Carolina, § 1983 claims are subject to a three-year statute of limitations. See *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (holding that courts must adopt a "personal-injury" statute of limitations period for § 1983 actions) *abrogated on other grounds by Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004); S.C. Code Ann. § 15-3-530(5) (2005) (providing a three-year limitations period for personal injury actions). Because Mims' lawsuit commenced on May 7, 2008, and he is entitled to a five-year extension of the statute of limitations under section 15-3-40, we find Mims' § 1983 claims are not time-barred unless they accrued before May 7,

2000.

Next, there is no dispute DDSN is a government entity within the definition of the Tort Claims Act (TCA) and, at the time Mims' causes of action accrued, Respondents Lacy and Butkus were employees of DDSN. See S.C. Code Ann. § 15-78-30(d) (2005 and Supp. 2016). Because the TCA provides the exclusive remedy for torts committed by governmental entities and their employees, absent tolling, the two-year statute of limitations from the TCA applies to Mims' state tort claims. S.C. Code Ann. § 15-78-110 (2005) (providing a two-year statute of limitations for claims subject to the TCA); *Fleteau v. Harrelson*, 355 S.C. 197, 209, 584 S.E.2d 413, 419 (Ct. App. 2003). Therefore, because Mims' lawsuit commenced on May 7, 2008, and he is entitled to a five-year extension of the statute of limitations under section 15-3-40, we find Mims' state tort claims against Respondents are not barred unless they accrued before May 7, 2001.

III.

In granting Respondents' motion for summary judgment, the circuit court dismissed Mims' § 1983 causes of action for failure to state a claim⁵ and additionally found Mims did not satisfy his summary judgment burden of proving Respondents Lacy and Butkus violated Mims' civil rights. We reverse.

Initially, we find the circuit court erred in limiting the scope of Mims' lawsuit to only three incidents of personal injury: the beating by a Clusters employee, the ant-bite incident, and the penis injury.

⁵ We find the circuit court erred in evaluating the sufficiency of Mims' pleadings at summary judgment. Respondents did not move for dismissal under Rule 12(b)(6), SCRCF; rather, Respondents moved for summary judgment under Rule 56, SCRCF. However, for clarity on remand, we find Mims' § 1983 causes of action were sufficiently pled. *Hotel & Motel Holdings, LLC v. BJC Enters., LLC*, 414 S.C. 635, 650, 780 S.E.2d 263, 271 (Ct. App. 2015) ("If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." (citing *Clearwater Tr. v. Bunting*, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006)); see, e.g., *Moore v. City of Columbia*, 284 S.C. 278, 282-83, 326 S.E.2d 157, 160 (Ct. App. 1985) (liberally construing the complaint to find plaintiff pled ultimate facts to support § 1983 cause of action)).

Respondents argue we may not reach the issue of whether the circuit court erred in limiting the scope of the lawsuit, asserting Mims has not appealed the finding. We disagree. Mims has appealed the sections of the order where the circuit court limited the scope of Mims' lawsuit, and he has consistently alleged and argued his theory of the case—from his pleadings to his arguments at summary judgment, and now on appeal. *See Spence v. Wingate*, 381 S.C. 487, 489, 674 S.E.2d 169, 170 (2009) (finding that because the circuit court's order granted respondents' motion for summary judgment on precisely the grounds argued by respondents at the summary judgment hearing, the ruling was sufficient to preserve petitioner's argument on appeal).⁶

The three elements of a § 1983 supervisory liability cause of action are:

(1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices;" and (3) that there was an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.

Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994).

Mims maintains that between 2001 and 2005, he was unconstitutionally confined at residential facilities by DDSN, and while there, he received multiple personal injuries due 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

⁶ Even if we were to find the issue was not preserved, we would still address it. *See Caughman*, 247 S.C. at 109, 146 S.E.2d at 95 (holding it is the duty of the court to protect the interests of those under legal disability, and therefore, the court will take notice of any error, prejudicial to them even though not raised appropriately); *Ramage v. Ramage*, 283 S.C. 239, 244, 322 S.E.2d 22, 25 (Ct. App. 1984) (choosing to address inadequately appealed issues when the arguments were reasonably clear from the brief and the issues were ruled upon by the circuit court).

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.

We find the record does not support the circuit court's conclusion that Mims referred only to the beating by a Clusters employee, the ant-bite incident, and the penis injury in alleging and arguing Respondents Lacy and Butkus are subject to § 1983 liability. Accordingly, we reverse the circuit court's finding that Mims' lawsuit is limited to these three discrete incidents.

We also find the circuit court erred in finding Mims presented no evidence of widespread abusive conduct at DDSN facilities and no evidence that Respondents Lacy and Butkus knew of and ignored systemic problems. At summary judgment, Mims cited to evidence indicating Respondents Lacy and Butkus were responsible for placing Mims in DDSN care; they knew or should have known of the abuse and neglect occurring at Clusters and Kensington, including beatings, insect infestations, and sexual assaults; and they failed to reassign or release Mims from DDSN care, despite knowledge of the ongoing abuse and neglect. This evidence, which Mims filed with the circuit court, consists of 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. Accordingly, viewing all reasonable inferences in the light most favorable to Mims' theory of the case, Mims has presented more than a scintilla of evidence to demonstrate there are material facts in dispute regarding his § 1983 claims. *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330–31, 673 S.E.2d 801, 803 (2009) ("[I]n cases applying federal law, the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment."); *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) ("Since it is a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.").⁷

⁷ On appeal, Mims cites to *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006), in asserting the circuit court erred by failing to consider any event that occurred before the start date of the statute of limitations in evaluating whether there are material facts in dispute regarding his causes of action. We decline to address this issue. At no point in his Rule 59(e), SCRPC motion, or on appeal, has Mims cited a particular example of this error, and we are unable to locate such an occurrence. See, e.g., *Doe v. Doe*, 370 S.C. 206, 217 n.7, 634 S.E.2d 51, 57 n.7 (Ct. App. 2006) (finding issue was abandoned for appeal when wife merely stated

IV.

In granting summary judgment, the circuit court dismissed Mims' causes of action for negligent supervision, negligence, and gross negligence for failure to state a claim.⁸ The circuit court additionally found Mims did not satisfy his summary judgment burden of proving negligent supervision. We reverse.

In his amended complaint, Mims alleged Respondents committed these torts when they failed to provide proper supervision to protect Mims from assault, battery, sexual assault, and injury; failed to properly monitor Mims' condition and treatment needs after initiating involuntary commitment proceedings for him; failed to discharge Mims to the care of his mother; and obstructed the attempts of Mims' mother to establish the guardianship. We find Mims presented at least a scintilla of evidence to support these claims at summary judgment. *See Hancock* 381 S.C. at 330, 673 S.E.2d at 803 (2009) ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."); *see also supra* Part III (describing the evidence presented by Mims at summary judgment).

To the extent the circuit court found Respondents Lacy and Butkus were immune from liability under the TCA as a matter of law, we reverse this finding as there are material facts in dispute regarding whether Respondents Lacy's and Butkus' actions towards Mims constituted fraud, actual malice, or an intent to cause harm. *See Wilson v. Style Crest Prod., Inc.*, 367 S.C. 653, 656, 627 S.E.2d 733, 735 (2006) ("Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be

in her brief, "the accountant's fee was incorrect" but did not explain why it was incorrect).

⁸ We again find the circuit court erred in evaluating the sufficiency of Mims' pleadings at summary judgment. *See supra* note 5. However, for clarity, we find Mims sufficiently pled his causes of action for negligent supervision, negligence, and gross negligence. *See Hotel & Motel Holdings, LLC*, 414 S.C. at 650, 780 S.E.2d at 271. ("If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." (citing *Clearwater Tr.*, 367 S.C. at 343, 626 S.E.2d at 335)).

denied." (quoting *Hamilton v. Miller*, 301 S.C. 45, 47, 389 S.E.2d 652, 653 (1990)); *Flateau*, 355 S.C. at 208, 584 S.E.2d at 418–19 (finding Section 15-78-70(b) of the South Carolina Code (2005) lifts the immunity normally enjoyed by governmental employees under the TCA "if their actions constitute fraud, malice, an intent to harm, or a crime of moral turpitude").

V.

We find the circuit court properly granted summary judgment to Respondents on Mims' claims for violations of the ADA and the Rehabilitation Act. Mims alleged Respondents violated these acts by systematically failing to provide Mims and others like him with needed services in the least restrictive setting. See *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581, 607 (1999) (holding that to be in compliance with the ADA, treatment for disabilities is to be provided in the most integrated, least restrictive setting possible). Mims' allegations appear to be based on a theory that DDSN structured its provision of services to skew in favor of residential facility placements and away from in-home care services by, for example, paying employees at residential facilities more than DDSN pays at-home caregivers.

Mims failed to provide evidence to support this theory of liability. See *Singleton v. Sherer*, 377 S.C. 185, 197–98, 659 S.E.2d 196, 203 (Ct. App. 2008) ("Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. The nonmoving party must come forward with specific facts showing there is a genuine issue for trial." (citation omitted)). While Mims cited to a single instance of a denial of requested services at summary judgment, we find this one example does not constitute more than a mere scintilla of evidence that Respondents systematically violated the ADA and the Rehabilitation Act in an ongoing manner. See *Hancock*, 381 S.C. at 330–31, 673 S.E.2d at 803 (2009) ("[I]n cases applying federal law . . . the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment."). Accordingly, we affirm the trial court's grant of summary judgment as to this cause of action.

VI.

In conclusion, we affirm the grant of summary judgment on Mims' claims for violations of the ADA and Rehabilitation Act. However, we reverse the circuit court's dismissal and grant of summary judgment on Mims' claims for violations of § 1983, negligence, gross negligence, and negligent supervision. Mims' lawsuit

commenced on the date his amended complaint was filed, May 7, 2008, and he may receive the benefit of a five-year tolling of the statute of limitations for each of his claims under section 15-3-40 of the South Carolina Code. Finally, we find the circuit court erred in limiting the scope of Mims' lawsuit. The case is remanded for proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GEATHERS, MCDONALD, AND HILL, JJ., concur.

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

RECEIVED
NOV 21 2017
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.

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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November 21, 2017

THE STATE OF SOUTH CAROLINA
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MEMORANDUM IN SUPPORT OF
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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 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*

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

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.**

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

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 opinion.

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.

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.

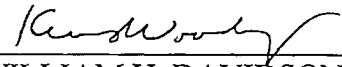
8. The opinion overlooked the absence of a supervisory connection between the Defendants and Babcock Center.

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.

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November 21, 2017

THE STATE OF SOUTH CAROLINA

In The 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.

RECEIVED

DEC 13 2017

SC Court of Appeals

Appellate Case No. 2014-001373

Appellant's Return Opposing Respondent's Petition for Rehearing

The Court should deny Respondents' petition for a rehearing in this case for the reasons set forth below and those argued in Appellant's opening and reply briefs.

- 1. Respondents ignore the clear intent of the legislature to extend the time for filing a complaint by five years.**

The legislature clearly understood when it enacted the state tolling statute that defendants could be required to defend against claims occurring seven (for state agencies) or eight (for individuals) years before the lawsuit is filed. *Harrison v. Bevilacqua*, 354 S.C. 129, 140 n.5, 580 S.E.2d 109, 115 n.5 (2003) ("The

express language of the statute allows the time for commencement of an action to be 'extended' by a maximum of five years."). In the case of minors, a defendant may be required to defend against claims that arose as many as nineteen years before the lawsuit is filed. The only limitation the General Assembly imposed on these time frames was for medical malpractice claims involving adults, where the lawsuit must be brought within six years pursuant to S.C. Code 15-3-545. *Sims v. Amisub of S.C., Inc.* 414 S.C. 109, fn 7 (2015).

In 2015, the Supreme Court of the State of South Carolina declined in *Sims* to adopt a rule suggested by Respondents that would terminate the tolling period when a conservator has been appointed. 414 S.C. at fn 7. It has been fourteen years since the Supreme Court ruled in *Harrison v. Bevilacqua* that the tolling statute extends the time for filing a lawsuit by five years. 354 S.C. fn 5. The Court in that case was obviously aware that the rule requires defendants to defend seven or eight year old claims. The "Legislature is presumed to be aware" of the Supreme Court's interpretation of its statutes, including the five year extension under the state tolling statute. *Id.* at 117.

In the now seventeen years since a single district court judge in New Hampshire interpreted that State's tolling statute as ceasing when a guardian is appointed (without referring the question to the New Hampshire Supreme Court, as

the federal court should have done on such an issue of state law), the New Hampshire Supreme Court still does not appear to have adopted Judge McAuliffe's interpretation of the tolling statute.¹

As discussed in Appellant's opening brief, the vast majority of states have ruled that the appointment of a guardian does not affect the state tolling statute. Appellant's opening brief at 12 - 13. See *Sullivan v. Chattanooga Medical Investors, L.P.*, 221 S.W.3d 506, 513 (Tenn. Supreme Court 2007); *Weaver v. Edwin Shaw Hospital*, 104 Ohio St. 3d 390, 2003-Ohio-2488 (2004) ("The appointment of a guardian for a person within the age of minority or being of unsound mind neither removes the disability referred to in R.C. 2305.16 nor commences the running of the statute of limitations."); *Young v. Key Pharmaceuticals, Inc.*, 112 Wash. 2d 216, 222, 770 P.2d 182 (Wash. S.Ct. 1989) (the tolling statute "tolls the statute of limitations for a legally incompetent person notwithstanding the appointment of a guardian"); *Pardy v. United States*, 548 F.Supp. 682, 684 (S.D.Ill. 1982) (noting that Illinois courts have held that the appointment of a guardian does not affect the tolling provision with regard to a minor because "the minor is the true owner of the action.")

¹ *Stewart* appears to have been cited in just one other district court ruling in New Hampshire, but on other grounds. *Jones v. McKenzie*, 2011 U.S. Dist. LEXIS 145319 (D.N.H. 2011).

For the reasons set forth in Appellant's opening brief and herein, Respondent's petition should be denied because the General Assembly extended the time for filing a lawsuit by a person like Mims for five years.

2. **Plaintiff's amended complaint pled all necessary elements of neglect, negligent supervision and gross negligence.**

Mims properly pled the elements of neglect, negligent supervision and gross negligence in his amended complaint. Not only did Mims demonstrate in his amended complaint and documents presented in opposition to Respondent's motion for summary judgment that the DDSN Defendants failed to exercise due care, but Mims also presented evidence demonstrating Defendants' conscious failure to observe due care. In *Wannamaker v. Traywick*, 136 S.C. 21 (1926), the Supreme Court held that "conscious failure to observe due care warrants a jury in giving not only actual damages, but punitive damages as well." Neglect may be proven by either direct or circumstantial evidence. *Merchant v. Columbia Coca-Cola Bottling Co.*, 214 S.C. 206 (1949), see also *Brown v. South Carolina Ins. Co.*, 284 S.C. 47 (Ct. App. 1984) and *Redman v. Ford Motor Co.*, 253 S.C. 266 (1969). Where, as here, considering "all facts and circumstances in the aggregate," there is evidence of neglect "in reasonable proximity of time," the case should be submitted to the jury. As the Supreme Court ruled in *Childers v. Gas Lines, Inc.*,

248 S.C. 316 (1966), where the injury was foreseeable, a defendant is not absolved from liability for wrongful acts due to intervening causes.

Supervisory officials in the “highest levels of state government” may be held liable where the supervisor has knowledge of the conduct engaged by a subordinate when, as here, that conduct poses a pervasive and unreasonable risk of constitutional injury to the plaintiff. *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994). Mims established that the wrongful conduct complained of was “widespread,” and far in excess of the “several different occasions” standard established in *Shaw*. *Id.* The continued inaction of Butkus and Lacy in the face of “documented widespread abuses” provides an “independent basis” for finding that they were deliberately indifferent or acquiesced in the constitutionally offensive conduct. *Id.* at 799. Mims presented evidence which a jury could find that these Defendants acted with deliberate indifference and that a causal link exists. *Id.* at 800. Mims has presented evidence to the lower court which would allow a jury to conclude that the response of these Defendants “was so patently inadequate as to justify an inference that the official actually recognized that his response to the risk of inappropriate under the circumstances.” *Morris v. Bland*, 666 Fed. Appx. 233, 240 (4th Cir. 2016).

The record documents that Butkus and Lacy failed to exercise even a slight degree of care. Butkus admitted that it was under his direction that Mims was involuntarily committed to the custody of DDSN. R. at 2618-2619. He also admitted that he was the person responsible for making placement decisions (R. at 2567), that he was promptly notified when Mims was injured, normally within 24 hours for a serious injury (R. at 2576, 2559-2560, 2565, 2594), that the facility where Butkus first placed Mims was decertified by both federal and state regulatory authorities for failure to meet the applicable standard of care (R. at 2561-2562), that the decertification of Clusters resulted from a “pattern of failure to meet basic standards” (R. at 2564), that both he and Defendant Lacy were notified when Mims required treatment in the emergency room due to his bed being infested by ants (R. At 2574), and that he was responsible for determining “how did it happen, who’s going to take care of it, how are we going to prevent it from occurring again, who’s going to do what to deal with it” (R. at 2576, see also R. at 2677). Butkus admitted that it was his responsibility to assure that there was “proper supervision” of clients. (R. at 2678). It was also his responsibility to make sure that staff were terminated when clients were neglected. (R. At 2561-2562.) He acknowledged having notice that DHEC had declared Immediate Jeopardy at Kensington when Mim’s roommate died. (R. at 2582.) But, instead of notifying

law enforcement about the “small wound” to Mim’s penis, it was Butkus who, ignoring his mandatory reporting obligation, elected instead to send the agency’s physician to investigate. (R. at 2584-2585). Butkus admitted that he and DDSN had responsibility for assuring that clients were “safe, free from harm, getting the services they’re supposed to get when they’re supposed to get it, that kind of thing.” R. at 2591. He acknowledged that federal standards required DDSN to assure the health and welfare of clients. R. at 2592. These federal standards required DDSN to “provide necessary safeguards...where people would be in danger, possibly in danger to make sure that they’re safe.” R. at 2592-2593. He acknowledged that, as agency director, that was his responsibility. Id.

Lacy’s job required her to follow “trend lines” on abuse and neglect in DDSN programs. R. at 2620, 2621. (“The tracking would be in Kathi’s office, with her and her director of quality assurance and that sort of thing, her staff.” R. at 2622.) Butkus and Lacy were both aware when Mims suffered the injury to his penis while left unsupervised that “the trend line still was not good.” R. at 2620. Butkus and Lacy consulted with each other and decided not to allow Mims to be released when his mother appeared at Kensington with a court order for his release. R. at 2599.

The decision to contest the appointment of Mims' mother as his guardian and to file a brief in opposition to her appointment was also made at Butkus' direction. R. at 2603-2607. Butkus made a conscious decision to attempt to prevent Mims' discharge because he and Lacy determined that Mims' mother worked and she "didn't have a lot of resources, income was limited, things of that nature." R. at 2609-2614. He and Lacy determined "based on our professional assessment" that "...he was in that facility, we felt that was best for him." R. at 2611-2614. Despite having directed Babcock Center to reduce its bed capacity due to a high rate of abuse and neglect at the time of the injury to Mims' penis, Butkus and Lacy attempted to obstruct his discharge and to prevent his mother from being appointed as his permanent guardian. R. at 2647.

Respondents fail to mention in their memorandum that the controlling law in this case is *Madison v. Babcock Center*, where the plaintiff sued both Babcock Center and DDSN for negligence, gross negligence and willful indifference, as well as failing to properly supervise Madison's care. 371 S.C. 123 (2003).² It is inconceivable that Respondents could argue in good faith that Mims "overlooked the absence of a supervisory connection between the Defendants and Babcock

² As in this case, DDSN and the Babcock Center obstructed the attempts of Madison's parents to remove her from the Babcock Center. ("...both ignored the requests of her parents that she be released from Babcock Center." 371 S.C. at 133.)

Center,” given not only the Supreme Court’s ruling in *Madison*, but Butkus’ own admission of his responsibility to supervise care provided in DDSN programs. Memo at 24. S.C. Code 44-20-420 provides that “The director or his designee may designate the service or program in which the client is placed,” based on “the evaluation and assessment of the needs, interests, and goals of the client.”³

The only assessment in the record determined that Mims required one-on-one supervision. R. at 310. After Edward was beaten by an employee in August, 2000, a crime that was witnessed and should have been immediately reported to law enforcement if he was receiving the level of supervision ordered, and his mother attempted to remove him from the Babcock Center, 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. The record shows that Defendants Butkus and Lacy were fully aware of the dangerous conditions that existed at the Babcock Center, yet they took no action at any time to protect Mims from further harm. Mims’ attacker remained in the employment of the Babcock Center and was not arrested for more than a year. R. 305-306.

³ S.C. Code 44-20-430 provides that the director or his designee “has the final authority over applicant eligibility, determination, or services and admission order, subject to policies adopted by the commission.”

Having removed the ability of Mims' mother to direct her son's care during the involuntary commitment to the custody of DDSN, Butkus, his "designee," Kathi Lacy, and DDSN voluntarily assumed liability to provide reasonable care treatment to him, which they breached. *Madison v. Babcock Center*, 371 S.C. at 143. As the Supreme Court held in *Madison*, the DDSN's defendants "may be held liable for breach of its common law duty where, as in this case, their negligence created a foreseeable risk of and caused injury. *Id.* The Supreme Court ruled that the agency's duties included "adequately supervising the provision of services by another entity" and "its own conduct in relation to prior notice of inappropriate care of its clients by such entity." *Id.*

As the Supreme Court recognized in *Madison*, it was not necessary for Mims to establish that the Babcock Center employees who harmed him were employees of DDSN, because DDSN owed a separate "common law duty of care directly to Appellant." 371 S.C. 143. In *Madison*, the Supreme Court applied the following elements to prove negligence: (1) a duty of care owed by the defendant to the plaintiff, (2) a breach of that duty by a negligent act or omission, (3) damages suffered by Plaintiff, (4) which actually and proximately resulted from the breach. *Id.* at 656. Mims clearly pled that the DDSN Defendants had a duty of care, that they breached that duty, that Mims suffered injuries and a jury could determine that

those injuries proximately resulted from Defendants' breach. Mims' mother repeatedly requested that he be discharged from dangerous facilities overseen by DDSN and the individual defendants and none of the injuries after she sought to remove him in 2001 would have occurred but for Defendants' voluntary assumption of custody and care of Mims. R. 189-194 and chronology at R. 198-212.

Respondents ignore the exceptions established by the Supreme Court in *Madison* to the general rule that there is no general duty to control the conduct of another, or to warn a third person or potential victim of danger. *Id.* at 136. Exceptions to this rule include situations (1) where, as here, the defendant has a special relationship with the victim, (2) where the defendant has a special relationship with the injurer, (3) where, as here, the defendant voluntarily undertakes a duty, (4) where, as here, the defendant negligently or *intentionally*⁴ creates the risk (by refusing to discharge Mims and obstructing her appointment as guardian); and (5) where, as here, federal and state statutes impose a duty on the defendant.

Mims has shown that the DDSN Defendants intentionally created the risk of harm to him when they refused to discharge him to the care of his mother in 2001,

⁴ Obviously, the Supreme Court does not consider intent and negligence to be mutually exclusive or "logically inconsistent."

and again in 2005, forcing him to remain in facilities they knew to be dangerous, and when they failed to properly monitor and supervise the services provided by the Babcock Center. Plaintiff provided the lower court with audits, investigations and reports putting the DDSN Defendants on notice of the dangerous conditions at the Babcock Center, and, specifically, the injuries suffered by Mims. The Attorney General forwarded the letter sent by Mims' mother begging that he be released. R. 227- 231. DDSN responded by recognizing that Mims' "significant special needs and complex medical conditions" required "more staffing and supervision than any one person could possibly provide." R. at 232. DDSN determined that "several different people have to be awake and around him all the time." R. at 232. Yet, no one appeared to be around Mims when he repeatedly suffered "unexplained" injuries that should have been immediately reported and explained had he been provided the constant supervision Defendants determined that he needed.

The Supreme Court ruled in *Madison* that DDSN has a common law duty of care directly to persons receiving services from the Babcock Center and that the fact that a third party may have committed the criminal act harming the victim "does not affect the existence of Department's duty." 371 S.C. 143. This is because "the "Department remains under a duty to provide reasonable care and treatment to its clients," which Mims has demonstrated that the DDSN Defendants failed to do.

Id. Where DDSN and its officials fail to adequately supervise the provision of services by another entity or, by their own conduct in relation to prior notice of inappropriate care of its clients by the entity, the Supreme Court ruled that they “may be held liable for breach of its common law duty provided such negligence creates a foreseeable risk of and causes injury.” Id. As in that case, the issue of whether the DDSN defendants “acted negligently is a matter of factual issue for the jury.” Id. at 144. Mims has provided extensive evidence demonstrating that the harms he suffered were foreseeable.

None of the DDSN Defendants were under a duty to file a petition for the involuntary commitment of Edward Mims - they voluntarily acted maliciously and intentionally to prevent his discharge by falsely accusing his mother of failing to provide appropriate care at home. As a social worker and nurse, Defendants Butkus and Lacy were mandated reporters obligated to report abuse occurring in Mims’ home to the Department of Social Services, which they consciously failed to do. S.C. Code 43-35-25. They were obligated to report the beating by Carl Anthony to law enforcement, which they also failed to do. Indeed, the applicable statute does not even authorize DDSN or its officials to petition the probate court for involuntary commitment to its facilities. S.C. Code 44-20-450.

-
3. **Individual Defendants Butkus and Lacy are not immune from suit, because there is evidence in the record that they may have acted with malice, and an intent to harm Mims, acting outside of the scope of their official duties and in violation of 42 U.S.C. 1983.**

S.C. Code Ann. § 15-78-70(b) (Supp. 2002) lifts the immunity normally enjoyed by governmental employees when they act outside the scope of their employment or their actions constitute fraud, malice, an intent to harm, or a crime of moral turpitude. *Pridgen v. Ward*, 391 S.C. 238, 244 (S.C.Ct.App. 2010). This Court correctly ruled that the record Mims has presented demonstrates 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).

Mims has shown that Defendants Butkus and Lacy had personal, non-employment related reasons for covering up the abuse Mims suffered and preventing his discharge from the Babcock Center. *Pridgen v. Ward*, 391 S.C. 238, 244 (S.C.Ct.App. 2010). Section 15-78-70(b) provides:

Nothing in the chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.

Not only were DDSN, Butkus and Lacy under a common law duty to protect Mims from harm, Mims has alleged that they violated his constitutional right to

liberty, as well as statutes and regulations established by Congress, CMS and the South Carolina General Assembly by confining him in an institution. In *Olmstead v. L.C.*, the United States Supreme Court ruled that persons who have disabilities are entitled to receive services in the least restrictive setting. 527 U.S. 581 (1999). Throughout the state statutes DDSN is obligated to operate under, the General Assembly expressed its intent that services must be provided in the least restrictive setting, defined in S.C. Code 44-20-30 as “the surrounding circumstances that provide as little intrusion and disruption from the normal pattern of living as possible.”⁵ But, throughout his confinement, Butkus kept Mims in ICF/MR facilities, the most restrictive setting in which DDSN provides services.

Chapter 21 of Title 44 expresses the legislative intent that persons with intellectual disabilities be provided the supports necessary to allow DDSN clients to live with their families at home. S.C. Code 44-21-10. But, instead of providing Mims’ mother with the supports she needed to provide care for her son at home, when he was beaten in a DDSN ICF/MR and his mother reported the crime to the Attorney General, Defendant Butkus caused Mims to be involuntarily committed

⁵ S.C. Code 44-20-480 provides that clients must be placed in the “least restrictive level of care possible...” Butkus was responsible for providing a range of placements offering various levels of supervision, but, instead placed Mims where he did not receive an appropriate level of supervision. *Id.*

and kept him in the most restrictive facilities where he knew clients were being abused and neglected. R. at 2605-2611.

Defendants also violated federal standards including, but not limited to those which required Defendants to provide a choice of institutional or community based services, to provide services in the amount, duration and scope necessary to meet the needs of the Medicaid participant and to provide services with reasonable promptness. In *Doe v. Kidd*, 501 F.3d 348 (4th Cir. 2007), the Fourth Circuit ruled that Medicaid participants have a private right of action to enforce the Medicaid Act through a Section 1983 action. It is undisputed that both facilities where Defendant Butkus placed Mims, Clusters and Kensington, were repeatedly found to be in violation of federal standards for the operation of those facilities. R. at 1219-2780.

It was not within the scope of Defendants' official duties to force Mims to remain in an institutional setting and to prevent his discharge from Babcock Center. S.C. Code 15-78-30(i) defines "scope of official duty" as "(1) acting in and about the official business of a governmental entity and (2) performing official duties." S.C. Code Ann. § 15-78-30(i) (2005). As discussed above, neither DDSN nor Defendant Butkus were authorized by S.C. Code 44-20-450 to petition the probate court to involuntarily commit Mims to DDSN in the first place. Mims

argued in his amended complaint that the DDSN Defendants were aware of systemic abuse, neglect and exploitation of clients living at the Babcock Center (AC at ¶ 14), that those defendants failed to report abuse and neglect of Mims to appropriate authorities (AC at ¶ 15, and that, instead, in retaliation, they accused Mims' mother of neglecting and/or abusing him at ¶ 16. They "threatened Plaintiffs' mother that she would not be able to see her son if she contested the involuntary appointment."⁶ ¶ 21. When Mims was beaten again on or about December 16, 2001 and his mother again attempted to secure his release, DDSN sent a letter to her saying that he could not be discharged because "several different people have to be awake and around him all the time." ¶ 26. Yet, less than a month later, Mims was again beaten, this time with a belt, "suffering abrasions and contusions and requiring treatment in the emergency room." ¶ 27.

Butkus and Lacy were both well aware that the rate of substantiated abuse, neglect and exploitation at Babcock Center was four times the state-wide average. ¶ 33. Mims continued to be subjected to ongoing and unexplained injuries at Kensington. R. at 3234-3373. Despite refusing to release Mims because he must have several persons awake and around him all the time, on July 27, 2004, Mims

⁶ Mims also presented sworn affidavits documenting Defendants' pattern of retaliation against family members who complain about their services. R. at 3212-3453.

was treated for “ant bites all over,” an injury which could not have occurred had he been provided the one-on-one supervision ordered by Dr. Platt.⁷

After CMS declared immediate jeopardy at the facility due to “inadequate training, understaffing, failure to conduct thorough investigations and failure to take appropriate actions to assure client protections,” deficiencies that placed Mims and other residents at risk of serious harm, Defendants Butkus and Lacy continued to obstruct his release from Kensington, even after the probate court issued an order authorizing his mother to remove him from the dangerous facility. ¶¶ 31 and 32. Even after his court-ordered release, DDSN, Butkus and Lacy made a conscious decision to prevent Mims’ mother from being appointed as his permanent legal guardian. R. at 3234-3373.

Even after the facility where Butkus had placed Mims was decertified due to additional findings of Immediate Jeopardy by CMS, Butkus failed to take necessary action to remove Mims from the dangerous facility when families of other clients at Kensington were notified that they should remove their loved ones from the facility due to Babcock Center’s failure to remedy Immediate Jeopardy violations. Instead of reporting the sexual assault to law enforcement, Butkus

⁷ The study by the University of South Carolina School of Public Health shows that this infestation was not, as Defendants claim, a one-time-occurrence. R. at 1616.

caused a DDSN physician to “investigate” Mims’ injuries.⁸ Rape protocol was not followed and Butkus took no remedial action when the evidence of the sexual assault was destroyed.⁹

Mims provided the trial court with credible evidence that his constitutional liberty rights were violated by the DDSN defendants, including Butkus and Lacy. Mims presented evidence that Defendants “failed to monitor Plaintiff’s condition and treatment needs after involuntarily committing him to the custody of the State.” Amended complaint at ¶ 65. Mims presented the trial court with evidence that the individual defendants “caused him to be subjected to deprivation of his rights, privileges or immunities secured by the Constitution and laws of the United States, including not only his right to liberty, but also to equal protection and to be secure in one’s person and property against unreasonable seizure. ¶ 66. Contrary to Respondent’s arguments, in the Petition, Mims alleged that Defendants Butkus and Lacy were “motivated by evil motives and intent and showed reckless and callous

⁸ DDSN’s physician, Dr. Johnson, determined that the injury to Mims’ penis was not self inflicted. R. at 3064.

⁹ Even after Mims was removed by appointment of his mother as temporary guardian in June, 2005, and later as permanent guardian in 2005, DDSN continued to pay his “band payment” to the Babcock Center, despite Mims not receiving a single service from that organization.

indifference” to his federally protected rights, entitling him to an award of punitive damages, attorney’s fees and expenses. ¶ 69-70.

This Court correctly ruled that he presented evidence that would demonstrate “fraud, actual malice, or an intent to cause harm,” considering, as the Court must, the facts in a light most favorable to Mims. Summary judgment should be granted only where it is clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. *McQuaig v. Brown, S.C.*, 242 S.E. (2d) 688 (1978). Mims has shown that throughout his confinement, Butkus and Lacy intended to prevent his release in order to protect themselves and their agency for personal reasons not related to his official duties.

4. **Respondents ignore the significance of Mims bringing this action in his important role as private attorney general.**

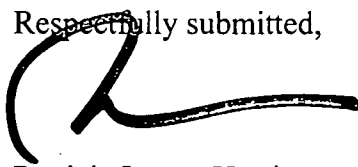
Respondents argue on page 19 that there should be no relaxation of the procedural rules, because “there is no suggestion that the money would go to a minor or disabled person,” since Mims has died. But, this argument ignores his important role as a “private attorney general” to vindicate a policy that Congress considered of the highest priority. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). Mims has shown that the violations he complains of are systemic

and that they affect thousands of the most vulnerable citizens in South Carolina,
and their families.

5. Conclusion.

For the reasons set forth herein and those set forth in his opening and reply
briefs, Mims prays that this Court will deny Respondent's Petition for Rehearing.

Respectfully submitted,



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Attorney for the Appellant

December 11, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

RECEIVED

DEC 13 2017

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

SC Court of Appeals

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

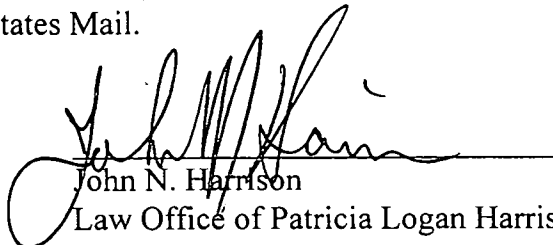
v.

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

CERTIFICATE OF SERVICE

The Appellant's **Return Opposing Respondents' Petition for Rehearing** was sent to Respondents' counsel, Kenneth P. Woodington, Esq., and William H. Davidson, II, Esq., Davidson & Lindemann, P.A., P.O. Box 8568, Columbia, SC 29202-8568 by Priority United States Mail.

December 11, 2017


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December 11, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, South Carolina 29211 803-734-1890

RECEIVED
DEC 13 2017
SC Court of Appeals

Re: **Estate of Edward Mims v. SCDDSN**
Appellate Case No. 2014-001373

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven copies of the Appellant's **Return Opposing Repspondents' Petition for Rehearing**. Also enclosed is a **Certificate of Service**. Please clock and return in the enclosed, stamped envelope the copy of this letter, one copy of the **Return** and the copy of the **Certificate**.

Thank you for your assistance in this matter.

Sincerely yours,



Patricia Logan Harrison

c: Kenneth P. Woodington, Esq.
William H. Davidson, II, Esq.

PLH:jnh

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FROM:

PATRICIA L. HARRISON
ATTORNEY AT LAW
611 HOLLY STREET
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TO:

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

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SC Court of Appeals



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APP 90

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

RECEIVED
DEC 18 2017
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.

**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.

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

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 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 contest 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,

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

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 particular 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.

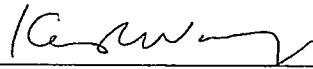
Piggie Park was an attorney fees case. It simply held that counsel for a private plaintiff could recover fees under the 1964 Civil Rights Act, noting that “[w]hen a plaintiff brings an action under [Title II of that Act], he cannot recover damages. If he obtains an injunction, he does so not for himself 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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December 18, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

RECEIVED
DEC 18 2017
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.

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

