THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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

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

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

v.

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

BRIEF OF RESPONDENTS DDSN, LACY AND BUTKUS

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2. Whether the circuit court correctly dismissed the claims for negligent supervision, negligence and gross negligence, because Plaintiff's only showing was either vague and conclusory or nonexistent.

3. Whether Plaintiff's vague ADA claims have been rendered moot by his death, but were properly dismissed.

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COUNTERSTATEMENT OF THE CASE

This appeal is from an Order dismissing Plaintiff's claims for damages and injunctive relief against the Department of Disabilities and Special Needs, its former Director, Stanley Butkus, and Kathi Lacy, who was also a DDSN official during the relevant timeframe.[1] This action was commenced with the service of the Summons and Amended Complaint on May 12, 2008.[2] Plaintiff Edward Mims, who died on March 7, 2015, was an adult who had mental retardation, among other disabilities. R. I, 73, ¶ 1. (His death was presumably unrelated to the alleged injuries involved in this case; those alleged injuries occurred ten or more years ago.) This action was brought on his behalf by his mother, Margaret Mims, who was appointed his legal guardian in 2005. The DDSN Defendants assume, but do not concede, that all of Plaintiff's claims survive his death except for the claims for prospective injunctive relief.

[1] In a separate Order, the court below also dismissed Plaintiff's claims against the other two defendants, who are the Babcock Center, Inc., and Judy Johnson, the Director of the Babcock Center.

[2] An original Complaint had been filed in May 2007, but it was never served. The defendants named in that Complaint included some, but not all, of the present defendants.

The events alleged in the Amended Complaint occurred between 2000 and 2005, when Mims resided in facilities owned by the Babcock Center.[3] Plaintiff alleges damage from several incidents of alleged physical injury between 2000 and 2005. Only one of these incidents occurred less than three years before the Amended Complaint was filed on May 7, 2008.

On appeal, Plaintiff has abandoned two of the original five causes of action in the Amended Complaint.[4] The remaining three claims as follows:

1. Alleged violations of 42 U.S.C. § 1983 (First Cause of Action)[5]
2. Negligent supervision under state law (Third Cause of Action)
3. Alleged violation of the Americans with Disabilities Act and the Rehabilitation Act (Fourth Cause of Action)

As noted above, the original Summons and Complaint in this action were filed on May 29, 2007. However, it is undisputed that the original 2007 Complaint was never served. On May 7, 2008, the Plaintiff filed a second Summons and an Amended Complaint, dropping some parties and adding others. The three DDSN Defendants in the present action were all served a few days later, on May 12, 2008. The case was

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[3] The Babcock Center is a private, non-profit organization which contracts with DDSN to house and care for individuals with mental retardation and other disabilities.

[4] The claims abandoned on appeal were the Second and Fifth Causes of Action in the Amended Complaint. Br. of Appellant 2, n. 1. These were claims for conspiracy under 42 U.S.C. § 1985 and for unjust enrichment, respectively.

[5] This claim also mentions 42 U.S.C. § 1988, the federal civil rights attorneys' fee statute, but that statute is not implicated unless a plaintiff prevails on the substantive federal claim, which did not occur here.

originally dismissed by Judge Strickland on grounds pertaining to untimely service, but the Supreme Court reversed that decision and remanded the case for consideration of the merits. *Mims ex rel. Mims v. Babcock Center, Inc.*, 399 S.C. 341, 732 S.E.2d 395 (2012).

In 2009, while the Motions to Dismiss were still pending, Plaintiff took more than fifteen depositions. The Defendants took the deposition of the guardian, Margaret Mims, and of Leigh Flynn, Plaintiff's guardian ad litem during a 2001 Probate Court proceeding.

On April 12, 2013, the DDSN Defendants moved for summary judgment in this action on a number of grounds, as set forth herein. R. II, 397. On April 23, 2013, the remaining Defendants (Babcock Defendants) also moved for summary judgment. R. II, 401. On May 8, 2013, following a status conference with Judge Manning that same day, the circuit court issued a notice setting the date of June 4, 2013, for the hearing of the summary judgment motions filed by both sets of Defendants. R. V, 1108.

Several weeks later, on May 24, 2013, counsel for the DDSN Defendants received from Plaintiff's counsel a motion for summary judgment, accompanied by a foot-high stack of exhibits totaling almost 2,300 pages. R. II, 403 (motion); R. VI, 1198 through XII, 3458 (exhibits to Plaintiff's motion) That date was the Friday before the Memorial Day weekend, and Defendants would have had only five business days to respond to Plaintiff's voluminous motion if that motion had been scheduled for hearing on June 4, 2013, the same day that Defendants' motions were

scheduled to be heard. On the next business day, May 28, Defendants' counsel sent a letter to Judge Manning by e-mail and U.S. Mail, with a copy to Plaintiff's counsel, R. VI, 1109-10, requesting confirmation that Plaintiff's motion was not scheduled to be heard on June 4. By e-mail of the following day, Judge Manning's law clerk confirmed that only the motions already scheduled for June 4 (that is, the Defendants' motions) would be heard then, and that Plaintiff's summary judgment motion would be heard at a later date, if necessary. R. V, 1116. Plaintiff complains that his cross motion for summary judgment was not heard at the same time as Defendants' motions, Br. of Appellant at 3-4, but does not point out that Plaintiff's motion was filed at the eleventh hour, and after Defendants' motions had been on the court's calendar for almost a month.

Defendants' motions were heard by Judge Thomas G. Cooper on June 4, 2013, as scheduled. Judge Cooper asked both sides to submit proposed orders on the Defendants' motions for summary judgment. R. II, 149-50 (transcript) and R. I, 4 (Form 4 order).

By Orders entered on January 22, 2014, Judge Cooper granted summary judgment for both sets of Defendants. R. I, 31-59 and I, 6-28. Plaintiff filed motions to reconsider on or about February 4, 2014. R. IV, 638-1049. Those motions were opposed by Defendants, R. IV, 1049 – R. V, 1094, and were denied by Judge Cooper by Orders filed on June 3, 2014. R. I, 60-63. This appeal followed.

COUNTERSTATEMENT OF FACTS

Plaintiff, who died on March 7, 2015, alleged several matters for which damages were sought. The matters not abandoned on appeal include (a) several alleged physical injuries between 2000 and 2005, during which time Plaintiff was a resident at Babcock Center facilities, R. I, 76-80, and (b) certain largely-unspecified claims under the ADA about alleged denials of services. R. I, 88-90.[6]

Plaintiff was living at home with his mother until 1999, when his mother became ill. R. XI, 3269, ¶ 2. At that time, he was placed in a Babcock Center facility. *Id.* In 2001, Plaintiff's mother was desirous of having him return to her home. R. III, 530-532 (2001 Order). DDSN then filed a petition for judicial admission to the services of DDSN. R. XI, 3299-3300. This petition was filed pursuant to S.C. Code §§ 44-20-450 and -460(B), the latter of which provides for such judicial admissions to DDSN when "the condition of the person is considered by the director or his designee to be such that he cannot be discharged with safety to himself or with safety to the general public. . . ." A psychologist recommended that a placement such as his then-existing one should be continued. R. XI, 3301-02.

The Probate Court conducted a hearing on June 26, 2001. R. III, 530. Plaintiff was present at the hearing, as were his mother and her attorney, Plaintiff's attorney,

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[6] Plaintiff also made reference in the lower court to a delay of several hours in permitting Plaintiff to go home as scheduled for a weekend visit on June 10, 2005, but as discussed in n.10 below, that claim was held unmeritorious by the circuit court, R. I, 45 n.8, and has been abandoned by Plaintiff on appeal.

and Ms. Leigh Flynn, a court-appointed guardian ad litem. *Id.* By agreement of all parties, including counsel for Plaintiff, counsel for his mother, and the guardian ad litem, the Probate Court issued a Consent Order, which concluded that the parties had agreed that Plaintiff's mother "will be unable to care for her son in her home." R. III, 530. The Consent Order accordingly judicially admitted Plaintiff to DDSN, but permitted weekend visitations in his mother's home as long as her home was maintained in a safe condition. R. III, 532.[7] Four years later, a different showing was made, and pursuant to another Probate Court order, R. III, 589-90, Plaintiff went home to live with his mother.

The incidents of physical injury that form the basis for this appeal were limited by the court below to the three specific incidents discussed in Plaintiff's June 28, 2013 response to Defendants' motion for summary judgment. *See* R. I, 38-39.[8] Those three incidents were as follows:

1. An occasion on August 13, 2000, when Plaintiff was residing at Babcock's Clusters facility and was beaten by Carl Anthony, an employee of Babcock Center. R. III, 597.[9]

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[7] In the lower court and on appeal, Plaintiff asserts that this Consent Order was obtained through "false information," but that argument is based on disavowed portions of affidavits signed by the GAL and Ms. Mims years later. Those affidavits are discussed in Issue 1, below.

[8] Plaintiff also made passing reference, in opposing summary judgment, to the statement of facts set forth in a May 29, 2013, memorandum filed by Plaintiff in support of his own motion for summary judgment. R. III, 593. The court below declined to consider that memorandum, however, because it did not pertain to any of the legal contentions and standards by Defendants in support of their motions for summary judgment. R. I, 38 n.3.

[9] As the court below noted, Plaintiff's Memorandum also briefly mentioned, but did not discuss, an alleged "second beating." R. I, 38 n.4.

2. An occasion on July 27, 2004, when Plaintiff was residing at Babcock's Kensington facility and was found to have a number of ant bites. R. III, 598.

3. An occasion on May 27, 2005, when Plaintiff was residing at the Kensington facility and was found with an unexplained penis injury which the treating physician at Lexington Medical Center described as "superficial," and which he did not regard as indicative of abuse or neglect. R. XI, 3317; R. X, 2752; R. III, 599.[10]

On appeal, Plaintiff has not challenged the lower court's decision to limit its examination of this case to those three incidents. As a result, only those three incidents are before this Court for appellate review. *See, e.g., Gamble v. Intl. Paper Realty Corp. of S. Carolina*, 323 S.C. 367, 474 S.E.2d 438 (1996)(citing Rule 207(b)1(B), SCACR ([o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal).

[10] The Amended Complaint, R. I, 81, ¶¶ 46 and 47, referenced an alleged refusal of the Defendants to permit Plaintiff to go home for a weekend visit on a Friday night (June 10, 2005). The court below held that this claim could not survive Defendants' summary judgment motion, because Plaintiff offered no suggestion as to how he was damaged by that incident, and did not dispute that a short time later that same day, Plaintiff was indeed permitted to leave that facility. R. I, 45 n. 10. *See generally,* R. III, 516-524 (incident report); *see also,* R. XI, 2079, Par. 44 (noting that Plaintiff returned home on June 10, 2005). Plaintiff has not challenged these conclusions on appeal, and therefore has abandoned them. *See, e.g., State v. Black,* 319 S.C. 515, 518, 462 S.E.2d 311, 313 (Ct. App. 1995)(claim deemed abandoned where not specifically argued in brief, or argued in only conclusory fashion).

SUMMARY OF ARGUMENT

Plaintiff's supervisory liability claim under 42 U.S.C. § 1983 was correctly dismissed, because Plaintiff completely failed to plead or prove that the individual DDSN Defendants knew of any conduct by subordinates that created a pervasive and unreasonable risk to Plaintiff in connection with three incidents argued by Plaintiff in the lower court, even assuming that Babcock employees could be considered subordinates of the DDSN Defendants. In one of the three incidents (the unexplained penis injury), the cause of the injury was unknown, as was the identity of the perpetrator, if indeed there was one. In another of the three incidents, the one pertaining to ant bites, no responsible subordinate was identified by Plaintiff. In the third of the three incidents, the beating of Plaintiff in 2000 by a Babcock employee who was later criminally charged, there was no evidence of any prior tendency of that employee toward violence, much less knowledge on the part of the DDSN Defendants of any such prior tendency.

Plaintiff claimed that the 2001 Consent Order admitting him to DDSN was obtained through false information given by DDSN employees, but this claim was based only on two affidavits that were both subsequently disavowed by the affiants in their depositions. In light of those disavowals, this argument clearly has no factual foundation, and should not even have been made. Finally, an unpled claim claiming unconstitutional policies was not properly before the court below and lacked merit, because no such policies were shown to exist.

Plaintiff's state law claims for negligent supervision were also properly dismissed, essentially for the same reasons as the Section 1983 claim. Plaintiff did not show that the DDSN Defendants knew or should have known that the employment of a specific person created an undue risk of harm, as state law requires. In fact, there was not even a showing that a specific person was involved in two of the three specific instances of physical injury argued by Plaintiff and considered by the court below. Plaintiff's claim for negligence other than supervisory negligence in connection with those three incidents is barred for the same reasons, and for any other incidents, is too vague to prove foreseeability, among other things. Finally, Plaintiff's state law claims against the individual DDSN Defendants should be dismissed pursuant to the Tort Claims Act, which permits only the agency to be named where, as here, no showing was made of malice or other facts requiring that the normal rule not be applied.

Plaintiff's ADA claims were also properly dismissed, but this no longer matters. Plaintiff Mims passed away on March 7, 2015. Only prospective relief was sought under the ADA claim, so that claim became moot upon the death of the Plaintiff. Even if this claim had not been rendered moot, it was correctly dismissed for the reasons set forth in the order below.

Finally, in light of the lack of substantive merit of Plaintiff's claims, it is probably not necessary to consider the effect of the statute of limitations. If the statute is considered, however, it bars most of Plaintiff's claims.

STANDARD OF REVIEW

In determining whether summary judgment is proper, the reviewing court must view all evidence in the light most favorable to the non-moving party. *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 543 S.E.2d 563 (Ct.App.2001). Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id.* (citing *City of Columbia v. ACLU of South Carolina*, 323 S.C. 384, 475 S.E.2d 747 (1996)). In addition, Rule 56(e) provides that "[w]hen 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 . . . must set forth specific facts showing that there is a genuine issue for trial."

ARGUMENT

1. The court below correctly dismissed Plaintiff's Section 1983 claims, because Plaintiff neither pled nor proved facts that would establish liability of supervisory personnel under Section 1983.

The court below dismissed Plaintiff's claims under 42 U.S.C. § 1983, holding that Plaintiff had neither pled nor proved facts that would establish liability of supervisory personnel under Section 1983. R. I, 38-45.[11] (No claim is made that either of these Defendants personally injured Plaintiff or were directly involved with his care.) The governing general legal principles, set forth in the Order at R. I, 39-41 can be

[11] This claim applies only to DDSN Defendants Butkus and Lacy in their individual capacities. Plaintiff has not challenged the circuit court's conclusion that there can be no damage claim under Section 1983 against DDSN itself or the individual DDSN Defendants in their official capacities, and that Plaintiff apparently did not intend to make such a claim. R. I, 37.

summarized as follows:

a. There is no *respondeat superior* liability in connection with claims made pursuant to a Section 1983 claim. *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

b. A necessary element of a § 1983 claim against a government official in his individual capacity is some showing of personal participation by the official. *See, e.g., Wright v. Collins,* 766 F.2d 841, 849-850 (4th Cir. 1985)(defendant in a Section 1983 action must be affirmatively shown to have acted personally in the deprivation of the plaintiff's rights).

c. The only exception to this requirement of personal participation occurs when the claim is brought as a supervisory claim. Such claims require more than simple "failure adequately to supervise or control any conduct that directly caused the specific deprivation charged." *Fisher v. Washington Metro. Area Transit Auth.,* 690 F.2d 1133, 1143 (4th Cir. 1982).

Taking the issue one step further, that is, with specific respect to a Section 1983 claim for supervisory liability, the elements of such a claim were set forth in the frequently-cited case of *Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994). Those elements, of which there are three, are as follows:

1. Actual or constructive knowledge on behalf of the supervisor that the subordinate's conduct was a "pervasive and unreasonable risk" of injury to citizens like the plaintiff;

2. Deliberate indifference or implied authorization of the conduct by the supervisor; and

3. An "affirmative causal link" between the supervisor's inaction and the constitutional injury suffered by the plaintiff.

13 F.3d at 799 (citations omitted). As the court below noted, "[t]he standard for asserting a valid claim for Section 1983 supervisory liability has become so strict that

there is some doubt as to whether such claims are still viable at all:

> As the *Ashcroft v. Iqbal*, [556 U.S. 662], 129 S.Ct. 1937 (2009) Court observed, because masters do not answer for the torts of their servants in § 1983 cases, "the term 'supervisory liability' is a misnomer." *Id.* at [677,] 1949. Indeed, the dissent in *Iqbal* opined that "[l]est there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating [ ] supervisory liability entirely." Id. at [693,] 1957 (Souter, J., dissenting)."

R. I, 40, quoting *Davis v. Richland County*, 2012 WL 6186470, 3, Report and Recommendation adopted, 2012 WL 6186468 (D.S.C. 2012).[12]

The facts of this case do not resemble the kinds of situations typically found in *Shaw* and its progeny. Such cases typically involve unconstitutional acts of harm committed by some specific subordinate who was supervised by the defendant in the case. In *Shaw*, for example, the supervisory defendant was a Highway Patrol supervisor, and the perpetrator of the tort was his subordinate employee. The evidence showed that the supervisor was aware that the subordinate was prone to "pervasive violent propensities" involving "frequent use of excessive force." 13 F.3d at 800. As

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[12] The court below assumed for the sake of argument that Butkus and Lacy actually had supervisory responsibilities over Babcock Center employees, but noted that "it cannot reasonably be claimed by Plaintiff that such persons were in fact employees of DDSN." R. I, 40 n. 5, citing *Young v. South Carolina Dept. of Disabilities and Special Needs*, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). As an additional sustaining ground, these Defendants would point out that 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 is probably not even 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).

a result, summary judgment for the defendant supervisor was denied. The facts in *Slakan v. Porter*, 737 F.2d 368 (4th Cir. 1984), another leading case on supervisory liability under Section 1983, were similar. There, a prison warden and the Director of the North Carolina Department of Corrections both admitted that they had personal knowledge of the use by subordinates of high-pressure water hoses on cell-confined prison inmates, and further admitted that they had approved of the procedures followed in each of the cases involved in the suit. 737 F.2d at 375. In that situation, the Fourth Circuit had no difficulty concluding that the plaintiff's injuries "were a natural and foreseeable consequence of the supervisors' indifference" to the tendency of water hosing to cause injury. *Id.* at 376. Plaintiff cites *Jennings v. Univ. of N. Carolina*, 482 F.3d 686 (4th Cir. 2007), but that case, like *Shaw* and *Slakan*, involved knowledge by a supervisor of the wrongful conduct of a specific subordinate.

Plaintiff has not made a showing of the kind of supervisor knowledge that was made in the cases above. As will be discussed in connection with each of the three incidents specifically argued by Plaintiff in the court below and addressed by that court, Plaintiff has made no showing of knowledge by Defendants Butkus and Lacy that a specific subordinate had been abusive to DDSN clients, or had permitted abuse to DDSN clients to occur in the past. Indeed, assuming that a tortfeasor actually existed in either the ant bite incident or the penis incident, Plaintiff never identified such a person.

a. The Amended Complaint did not allege the necessary elements of a Section 1983 supervisory liability claim.

The court below held that the three elements in *Shaw v. Stroud, supra,* must be pled in the Complaint. R. I, 40-41, citing *Payne v. CCOH,* 2012 WL 6801387, 5 (report and recommendation adopted, 2013 WL 81055 (D.S.C. 2013) (dismissing supervisory liability in part because "none of the three elements for such liability have been pled"); *Mitchell v. Lewis*, 2012 WL 137471, 5 (report and recommendation adopted, 2012 WL 137850 (D.S.C. 2012) (dismissal where "Plaintiff does not allege any facts to show the existence of an affirmative causal link between any alleged injury to Plaintiff and any action or inaction on the part of the defendants"). The Amended Complaint is devoid of allegations that could be read as containing the elements set forth in *Shaw v. Stroud.* In particular, the allegations of the § 1983 cause of action, R. I, 84-85, ¶¶ 64-69, are devoid of reference to any of those three elements.

b. Plaintiff has made virtually no argument in connection with the Section 1983 claims based on the three incidents discussed by the circuit court.

On appeal, Plaintiff's brief contains almost 16 pages of discussion on the Section 1983 claim. Br. of Appellant at 25-40. However, that discussion makes almost no reference to the three specific incidents considered by the court below. Each of the three is addressed below.

1. The August 13, 2000 incident.

This incident involved a Babcock Center employee, Carl Anthony, who was

found to have beaten Plaintiff. He was fired by Babcock, and prosecuted by the Attorney General. *See* R. I, 41 n.3. The circuit court held, with respect to this incident, that "Plaintiff has shown nothing prior to 2000 that would amount to a factual or logical connection between the August 2000 incident and any acts or omissions of Defendants Butkus or Lacy." R. I, 41. On appeal, the portion of Plaintiff's brief pertaining to the Section 1983 claim, Br. of Appellant at 25-40, does not even refer specifically to the August 13, 2000 incident. As a result, the conclusions of the court below that pertain to this incident have not been challenged by Plaintiff.[13]

Even if the Brief of Appellant had contained some discussion of the August 2000 incident involving Babcock employee Carl Anthony, Plaintiff presented no evidence that Anthony had ever previously abused a DDSN client. It follows that Plaintiff did not show any wrongful conduct by Anthony of which Defendants Butkus or Lacy should have been aware. This contrasts sharply with the facts in *Shaw, supra, Slakan, supra,* and *Jennings. supra,* all of which involved repeated abuses in the past by subordinates, as well as knowledge of those abuses by the supervisors. In order to fit within this pattern, Plaintiff had to show that the perpetrator Carl Anthony had committed similar acts of DDSN client abuse and that the individual DDSN Defendants were aware of

[13] The Brief of Appellant does refer to this incident in several other contexts, but it never challenges the circuit court's conclusion that Plaintiff had shown nothing prior to 2000 that would lead to liability under Section 1983. Instead, Plaintiff only refers to actions allegedly taken or not taken after the incident. Br. of Appellant at 29, 36, 42. Such allegations relating to subsequent events obviously cannot establish liability for the August 13, 2000 event itself.

such acts and failed to act to stop them. However, Plaintiff made no showing of prior abusive acts by Anthony. In fact, Plaintiff's counsel did not even inquire of Defendant Butkus at his deposition concerning whether such previous acts by Anthony had occurred, or whether Butkus was aware of them. The sole mention of Anthony at the Butkus deposition was merely a passing reference. R. X, 2558-59. In the deposition of the other individual Defendant, Kathi Lacy, Plaintiff's counsel did not mention Carl Anthony at all. *See* R. VIII, 1925-2025.

Rather than make the showing required by *Shaw* and *Slakan* and their abundant progeny, Plaintiff makes only the kind of showing that those cases have held not to suffice. As held in *Slakan,* and quoted in *Shaw* and many times thereafter,

> Ordinarily, [the plaintiff] cannot satisfy his burden of proof by pointing to a single incident or isolated incidents, for a supervisor cannot be expected to promulgate rules and procedures covering every conceivable occurrence within the area of his responsibilities. Nor can he reasonably be expected to guard against the deliberate criminal acts of his properly trained employees when he has no basis upon which to anticipate the misconduct.

Slakan, supra, 737 F.2d at 372-73 (quoted in *Shaw*, 13 F.3d 1391. Plaintiff here instead "point[s] to a single incident," and asks that the supervisory personnel "guard against the deliberate criminal acts of [others] when [they have] no basis upon which to anticipate the misconduct." For these reasons, any claim based on the August 13, 2000 incident is clearly barred for lack of the required proof.

2. The July 27, 2004 ant bite incident.

This incident occurred at Kensington, the Babcock facility to which Plaintiff had been moved two years earlier. 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.

On appeal, Plaintiff makes no reference to this incident in the course of the argument pertaining to Section 1983, except to refer to post-incident actions. Br. of Appellant at 42. Plaintiff does argue in another section of the brief that the court below should not have dismissed the claim based on this incident. Br. of Appellant at 15-16. However, that argument is based only on certain very general statements about sanitation in reports dated 2007 and 2005, that is, after the ant bite incident. Plaintiff's brief inaccurately characterizes both of those reports as being dated 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. The reports accordingly do not provide support for Plaintiff's claim with regard to the 2004 ant bite incident. In any event, the reports appear generally to refer to kitchen sanitation issues, and not to a situation where ants

got into a bedroom.

The kind of proof that Plaintiff needed to provide in order to establish Section 1983 supervisory liability for this incident would have been a showing that there were other ant bite incidents in the past, that the individual Defendants knew of them, and that they took no action to prevent them. No such facts have been shown. This claim is therefore unsupported, and was properly dismissed.

3. The unexplained penis injury on May 27, 2005.

The third and last specific incident discussed by the circuit court order was the unexplained penis injury that occurred on May 27, 2005. As the Order below has described it, this injury consisted of a superficial tear of unknown origin on the bottom of the Plaintiff's penis that occurred on May 27, 2005. R. I, 42, citing R. III, 468-486 (Incident Report for May 27, 2005 incident). The incident occurred while Plaintiff was by himself at a Babcock Center facility for a moment while his caregiver went to get clothing for him prior to his going home for the weekend. R. III, 470. The tear lengthened somewhat as it was examined by a nurse, and lengthened still further upon examination by a doctor. *Id.* Eventually, it was four centimeters long and required seven stitches. *Id.* It was described by the treating physician at Lexington Medical Center as a "superficial laceration." R. XI, 3317.[14]

The circuit court further noted that the clinicians at Lexington Medical Center,

[14] Although this event has not been proven even to have been an assault, as opposed to an unexplained accident, the Brief of Appellant at pp. 28, 32 and 34 hyperbolically refers to it as a "sexual assault."

where Plaintiff was immediately taken upon discovery of the injury, did not believe that the injury was the result of abuse or neglect. R. I, 42. (Plaintiff was first taken to a Doctors Care facility, but that entity was closing for the evening, so he was taken to the Lexington Medical Center emergency room instead. R. III, 489.) As a result, the clinicians permitted Plaintiff to return to Babcock that same evening. *Id*, citing R. III, 470. A medical consultant from DDSN, Dr. Graeme Johnson, examined Plaintiff several days later. He concluded that the cause for the laceration was unknown, but that it did not appear to have resulted from abuse or neglect. R. III, 488-90. The injury apparently healed quickly and without incident. *Id.*

The Order below held that this was a factually unique incident whose cause was found to be unknown. R. I, 33, citing R. III, 488-90. The court further held that this injury "was not foreseeable, and therefore no action by a supervisor can logically be said to have been necessary to prevent it, much less that there was in fact any causal connection between the injury and action or inaction by the DDSN Defendants." R. I, 43. The court then held, citing and quoting *Shealy v. Doe*, 370 S.C. 194, 204, 634 S.E.2d 45, 50 (Ct. App. 2006), that "[f]or circumstantial evidence to be sufficient to warrant the finding of a fact, the circumstances must lead to the conclusion with reasonable certainty and must have sufficient probative value to constitute the basis for a legal inference, not for mere speculation." The court concluded that Plaintiff had produced "nothing to show an 'affirmative causal link' between some act or omission of the defendants and the penis injury." *Id.* As a result, the court held that this

incident, like the others discussed above, could not serve as the basis for a Section 1983 claim by Plaintiff. *Id.* Given that the cause of this injury was completely unknown, and therefore not shown to have been a result of client abuse, there was simply no previous similar incident that would have put these Defendants on notice that they should have done something to prevent such occurrences in the future. Nor was this incident shown to have been an act of some specific person, much less a person under DDSN's supervision.

As with the other two incidents discussed above, Plaintiff's brief on appeal makes no real challenge to the circuit court's conclusions on this issue. The incident is briefly mentioned at pp. 33-34 of the Brief of Appellant, but Plaintiff offers nothing to rebut the court's conclusion that there was no evidence that the injury was the result of an assault by anyone.[15]

Plaintiff does seek to make a "but for" causation argument in connection with this incident, claiming that if DDSN had not sought the judicial commitment of Mims, or allegedly refused to release him to his mother's home, this incident would not have happened. Br. of Appellant at 40, 42. However, the Fourth Circuit has specifically that that such a theory of causation does not satisfy the "affirmative causal link" standard. *Spell v. McDaniel*, 824 F.2d 1380, 1388 (4th Cir. 1987)("there must be proven at least an 'affirmative link' between policy or custom and violation; in tort principle terms,

[15] The incident is also mentioned in passing on p. 14 of the Brief of Appellant, again without any attempt to make a specific challenge to the court's conclusion regarding it.

the causal connection must be 'proximate,' not merely 'but-for' causation-in-fact").

For all three of the incidents above, the circuit court held that "it is probably not even necessary to discuss the other two elements of the supervisory liability tests, [because] it is obvious from the discussion above that Plaintiff has not shown anything that would satisfy either of them." R. I, 43. However, the court went on to discuss those elements, holding that

> [t]here has simply been no showing of anything at all that would have provided prior notice to Butkus or Lacy that the 2000 beating was likely to occur, or that the 2004 ant bite incident was likely to occur, or that the 2005 penis incident was likely to occur. In other words, Plaintiff has not provided any evidence that these Defendants were on notice of a problem which affirmatively caused an injury to Plaintiff and responded inadequately to it. All Plaintiff has cited, without trying to argue a logical connection to any injury, is that other events of other kinds occurred at Babcock facilities, often at times after the events involving Plaintiff, and in any event not connected to the kinds of injuries that occurred with respect to Plaintiff.

R. I, 43-44.

c. Plaintiff's other contentions concerning the Section 1983 claims are likewise unavailing.

In addition to the three specific incidents of physical injury discussed above, Plaintiff has also made certain other contentions which are claimed to support a Section 1983 claim. These were considered and dismissed by the circuit court for the reasons set forth below.

1. The 2001 Probate Court order.

At various points in the discussion of the Section 1983 claim in the Brief of

Appellant, Plaintiff seeks to make what is in effect a collateral attack on a 2001 Consent Order in the Probate Court that provided for Plaintiff's commitment to a facility for the developmentally disabled. *See, e.g.* Br. of Appellant at 22. Counsel for Plaintiff, counsel for his mother, and the GAL all agreed to that Consent Order. R. III, 530-532. Plaintiff claims that the Consent Order was obtained because "defendants" (sometimes referring only to Babcock Center Defendants and sometimes not specifically limited to them) supplied "false information" to the GAL at the time, Ms. Leigh Flynn. This claim is made no fewer than four times. Br. of Appellant at 19, 22, 30.[16] However, Plaintiff's brief misstates the record in a substantial way by failing to make it clear that while the guardian ad litem had originally said in her 2009 affidavit that she was misled in 2001 about conditions at Babcock both by Babcock Center employees and by DDSN employees, she later repudiated those statements in her deposition, to the extent that they related to DDSN employees. At the deposition, she testified that in fact, she was unaware of any false information having been provided to the Probate Court by DDSN or its employees notwithstanding statements to that effect in her affidavit. R. V, 1076-1091, and 1078, lines 16-18. As a result, the court below held that there was no need to consider the contentions of Plaintiff's counsel pertaining to alleged false information provided by DDSN to the Probate Court in 2001, because those contentions were based solely on portions of affidavits that the affiants later

[16] Only one of the four references, the second reference on p. 22, is specifically limited to Babcock Center personnel.

contradicted in their depositions. R. I, 44[17] (The affidavit of Plaintiff's mother is discussed below.)

Plaintiff's counsel at one point nevertheless recklessly states that "each supervisory defendant" provided "false and misleading information to the [Probate] court for the purpose of preventing [Plaintiff] from leaving Babcock." Br. of Appellant at 32. This latter statement is completely without foundation in the record and should be disregarded. Similarly, it is stated at p. 22 of the Brief of Appellant, citing only the recanted Flynn affidavit, that "defendants and their agents kept from the GAL the fact that Mims had been beaten by a Babcock Center employee." Again, to the extent that this statement might be read to include the DDSN Defendants, it is either a careless or a reckless misstatement of the record. At another point in the Brief of Appellant, the 2001 judicial admission is referred to as a "fraudulent and illegal action by DDSN." *Id.* at 25. Still again, this is a statement based on evidence that was recanted. On p. 29 of the Brief of Appellant, there is a reference to "defendants' best efforts . . . to deceive the GAL and Probate Court. . . ;" a similar reference is made on p. 38, where it is stated that the GAL "provided a sworn statement that she was provided false and misleading information by defendants in order to involuntarily commit Mims to DDSN. . . ." As already shown, this "sworn statement" was

[17] The affidavit of Mrs. Mims, presumably drafted by Plaintiff's counsel, averred that DDSN employees "told lies about me" at the 2001 hearing. R. XI, 3270, ¶ 13. In her deposition, though, she agreed that she did not "know of any false or misleading information that was ever provided to the Probate Court in South Carolina in regard to Edward." R. V, 1093, lines 15-21.

subsequently recanted by the affiant, to the extent that it pertained to the DDSN Defendants. It is difficult to see how Plaintiff's counsel can cite in good faith, not once but a number of times, an affidavit that was very specifically disavowed.

On appeal, Plaintiff argues that "the lower court ignored the affidavit and testimony of Attorney [more properly GAL] Flynn. . . ." Br. of Appellant at 30. However, Plaintiff never mentions the court's holding with regard to Ms. Flynn's recantation of her affidavit to the extent that it pertained to the DDSN Defendants. In any event, the court below correctly dismissed this contention, holding 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. This conclusion has not been challenged and was clearly correct. The dismissal of this claim should therefore be affirmed.

2. Plaintiff's "obstruction" claims.

Plaintiff's brief frequently asserts that one or more of the DDSN Defendants participated in the 2005 Probate Court proceedings pertaining to guardianship. *See, e.g.*, Br. of Appellant at 13-14, 28, 32, 36, 38. It is true that DDSN participated in those proceedings, R. XII, 3383-87, because among other things, DDSN believed that Mrs. Mims would not make the best guardian. However, Plaintiff never mentions that these efforts by DDSN had absolutely no effect on the outcome of the proceedings. Mrs. Mims was appointed guardian in 2005 over DDSN's objections, R. XII, 2195-

97. and Plaintiff was permitted to return to his mother's home. Plaintiff's assertions on this point therefore are directed at acts that had no effect on him.

d. Plaintiff's brief ignores the requirements of Rule 56(e).

Throughout the Brief of Appellant, regarding both the Section 1983 claim and the other claims, Plaintiff continuously errs in relying on the Amended Complaint in order to try to defeat these Defendants' Motion for Summary Judgment. *See, e.g.,* Br. of Appellant at 27, in which Plaintiff asks the Court to review this matter "looking at Mims' amended complaint and drawing all reasonable inferences in his favor. . . ." Other similar statements are found in the Br. of Appellant at pp. 31-32.

In relying on Plaintiff's pleadings, Plaintiff seeks to do exactly what Rule 56(e) says cannot be done. That rule 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. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

As the appellate courts of this state have held many times, in opposing summary judgment, "[t]he nonmoving party must present specific facts showing a genuine issue for trial." *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008)(citing several other cases to the same effect). The court below correctly disregarded Plaintiff's efforts to rely on the Amended Complaint in opposing these Defendants' Motion for Summary Judgment.

e. Plaintiff's claim based on alleged policies by the DDSN Defendants was never pled, and no such policies have been shown.

Seeking to argue another unpled claim, Plaintiff couches his Section 1983 claim in part on a body of case law pertaining to official policies. *Moore v. City of Columbia*, 284 S.C. 278, 326 S.E.2d 157 (Ct.App. 1985), cited by Plaintiff in support of this claim, holds that the complaint in such cases must "plead three elements: (1) an official policy or custom (2) that causes the plaintiff to be subjected to (3) a denial of a constitutional right." 284 S.C. at 285, 326 S.E.2d at 161. There is no mention of this "official policy" argument anywhere in the Amended Complaint, so the issue is not properly before this Court, and should be disregarded for that reason alone.

If the merits of this belated claim are nevertheless considered, it still fails. Plaintiff never identifies a specific policy of the DDSN Defendants that caused injury to Plaintiff. Instead, Plaintiff asserts that these Defendants should be held liable because "[o]fficial policy may be established by the omissions of supervisory officials as well as from their affirmative acts." However, as discussed elsewhere in this brief, Plaintiff never seeks to tie any specific injury to Plaintiff to any specific acts or alleged omissions of the DDSN Defendants, much less to any course of action that might be deemed to constitute a policy. By contrast, in *Slakan, supra,* for instance, it was clear that the supervisory defendants had knowledge of "the excessive and unregulated use of water hoses against unarmed, securely confined inmates in North Carolina's Central Prison" and did not to stop it. *Slakan, supra,* 737 F.2d 368 at 376. The use of water hoses in that

fashion was the specific cause of the injuries in that case. In the present case, however, Plaintiff makes no such connection between alleged acts or omissions of the Defendants and any specific injury alleged by Plaintiff. As a result, this claim by Plaintiff should be dismissed even if it were to be held to be properly before the Court.

2. The circuit court correctly dismissed the claims for negligent supervision, negligence and gross negligence, because Plaintiff's only showing was either vague and conclusory or nonexistent.

The circuit court dismissed Plaintiff's Third Cause of Action (Negligent Supervision) for several distinct reasons:

a. The claim is barred by applicable statutes of limitations (discussed under Issue 4, below). R. I, 48-49 (This issue is discussed under Issue 3 below.).

b. The Tort Claims Act renders the two individual DDSN Defendants immune from suit. R. I, 49-50.

c. In any event, Plaintiff has cited no specific evidence in support of this claim. R. I, 50-52.

a. Negligent supervision.

As the lower court held, a plaintiff in a negligent supervision claim must prove that "a specific person created an undue risk of harm . . . . *Bank of New York v. Sumter County*, 387 S.C. 147, 156, 691 S.E.2d 473, 478 (2010)." R. I, 50 (emphasis added). The full quote from that case is as follows: "[T]his cause of action lies in circumstances where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public. . . ." *Id.* The Court in

Bank of York affirmed the grant of summary judgment for the defendant in that case, holding that "[t]here is no evidence here that [the defendant] knew or should have known that Evans or Holloman posed an undue risk of harm to the public." *Id.* (internal quotation marks omitted). Plaintiff's brief on appeal does not even mention the *Bank of York* case on which the lower court relied.

The first specific incident referenced by Plaintiff under this heading is the May 27, 2005, penis incident. Br. of Appellant at 41. However, there is no proof that this incident was even caused by the action of some specific person other than Plaintiff himself. Given this absence of proof that "a specific person created an undue risk of harm," as *Bank of York* requires, there is no foundation for a negligent supervision claim regarding this incident.

With regard to the August 13, 2000, beating of Plaintiff by Babcock Center employee Carl Anthony, Plaintiff makes several references to this incident in the course of arguing the negligent supervision claim. Br. of Appellant at 42-43. Again, however, there has been no suggestion whatsoever by Plaintiff that the employment (by Babcock) of Carl Anthony posed an undue risk of harm to Babcock's clientele. This failure of proof is fatal to the negligent supervision claim as to this incident.

Plaintiff has not tried to argue that there is a viable state law supervisory negligence claim for the ant bite incident. Nor does Plaintiff cite a specific supervised person as the tortfeasor in connection with the penis incident or any other incident passingly referenced in the Brief of Appellant. The court below therefore correctly

dismissed the negligent supervision claim.

b. Negligence.[18]

The discussion of negligence in Plaintiff's Issue 5, Br. of Appellants at 40-47, is too vague to support Plaintiff's claim. As the court below held, "Plaintiff sets forth a lengthy version of the facts on the one hand, coupled with a general discussion of legal principles on the other hand, but Plaintiff completely fails to connect the two." R. I, 51. The Brief of Appellant adds another layer of vagueness to this, citing various findings of general deficiencies on the one hand and various alleged but largely unspecified injuries to Plaintiff on the other hand, but again without a factual or logical connection between the two.[19]

A careful review of the negligence arguments in Plaintiff's brief on appeal (pp. 40-47) shows that very few specific instances of alleged injury are mentioned. No factual connection to the DDSN Defendants has been shown in those few instances.

The first specific incident is the 2005 penis incident, which is referenced at pp. 41 and 46 of the Brief of Appellant. As already shown above, it is undisputed that the

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[18] The circuit court noted that Plaintiff apparently was seeking to extend the Third Cause of Action, labeled "Negligent Supervision," to negligent acts in general, but did not find it necessary to rule on whether negligence was actually raised in the Amended Complaint. R. I, 50 n.13. The DDSN Defendants submit that that the claim should be not be thus extended, but this probably does not matter, since the negligence claim was not proven.

[19] On p. 42 of the Brief of Appellant, Plaintiff string-cites ten different reports about Babcock facilities, but nine of the ten are dated after the events of which Plaintiff complains. The other report, R. VI, 1246-62, is a 2003 report concerning the Kensington facility, but Plaintiff has not shown any connection between any finding in that report and the 2004 ant bite incident that the report preceded.

cause of this injury was unknown. When the cause of an injury is unknown, a negligence claim cannot be made. *See, e.g., Bush v. Weston & Brooker Quarry Co.,* 105 S.C. 509, 90 S.E. 158, 159 (1916)("[w]hen the evidence leaves the cause of the injury unproved, it cannot be attributed to the defendant's negligence").

The second specific incident of alleged negligence is the 2000 incident involving Babcock employee Carl Anthony. Br. of Appellant at 42. As has also been discussed above, Plaintiff showed nothing that would cause it to have been foreseeable to these Defendants that Anthony would be likely to beat the Plaintiff. As a result, no negligence has been shown in connection with this event.

Other alleged injuries mentioned in the Brief of Appellant are discussed therein only briefly. On p. 42-43, Plaintiff mentions an alleged injury in September 2000, but concedes that no cause for it is shown in the records. Moreover, the only support in the record for this is "BC 3356," a document that does not appear to have been presented to the lower court; as a result, this claim should not be considered. On p. 43, there is a very brief and passing mention of other alleged injuries, but no attempt to present specific facts indicating how those should have been prevented by these Defendants. (The only record support for those claims, including ones listed on pp. 42 and 43 as "Mims 2090" or "Mims 2091," consists of pages with "BC" numbers that apparently were never presented to the lower court; some of those pages are erroneously cited as "Mims" numbers, but they are not, except for Mims 2091, which is not a medical record, but only a chronology prepared by Plaintiff's counsel.) The

last such reference is at the bottom of p. 42, which refers to other "unexplained injuries," without even the semblance of a cite to the record, much less a connection to the DDSN Defendants.[20]

The court below held that Plaintiff's showing with regard to negligence failed to satisfy the requirement of Rule 56(e) that the party opposing summary judgment must set forth must set forth specific facts showing that there is a genuine issue for trial. R. I, 51. Plaintiff's showing on appeal is no more specific, and the Order below should therefore be affirmed on this point.

Plaintiff makes a different "but for" causation argument in this context. As stated on appeal, this argument is that "'but for' Butkus' decision not to release Mims from confinement at Babcock Center" he would not have suffered certain injuries. Br. of Appellant at 40, 42. This argument was not presented in the lower court, and should be disregarded for that reason. Plaintiff did offer a "but for" argument in the circuit court, but it was different: instead of arguing that Butkus improperly decided not to release Plaintiff from Babcock, as is now argued on appeal, Plaintiff argued in the lower court only that "'[b]ut for' the fraudulently [sic] obtained involuntary admission in 2001," certain injuries would not have occurred. R. III, 610 (emphasis added).

If the Court nevertheless elects to consider this unpreserved issue, the first

[20] Plaintiff's Issue 2 on appeal claims that the circuit court erred in not considering events that occurred prior to the start date of the running of the statute of limitations, but Plaintiff cites no specific evidence from this period that he argues should have been considered.

answer to it is that after the Probate Court had entered its 2001 Consent Order admitting Plaintiff to DDSN, Plaintiff's remedy was for his representatives to seek to have that Order abrogated, which in fact is what later occurred. The second answer to Plaintiff's "but for" causation argument is that even if it is factually correct, which these Defendants deny, it only establishes causation in fact. *Hurd v. Williamsburg Cnty.*, 353 S.C. 596, 611, 579 S.E.2d 136, 144 (Ct. App. 2003) *aff'd*, 363 S.C. 421, 611 S.E.2d 488 (2005). Plaintiff still has to show legal cause, that is, foreseeability, *id.*, which as shown above, has not been done.

c. Gross negligence.

Plaintiff makes no specific argument at all with respect to gross negligence, other than to make bare, conclusory references to this concept in the first and last paragraphs of Plaintiff's Issue 4. Br. of Appellant at 40, 47. Plaintiff has therefore effectively abandoned any claim based on gross negligence.

d. Tort Claims Act.

The circuit court held that pursuant to the Tort Claims Act, the two individual Defendants, Butkus and Lacy, were immune from Plaintiff's negligence claims. R. I, 49-50. As that court held, that act "constitutes the exclusive remedy for any tort committed by an employee of a governmental entity. S.C. Code Ann. § 15-78-70(a)." R. I, 49. The same subsection provides further that an employee of a governmental entity is immune from liability for tortious acts committed within the scope of his official duties." R. I, 49, citing *Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413, 417-18 (Ct.App.2003).

This rule, of course, does not apply when the employee commits actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. S.C. Code Ann §15-78-70(a) and (b).

As the court below noted, Plaintiff neither alleged nor proved any of those exceptions. R. I, 49. Instead, 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.

On appeal, as has been the case for so many of Plaintiff's other arguments, Plaintiff seeks to argue a new theory for the first time, namely, an assertion that "defendants maliciously violated Mims' due process rights by knowingly providing false information to the [Probate] court in order to prevent him from leaving the Babcock Center not once, but twice." Br. of Appellant at 19. In addition to being untimely, this argument also fails on its merits. To the extent that this assertion pertains to the 2001 proceedings, it has already been shown above that the evidence on which Plaintiff relies for this argument was recanted. The second alleged instance of "providing false information" is apparently a reference to DDSN's filing a brief objecting to the appointment of Plaintiff's mother as his guardian, and suggesting that his sister would be a better guardian if one were to be appointed. R. XII, 3383-87. No reason is given by Plaintiff as to how that filing contained "false information," or why it was "malicious" for that filing to have been made. As a result, this belatedly-raised claim of "malice" fails on its merits.

3. Plaintiff's vague ADA claims have been rendered moot by his death, but were properly dismissed.

Plaintiff's Fourth Cause of Action pertains to the Americans with Disabilities Act and the Rehabilitation Act. R. I, 88-89. This vague claim asserts only that the DDSN Defendants have not, in acts that are not specified, provided Plaintiff with services in the most integrated setting appropriate to his needs. R. I, 88, ¶ 83.[21] As the court below noted, "[t]he only specific allegation of the Amended Complaint in this regard is the assertion in Paragraph 52 of the Amended Complaint that 'Defendant Lacy [in 2005] denied Plaintiff's request for adult health care services, requiring Plaintiff to appeal eligibility for those services.'" R. I, 52. The court below noted that any issue about that 2005 denial was rendered moot by a 2006 DHHS decision that reversed DDSN's 2005 decision, ruling in favor of Plaintiff on this point. R. I, 52-53.

Plaintiff's argument on appeal concerning the ADA claim, Br. of Appellant at 48-50, is devoid of even a single reference to the record indicating any specific service that was being denied by DDSN. The circuit court noted a similar absence of a specific claim of a denial of services, except for one unpled claim of an alleged 2013 denial. R. I, 53. Even that untimely claim has not been mentioned by Plaintiff on appeal. Since Plaintiff

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[21] Plaintiff's ADA claim is characterized by Plaintiff as one for prospective relief. Br. of Appellant at 48, and Plaintiff does not suggest that this case presents a damage claim under the ADA. If indeed the ADA claim involves only prospective injunctive relief, as would appear to be the case, it has been rendered moot by the death of the Plaintiff. *See, e.g., Tandy v. City of Wichita,* 380 F.3d 1277, 1290 (10th Cir. 2004)(plaintiff's claims for prospective relief were mooted by his death "because once dead, he is no longer under a real and immediate threat of repeated injury").

has never presented evidence of a denial of services that might trigger an ADA claim, the court below correctly dismissed that claim.[22]

4. Most of Plaintiff's claims are barred by applicable statutes of limitation.

The first thing to be noted about the statute of limitations issues in this case is that none of them need to be reached at all, if the Court affirms the Order below granting summary judgment on the merits of all of Plaintiff's claims. If, however, it turns out to be necessary for the statute of limitations to be addressed on appeal, the DDSN Defendants submit that the statute bars most of Plaintiff's claims. It should be noted that in the prior appeal in this case, the Supreme Court expressly did not address the issue of whether the statute had run. *Mims*, *supra,* 399 S.C. 341, 348 n.3, 732 S.E.2d at 398 n.3.

a. For purposes of the statute of limitations, this case was commenced on May 12, 2008, the date of the service of the Summons and Amended Complaint.

The first issue to be determined in considering the limitations issues is whether this action was commenced on May 29, 2007, when the original, never-served, Complaint was filed, or whether it commenced on May 12, 2008, when the second Summons and attached Amended Complaint were served. As the court below held, *S.C. Code Ann.* § 15-3-20(B) provides that "[a] civil action is commenced when the

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[22] In addition, it should be noted that an ADA claim based on a denial of services is not ripe for adjudication until the appropriate agency has denied a request for services. *See, e.g., Peter B. v. Buscemi,* 2013 WL 869607, at *10 (D.S.C. 2013)(ADA claim unripe when final decision of ineligibility was still pending). No suggestion was made that there was an agency denial of services other than the one in 2005 that was reversed.

summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing." R. I, 48-49. Rule 3, SCRCP, is in accord. The court below further held that the complete absence of service of the 2007 Summons and Complaint meant that this suit could not be deemed to have commenced any earlier than the date the Plaintiff first filed the Amended Complaint, which was May 7, 2008. *Id.*

On appeal, Plaintiff does not mention or directly challenge this conclusion, although Plaintiff does claim that the "amended complaint relates back to the filing of the amended complaint." Br. of Appellant at 12. The only authority cited for this argument is *Thomas v. Grayson*, 318 S.C. 82, 456 S.E.2d 377 (1995). However, in that case, the original complaint had been duly served and answered prior to service of the Amended Complaint, so that case is not relevant to the issue of whether an unserved complaint commences an action for purposes of the statute. Section 15-3-20(B) makes it clear that an action is commenced only by filing plus service of the Summons and Complaint. In this case, service did not occur until May 12, 2008, when the Summons was served for the first time, along with the Amended Complaint. Accordingly, that 2008 date will be considered the date on which this action was commenced for purposes of the statute of limitations.

b. No tolling of the statutes of limitations occurred until Plaintiff was adjudicated to be incapacitated in June 2005.

Plaintiff has sought to rely on the tolling provisions of S.C. Code Ann. § 15-3-

40(2). The court below held that S. C. Code Ann. § 44-26-90 provides that a mentally retarded person has all the rights of citizenship unless and until the person is adjudicated to be incompetent and that Plaintiff was not so adjudicated until June 2005. R. I, 55-56. Plaintiff argues that this issue was decided unfavorably to Defendants' position in *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006). However, the holding of that case was that the action had been filed within two years of the events in question, so there was no issue of tolling to be decided in that case. Plaintiff also cites *Wiggins v. Edwards*, 314 S.C. 126, 442 S.E.2d 169 (1994), which discussed the general rule as to the standard for insanity under tolling statutes, but did not find the plaintiff "insane," and therefore did not address Section 44-26-90's requirement that there be an adjudication of incompetence. Finally, Plaintiff cites language in *Harrison v. Bevilacqua,* 354 S.C. 129, 580 S.E.2d 109 (2003), but that case also did not involve § 44-26-90.

Plaintiff also erroneously contends that he was adjudicated to be incapacitated in 2001 in the Consent Order issued by the Probate Court in that year. Br. of Appellant at 4. However, while the 2001 Consent Order made reference to his mental retardation, it did not make an adjudication of incapacity, as § 44-26-90 expressly requires. The 2005 Probate Court Order, on the other hand, does contain the requisite finding, specifically holding that "Edward Mims is incapacitated. . . ," and appointing a guardian for him for the first time. R. XII, 3391.

As the circuit court held, quoting *Stephens v. Draffin*, 327 S.C. 1, 5, 488 S.E.2d

307, 309 (1997), "[a] cause of action accrues at the moment when the plaintiff has a legal right to sue on it." R. I, 56. As applied in this case, this rule means that Plaintiff's causes of action accrued as they occurred. The lower court therefore concluded that "[b]ecause the Plaintiff had not been adjudicated incompetent at the time that the allegations contained within his Complaint arose, he is not entitled to the tolling provision of S.C. Code Ann. § 15-3-40(2), and the applicable statutes of limitations bar all of the Plaintiff's claims other than the claims brought pursuant to 42 U.S.C. § 1983 involving the unexplained injury discovered on May 27, 2005 and the alleged detention on June 10, 2005" [the latter claim has been abandoned]. R. I, 56.

c. Alternatively, the appointment of a guardian in June 2005 ended any tolling that occurred under S.C. Code Ann. § 15-3-40(2).

The court below alternatively held that the appointment of a guardian terminated the disability period, leaving the guardian with one more year in which to file an action, that is, until June 2006 for any claims for which the applicable statute would otherwise have run. R. I, 56-58. Section § 15-3-40(2) provides that the tolling period "cannot be extended (a) more than five years by any such disability, except infancy; nor (b) in any case longer than one year after the disability ceases."

The circuit court recognized that courts have taken differing views on this issue, but held that the better rule was that the appointment of a guardian terminated the disability period. The court cited *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.[23] Other cases to the same effect were cited by the court below. R. I, 57.[24]

Plaintiff argues on appeal that the other cases cited by the court below should be disregarded, but these efforts are unavailing. Plaintiff argues that *Fox v. Health Force, Inc.*, 143 N.C.App. 501, 507, 547 S.E.2d 83, 87 (2001) is inapposite, but in fact, it was there held that "[o]nce [plaintiff's] guardian was appointed to represent her interests, the limitation period began to run from the time of the appointment". The case was subsequently cited as so holding in a later North Carolina case, *Davis v. Sugarman*, 192 N.C. App. 275, 664 S.E.2d 666 (2008). Plaintiff also cites several cases from New York in response to *Hernandez v. New York City Health and*

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[23] Plaintiff incorrectly suggests that *Stewart v. Robinson* "contradicts" a prior New Hampshire state court case. However, in that case, the Supreme Court of New Hampshire specifically stated that it was not considering the application of the disability tolling provision., *Coffey v. Bresnahan*, 127 N.H. 687, 694, 506 A.2d 310, 315 (1986).

[24] In *Sims v. Amisub of South Carolina*, 408 S.C. 202, 217, 758 S.E.2d 187, 195 (Ct. App., Feb. 12, 2014, certiorari granted, Nov 19, 2014), this Court held that authorities to this effect were "persuasive," but did not find it necessary to reach this precise issue.

Hospitals Corp., 78 N.Y.2d 687, 694, 585 N.E.2d 822, 826 (1991), a New York case cited in the Order. However, while those cases distinguish *Hernandez*, none of them overrule it.

The circuit court described the effect of this rule on Plaintiff's claims as follows:

> As applied to the facts of the present case, the appointment of the guardian in June 2005, extended the statute of limitations by one year for all of the older claims. §15-3-40(b). In other words, for any claim for which the statute would otherwise already have run as of June 2005, Mrs. Mims had until June 2006 to bring suit upon such claims. She did not, however, file a lawsuit between June 2005 and June 2006. For any claim for which the statute had not run as of the time of her appointment as guardian in June 2005, she could bring suit on such claims within the time remaining on the statute for such claims, or within one year of her appointment, whichever was longer. This does not add any viable claims to this case in addition to the ones from May and June 2005 discussed above. The next most recent claim is an ant bite incident alleged to have occurred in July 2004. The appointment of a guardian did not extend the time for filing suit on this 2004 claim as far out as May 2008, the time when the present action was served. Absent tolling, the state law action on this claim could have been filed as late as July 2006 (two years after July 2004), while the federal law action on this claim could have been filed as late as July 2007 (three years after July 2004). However, both of these dates were more than a year after Mrs. Mims' appointment as guardian in June 2005, so the tolling statute did not add any time to that which already existed.

R. I. 57-58. In other words, if tolling ended with the appointment of a guardian in June 2005, the only claims not time-barred would be those for the occurrences in May and June 2005.

d. Statutory periods.

The applicable statute of limitations for the Section 1983 claims is the three-year statute, § 15-3-530(5), as the court below held. R. I, 37, citing *Hoffman v. Tuten*, 446 F.Supp.2d 455 (D.S.C. 2006)(three-year statute of limitations applies to claims brought in South Carolina under 42 U.S.C. § 1983).[25] The applicable statute for the state tort claims is found in the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-110. That section, as the court below held, provides for a two year statute of limitations after the "date the loss was or should have been discovered." S.C. Code Ann. § 15-78-110. R. I, 48. Finally, as to the ADA claims, the court below held that the applicable statute is the one-year statute of limitations found in the South Carolina Human Affairs Law (SCHAL), S.C. Code Ann. §§ 1-13-10, *et. seq*. R. I, 53, citing *Cockrell v. Lexington County School District One*, 2011 WL 5554811 (D.S.C. 2011) and *Mestrich v. Clemson University,* 2013 WL 842328 (D.S.C. 2013). Plaintiff has argued that these periods should be tolled, but has not taken issue with the fact that unless tolled, they are the applicable periods, except for the ADA claim.[26]

e. Application of the statute to various claims.

If the applicable statutes of limitation apply without tolling, as these Defendants

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[25] *Hoffman* involved a claim against federal agents under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), but the court in *Hoffman* noted that *Bivens* actions are governed by same statute of limitations as § 1983 actions. 446 F. Supp. 2d at 459.

[26] Plaintiff takes issue with the federal cases on which the circuit court relied in applying a one-year statute to the ADA claim, Br. of Appellant at 49-50, but cites no authority at all in support of that argument.

have contended, then all of Plaintiff's claims are time-barred except for the Section 1983 claims relating to the May 27, 2005 penis incident and the now-abandoned June 2005 incident of alleged detention. Conversely, if the five-year tolling period applies, as Plaintiff has argued, then the only claims that are time-barred are occurrences prior to May 29, 2000 (as to the three-year statute) and prior to May 29, 2001 (as to the two-year statute). Plaintiff does not mention the one-year statute for the ADA claims in this part of his brief, but if that statute applies, it would bar any occurrences prior to May 29, 2007.

Set forth below is a discussion of how the statutes would apply if this Court were to accept the circuit court's alternative holdings about the running of the statutes if tolling was present, but ended with the appointment of the guardian in June 2005.

1. The August 13, 2000 incident.

The tolling statute, S.C. Code Ann. § 15-3-40(2), provides that for a person with a mental disability, the operation of the applicable statute of limitations can be tolled for up to five years, or one year after the disability ceases. If the five-year tolling provision applies, as Plaintiff argues, it can be seen that for the August 13, 2000, incident, the respective statutes started to run on August 13, 2005.

As applied to the August 13, 2000, incident, it can be seen that the two-year statute ran out on August 13, 2007, and that any claims under the Tort Claims Act and arising from the August 13, 2000, incident were accordingly barred by the two year statute.

This leaves the question of whether, assuming that the action was commenced on May 12, 2008, the three-year statute bars the Section 1983 claim against the two individual DDSN Defendants, Butkus and Lacy, based on the August 13, 2000, incident. If the appointment of a guardian for Plaintiff in June 2005 ended the tolling period, leaving the guardian with one more year after her appointment in which to file the action, then Plaintiff had only until August 2006 in which to file the Section 1983 claim. This did not occur, so under this scenario, the Section 1983 claims are time-barred.

2. The July 27, 2004 ant bite incident.

If the appointment of the guardian in June 2005 ended the disability period, the two year statute for this incident ran out on July 27, 2006, and the three-year statute ran out on July 27, 2007. (Both of these dates are more than one year after the appointment of the guardian.) Since this action can only be deemed as having commenced in May 2008, when it was served, then the July 24, 2004, ant bite claim is completely barred by the applicable statutes of limitation.

3. The May 27, 2005 penis injury.

With regard to the unexplained penis injury on May 27, 2005:

a. The 2008 Amended Complaint was timely for purposes of the three-year statute.

b. If the appointment of the guardian in June 2005 ended the disability period, then the two year statute ran out on May 27, 2007. The filing of the unserved original Complaint did not serve to commence the action, as discussed above. The appointment of

the guardian in June 2005 did not extend the time for filing this claim, because there was more time remaining in which to file it than would have been created by the one-year extension that was created by the one-year extension under , § 15-3-40(2)(b).[27]

4. ADA claims.

Again, Plaintiff's ADA claims have been rendered moot by his death, since only prospective relief was sought. The court below properly dismissed those claims as untimely while he was still living.

f. Plaintiff's equitable tolling argument has been raised for the first time on appeal, and in any event is without merit.

In still another argument made for the first time on appeal, Plaintiff asserts a claim of equitable tolling with respect to the statute of limitations. Under well-settled principles, a contention never asserted to the trial court cannot be made for the first time on appeal. *See, e.g., Baughman v. Am. Tel. & Tel. Co.,* 306 S.C. 101, 117, 410 S.E.2d 537, 546 (1991). This principle has been specifically applied to bar an untimely equitable tolling claim. *Kelly v. Logan, Jolley, & Smith, L.L.P.*, 383 S.C. 626, 637 n.3, 682 S.E.2d 1, 7 n.3 (Ct. App. 2009)(equitable tolling argument not preserved for review where Plaintiff did not specifically make an equitable tolling or fraudulent concealment argument to the lower court).

Even if the merits of this belated claim were to be reviewed, it is clearly without merit. Plaintiff asserts only a vague claim of fear of retaliation if the guardian

[27] While Plaintiff has not preserved on appeal any contentions about the short delay in his going home on Friday afternoon, June 10, 2005, the same principles would apply to that claim as apply to the unexplained penis injury on May 27, 2005.

were to file a lawsuit. However, it has been held that

> To establish duress sufficient to toll the running of the limitation periods and defeat Defendants' motion for summary judgment, Plaintiff must do more than simply allege a subjective fear that retaliation might occur. Instead, Plaintiff must show some act or threat by the Defendants that precluded the exercise of her free will and judgment, and prevented her from exercising her legal rights.

Moses v. Phelps Dodge Corp., 818 F. Supp. 1287, 1289 (D. Ariz. 1993). No such showing has been made in this case, but even if such a showing had been made, the argument is being presented to this Court for the first time on appeal and should be disregarded.

CONCLUSION

For the foregoing reasons, the DDSN Respondents respectfully submit that the Orders of the Circuit Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondents South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stan Butkus certifies that the Final Brief of Respondents DDSN, Lacy and Butkus complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondents South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stan Butkus certifies that the Final Brief of Respondents DDSN, Lacy and Butkus complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondents DDSN, Lacy and Butkus, does hereby certify that service of the **Brief of Respondents DDSN, Lacy and Butkus** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 29th day of February 2016:

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