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)

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.

CORRECTED PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

CERTIFICATE OF COUNSEL

Counsel for the Petitioners certify that their Petition for Rehearing was made and ruled on by the South Carolina Court of Appeals on February 21, 2018. App. 40, 26. Petitioners filed a second Petition for Rehearing on March 8, 2018, as a precaution. App. 15. That second petition has not been ruled on, but the present Petition for Certiorari has been filed, also in an abundance of caution.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the appointment of a guardian did not trigger the provision of S.C. Code Ann. § 15-3-40(2) that any extension of the statute of limitations resulting from disability would end after one additional year.

2. Whether the Court of Appeals greatly overextended the discretionary relaxing of procedural rules in this appeal, when such relaxing of the rules did not benefit a disabled person, and the deceased disabled person's rights were capable of being protected by his guardian and his counsel.

3. Whether the Court of Appeals erroneously based its opinion on facts and legal theories neither pled nor argued by counsel for the appellant estate.

4. Whether the Court of Appeals overlooked the absence of a supervisory connection between the Defendants and Babcock Center.

STATEMENT OF THE CASE

The DDSN Defendants by this Petition for Certiorari ask that this Court review the conclusions of the Court of Appeals as to several important issues. First, the issue regarding the effect of the appointment of a guardian on the statute of limitations is novel in this state, and its resolution by this Court would benefit both future plaintiffs and future defendants. Equally important is the need for this Court to clarify that procedural and error preservation deficiencies should not be waived where (a) such a waiver would not benefit a disabled person, now deceased, but rather only the financial interests of his non-disabled beneficiaries, and (b) where the estate is represented by counsel. The Court of Appeals, waiving or ignoring virtually all

procedural and preservation rules, remanded the case for trial on claims that were (a) never pled, (b) never raised by the estate in opposition to the Defendant's summary judgment motion, and (c) for the most part never raised on appeal, or else abandoned on appeal by the estate. Finally, certiorari should be granted because even if the claims had been raised or preserved, the opinion of the Court of Appeals was so devoid of any reference to evidence of cause and effect as to amount to the imposition of strict liability or res ipsa loquitor.

a. Procedural history.

This action was commenced on May 12, 2008. The plaintiff estate's decedent, Edward Mims, was an adult who had mental retardation, among other disabilities. R. I, 73, ¶ 1. Mims died on March 7, 2015, more than ten years after events alleged in this case, but it has never been suggested that his death was related to any alleged injuries. This action was brought on Mims' behalf by his mother, Margaret Mims, who was appointed his legal guardian in 2005. The defendants were the Babcock Center, the Department of Disabilities and Special Needs (DDSN), and two DDSN officials, Stan Butkus and Kathi Lacy.[1]

The events alleged in the Amended Complaint occurred between 2000 and 2005, when Mims resided in facilities owned by the Babcock Center. Mims alleged damage from several incidents of alleged physical injury between 2000 and 2005. Amended Complaint, R. I, 73.

The two causes of action now remaining in the case sought damages under 42 U.S.C. § 1983 (First Cause of Action) and pursuant to a negligent supervision claim under state law (Third Cause of Action).[2]

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[1] Mims' claims against Babcock were settled while the case was pending in the Court of Appeals, so only the DDSN Defendants, who are the present Petitioners, remain in the case.

[2] A prior decision of this Court reversed a circuit court decision that the Summons and Amended Complaint were not timely served. *Mims ex rel. Mims v. Babcock Center, Inc.*, 399 S.C. 341, 732 S.E.2d 395 (2012).

On April 12, 2013, the DDSN Defendants moved for summary judgment. R. II, 397. By Orders entered on January 22, 2014, Judge G. Thomas Cooper, Jr., granted summary judgment for both sets of Defendants, i.e., the Babcock Defendants as well as the DDSN Defendants (DDSN, Lacy and Butkus). R. I, 31-59 and I, 6-28. Plaintiff filed motions to reconsider on or about February 4, 2014, R. IV, 638-1048, which were denied by Judge Cooper by Orders filed on June 3, 2014. R. I, 60-63.

The estate appealed to the Court of Appeals. which affirmed in part, reversed in part, and remanded by opinion dated November 8, 2017. App. 28. That opinion reversed the circuit court's decision holding that most of the estate's claims were barred by applicable statutes of limitation. App. 33. The opinion also reversed the circuit court's grant of summary judgment on issues of liability for damages under state and federal law. App. 34-36. The DDSN Defendants petitioned for rehearing on November 21, 2017. App. 40. On February 21, 2018, the Court of Appeals granted the Petition for Rehearing as to one point, holding that as a matter of law, Defendants Lacy and Butkus are not liable to the estate under state law. App. 26. The remainder of the Petition for Rehearing was denied. *Id.* A substituted opinion was filed which reflected the partial grant of the Petition for Rehearing, and made other revisions to the original opinion. App. 1.

b. Facts.

Mims, who was born in 1971, 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 by his mother. *Id.* In 2001, Mims' mother was desirous of having him return to her home. R. III, 530-532. DDSN then filed a petition for judicial admission to the services of DDSN. R. XI, 3299-3300. This petition was filed (by a nonparty DDSN employee) pursuant to S.C. Code §§ 44-20-450 and -460(B). 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. Mims was represented by counsel at the hearing, as was his mother. Ms. Leigh Flynn, an attorney and court-appointed guardian ad litem, was also present at the hearing. *Id.* With the agreement of all concerned, the Probate Court issued a Consent Order, which concluded that the parties had agreed that Mims' mother "will be unable to care for her son in her home." R. III, 530. The Consent Order accordingly judicially admitted Mims 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. Four years later, a different showing was made, and pursuant to a 2005 Probate Court order, R. III, 589-90, Mims went home to live with his mother. He was never again placed in a Babcock Center facility, and died ten years later, with no suggestion that his death was caused by anything that happened at Babcock.

The Amended Complaint alleged several specific injuries to Mims over a period of about six years, as follows:

1. A beating to which a Babcock Center employee confessed. Amended Complaint, ¶ 23, R. 77. As appears elsewhere in the record, this incident occurred on August 13, 2000. R. III, 502.

2. An alleged beating by an unspecified person on December 16, 2001. Amended Complaint, ¶ 25, R. 77. This event was not mentioned in Mims' brief on appeal. The circuit court order noted that Mims had mentioned, but did not discuss, an unspecified alleged "second beating." R. I, 38 n.4.

3. An alleged beating by another Babcock resident, allegedly with a belt, on January 24, 2002. Amended Complaint, ¶ 27, R. 78.

4. An incident several years later, on July 27, 2004, where Mims was found to have numerous ant bites. Amended Complaint, ¶ 29, R. 78.

5. An incident almost another year after that, on May 27, 2005, where Mims was found to have a laceration on his penis for which no cause was ever determined. Amended Complaint, ¶ 39, R.80.

No other specific injuries were referenced in the Amended Complaint. The circuit court concluded that only three of these five incidents of physical injury were actually discussed in Mims' June 28, 2013 response in opposition to Defendants' motion for summary judgment. *See* R. I, 38-39. Those were the August 13, 2000, beating, the 2004 ant bite incident, and the unexplained 2005 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. X, 2752; R. III, 470). On appeal, the estate did not challenge the circuit court's decision to limit its examination of this case to those three incidents. As a result, only those three incidents should have been reviewed by the Court of Appeals. *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).

ARGUMENT

1. The Court of Appeals erred in holding that the appointment of a guardian did not trigger the provision that any extension of the statute of limitations resulting from disability would end after one additional year.

S. C. Code Ann. § 15-3-40 provides that for a person with mental disability, statutes of limitations are tolled by the disability. 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." In this case, a guardian was appointed for Mims on or about June 14, 2005. The question presented by this case is whether that appointment of a guardian should be regarded as ceasing the disability, thereby requiring the guardian to file suit within one year after being appointed (unless the normal operation of the statute would permit more time). This issue regarding the statute of limitations is one that has not been decided by this Court. The Court of Appeals recognized that the issue was "novel in South Carolina." App. 7. The

Defendants, the estate and several advocacy groups who filed an amicus brief in the Court of Appeals all agree that this is a significant issue, whose resolution by this Court would assist attorneys who represent both sides in cases brought by disabled individuals.

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 held 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. Other cases to the same effect were cited by the circuit court. R. I, 57.

The Court of Appeals devoted just one paragraph to its resolution of this issue. App. 7. The court did not mention its own statement in *Sims v. Amisub of S.C., Inc.*, 408 S.C. 202, 217, 758 S.E.2d 187, 195 (Ct. App. 2014), noting that the defendants in that case had cited "persuasive authority from Georgia, North Carolina, and New Hampshire [*Stewart v. Robinson, supra*] supporting their position that the appointment of a conservator affects the viability of a person's insanity for tolling purposes. . . ." On certiorari in *Sims*, this Court held that the issue did not need to be reached but noted that

> 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)

Sims v. Amisub of S.C., Inc., 414 S.C. 109, 117, 777 S.E.2d 379, 384 (2015).

This Court has held 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.* The same case further holds that "[a]nother purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation[,]" and that "[s]tatutes of limitations are, indeed, fundamental to our judicial system." *Id.*

The guardian in this case was first appointed by order dated on or about June 14, 2005. R. II, 262.[3] If the appointment of a guardian affected the statute's tolling, then the minimum time period for filing suit would be the original limitation period plus one year. The present case involves a two-year statute for the state tort claims and a three-year statute for the federal Section 1983 claim, so the minimum periods, if they ran from the appointment of the guardian, would be three and four years, respectively. These periods are still generous, and provide guardians ample time to investigate and file suit on claims predating the appointment. While Defendants can develop this point in more detail if certiorari is granted, Defendants respectfully submit that it is indeed a significant legal issue, novel in this state, and one that should be resolved by this Court.

2. The Court of Appeals greatly overextended the discretionary relaxing of procedural rules in this appeal, when such relaxing of the rules did not benefit a disabled person, and the deceased disabled person's rights were capable of being protected by his guardian and his counsel.

[3] The precise dates for this computation are not material, because there is no claim in this case involving an issue of whether the statute was missed by a day or two.

Another substantial legal issue involved in this case is the extent to which procedural rules should be relaxed when such relaxing of the rules will not actually benefit a disabled person. The original disabled Plaintiff, Mims, is deceased, and the estate has been represented throughout this case by retained counsel.

The Court of Appeals held in effect that certain claims of injury could go to a jury when those claims and injuries were neither specifically pled, nor mentioned in opposition to summary judgment, nor argued on appeal, and indeed abandoned on appeal. In other words, the Court of Appeals took it upon itself to relieve the estate in this case from compliance with virtually all procedural rules. Apparently realizing the extraordinary extent to which it was waiving the procedural safeguards to which the Defendants were entitled, the Court of Appeals invoked the rule that permits the discretionary relaxation of procedural rules "to protect the interests of those under legal disability. . . ." App. 9, n. 8. In so holding, the Court of Appeals committed a twofold error: First, the beneficiary of its decision to relax rules was not a disabled person, Mims being deceased, but rather was his estate, whose only gain would be financial. The waiver of procedural rules accordingly did not "protect the interests of those under legal disability," the statement by the court to that effect notwithstanding. Secondly, there is no South Carolina case that permits relaxation of procedural rules where, as here, the person in whose favor the rules were relaxed, i.e., the estate, was represented by retained counsel who did not represent anyone else in the case.[4]

The disabled Plaintiff, Mims, died in 2015, ten years after leaving DDSN's custody. This

[4] In addition, by the time this action was filed and served, Mims had had a guardian appointed for three years (2005-2008), and was also represented by counsel throughout that three-year period. Whether the appointment of a guardian technically removed the disability or not, the fact is that Mims' interests were represented by a responsible adult, that is, his guardian, as well as by counsel. This is an additional ground for there being no reason to relax procedural rules.

case now involves only money damages. There is no suggestion that the money would go to a minor or disabled person. Thus, this is not a situation where the disabled person might lose some prospective benefit such as housing or future services. Nor is it a case involving an unrepresented minor, perhaps the most typical situation in which procedural rules are sometimes relaxed. 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 (other than seeking rehearing) to address issues that were either not actually raised by the estate or that were actually abandoned by the estate and then revived by the Court of Appeals.

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. Where such rules are relaxed, the reason for the relaxation is to ensure that a living person under disability receives adequate protection and care during his or her lifetime, rather than to relieve counsel for an estate in a damage action from the procedural rules that normally apply.

Moreover, even a person under legal disability is not entitled to the relaxation of procedural rules when his interests have been represented at all times by counsel who could have properly 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, this 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, awarding damages to an estate is of a far lesser order than in a criminal case, and obviously does not involve any actual interest of, or benefit to, the deceased

disabled person himself. This case is therefore no different from any other case in which an estate seeks money only and is represented by counsel. There is nothing whatsoever about it that justifies the elimination of procedural safeguards to which the Defendants were entitled.

Two Justices of this Court have concluded in a case similar to this one that they would decline to relax preservation rules when the plaintiff "was at all times well-represented by counsel," coincidentally including the estate'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 in *Doe* did not relax procedural requirements with regard to the issue that determined the outcome, so the dissent's view on that point was uncontested.

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 should 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, as here):

> [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.

It is also "precisely what happened" in the present case. The court in *Cogan* 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 . . . are no less entitled to a fair trial consistent with all applicable rules of procedure and evidence" than was the disabled plaintiff. *Id.* This holding

applies all the more strongly where the party is an estate, and not a minor or an incompetent.[5]

3. The Court of Appeals erroneously based its opinion on facts and legal theories neither pled nor argued by counsel for the estate.

Consistently with its decision that it would excuse the estate from complying with virtually all procedural requirements, the Court of Appeals based its reversal and remand on facts and legal theories that were neither pled in the Amended Complaint, nor for the most part argued by the estate, either in the circuit court or on appeal. In effect, the Court of Appeals undertook to act as an advocate for the Appellant, which as noted above, is not actually a disabled individual, but rather is his estate. In addition to poring over the record for facts and theories neither pled not argued, the Court of Appeals then reached holdings that effectively amounted to the imposition of strict liability or res ipsa loquitor, concluding that if physical injuries occurred at a DDSN facility, then DDSN or its officials can be held liable for them, whether a causal link has been shown or not.

a. The opinion of the Court of Appeals erroneously held that there was a jury issue regarding claims of injury that were neither raised below nor preserved for review, and for which the opinion cited no proof of proximate causation.

When this case came before the circuit court on Defendant's motion for summary judgment, that court concluded that Mims had opposed the motion only as it regarded three instances of alleged physical injury. All three were alleged in some fashion in the Amended Complaint. R. I, 38-39. Those three incidents were as follows:

1. The occasion on August 13, 2000, when Mims was beaten by Carl Anthony, an employee of Babcock Center. Amended Complaint, ¶ 23. R. I, 77.

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[5] The opinion also misapprehended the effect of *Spence v. Wingate*, 381 S.C. 487, 674 S.E.2d 169 (2009). App. 9. 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. Here, however, the points erroneously relied upon by the Court of Appeals were never raised or argued at all in the circuit court.

2. The occasion on July 27, 2004, when Mims was found to have a number of ant bites. Amended Complaint, ¶ 29, R. I, 78.

3. The occasion on May 27, 2005, when Mims was found with an unexplained penis injury which was not regarded by the treating physician as indicative of abuse or neglect. Amended Complaint, ¶ 39, R. I, 80.[6]

The Appellant's Statement of Issues on Appeal did not even mention the circuit court's decision to limit its review to these three incidents, nor did the brief itself argue that that decision was in error. Nevertheless, the Court of Appeals, citing nothing and relaxing all applicable rules, held that it could reverse the circuit court based on arguments never presented by the appellant.

Having held that the estate was not limited to the incidents discussed in the unchallenged decision of the circuit court on that point, the Court of Appeals then proceeded to scour the record for other alleged physical injury incidents, even though they had never been argued by the estate. These newly-cited incidents were simply listed seriatim by the Court of Appeals.[7] The opinion did not suggest what any Defendant might have done that proximately caused the incidents. It also did not even conclude that all of the incidents were actually injuries, as opposed to medical encounters not involving physical injury.[8] The Court of Appeals also referred to an

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[6] Two other incidents were also referenced in Paragraphs 25 and 27, R. I, 77, 78, but the circuit court noted in the summary judgment context, Mims' counsel referenced only an alleged "second beating," with no discussion of what occurred. R. I, 38, n. 4.

[7] The newly-found incidents listed in the opinion, and then never specifically discussed again, were "bruises on his groin, vomiting, . . . a twenty-eight pound weight loss" and "a swollen and bruised hand, elevated blood pressure [and] suspected pain. . . ." App. 2, 3. The opinion also referred to a January 2002 incident involving the use of a belt by another resident, App. 3, but as noted above, the circuit court held that this "second beating" had not actually been raised in that court, aside from a vague and passing reference.

[8] For instance, the medical encounters that involved vomiting, "suspected pain," and elevated blood pressure are far from likely to have constituted injuries at all, much less injuries with a proximate cause that could be traced to DDSN. A review of such details as are in the record about the incidents newly raised by the Court of Appeals is in the Defendants' first Petition for

alleged need to provide one-on-one supervision for Mims, App. 10, but that is still another issue that was neither pled nor raised in Plaintiff's opposition to Defendants' Motion for Summary Judgment. See R. I, 73-91, III, 593-626.

In order for someone to be held liable for an injury to another, there must first, of course, be proof that an injury occurred. Then the plaintiff must shown that the defendant owed a duty of care to the plaintiff, that that duty was breached, and finally that the breach of the duty actually and proximately caused the injury. *See, e.g., Doe v. Marion*, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007), which sets forth the requirements in the context of a negligence claim.[9] If this case had involved only a single alleged injury, one would expect that an appellate opinion remanding a case for trial would specifically set forth the evidence of proximate causation that the court had found to have created a jury question. If the case involves more than one injury, as the Court of Appeals has held, one would expect that the opinion would list each injury, together with the evidence of proximate causation which was held to create a jury question for each injury.

This, however, did not happen. Assuming that the Court of Appeals set forth all of the incidents which the court held to have presented a jury question, the opinion nevertheless did not specify what the evidence of proximate causation was that would enable each incident to be submitted to a jury. Instead, the opinion held that the estate presented

> . . . evidence of widespread abusive conduct at Clusters and Kensington and . . . evidence that Respondents Lacy and Butkus knew of and ignored systemic problems. At summary judgment,

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Rehearing, App. 54-55. Some of the incidents are not even referenced by evidence in the record, but even for those that are, the opinion offers no suggestion as to how any Defendant could have been involved in the chain of causation for those encounters.

[9] The Fourth Circuit has recognized that § 1983 actions, which may involve injuries of a different nature than in a state personal injury case, are nevertheless "closely analogous to a tort action for the recovery of damages for personal injuries." *Wolsky v. Med. Coll. of Hampton Roads*, 1 F.3d 222, 223 (4th Cir. 1993)

> 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.

App. 10. Palpably missing from this conclusion is any reference to what evidence is to be found in those CMS reports, depositions and affidavits.[10]

Instead, the opinion held only that the estate, "[a]mong other [unspecified] allegations that encompassed these health complaints, Mims referenced 'systemic abuse, neglect, and exploitation of clients' living in Clusters and Kensington in his amended pleading [as well as] "the six-volume record . . . consisting of news articles, medical records, sworn affidavits, and depositions. . . ." The opinion correctly held that "proximate cause is ordinarily an issue resolved by the fact finder," App. 11, but it is axiomatic that the issue of the sufficiency of the evidence as to proximate causation is a question of law for the court.

Although the second opinion of the Court of Appeals denied that the court was holding the Defendants to a strict liability (or res ipsa loquitor) standard, *see* App. 11, the conclusion is inescapable that that is exactly what the court did. It held that if there was proof of <u>any kind</u> of medical encounter at a Babcock facility, even if the encounter did not necessarily involve the infliction of injury, then DDSN or its officials could be held liable for <u>any and all</u> such encounters. This ultimate result reached by the opinion, coupled with the opinion's failure to specify the acts of the Defendants that were held to be the proximate cause of the alleged injuries, means that the opinion did indeed dispense with any need for the estate to show cause

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[10] In the Brief of Respondents, 18-19, and in the first Petition for Rehearing, App. 51, the Defendants pointed out that the reports regarding Clusters and Kensington were not issued until well after the alleged injuries, the sole exception being the penis injury in 2005 for which no cause was ever determined. The Court of Appeals did not explain how a CMS report issued after a person had left a facility, such as Clusters, could have put the Defendants on notice of a problem that could not have affected Mims by the time of the report.

and effect. When proof of actual causation is not required, the result is that a rule of strict liability or res ipsa loquitor has been imposed. This is not the law of this State, and the Court of Appeals was incorrect in effectively imposing such a rule. As a practical matter, neither a trial court nor the Defendants presently have any way of knowing what evidence has been held to establish a prima face case of proximate causation.

b. With regard to the three incidents actually pled and argued by Mims and reviewed by the circuit court, the opinion of the Court of Appeals erroneously held that there was a jury issue regarding causation, when the estate presented no proof of causation.

An examination of the three incidents that the circuit court reviewed, and to which limitation no challenge was made in the Brief of Appellant, reveals that the circuit court was clearly correct in holding that those claims could not survive summary judgment. There was simply no proof of cause and effect in those instances.

It is well settled that there is no *respondeat superior* liability in connection with claims made pursuant to 42 U.S.C. § 1983. *Monell v. Department of Social Services*, 436 U.S. 658 (1978). 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). The only exception to this requirement of personal participation occurs when the claim is brought as a supervisory claim. As discussed in more detail herein, 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).

1. The August 13, 2000, beating by a Babcock employee.

The decision of the Court of Appeals that the Section 1983 injury was "the unlawful

confinement he experienced while in DDSN care" This appears to refer to the period between the July 3, 2001, Probate Court order admitting Mims to DDSN custody and his exit from Babcock in 2005. App. 10.[11]

Even if the Section 1983 claim regarding this incident is still in the case, however, the Court of Appeals cited 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). To the contrary, and as the circuit court held, "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.

2. The 2004 ant bite incident.

As with the Carl Anthony incident, the Court of Appeals did not specifically discuss this incident, and cited no evidence in support of its conclusion that there was a triable issue of fact regarding it. There is no suggestion that this situation was 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. *Shaw, supra.* 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.

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[11] If that conclusion remains in effect after the resolution of Defendants' Second Petition for Rehearing, the second opinion itself precludes Section 1983 liability on this 2000 incident, because it occurred prior to the 2001 Probate Court order. This incident is also not part of the state law claim, because it is outside the two-year statute of limitations for that claim even if the decision of the Court of Appeals on that point is not disturbed.

The circuit court held that Mims had not established a Section 1983 claim based on this incident, noting among other things that 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. His testimony was uncontroverted.

On appeal, the estate made no reference to this incident in the course of the argument pertaining to either Section 1983 or negligent supervision under state law, except to refer to post-incident events. Br. of Appellant at 42.

3. The 2005 penis injury.

The undisputed evidence regarding this incident was that its cause was unknown and undetermined. R. I, 42. 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). The Court of Appeals simply ignored this well-settled legal principle. Since the estate unquestionably did not establish any causation for this injury, then as a matter of law, no negligence could be ascribed to any of these Defendants under either state or federal law. As with the aforementioned two incidents, the opinion of the Court of Appeals did not specifically discuss this incident, and cited no evidence in support of its conclusion that there was a triable issue of fact on this point.[12] The circuit court had 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. Again, the only way the estate's proof on this point would be sufficient would be if liability were to be based on strict liability or res ipsa

[12] The opinion, App. 3, apparently quoted 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.

loquitor, neither of which is a permissible basis for liability.[13]

c. In holding that the "§ 1983 injury was the unlawful confinement," the second opinion of the Court of Appeals adopted a new theory of liability that was not attributable to the Defendants and that the estate had neither pled nor proven.

The Court of Appeals accurately listed the elements of a § 1983 claim, quoting *Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994), App. 9-10, but failed to recognize that the estate had neither pled nor proven those elements. On the other hand, and as the circuit court correctly held,

> The Amended Complaint fails to allege any of these elements of supervisory liability under 42 U.S.C. § 1983. For that reason alone, any Section 1983 claims against the DDSN Defendants must be dismissed. *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"); *Mitchell v. Lewis*, 2012 WL 137471, 5 (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").

R. I, 40-41.

The second opinion of the Court of Appeals held that Mims alleged that he was "unlawfully" confined at the two facilities, "because while there, he received multiple personal injuries due to substandard care and neglect." App. 10. The second opinion also added a new conclusion, which was that

> Mims asserts . . . 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.

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[13] On appeal, the penis injury incident was only briefly mentioned at pp. 33-34 of the Brief of Appellant, but Plaintiff offered nothing to rebut the circuit court's conclusion that there was no evidence as to how the injury was caused. The failure of Plaintiff to argue anything else on appeal is discussed in the Brief of Respondents at 31-32.

App. 10. The second opinion further described this new theory by concluding that "Mims alleges his § 1983 injury was the unlawful confinement he experienced while in DDSN care." *Id.* (emphasis added). The second opinion also 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 Lacy and Butkus have filed a second petition for rehearing in the Court of Appeals in the event that such a petition is necessary when a revised appellate opinion adds new grounds or theories. App. 15. The present petition discusses this new conclusion by the Court of Appeals under the assumption that this language in the second opinion will not be changed.

Defendants Lacy and Butkus[14] respectfully submit that this newly-created characterization of Plaintiff's Section 1983 claim does not cure the failure of the Amended Complaint to plead the elements listed in *Shaw v. Stroud, supra.* Indeed, the Amended Complaint contains no allegation that Butkus or Lacy were responsible for Mims' confinement. The only references to them by name in the Section 1983 cause of action are conclusory, describing only the effects of unstated actions by them, rather than alleging any actions themselves. *See* Amended Complaint, ¶¶ 66, 68, R. I, 84, 85.[15] In fact, the Amended Complaint's only reference to "confinement" is in Paragraph 34, where confinement is mentioned only in passing.[16]

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[14] The circuit court held that it was uncontested that the other Defendant, i.e., DDSN itself, was not subject to the § 1983 claim, R. I, 37, and the estate has never suggested otherwise.

[15] For instance, Paragraph 68 alleges only that "[t]he 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." Amended Complaint, R. I, 85.

[16] "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. As noted earlier, it is undisputed that DDSN itself cannot be subject to the § 1983 claim. The only paragraph of the Amended Complaint that references the actions of individuals in connection with the original 2001 confinement order (which, again, was a Probate Court order entered with consent) is Paragraph 20, which alleges that "employees of the Babcock Center and SCDDSN caused Plaintiff to be involuntarily committed to the custody of the Department." R. I, 76. This non-specific allegation cannot serve to allege a § 1983 claim against Butkus or Lacy. *See, e.g., Ashcroft v. Iqbal,* 556 U.S. 662, 676 (2009)("a plaintiff must plead that each 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).

Moreover, the petition to have Mims confined was not filed by Lacy or Butkus, but instead was filed by another DDSN official, James Christian, who is not a party to this case. R. XI, 3242-43. (The Court of Appeals noted that Mrs. Mims had averred that "people from the [DDSN] said that if I did not agree to their petition, they would terminate my weekend visitation," App. 2, n. 2, but that statement also did not name Butkus or Lacy specifically.) The action that resulted in Mims' confinement was a court order, the 2001 Probate Court Consent Order, the existence of which could not in any event give rise to a cause of action against Butkus

or Lacy, even if they had sought it, which they did not. *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.[17]

As noted above, 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 not logically follow. Butkus and Lacy were not charged in the Amended Complaint with causing Plaintiff's confinement to DDSN facilities, so neither of them could be held liable for any alleged personal injuries said to have been caused by the court-ordered confinement.[18]

d. The Court of Appeals erroneously remanded the case for consideration of state law causes of action that were neither set forth in the Amended Complaint nor proven.

The Court of Appeals also expanded the estate's sole state law claim beyond recognition, finding causes of action to be present when they were not. The estate's only state law claim is in

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[17] 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).

[18] As Defendants have previously contended, Brief of Respondent at 21-22, the original commitment and any subsequent alleged failures to reassign would in any event establish only "but for" causation, i.e., causation in fact, rather than legal causation, i.e., proximate cause. *See also,* Memoranda in Support of Petitions for Rehearing, App. 58, n.10; App. 25, n. 3. 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 Fourth Cause of Action, entitled "Negligent Supervision." R. I, 86. The Court of Appeals concluded that "we find Mims sufficiently pled his causes [sic] of action for negligent supervision, negligence, and gross negligence." App. 12, n. 10. However, the Amended Complaint did not contain "causes" (plural) of action on those three theories, as the Court of Appeals erroneously held, but only the single cause of action for negligent supervision. R. I, 86. That cause of action referred to negligence and gross negligence, but only within the context of the cause of action for negligent supervision. R. I, 87. The Court of Appeals erred in holding that the Amended Complaint contained any state law causes of action other than negligent supervision.

Moreover, the negligent supervision cause of action was fatally deficient, because 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). R. I, 87. 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 claims," App. 12, which again, were not "claims," but only a single claim of negligent supervision.

Even if the negligent supervision claim were to be regarded as extending beyond its terms to include negligence and gross negligence, the Amended Complaint pled those theories only by conclusory references to them. R. I, 87, 88 (Paragraphs 80, 81). There was no connection between the few specific allegations of injury and any specific acts or omissions of DDSN. 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 Fourth Cause of Action contains no such allegations.

4. The Court of Appeals overlooked the absence of a supervisory connection between the Defendants and Babcock Center.

Finally, the estate did not show, and the Court of Appeals did not discuss, the absence of the existence of a supervisory connection between DDSN officials and Babcock Center employees. In the absence of such a showing, 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 circuit court held that "it cannot be reasonably claimed . . . that [Babcock Center employees] were in fact 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, n. 5.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

DAVIDSON, WREN & PLYLER, P.A.

BY: /s/

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March 19, 2018, as corrected March 22, 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

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, Wren & Plyler, P.A., attorneys for the Petitioners, does hereby certify that service of the **Corrected Petition for Writ of Certiorari** in the above referenced action was made upon the Clerk of the South Carolina Court of Appeals by hand delivery and upon all counsel of record (minus the Record filed with the Court of Appeals) by placing copies in the United States

Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 22nd day of March, 2018:

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The Honorable Jenny Abbott Kitchings
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March 22, 2018

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The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
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RE: Estate of Edward James Mims, Laura M. Cole, Personal Representative v. The South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stan Butkus
Appellate Case Number: 2014-001373
Civil Action Number: 2007-CP-40-3365
Claim Number: 44654
Our File Number: 104.7785

Dear Ms. Kitchings:

Please find enclosed for filing two (2) copies of the **Corrected Petition for Writ of Certiorari** and **Certificate of Service** in the above referenced matter that has been filed with the South Carolina Supreme Court. Please provide me with a clocked-in copy of each document by way of my courier.

Thank you for your assistance in this matter.

With highest regards, I am

Sincerely yours,

DAVIDSON , WREN & PLYLER, P.A.

/Ken Woodington

Kenneth P. Woodington

KPW/mss
Enclosures

cc: *(w/ Enclosures)*

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