

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

RECEIVED
APR 03 2018
SC Court of Appeals

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

v.

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

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

Respondents submit the following Reply in response Appellant's Return to Respondents' Second Petition for Rehearing. The Return illustrates two of the main attributes of the estate's claims that have made this case much more convoluted than it ever should have been: First, the Return attempts to resuscitate, for the first time ever in the course of this appeal, still another claim that the estate abandoned long ago, namely a claim that DDSN could be held liable in a Section 1983 suit. Secondly, by attaching certain exhibits, the Return continues the estate's

practice of cluttering up the record with material that does not pertain to events at locations where Mims was living, or at times when he was living there, or both. The Return further shows how the estate's claims throughout this case have been a moving target, in violation of all the rules requiring issues to be presented and preserved in orderly fashion.

ARGUMENT

- 1. The estate long ago abandoned any claim that DDSN could be sued under 42 U.S.C. § 1983, and any such argument is without merit in any event.**

As Defendants pointed out on p. 6, n.2, of the Second Petition for Rehearing, the circuit court held that it was uncontested that the other Defendant, i.e., DDSN itself, was not subject to the Section 1983 claim:

Plaintiff has conceded that the agency, DDSN, was not intended to be subject to suit in the First Cause of Action, i.e., the claim made pursuant to 42 U.S.C. §1983. This concession is well taken, because there is no doubt that an agency of the state, such as DDSN, is not a "person" within the meaning of § 1983, and thus is not a proper defendant. *Will v. Michigan State Police*, 491 U.S. 58 (1989).

R. I, 37. Unbelievably, the estate for the first time now asks this Court to review that conclusion. That argument should fail for any and all of the following reasons:

- a. First and foremost, the circuit court was correct on the merits of this claim. *Will v. Michigan State Police*, 491 U.S. 58, 71 (1989) holds that "a suit . . . against [a state agency] . . . is no

different from a suit against the State itself. . . .]N]either a State nor its officials acting in their official capacities are ‘persons’ under § 1983.” *Will* is universally recognized as holding that “neither a state agency nor its officials acting in their official capacities are ‘persons’ amenable to suit under § 1983.” *Manning v. S.C. Dep't of Highway & Pub. Transp.*, 914 F.2d 44, 48 (4th Cir. 1990). This is a fundamental precept of Section 1983 law.¹

- b. Plaintiff never argued otherwise in opposition to Defendants’ Motion for Summary Judgment. R. III, 593-626.
- c. After the circuit court held that the point had been conceded, Plaintiff did not challenge that holding in Plaintiff’s lengthy Rule 59(e) motion. R. IV, 638-672.
- d. The Brief of Appellant did not challenge the circuit court’s conclusion on this point.
- e. Neither of this Court’s opinions made any reference to Section 1983 liability of DDSN itself, and the estate never sought rehearing on that (or any other) basis.

¹ The rule of *Will* applies in cases brought in state courts as well, and *Will* itself was a state court case. *See also, e.g., Williams v. Condon*, 347 S.C. 227, 248, 553 S.E.2d 496, 507 (Ct. App. 2001).

The fact that a party to an appeal would even consider raising such a completely unmeritorious and unequivocally discarded argument at this late stage of this case illustrates why this Court should not relax procedural rules in this case. In fairness to the Defendants, the estate should be held to be bound to the positions it has taken as well as to its abandonment of certain points, just as other parties are so bound.²

2. The estate has failed to show that the Amended Complaint charged Butkus and Lacy with unlawful confinement of the Plaintiff.

The gravamen of the Second Petition for Rehearing is that the Court's second opinion erroneously concluded that Butkus and Lacy could be held liable under Section 1983 for "unlawful confinement" of Mims when the Amended Complaint made no such allegations against either one of them. The Second Petition discussed each allegation of the Amended Complaint that specifically mentioned Butkus or Lacy, and noted that the Amended Complaint was devoid of

² The estate now inexplicably seeks to have this Court add current DDSN officials in their official capacities as parties. *See* Return at 12. Section 1983 suits against state officials in their official capacities are permitted by *Ex Parte Young*, 209 U.S. 123 (1908), but only to permit enjoining State officials in their official capacities from engaging in future conduct that would violate the Constitution or a federal statute. *Antrican v. Odom*, 290 F.3d 178, 184 (4th Cir. 2002). This case obviously does not currently involve a claim for injunctive relief. The estate also refers to the "private attorney general" concept mentioned in *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), Return at 1, but *Newman* applied that concept only to an attorney fee claim in a case where the plaintiff sought and obtained permanent injunctive relief.

any allegation that the confinement was caused by Lacy or Butkus, as opposed to DDSN or unnamed persons. Memorandum in Support of Second Petition for Rehearing at 4-9.

The estate's Return fails to show otherwise. It first cites Paragraph 66 of the Amended Complaint, but that paragraph is merely a general, conclusory allegation that the individual Defendants deprived Plaintiff of "the right to liberty." This conclusory allegation, which perhaps could suffice if the Amended Complaint had elsewhere alleged some specific fact showing involvement by Butkus and Lacy in the alleged confinement of Plaintiff, cannot stand where, as here, no such factual allegations have been made, as will be shown below. *See, e.g., Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct.App.1986) (providing conclusory allegations in a complaint are insufficient).³

The Return next cites Paragraphs 11 and 13 of the Amended Complaint, Return at 7, but neither of those paragraphs refers to Butkus or Lacy. It is axiomatic in Section 1983 cases that "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)(emphases added). Next, the Return, p. 8, cites Paragraph 14 of the Amended Complaint, which alleges that

³ The estate notes that the Section 1983 cause of action incorporates all preceding paragraphs of the Amended Complaint, but that does not help, because as shown below, the preceding paragraphs themselves are devoid of the necessary allegations that Butkus or Lacy, specifically, caused Mims to be unlawfully confined.

Butkus and Lacy were aware of conditions at Babcock facilities, but does not allege that they had any role in the confinement of Mims there. The Return then on p. 9 cites “page 15 of the amended complaint,” apparently meaning Paragraph 15, which alleges only that unnamed DDSN officials failed to make reports or to investigate reports. In addition to not specifically identifying any individuals, Paragraph 15 also makes no allegations about confinement. Next, the Return claims that Paragraph 17 of the Amended Complaint might also have some relevance, Return at 10, but that paragraph pertains to alleged retaliation, not confinement, and does not identify any specific person in any event. Finally, the Return, p. 10, mentions Paragraph 34, but that paragraph also does not refer to Butkus or Lacy.

The Amended Complaint is accordingly completely devoid of any allegation of fact that would support a holding that Butkus or Lacy caused Mims to be unlawfully confined. The estate has tried to show otherwise, but has not been able to point to anything in the Amended Complaint that would support this Court’s theory of Section 1983 liability. In holding in its second opinion that “Mims alleges his § 1983 injury was the unlawful confinement he experienced while in DDSN care,” slip op. at 10, this Court based its conclusion on a theory that was

never pled, and of which the Defendants had no notice.⁴ Defendants therefore respectfully request that the Section 1983 claim be dismissed from this case.

3. The attachments to the Return are irrelevant and inadmissible.

The Return also continues a pattern of calling the Court's attention to lengthy exhibits containing irrelevant material. Exhibit 1 appears to refer to a 2018 DDSN report, but it is not actually attached, and therefore shows nothing at all. Exhibit 2, a 24-page report dated September 2016, pertains to allegations of abuse and neglect at a different private provider, SC Mentor, between 2013 and 2016. Exhibit 2, p. 1. Those allegations occurred long after Mims was released from Babcock in 2005, and in any event do not pertain to Babcock at all. The exhibit appears to have been attached solely in order to smear the reputation of Defendant Butkus, who worked for Mentor during this period. Defendants object to these exhibits as being grossly inappropriate and inadmissible at this stage of the case. Defendants would also reiterate that many of the exhibits in the record are just as chronologically and otherwise irrelevant as these newest exhibits, as Defendants have already contended in prior filings both before and after this Court's decision. These most recent exhibits provide the most vivid example yet of how the estate

⁴ The estate and the second opinion also mention an alleged possible failure to provide one-on-one supervision, Return at 3, slip op. at 10, but that is another claim that the Amended Complaint never made, neither in general nor with reference to Butkus or Lacy specifically.

tries to rely upon “evidence” that cannot possibly be relevant, in order to sow confusion and maintain unsupported claims.

4. The time consumed by this litigation is largely the result of the inactions of Plaintiff’s representatives.

Finally, the estate complains about the amount of time that has elapsed since the events in this case occurred, but most of that time is directly attributable to unexplained delays by the estate’s own counsel or guardian, or both. Ms. Harrison represented Mims at least as early as 2005. R. III, 522. Even as of that long-ago date, some of the complained-of events were already 5 years old. This action was filed only in 2007, and even then the original Complaint was never served. The Defendants were served only in 2008, 8 years after the first complained-of event.

The failure of Plaintiff’s counsel to serve the Amended Complaint until a year after the case was filed gave rise to the reasonable contention that the case was subject to dismissal because of the lapse of time between filing and service. While the Supreme Court ultimately rejected that claim in a split decision, the appeal process took two and a half years (February 2010 through August 2012). Defendants did nothing to delay the resolution of the case during that timeframe. In any event, that entire first appeal would never have happened if Plaintiff’s counsel had served the original Complaint in 2007, when it was filed.


Summary judgment was granted in early 2014, and Plaintiff’s Rule 59(e) motion was denied in June 2014. Oral argument in this Court was not held until

three years later, in June 2017. A review of the case record in this Court will show that it took almost two years for the case to be ready for consideration. Practically all of the delays during that period were attributable to counsel for Plaintiff-Appellant. Counsel for the estate should therefore not be heard to complain about the time that elapsed in this case to this point.

CONCLUSION

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

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April 3, 2018

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson, Wren & Plyler, P.A., counsel for the Respondents, does hereby certify that service of the **Reply Memorandum in Support of Second Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by placing a copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 3rd day of April, 2018:

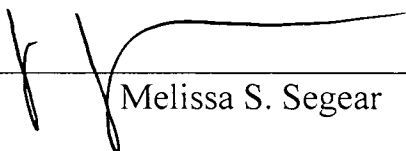
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Certificate of Service-Reply Memorandum in Support of Second Petition for
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Appellate Case No. 2014-001373
Page Two

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April 3, 2018

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The Honorable Jenny Abbott Kitchings
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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 the original and seven (7) copies of the **Reply Memorandum in Support of Second Petition for Rehearing** in the above referenced matter. Please file the original and return a clocked-in copy to me by way of my courier. I have not enclosed a filing fee since the Respondents are exempt pursuant to Rule 203(d)(1)(B)(iii), SCACR.

By copy of this letter, I am serving copies on all counsel of record. Thank you for your assistance in this matter.

With highest regards, I am

Sincerely yours,

DAVIDSON & LINDEMANN, P.A.



Kenneth P. Woodington

KPW/mss
Enclosures

The Honorable Jenny Abbott Kitchings

April 3, 2018

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cc: *(w/ Enclosures)*

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