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.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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v.

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

Appellate Case No. 2014-001373

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

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Withdrawn, Substituted and Refiled February 21, 2018

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Patricia Logan Harrison, of Columbia, for Appellant.

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

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

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

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

I.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II.

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

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

Initially, we find Mims' lawsuit commenced on May 7, 2008, the day Mims' amended complaint was filed. S.C. Code Ann. § 15-3-20(B) (2005) ("A civil action is commenced when the summons and complaint are *filed* with the clerk of court if actual service is accomplished within one hundred twenty days after filing." (emphasis added)); Rule 3(a), SCRCP ("A civil action is commenced when the summons and complaint are *filed* with the clerk of court . . . ."(emphasis added)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III.

In granting Respondents' motion for summary judgment, the circuit court dismissed Mims' § 1983 causes of action for failure to state a claim[7] and additionally found

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

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

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

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

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

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

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

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

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

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

Mims maintains that between 2001 and 2005, he was unlawfully confined at Clusters and Kensington, because while there, he received multiple personal injuries due to substandard care and neglect. Mims asserts Lacy and Butkus had actual and constructive knowledge Mims' confinement at Clusters and Kensington posed a "pervasive and unreasonable risk" of constitutional injury because they knew or should have known of the ongoing substandard care and neglect occurring at Clusters and Kensington, including beatings, insect infestations, and sexual assaults; that Lacy's and Butkus's response to the knowledge was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices"; and finally, that there was an "affirmative causal link" between the Lacy's and Butkus's inaction and the particular injury of unlawful confinement suffered by Mims—namely, that while Mims' confinement to DDSN's care was justified by his need for safe, one-on-one supervision at all times, Lacy and Butkus failed to ensure this level of care was provided to Mims, resulting in multiple personal injuries to Mims over a period of years.

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

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

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

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

IV.

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

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

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

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

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

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

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

V.

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

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

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

VI.

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

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GEATHERS and MCDONALD, JJ., concur.

The South Carolina Court of Appeals

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

v.

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

Appellate Case No. 2014-001373

ORDER

After careful consideration of Respondents' "Second Petition for Rehearing," the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

J.

J.

J.

Columbia, South Carolina

cc:
Patricia Logan Harrison, Esquire
Kenneth P. Woodington, Esquire
William H. Davidson, II, Esquire

FILED
April 13, 2018

DLSCN 04/16/18

Kathleen Ashley Warthen, Esquire
Andrew Jefferson Atkins, Esquire
Franchelle C. Millender, Esquire

DLSCN 04/16/18

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.

SECOND PETITION FOR REHEARING

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

The grounds for this second petition for rehearing and the specific relief

requested are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

This petition for rehearing is based on the Court's decision in *Estate of Estate of Edward Mims, etc., v. South Carolina Department of Disabilities and Special Needs, et. al,* (S.C. Ct. App. filed February 21, 2018), Op. No. 5539, the original opinion, Op. No. 2017-UP-422 (S.C. Ct. App. filed November 8, 2017), the supporting memorandum filed herewith; the briefs and Record on Appeal and subsequent filings with this Court; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

DAVIDSON, WREN & PLYLER, P.A.

BY: /s/

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March 8, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

v.

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

MEMORANDUM IN SUPPORT OF SECOND PETITION FOR REHEARING

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

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

ARGUMENT

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

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

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

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

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

Id. at 8-9.

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

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

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

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

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

> FOR A FIRST CAUSE OF ACTION
>
> VIOLATION OF 42 U.S.C. §§ 1983 and 1988
>
> 63. Each and every allegation above, not inconsistent herewith, is realleged in full as if set forth below. (Emphasis added.)
>
> 64. Individual Defendants Lacy, Butkus and Johnson, in their individual capacities, acted, as alleged herein, under color of South Carolina and federal statutes, ordinances, regulations, customs or usage.
>
> 65. Defendant SCDDSN failed to monitor Plaintiff's condition and treatment needs after involuntarily committing him to the custody of the State. (Emphasis added.)
>
> 66. Through their acts, the individual Defendants, in their individual capacities, subjected Plaintiff or caused him to be subjected to deprivation of his rights, privileges or

> immunities secured by the Constitution and laws of the United States, which include, but are not limited to, the right to liberty and the pursuit of happiness, the right to equal protection of the laws and the right to be secure in one's person and property against unreasonable seizure.
>
> 67. Through their acts, the individual Defendants, in their individual capacities violated Plaintiff's rights granted under the Americans with Disabilities Act.
>
> 68. The acts of the individual Defendants that deprived Plaintiff of his rights, privileges and immunities secured by the Constitution or the laws of the United States, proximately caused great harm to Plaintiff for which he is entitled to recover damages.
>
> 69. In violating Plaintiffs federally-protected rights, individual Defendants Johnson, Butkus and Lacy were motivated by evil motives and intent and showed reckless and callous indifference to the federally protected rights of Plaintiff; therefore the Plaintiff is entitled to recover punitive damages.
>
> 70. The Plaintiff is entitled to recover reasonable attorney's fees and expenses of this action in accordance with 42 U.S.C. § 1988.

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

> 34. During this time [fiscal year 2004], CMS and the South Carolina Department of Health and Human Services closed Clusters, the facility where Plaintiff had been forced to live during the first years of his involuntary [sic] confinement, for violation of health and safety standards.

R. I, 79.

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

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

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

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

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

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

In addition, as previously contended by the Defendants, the petition to have Mims confined was filed by another DDSN official, James Christian, who is not a party to this case. R. XI, 3242-43. Moreover, the action that resulted in Mims' confinement was a court order, the 2001 Probate Court Consent Order, the existence of which could not give rise to a cause of action against Butkus or Lacy. *See, e.g., Argoe v. Three Rivers Behavioral Health, L.L.C.*, 392 S.C. 462, 473, 710 S.E.2d 67, 73 (2011)(plaintiff who was "lawfully taken into custody and detained pursuant to valid probate court orders" had no claim for unlawful confinement against probate court petitioners). The confinement could not have been accomplished or maintained if the Probate Court had declined to issue that Order.

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

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

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

CONCLUSION

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

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March 8, 2018

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

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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

v.

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

Appellate Case No. 2014-001373

Appellant's Return Opposing Respondent's Second Petition for Rehearing

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This case was commenced a decade ago. Defendants have delayed trial on the merits so long that Mims died before he had the opportunity to go before a jury in person. But his claims were brought not only for himself, but were brought in his important role as private attorney general under Section 1983. *Newman v. Piggie Park*, 390 U.S. 400, 402 (1968) ("When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority.") These claims under Section 1983

and the Tort Claims Act survived his death. The Court should deny Respondents' second petition for a rehearing for the reasons set forth below, as well as those argued at oral argument, and in Appellant's opening and reply briefs, which are incorporated by reference.

1. Respondents have requested reconsideration of Section III.

Respondents have requested reconsideration only of Section III and Appellant's return will address only that section of this Court's order that was issued on February 21, 2018.

A. Respondents misinterpret *Will v. Michigan State Police.*

Appellant sued Butkus and Lacy in both their individual and official capacities, thus the agency is also subject to Appellant's Section 1983 claims. Second Request for Reconsideration (SRR) at 6. The circuit court's and Respondent's reliance on *Will v. Michigan State Police* in the Second Request for Reconsideration are clearly erroneous. 491 U.S. 58 (1989). SRR at 6. The question of the liability that may be imposed on a government entity under Section 1983 was discussed recently in *Lewis v. Clarke*, 137 S. Ct. 1285 (2017). In that case, the Supreme Court explained that:

> In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself. Will v. Michigan Dept. of State Police, 491 U. S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989); Dugan v. Rank, 372 U. S. 609, 611, 620-622,

> 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963). This is why, when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation. Hafer, 502 U. S., at 25, 112 S. Ct. 358, 116 L. Ed. 2d 301. The real party in interest is the government entity, not the named official. See Edelman v. Jordan, 415 U. S. 651, 663-665, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). "Personal-capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under color of state law." Hafer, 502 U. S., at 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (emphasis added); see also id., at 27-31, 112 S. Ct. 358, 116 L. Ed. 2d 301 (discharged employees entitled to bring personal damages action against state auditor general); cf. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). "[O]fficers sued in their personal capacity come to court as individuals," Hafer, 502 U. S., at 27, 112 S. Ct. 358, 116 L. Ed. 2d 301, and the real party in interest is the individual, not the sovereign.

Id. at 1292.

Respondents' argument that Plaintiffs have never suggested that DDSN is subject to liability under Section 1983 ignores the allegations in the amended complaint and the multiple references to violations by DDSN contained in Plaintiff's brief to this Court at pages 30 to 38. Issue 3 in that brief states that "defendants" violated his civil and constitutional rights" and the First Cause of Action for violation of Section 1983 clearly refers to DDSN as one of the defendants. On page 26 of the brief, Plaintiff argues that "Much suffering occurred as a result of this fraudulent and illegal action by DDSN." Plaintiff states that it was DDSN experts who determined that he required one-on-one supervision. Id.

Plaintiff argued in his brief that DDSN failed to provide care and treatment in accordance with federal and state standards. Brief at 33. Plaintiff's brief states at page 40 that DDSN and the individual defendants were well aware of the seriousness of the problems at Babcock Center and the risk of harm to Plaintiff.

Plaintiff's amended complaint and brief clearly allege both official and individual liability claims under Section 1983 and Respondents' motion should be denied. The Court may wish to inquire, however, as to whether a conflict of interest exists in state taxpayer dollars being spent to defend Butkus and Lacy against Plaintiff's individual capacity claims. Rule 1.13 of the South Carolina Rules of Professional Conduct provides that "...in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances." That Rule advises of the obligation to balance "maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved."

Lacy retired in 2014 and she is no longer an employee of DDSN, although she may or may not be performing work for DDSN under contract. She was succeeded in her official capacity at DDSN by Susan Beck.

Butkus resigned as Director of DDSN under pressure in 2009, soon after a critical audit conducted by the Legislative Audit Council reported that the agency failed to protect the health and welfare of its clients and spent tens of millions of dollars allocated by the General Assembly for services for other purposes. Butkus resurfaced in South Carolina as Director of Mentor, a private corporation funded by DDSN programs. In 2016, the South Carolina Office of Inspector General issued findings substantiating a high rate of abuse in Mentor homes in a report titled "Review of Abuse, Neglect, and Exploitation Allegations Involving SC Mentor, a Private Provider for the South Carolina Department of Disabilities and Special Needs." which is published on the website of the Inspector General at http://oig.sc.gov/Documents/Review%20of%20Allegations%20Involving%20SC%20Mentor-a%20Private%20Provider%20for%20DDSN.pdf. Soon after the release of that report, Butkus either resigned or was terminated as director of Mentor.

Rule 201 of the South Carolina Rules of Court provides that his Court may take judicial notice of that report, which is attached as Exhibit 1. *Jenkins v. Atlantic Coast Line R.R. Co.*, 84 S.C. 343, 351 (1909). (Appellate Court may take judicial notice of "whatever is or ought to be generally known within the limits of their jurisdiction.") See also See *Hetrick v. Friedman*, 237 Mich. App. 264, 602 N.W.2d 603, 606 (Mich. Ct. App. 1999) (holding an appellate court may take judicial

notice of the AAA medical malpractice rules, where the arbitration agreement stated it would be governed by them); see also *Jones v. Anderson Cotton Mills,* 205 S.C. 247, 254, 31 S.E.2d 447, 449 (1944) (holding the supreme court will take judicial notice of the existence and content of a rule adopted by the Industrial Commission); *Porter v. South Carolina Pub. Serv. Comm'n, 327* S.C. 220, 223, 489 S.E.2d 467, 469 (1997) (holding the supreme court will take judicial notice of South Carolina statutes).

The Court may also take judicial notice that the author of that OIG report, Patrick Maley, is now the interim director of DDSN and he automatically succeeds the former director in representing the agency in Mims' Tort Claims Act and official capacity claims. Exhibit 2. It would appear that the interests of the individual defendants and the agency may be in conflict.

The caption should be amended to add Beck and Maley, in their official capacities.

B. Mims' allegation of unlawful confinement was not "newly-added"

Respondents complain that the Court's "characterization of Plaintiff's § 1983 claim bears no resemblance to the allegations in the Amended Complaint with regard to § 1983. This argument ignores not only Paragraph 63 in the § 1983 Cause of Action, which realleges "Each and every allegation above..as if set forth

below," but also Mims' constitutional claims of violation of his liberty, equal protection and freedom from unreasonable seizure claims in paragraph 66.

Rather than having no resemblance to claims of unlawful confinement, the amended complaint repeatedly describes these allegations and claims. SRR at 4. In paragraph 34, Mims complained that during the "first years of his involuntary confinement" he was forced to live at Clusters, which CMS and SC DHEC found to be in violation of health and safety standards. Mims provided evidence of the horrific violations resulting in abuse and neglect of residents living at Clusters. Record at 1264.

Paragraph 11 states that DDSN undertook a duty and responsibility and failed to exercise reasonable care and paragraph 13 alleges that Mims was "subjected to physical assaults and batteries, which resulted in physical injuries and psychological abuse to Plaintiff."

Respondents argue that confinement was not caused by Lacy and Butkus, but by DDSN, which it claims cannot be liable under Section 1983. (See discussion above re official capacity claims.) Attempting to deflect responsibility to the probate court at SRR 6, Respondents ignore the fact, contained in the record and the state statute that Butkus, and only Butkus could determine his

placement...and he placed and kept Mims in facilities he and Lacy personally knew to be unsafe.

Even if the involuntary commitment had been "lawful," which it was not, Plaintiff provided material facts (including the affidavit of the GAL) showing that the commitment was fraudulently obtained and Butkus, Lacy and the Department had a continuing duty to provide safe conditions of confinement, which they totally failed to do.

Paragraph 14 clearly states that Lacy and Butkus "were aware of the systemic abuse, neglect and exploitation of clients" in Babcock Center, where Butkus had placed him. At page 1369 of the Record, Butkus admitted that it was his responsibility to determine placement:

Q. So who makes the final decision?

A. It would be a consensus, but I make decisions on placement in the code. The executive of the Agency's responsible for making placement decisions.

Q. If you're responsible for making placement decisions, is it also your responsibility to get people out of the placement if they're in danger there?

A. Well, that could be a separate determination. I think that anytime there's an event, you need to assess the circumstances carefully to see if it was isolated or a pattern of some type.

It is undisputed that Lacy was the individual at DDSN responsible for tracking abuse and neglect events and reporting them to Butkus. According to Butkus, reports of abuse must be made to DDSN within 24 hours and the employee doing intake gave those reports directly to Lacy. Record at 1378. Lacy used her "judgment" to determine whether the event was something Butkus needed to know about, or whether it was "just an unexplained random event that doesn't mean anything." Id. Butkus acknowledged that when Lacy reported events of abuse and neglect to him, it was his responsibility to determine "how did it happen, who's going to take care of it, how are we going to prevent it occurring again, who's going to do what to with it." Id.

At page 15 of the amended complaint, Plaintiff alleged that DDSN officials failed to make necessary reports to the appropriate authorities or to take necessary action to investigate reports of abuse and neglect. Butkus is a social worker and Lacy a nurse, and both had a statutory duty to file reports with law enforcement. Instead of making a report to SLED and working with local law enforcement to investigate these occurrences, Butkus sent DDSN's physician, Dr. Grahame Johnson, to determine what happened. Record at 1386-1387.

Whether or not Butkus personally participated in the original involuntary commitment process, as noted above, once committed, it was Butkus who had the

authority and duty to determine his placement. Plaintiff presented evidence that the commitment was fraudulently secured. See affidavit of GAL Leigh Flynn at page 2038 of the Record.

Plaintiffs alleged in the amended complaint at paragraph 17 that Defendants established a "pattern and practice of bringing reprisals against parents who complain..." The Record documents that Butkus made two major decisions to downsize, both the Babcock Center, due to high rates of abuse and neglect there, and Kensington, when circumstances leading to findings of Immediate Jeopardy were not corrected. Yet, despite the pleas of Mims' mother to bring him home, and even a court order ordering his release, Lacy and Butkus participated in the effort to keep him in an undeniably unsafe facility. Butkus testified as to his own personal involvement in that decision, as well as his team's "consensus" that Mrs. Mims would be unable to care for her son at home. Record at 2613 and 2614. Lacy made at least two appearances at the probate court attempting to obstruct Mims' mother from being appointed as his guardian after the injury to his penis.

All of this evidence, and the affidavits and other records contained in the Record on Appeal support this Court's ruling. This is simply not a case where a low level employee, unbeknownst to the official being sued, makes a bad judgment call. The Court was correct in its ruling that Mims has properly pled his Section

1983 claims and Respondents' second motion to reconsider should be denied.

Respondent keeps trying to make this case about three or so isolated incidents, suggesting that because neither Lacy nor Butkus hit him or personally deposited ants in his bed, they cannot be held liable for Mims' injuries. But this Court has twice correctly ruled that Respondents are wrong. In Mims' First Cause of Action in the amended complaint, he again repeated each and every allegation made on pages one through twelve, contained in paragraphs one through sixty-two. It was not necessary to repeat the words contained in those allegations.

In *Madison v. Babcock Center*, the Supreme Court reiterated that person or business entity which "accepts the responsibility of providing care, treatment, or services to a mentally retarded or disabled client has a duty to exercise reasonable care in supervising the client and providing appropriate care and treatment to the client." 371 S.C. 123, 142 (2006). That Court ruled that DDSN has the same common law duty, reversing the Richland County Court of Common Pleas award of summary judgment to DDSN.

II. Conclusion.

Enough is enough and it is long past time for Respondents to end their delaying tactics and to give Mims the opportunity to present his case to a jury. For the reasons set forth herein and those set forth in Mims' opening and reply briefs, Mims prays that this Court will deny Respondent's Second Motion for Rehearing and remand this case for trial. Mims also requests that Patrick Maley, Director of DDSN, and Susan Beck, Associate State Director of DDSN, be added to the caption, so that it will read:

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, in their Individual Capacities, and Patrick Maley and Susan Beck, in their Official Capacities,
Respondents.

Respectfully submitted,

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March 28, 2018

Exhibit 1

Background Data Collection Regarding the Strengths/Weaknesses of DDSN's Current Band Payment System & Direction for Improvement

Presentation to the Legislative Oversight Committee, House of Representatives
February 1, 2018
By Interim DDSN State Director Pat Maley

Exhibit 2

Office of the Inspector General

Patrick J. Maley

Review of Abuse, Neglect, and Exploitation Allegations Involving SC Mentor, a Private Provider for the South Carolina Department of Disabilities and Special Needs

File# 2016-1694-I

September 2016

I. Executive Summary

This review was requested by the Department of Disabilities and Special Needs (DDSN) for an independent review of allegations of abuse, neglect, and exploitation (ANE) at SC Mentor (Mentor), a private provider of residential services for DDSN consumers. Factors predicating the State Inspector General (SIG) accepting this review included derogatory media reporting of ANE incidents at Mentor; concerns from Commissioners and vulnerable adult advocates; and an emerging atmosphere of distrust in DDSN's oversight of ANE allegations at Mentor in particular, as well as indirectly Mentor's standard of care provided to its consumers.

During the period under review (7/1/2013 – 3/31/2016), Mentor had proportionately higher ANE allegations (170) and sustained criminal incidents (5) than peer facilities, which could not be fully explained by Mentor's consumers having more challenging behaviors to manage. The 170 ANE incident allegations were alarming for a population of 200 consumers in 74 residential facilities over nearly a three year period. However, an analysis of these 170 incidents did not indicate systemic abuse towards consumers inasmuch as the majority of the ANE reporting system contained allegations more akin to staff/facility performance issues and the vast majority of all allegations were unsustained by independent investigations.

To facilitate stakeholders' ability to assess ANE allegations in the future, DDSN should expand the level of detail in its ANE reporting, which currently only reports total allegations and sustained criminal incidents. However, this first requires the ANE process's multi-agency participants to expand its ANE categorization system to better discern the degree of significance of the allegations. For example, the 170 Mentor allegations could be categorized by those with a potential criminal nexus (71 allegations; five substantiated) and staff/facility performance issues (99 allegations; 15 substantiated). When aggregated, Mentor's 170 alleged ANE incidents yielded 150 (88%) unsustained by independent investigations; 15 (9%) sustained staff/facility performance issues (9%); and five (3%) sustained criminal charges against staff.

Many factors can contribute to having a disproportional number of ANE allegations, many of which do not correlate with a provider's performance. However, there is no ambiguity applying the criminal legal standard of probable cause to every provider alleged incident. Despite only 3% of Mentor's alleged incidents resulted in criminal charges to staff, this 3% was six times greater than expected when compared to peer providers. Mentor served 5% of a residential community, yet had 29% of this population's criminally sustained incidents (5) over the audit period. Of the four incidents with sufficient documentation, three (75%) indicated staff used abuse (hitting, pushing, and verbal) as a premeditated tool to gain compliance, rather than losing their temper in response to a consumer's behavior. A single incident with staff showing up for their shift apparently intent on using abusive techniques to manage their consumers is a major failure.

The ANE process is overall effective with many well engineered process attributes. However, the ANE process's effectiveness is being undermined by deficient oversight procedures. Of the 170 incidents, 70 (41%) took in excess of 45 days to resolve and 19 (11%) incidents were without resolution after being open at least 90 days, often much longer, at the time of the audit. Mentor's follow-up on these 19 unresolved cases during the SIG review identified two additional incidents where Mentor staff was criminally charged.

The direction to reduce the probability of staff abusing consumers, whether reactionary or premeditated, is to examine the factors impacting this issue, such as staff training, hiring, supervision, and improving consumers' behaviors. In many ways, the ANE issue underpinning this review was likely a symptom of a broader issue—Mentor contract performance. Looking at Mentor's overall operations, both currently and over the past eight years, it is clear there was not an obvious single solution based on a pattern of performing below standards on a consistent basis as illustrated by:

- Mentor's annual quality assurance review scores over the past eight years were always below the statewide average by, on average, 16%;

- In 2010, DDSN placed Mentor in a freeze from adding new consumers based on performance deficiencies described as, *"this signifies significant systemic problems throughout your organization;"*

- In 2011, a second freeze was described as, *"Mentor has failed to ensure the stability of its improvements signifying that real systemic change did not take place;"* and

- In March 2016, a third freeze was placed on Mentor, which is still ongoing, best illustrated by its nearly complete failure to implement consumer behavioral support plans along with strong indications implementing consumer residential service plans were also weak. The third freeze analysis noted Mentor had positive attributes in terms of physical facilities, managing consumers' drugs, and even consumer appreciation for staff.

- In all three freezes, DDSN identified a pattern of Mentor consumers not being sufficiently challenged to engage the world outside of the home with employment, day service, or other interests.

Mentor's weaknesses seemed to be in the consumer training and development areas, which Mentor was contractually required to provide. Rather than looking for piecemeal solutions to the ANE issues, Mentor needs to address its systemic pattern of operational deficiencies, which then increases the probability of enhancing the residential home environment impacting the ANE issues in a positive manner.

From a DDSN oversight perspective, its management control systems have been sufficiently "blinking red" to identify Mentor as having problems, which did result in three performance related freezes to prevent Mentor from adding new consumers over the past six years. However, despite its quality assurance reviews noting Mentor constantly trailing its peer providers, it was really only measuring minimum contract compliance indicators correlating more with deficient administrative capabilities. These reviews were not able to truly get to the heart of Mentor's ineffectiveness issues in the quality of consumer training/development. DDSN needs to move away from its predictable compliance audits towards quality audits of front line services to consumers in a less predictable pattern to motivate providers to be audit ready "every day." These quality measures, along with corresponding audit measurement techniques, need to be explicitly set forth in upcoming contract renewals, along with incrementally rolling out the private sector concept of performance incentives and penalties, as well as a willingness to use these tools. DDSN can't micromanage a provider to put forth the right combination of leadership, management, and resources for a successful operation; however, it can hold providers accountable, as well as motivate providers, through measuring outcomes with basic audit sample testing of residential and behavioral support plans' effectiveness.

The ANE process's multi-agency participants should permit, if not require, DDSN to administratively review bad ANE outcomes, whether criminally charged or not, after law enforcement completes its criminal investigation. Law enforcement fixes individual criminal accountability; DDSN should be allowed to conduct a review to fix provider administrative contract accountability, if warranted. This provides an opportune time to assess providers' operational capabilities to reduce the risk of bad outcomes, with particular attention if pre-existing risks developed were being proactively addressed prior to the bad outcome.

The long-term solution is for DDSN to shift provider contract monitoring from a minimum contract compliance reviews towards a risk-based approach emphasizing outcome measures to hold a provider accountable. Weak contract expectations and contract monitoring more focused on administrative indicators rather than outcome performance, creates a fertile environment for complacent provider performance, or worse.

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II. Background

A. Predicate

This review was requested by the DDSN for an independent review of allegations of ANE at Mentor, a private provider of residential services for DDSN consumers. Factors predicating the SIG accepting this review included derogatory media reporting of ANE incidents at Mentor; concerns from Commissioners and vulnerable adult advocates; and an emerging atmosphere of distrust in DDSN's oversight of ANE allegations at Mentor in particular, as well as indirectly Mentor's standard of care provided to its consumers.

B. Scope & Objectives

This review's scope and objectives were:

- Determine if DDSN has adequate management controls to monitor ANE allegations and resolutions at Mentor facilities, as well as standard of consumer care;
- Determine the risk of Mentor under-reporting ANE allegations; and
- Determine if DDSN takes reasonable administrative steps based on monitoring results to ensure Mentor is compliant with its contract to provide a safe residential and training environment for consumers.

Reviews by the SIG are conducted in accordance with professional standards set forth by the Association of Inspectors General, often referred to as the "Green Book."

C. Department of Disabilities and Special Needs Overview

DDSN provides services and programs for the treatment and training of persons with intellectual disability, autism, head injuries, and spinal cord injuries. The agency coordinates with other state and local agencies, county DDSN boards, and private providers to serve approximately 36,000 individual consumers. Of these consumers, 87% live at home and 13% live in a variety of out-of-home residential care.

Consumers are placed in out-of-home residential care based on their assessed level of need. There are six models on the spectrum of care based on consumer needs, which are listed below from the most to the least intense level of care:

- Intermediate Care Facilities: These are residential centers with the highest regulated and structural environments for consumers.
- Community Residential Care Facilities (CRCF): These facilities provide supervised living arrangements in a residential setting, which are licensed by DHEC.
- Community Training Home-II (CTH-II): A home environment in the community where no more than four individuals live. Care, supervision, and skills training are provided by qualified and trained staff 24 hours/day in accordance with the resident's service plan. Within this model, 3% are designated "high management" consumers, which justify a higher daily contract rate to offset providers' additional costs to manage this population.

- Community Training Home-I (CTH-I): Personalized care, supervision, and individualized training provided, in accordance with the resident's service plan, with generally no more than two individuals living in a licensed support provider's home.

- Community Inclusive Residential Services (CIRS): Promotes the development and independence of individuals with disabilities in homes leased by the individuals. A customized plan is developed to transition the individual from a 24 hour setting to a semi-independent living arrangement.

- Supported Living Program-I & II: Supports are provided by qualified and trained staff to adults who need intermittent supervision and supports. Staff are available on-site or in a location from which they can be on-site within 15 minutes of being called 24 hours a day.

DDSN's goal is to place the consumer in the least intensive level of care required, followed by skills training to move them towards independence. More independence relates both to a higher quality of life for the consumer and lower expenses to the taxpayer as the cost for supervision is reduced as care is stepped down.

D. SC Mentor Overview

Mentor is a national private provider under contract with DDSN to provide CTH-I and CTH-II residences. At the time of this review, Mentor operated 74 residences serving 208 consumers in CTH Is (16) and CTH IIs (192). Additionally, 120 (58%) consumers were classified as "high management (HM)," which represented 81% of all HM consumers in the residential community setting. Interviewees consistently noted Mentor served a very difficult population, with a number of consumers having behavioral problems needing special behavior support plans to address their needs. Depending upon the needs of the consumers in CTH IIs, staff ratios range from 1:2 to 1:4.

Mentor's FY17 contract budget is $17.2 million, of which $16.4 million is to serve a population of approximately 200 consumers in CTH I & II residences. Of this $16.4 million, $10.1 million is budgeted for HM consumers and $6.3 million for QPL (qualified provider list) consumers. Mentor also receives $787,000 for therapeutic foster homes.

E. Previous Reviews of DDSN's Abuse, Neglect & Exploitation Program

The South Carolina Legislative Audit Council (LAC) audited DDSN in both 2008 and in 2014. The 2008 audit touched on the ANE process and the 2014 audit reviewed this process in-depth. The 2014 report noted, "We found no substantive issue with DDSN's investigative process; however, we found an inconsistency in what types of allegations the State Law Enforcement Division's Vulnerable Adult Investigative Unit receives and what it refers to various investigative agencies." Additionally, in 2014, DDSN hired the Public Consulting Group to review its business practices, which yielded minor recommendations to improve the ANE system.

III. DDSN's ANE Program

A. ANE Process Workflow

State law mandates reporting by caregivers within 24 hours of a suspected ANE incident, but an ANE allegation may also be reported by any witness or victim. All reports are funneled into the South Carolina Law Enforcement Division's Vulnerable Adult Investigations Unit (SLED-VAIU) through a 24 hour a day, toll-free number. Failure to report may subject a caregiver to a criminal charge. In addition to notifying SLED-VAIU,

reporting caregivers must also alert their supervisor and DDSN. When named as a subject of an ANE allegation, State law requires a caregiver be immediately placed on administrative leave without pay. Allegations are assessed by the SLED-VAIU, and then routed to the appropriate independent investigating entity based primarily on the allegation's potential nexus to criminal liability. SLED-VAIU then notifies DDSN and the provider of the investigative entity assigned the allegation for resolution. The independent investigative entities are:

- SLED-VAIU for allegations in DDSN Intermediate Care Facilities;
- Local law enforcement (LLE) for allegations with a potential criminal nexus primarily in residential settings;
- Long-Term Care Ombudsman's Office (LTCO) for allegations without a criminal nexus occurring within residential settings; and
- Department of Social Services-Adult Protective Services (DSS-APS) for allegations involving DDSN consumers occurring outside of the residential/facility settings.

It should be noted SLED-VAIU will record an allegation as "for information only" when it determines an allegation lacks a sufficient basis to warrant investigation or complainant has a known pattern of false allegations. After referring an allegation to the appropriate investigative entity, SLED-VAIU conducts no further follow up, absent unusual circumstances, nor does it receive results of referred investigations.

In addition to the external independent investigations, the caregiver provider conducts its own internal administrative review. In cases with a criminal nexus investigated by a LLE, the provider's actions are very limited to only reporting the facts from the initial allegation and copies of relevant records, such as log books, which are sent to DDSN. For all allegations without a criminal nexus investigated by the LTCO or DSS-APS, as well as "for information only" reports taken by SLED, the provider conducts a parallel, but separate, administrative review of the entire incident, to include witness interviews. A final report is submitted to DDSN within 10 business days.

Providers submit their administrative investigative reports to DDSN through a web portal. The independent investigators formally submit reports to the provider, which upload the reports through the web portal. DDSN reviews final reports for adequate and complete information before closing the allegation. During the audit period, DDSN rejected 31 of the 160 incident review reports initially submitted due to missing information; of the 31 rejected, six were rejected a second time before they were deemed adequate. DDSN tracks ANE allegations for its consumers and provides statistical data on statewide totals and creates a performance profile for each provider of services. DDSN had a more robust ability to capture audits and incidents in an electronic format for retrieval, analytical reporting, and generate automated reporting than other State agencies regulating providers previously reviewed by the SIG.

Providers are tasked with following up with the independent review to obtain final investigative reports regarding ANE allegations. In most cases, the named caregiver in an allegation cannot return to duty until the case is closed by the independent investigator.

It is critical to understand the ANE process is governed by State statute, and no one State agency "owns" this process. Rather, multiple State agencies cooperate to execute the ANE process as legislatively intended. As a result, any modifications to the ANE process must be agreed upon by the involved agencies if the latitude exists within the statute, or possibly requires legislative modifications to the statute.

B. Analysis of ANE Allegations for Period 7/1/2013 – 3/31/2016

1. Methodology of Analysis

The SIG reviewed all ANE allegations involving Mentor for FY14, FY15, and the first three quarters of FY16 (7/1/2013 - 3/31/16). Mentor had 233 ANE allegations. The 233 allegations pertained to 170 individual incidents. A single incident can generate multiple allegations due to a practice of opening a separate allegation for each consumer potentially involved.

In order to understand the characteristics of this 170 incident population, each incident was initially analyzed and placed into two main categories: an allegation with a potential criminal nexus; and an allegation with no criminal nexus and generally related to complaints about staff performance or a facility's physical condition. Within each of the two main categories, the population was further subcategorized as follows:

- Allegation with a potential criminal nexus:
    - physical assault;
    - non-physical neglect or exploitation; and
    - incident occurred outside of Mentor's residential setting and control, such as during a family home visit or attending another provider's day center.
- Allegation with no criminal nexus and related to complaints about staff performance or the facility's physical condition:
    - unknown bruises/injuries of a non-substantial nature;
    - facility physical condition;
    - lack of professional conduct by staff;
    - restraint/self-defense; and
    - incident occurred outside of Mentor's residential setting and control, such as during family home visit or attending another provider's day center.

The ANE process labels allegations with a criminal nexus resulting in a criminal charge as "substantiated," while using a different term, "verified," in non-criminal investigations. The SIG used "sustained," or "unsustained," rather than substantiated or verified to simplify the terminology, as well as due to "verified" being used in circumstances creating potential misleading results. Sometimes the "verified" meant the allegation occurred with sufficient evidence to fix accountability to a caregiver. Sometimes the "verified" only meant the allegation occurred without evidence to fix accountability, such as a nominal bruise from an unknown origin being verified as existing without developing any information as to how it occurred. This second type of "verified" caused a perception of wrongdoing by the provider and staff, when in fact there was no evidence to discern if the incident was staff poor performance or a consumer accident. As a result, the SIG determined these type of allegations to be unsustained. Additionally, when a non-criminal allegation was "verified" or "sustained" involving a Mentor consumer but the subject was another caregiver, such as an ambulance driver or daycare provider, these allegations were considered by this review as unsustained towards Mentor due to its complete lack of involvement.

2. ANE Incident Data Analysis

The 170 incidents were analyzed by reviewing DDSN incident files. Audit judgment was required to categorize each incident with data available. Inasmuch as a key factor in generating this SIG review was a level of mistrust of DDSN providing ANE incident data, the SIG's spreadsheet summarizing its review is being made

available for stakeholder detail review at the following Internet link: http://oig.sc.gov/Documents/SIG-ANE-Review-of-SC-Mentor-Incidents.pdf. This will allow interested stakeholders to independently categorize incidents in their own frameworks to understand the characteristics of this ANE incident population. A summary of the SIG's analysis of ANE incidents during the audit period is contained in the below table:

SIG Analysis of 170 ANE Incidents at Mentor for Period 7/01/2013 to 3/31/2016

Status	No Nexus to Criminal liability-performance of personnel/facility & customer allegation						Criminal nexus to allegation				
	Unknown Injury	Facility-Standard of Care	Lack of Professional Conduct	Self-Defense/ Restraint	Different Provider	Subtotal	Non Physical Asault, Neglect, Exploitation	Assault	Different Provider	Subtotal	Totals
Incidents	39	10	25	19	6	99	16	53	2	71	170
Sustained	0	4	9	2	0	15	1	4	0	5	20
Not sustained	36	6	14	17	5	78	15	46	2	63	141
Open Cases-significant	1	0	0	0	0	1	0	2	0	2	3
Open Cases-Not significant	2	0	2	0	1	5	0	1	0	1	6
Totals	39	10	25	19	6	99	16	53	2	71	170

Of the 170 incidents, there were 71 (41%) incidents with the initial allegation having a potential criminal nexus and 99 (59%) without a potential criminal nexus more akin to the performance of staff and facility conditions. Five incidents (3%) resulted in six Mentor staff members being criminally charged. Fifteen incidents (9%) resulted in non-criminal allegation being sustained by an independent investigation. At the time of the analysis, 19 incident cases (11%) were pending longer than 90 days, often much longer, without an investigative resolution. Mentor was requested to update the DDSN incident file, to include re-contacting the independent investigator. Ten of these cases were subsequently closed with an investigative update resolving the allegation, of which two identified new incidents of Mentor staff being criminally charged. Nine incident cases are still open, with three incidents with a criminal nexus having potential significant issues without resolution.

During the audit period, Mentor had 5% of the entire consumers in the community residential training home population, while having 20% of the allegations and 29% of the criminally sustained incidents. Many factors can contribute to having a disproportional number of allegations, such as a potential management emphasis to over-report; staff skill level in managing consumers; and degree of difficulty in consumers' behavior issues being managed. DDSN and Mentor both pointed out Mentor served a consumer population with more difficult behavior issues to manage, as illustrated by 58% of its consumers were designated as HM (42% QPL) and Mentor served 81% of all HM consumers in the community residential training home population. This certainly could be a contributing factor. However, examination of Mentor's 170 incidents during the audit period, 60% were in HM homes (40% QPL), which indicated a proportional distribution of these high number of allegations between Mentor's HM and QPL sub-populations.

To better understand the characteristics of the 170 incident population under review, case vignettes are presented below for the five incidents involving Mentor staff criminally charged; three incidents with a potential criminal nexus still pending; one significant event not recorded as an ANE allegation; and the 15 sustained incidents with no criminal nexus and generally performance related.

Incidents Involving Mentor Staff Criminally Charged (5)

- Case# 2014ANE 0194: Caller identified victim consumer with two black eyes, bruised nose, and a scar on his jaw allegedly caused by abusive staff, as well as staff allegedly falsified reports claiming the injuries were caused by a fall in the shower. Investigation determined a staff member hit multiple consumers on multiple occasions, to include the use of pepper spray, which led to criminally charging one staff member with three counts of abuse of a vulnerable adult. A second staff member was criminally charged with two counts of failing to report abuse.

- Case# 2016ANE 0004: An anonymous caller alleged a staff member pushed a consumer into a wall. Investigation determined a staff member had a pattern of yelling, intimidating, and pushing consumers leading to physical bruising, which resulted in two counts of abuse of a vulnerable adult.

- Case# 2014ANE 0322: A co-worker reported a staff member brought a taser to work, which he threatened to use on consumers to gain compliance. Investigation resulted in staff member being criminally charged with abuse.

- Case# 2016ANE0009: Victim consumer reported staff pushed him resulting in victim hitting the stove causing hot water to spill and burn his arm. Staff member charged with assault & battery, 3rd degree.

- Case# 2014ANE0394: Anonymous tip alleged staff members "jumped" a consumer causing a broken hip. One staff member arrested for unlawful neglect and abuse of a vulnerable adult; the file failed to denote details of incident.

Incidents with a Potential Criminal Nexus Still Pending (3)

- Case# 2015ANE0381: Staff reported consumer initiated physical altercation with another staff member. After the altercation ended and consumer was still on the floor, the staff member stomped on consumer's face and spit on her as the staff left the residence. Staff terminated on 9/25/2015. Only law enforcement report to date was welfare check shortly after incident.

- Case# 2015ANE0219: Staff reported redness and swelling to victim's scrotum and testicles on 5/09/15. Victim was transported to emergency room and a sexual abuse exam was performed. DDSN, nor provider, had results of exam, but file reports indicated victim had an infection, cellulitis, a potential cause of the redness. This incident is still an open ANE case because the victim in this case died several months later, 9/05/15, as the result of a food related choking incident, which was not opened as an ANE incident.

- Case#2015ANE0403: Staff reported victim had a swollen eye and scratches on his chest. There were no behaviors listed in the log for date of incident. There was a behavior incident listed the day before which resulted in victim being restrained by staff. Both of those staff were placed on administrative leave, on 9/24/15, pending the outcome of the still ongoing LLE investigation.

Significant Allegation with Criminal Nexus without Criminal Charge (1)

- Case# 2013ANE0542: Consumer left the home, on 12/08/13, during third shift and was hit by a car less than 100 yards from the residence. Victim later died from his injuries. Staff reported when they exited the bathroom they found the front door to the home open and consumer had eloped. Accountability log

shows improper documentation in that the log appeared to have been pre-filled. There were no criminal charges filed against the staff on duty.

Incidents Sustained with No Criminal Nexus and Performance Related (15)

Normally, a narrative of 15 cases would be placed in an appendix and summarized in the body of the report. However, these 15 cases, all sustained, are presented to illustrate the types of performance deficiencies sustained within the ANE system, which are distinctly different from sustained cases with criminal charges of abuse.

- Case# 2014ANE0258: Victim consumer had not been paid by subject caregiver for washing his car on two occasions. Subject denied statements about not having paid victim for dates in question. However, he did admit to taking victim to corner store and buying him treats in return for a previous car wash, which he also did the same for another consumer. Subject was terminated 7/18/14.

- Case# 2014ANE0408: Anonymous caller alleged there was no food at the facility, the oven door was a fire hazard in need of repair, and a subject caregiver was able to pass out medications without a supervising nurse. It was determined the subject caregiver was med-tech certified having the authority to dispense medication. However, the LTCO verified oven was broken and had been replaced and food service allegation.

- Case# 2014ANE0444: Family of victim consumer reported there was a snake in the home a week prior and the back porch was off limits to consumers due to needed repairs, which then caused residents only being able to walk in hallway of home. It was determined the residential logs showed victim had been actively using the back porch and walking in the yard. Standards of care violations were verified by LTCO and another violation for using a thickening agent incorrectly in one resident's liquids.

- Case# 2014ANE0446: LTCO reported the following safety issues in the home: a raccoon had entered through a doggie door; snakes had entered the home through a hole in the bathroom wall leading to the crawl space; there was a gap in a window preventing it from completely closing; black mold spores were on the outside vent cover; and an air return vent was detached. Mentor gave written warnings to the house manager and program director in regards to not reporting maintenance concerns in a timely manner. Standards of care violations were verified.

- Case# 2014ANE0517: Victim alleged a subject staff member was going to 'knock him *** out' if victim hugged him. It was determined subject staff claimed the victim came up from behind and caught him off guard with a hug. Subject staff asked victim to stop hugging him and keep his hands off of him because he was staff, but subject staff did not remember his exact words. Two of the victim's housemates witnessing the incident reported subject staff cursed. Subject terminated for violating the dignity & respect policy.

- Case# 2015ANE0018: Allegation consumer urinated in the front yard and trash from residence's trash can blows into the neighbor's yards. It was determined from staff numerous incidents of a consumer improperly urinating and putting trash in the street. This consumer also exposed himself to staff. LTCO verified allegation of lack of cleanliness; a toileting issue; consumer wandering; and failure to accommodate/monitor a consumer. Mentor provided written warnings to five staff members.

- Case# 2015ANE0117: Allegation from staff that after reviewing the residence's logs, it was noted another subject staff member pushed victim on several dates and failed to report suicidal comments. The consumer's behavior logs showed the victim being pushed by subject staff to avoid consumer hitting another consumer or to avoid getting subject's drinking cup. Victim said on two occasions he wanted to die and subject staff did not report suicide ideations. Subject staff terminated. LTCO verified allegations of standard of care of dignity and respect.

- Case# 2015ANE0251: Staff reported another subject staff member made statements about disliking victim consumer's sexuality loud enough that victim consumer heard, but not directly to the consumer. Victim consumer heard statement and had his feelings hurt. A second victim consumer reported this subject staff was also rude to him, used profanity, and made him go to bed earlier than usual. LTCO verified finding of subject staff using profanity. Employee terminated.

- Case# 2015ANE0255: Subject staff reported victim consumer for taking cigarettes from painters. Victim consumer yelled at the subject staff member pertaining to having to return the cigarettes. Subject staff yelled at victim for 3-5 minutes and threatened him with pressing charges and sending him to jail. Witness statements showed subject staff yelling only after victim yelled at staff. LTCO verified psychological abuse. Employee terminated.

- Case# 2015ANE0265: Victim consumer retrieved from corner store after eloping. Program Director was walking in the home when subject staff came back with victim. Program Director overheard subject staff curse at victim consumer for running off and reported ANE allegation. Subject staff stated he was on shift alone and called police repeatedly to assist with victim's actions without assistance. On his last return to home, victim threatened to stab subject staff, broke the freezer door handle, and grabbed a knife. Subject admitted using profanity due to severity of situation. LTCO verified standards of care violation. Employee terminated for violation of dignity and respect.

- Case# 2015ANE0361: Five Mentor staff reported this incident. Staff subject yelled at day program staff and victim consumer. Subject staff was angry the victim consumer was butting in, while the subject staff was trying to diffuse a situation between two other consumers who were about to fight. LTCO verified violation of standards of care of dignity & respect. Employee terminated.

- Case# 2015ANE0433: Staff reported another subject staff cursed at victim consumer. Victim consumer would stay in his room when subject staff was on duty. Victim also claimed subject staff took away his cigarettes. LTCO verified complaints of verbal abuse, mental confinement of facility against will, individual right to smoke, failure to report, failure to follow plan, and dignity and respect. Employee terminated.

- Case# 2015ANE0457: Staff reported that subject staff yelled at victim consumer to move her feet that were on the couch so another housemate could sit down. LTCO verified allegations of violation of the dignity and respect policy.

- Case# 2016ANE0060: Staff reported that consumer victim was left alone for an undetermined amount of time in a van while subject staff went inside another facility. Investigation determined the incident lasted five minutes. The subject staff told the victim consumer to stay in the van while she quickly ran inside to pick up a medical product because it was raining so hard. LTCO verified violation of standard of care for supervision.

- Case# 2016ANE0147: Staff reported subject staff provided victim consumer with cigarettes and allowed victim to smoke marijuana in the home. Victim consumer has COPD and was not allowed to smoke or be around smoke. Subject admitted to giving victim cigarettes, but not knowing her smoking status. Employee terminated. LTCO verified failure to follow plan of care for smoking.

3. Observations of ANE Allegations:

After reviewing the data, the SIG developed the following six observations:

a. DDSN Classification of Allegations

The ANE process intentionally and appropriately casts a wide net to collect any information on a possible ANE incident. As a result, a majority of allegations are more staff and facility performance related than have a criminal nexus to ANE. A problem emerges when these non-criminal, performance related allegations are force fitted into one of five classifications: sexual abuse, physical abuse, psychological abuse, neglect, or exploitation. Just because someone makes an allegation to the ANE process, it does not equate that each entry has to be classified in ANE terms. For example, a staff member inappropriately yells or uses a curse word is certainly a performance related lack of professional conduct, but an independent investigator could classify this conduct as "psychological abuse." A staff member unavoidably leaves a consumer unattended in a van for five minutes to chase after another consumer eloping may be a technical policy violation, but this conduct could be classified as "neglect." These type of findings using ANE terms can create distortions in interpreting ANE results data when aggregated.

In addition to the limited ANE classification issue, DDSN had other concerns with non-criminal reviews. First, DDSN observed non-criminal allegations sustained, yet in its opinion, there was insufficient evidence. Second, non-criminal allegations have been sustained when the actual issue sustained was different than the original allegation. Third, and the most significant issue, independent investigators' terminology creates an appearance of wrongdoing without any evidence even suggesting wrongdoing. Providers are required to report every unknown bruise, such as a small bruise on a consumer's shin, which independent investigator will "verify" the incident based solely on confirming the bruise exists, regardless if evidence is developed of staff inappropriate conduct. Despite DDSN having disagreement with some of the independent investigative findings, based on fact or terminology, DDSN had no "due process" appeal rights to question a disputed finding.

All these reasons combined resulted in DDSN's decision to report sustained ANE allegations externally only when confirmed through a criminal charge against staff. These criminally sustained allegations are small in number, such as Mentor's five sustained incidents from a population of 170 alleged incidents. This then triggers stakeholders' concern with the disproportionately low number of sustained incidents in comparison to the large number of ANE allegations.

The root cause of this reporting problem issue stems from the rigid ANE classification system inhibiting accurately describing the substance of many performance related allegations. The reality is the clear majority of allegations have no criminal nexus and are more akin to staff or facility performance deficiencies. If accurately classified in performance terms rather than exclusively in ANE terms, the data could easily be discerned by stakeholders as to the level of significance. This would facilitate both DDSN management and external stakeholders to focus on serious ANE criminal allegations and outcomes, as well as be aware, but not misinterpret, sustained performance related allegations.

b. Low Risk of Under-Reporting ANE Allegations

Of the 170 incidents reviewed, 103 were reported by Mentor staff. Other reporters of ANE incidents were: family members (22), victims (19), house mates (2), anonymous (7), investigators (5) and other sources (12). Mentor enforced ANE reporting as evidenced by many instances of Mentor administratively sanctioning staff for lack of timely ANE reporting to SLED or their immediate supervisor, to include terminations. A review of the types of allegations reported does not indicate complainants were constrained or limited in making allegations. Further, the ANE system has attributes to support and encourage reporting, to include a confidential 24 hour hotline; ANE training required for staff and consumers; criminal liability for not reporting; and independent investigations for all allegations. Between staff, consumers, families, and neighbors, every residential home has many "eyes" on the home's activities, as well as a simple and confidential mechanism to report suspected ANE incidents.

c. Elongated Reporting Timeframes by Independent Investigators

During the audit period, the investigations by the independent investigators were completed with a median of 32 days, ranging from one to 733 days; 70 (41%) required over 45 days to complete; and nine were in excess of a year. Of these 70 incidents, 33 were vetted to the LTCO, 30 were to LLE, and seven to DSS-APS. The impact of delayed investigations for non-criminal allegations by LTCO and DSS-APS is less due to the provider completing its parallel, but separate, administrative reviews in ten days. However, the delayed investigation by LLE has a much greater impact for several reasons. First, evidence in these cases relies heavily on statements from victim(s), subject(s), and third party witnesses, and delayed interviewing diminishes the accuracy of witnesses' recollections, particularly consumers with intellectual disabilities. Second, and most important, if there was a risk of ongoing abuse of a vulnerable adult, delayed investigation only allows the alleged conduct to potentially continue. If the allegation identifies specific staff, the staff are immediately place on administrative leave, which partially mitigates this risk. Third, it creates a "real world" undue burden on the caregiver placed on leave without pay pending a resolution, as well as unnecessary stress on providers to properly staff residential homes during these elongated suspension periods. At some point with delayed LLE investigation, the multiple agencies operating the ANE process need to consider additional procedures to weigh the risk of unaddressed abuse to consumers against these unnecessary investigative delays. The current ANE process does not have procedures to proactively address delayed investigations, which exposes the system to unnecessary risks due to inaction.

d. Unresolved Investigations for Elongated Periods of Time

At the beginning of the audit of the 170 ANE incidents, 19 (11%) were pending with no resolution despite being opened at least 90 days, often much longer. The SIG requested these incidents be updated and, if possible, closed with a resolution from the independent investigator. Mentor's follow-up resulted in closing 10 cases with two sustained based on Mentor staff being criminally charged with abuse. Both incidents lacked a final LLE report, but SC Mentor had constructive notice of each criminal charge against staff and failed to report to DDSN. This increased the total sustained criminal incidents to five during the review period, which was a 66% increase. Of the nine incidents still unresolved, three were considered potentially significant. These nine incidents had been opened from 11 to 29 months, and were vetted to LLE (6), LTCO (1), and DSS-APS (2).

e. A Few Victims Generate a Disproportional Number of Allegations

Of the 170 incidents, 69 (40.5%) involved the same victim/complainant in four or more allegations. Although many of these complaints from "frequent flyers" appear nominal or even intentionally false to retaliate against staff, each had to be vetted and investigated. For example, 10 allegations pertained to the same victim for bruises of unknown origin. Subsequently, SLED-VAIU noted this pattern and learned the victim had an

unsteady gait and may have sustained bruises while being helped on/off transportation van. However, one of these "frequent flyer" complaints did result in a sustained incident with a staff criminally charged, which only reinforces the need to thoroughly vet allegations from all sources. A pattern was also noted in this group of misusing the ANE system to threaten staff as leverage to get their way in a particular situation or retaliate against staff for a decision(s) made.

f. Mentor Takes Administrative Action for Policy Violations

Of the 170 incidents, a review of the available records identified Mentor citing its staff with policy violations in 63 incidents (37%). The most frequent policy violations pertained to violating the dignity and respect policy; not following the Behavior Support Plan guidelines; and delay in ANE reporting. Mentor's internal administrative reviews recommended re-training in 38 incidents (22%). Further, 39 incidents (23%) resulted in staff terminations. Mentor advised the specific policy violation for an incident may not have been the sole factor in terminations; often, after an incident Mentor determines, based on the totality of information, the staff member is just not a good fit for the caregiver duties.

C. SLED-VAIU Observations

SLED-VAIU identified an opportunity for the provider, the agency, or both, to do a deeper administrative review into serious incidents, even if the evidence did not rise to the level to support a sustained criminal charge. In many cases, review of facility logs revealed behavioral indicators potentially contributing to the actual incident being investigated, such as behavior escalations or refusal to take prescribed medication. Further, residential home logs could be improved by creating a shift report with more detail. Regional DDSN facilities excel on quality shift reports, while the current residential home tendency is to only document negative behaviors or incidents. A more robust shift report could identify leading indicators allowing subsequent shifts to be more aware of potential or brewing issues. These deeper administrative reviews also could be used to improve operations to mitigate the risk of future incidents.

SLED also noted many agencies support the creation of an adult abuse registry to prevent re-hiring care workers not suitable to work in this industry. However, there are issues to work out with such a registry who would manage the list and establishing legal and workable standards to warrant placement on the list.

D. Advocacy Groups' Observations

Staff from the LTCO and the Protection & Advocacy for People with Disabilities, Inc. (P&A), a non-profit, were interviewed. Both entities serve the vulnerable adult community consumers residing in facilities owned or contracted by DDSN. Six staff members participating in the two group interviews unanimously identified Mentor as providing services of a lower quality when compared to peer providers. Each group had difficulty articulating exact reasons for this difference, but Mentor seemed to lack an intangible quality of striving to improve consumer care.

E. Other DDSN Providers Comparative Data & Observations

DDSN has five providers serving HM consumers in CTH I & II facilities, to include Mentor. Within this provider community, Mentor had 50% of the consumers and incurred 77% of the ANE allegations. Mentor did serve 74% of the HM consumers in this community.

The below table sets out the provider community's ANE allegation and population data during the audit period:

	ANE Incidents					Consumer Population			
Provider	FY 14	FY 15	FY 16	Total	% Total	Population	% Total	HM population	% Total HM pop.
CHESCO	9	4	9	22	9%	128	31%	11	7%
Excalibur	3	0	1	4	2%	17	4%	17	11%
Lutheran	3	6	9	18	8%	47	11%	9	6%
Mentor	43	76	57	176*	77%	208	50%	120	74%
Willowglen	6	1	1	8	4%	16	4%	4	2%
Total	64	87	77	228	100%	416	100%	161	100%

*Includes six duplicate incidents for Mentor

Common themes developed from interviews were:

- A key factor in managing consumers' behaviors was to motivate consumers to get out of the home and into the community on a regular basis. One provider worked to keep its HM population employed. A second provider focused on consumers volunteering for charitable organizations. A third provider spoke of the importance of developing schedules for out of home events with resident input and maintaining those schedules. Enhancing consumer behavior and activity was believed to indirectly reduce the risk of ANE allegations, particularly frivolous allegations motivated by consumer frustration or an unmet need.

- The majority of providers noted the consumer population had a tendency to make false allegations. This was done for many reasons, to include frustration, leverage against staff to get their way, or even retaliation against staff decisions.

- Two private providers used cameras in the common areas of the residences. The first provider used live-feeds only to allow staff to better monitor activities in other parts of the home while staff was busy in another part of the home, such as preparing meals. This provider also used recorded feeds in day program common areas. Cameras or audio monitors were used in bedrooms only if there were medical conditions needing more attention. The second provider used cameras with recorded feeds in common areas. Both providers stated cameras helped reduce ANE allegations and shortened investigative time periods addressing allegations. The use of cameras was approved by each provider's Human Rights Committee. It was noted the Protection & Advocacy group had no issues with using cameras in common areas.

IV. Other DDSN Management Controls Monitoring SC Mentor

A. DDSN "Freeze" on SC Mentor

On 3/24/2016, DDSN noticed Mentor, via letter, it was under a DDSN temporary "freeze" order to halt any plans to expand homes to add more consumers. This was done to allow Mentor to focus on enhancing service quality. The letter referenced a 3/15/2016 meeting where DDSN expressed concerns surrounding Mentor's performance serving consumers. Specifically, DDSN was concerned with Mentor's higher rate of sustained ANE cases.

It should be noted Mentor has been subjected to two prior temporary "freezes." The first freeze, documented via DDSN letter dated 7/7/2010, was based on the majority of its compliance/licensing measures being substantially below statewide averages with a declining trend line. Further, DDSN identified Mentor's rates of critical incidents and sustained abuse as requiring immediate attention. DDSN concluded, *"This signifies significant systemic problems throughout your organization."* A DDSN 3/4/2011 letter to Mentor identified

improvement, but DDSN still had concerns with the *"level and type of activity that Mentor consumers are engaged in during the day. Specifically, it appears that many consumers remain at their respective home during the day. During the DDSN visits noted above, several consumers expressed concern about being bored because they stayed in the home all the time. Such boredom can contribute to consumer behavioral challenges and the critical incidents that have caused concern in the past."* On 5/17/2011, ten months later, DDSN lifted the first freeze.

The second freeze, documented via letter dated 9/7/2011, was based on the poor results in a recent audit of Mentor. DDSN concluded, *"SC Mentor has failed to ensure the stability of its improvements signifying that real systemic change did not take place."* On 2/28/2012, five months later, this second freeze was lifted. DDSN noted it was particularly pleased that *"meaningful activities outside of the residence for the individuals you support have significantly increased."* DDSN applauded Mentor's self-initiating a day service in Columbia as an effective strategy to address this lingering issue. However, this day service was never established as planned.

The third and currently ongoing freeze, effective 3/24/2016, was followed by DDSN deploying robust data collection techniques to fully assess Mentor's problems. DDSN initiated its reoccurring Quality Assurance Review (QAR) for Mentor several months ahead of its normal 18 month schedule. DDSN conducted unannounced home visits in March (23 homes) and June 2016 (23 homes). However, the most powerful data of a potential root cause was developed by two subject matter expert clinicians assessing 21 total consumers' behavioral support plans (BSP) implemented by front-line staff. These two experts operated independently, but reached similar conclusions. BSPs assess problematic consumer behavior, followed by designing a plan for front line workers to use to intervene and replace a problem behavior with a positive behavior to improve consumers' quality of life. It is well understood consumers' problem behaviors can be key drivers resulting in critical incidents, to include ANE allegations against staff.

Both experts had significant concerns with the quality of the written BSPs developed for consumers. However, the most critical finding was the failure of front-line staff to use, as well as even understand, the written plan to work with the consumer on a day-to-day basis to improve behaviors. One expert commented, *"In all cases the staff members were largely unaware of the procedures contained within the BSPs and these plans did not predict their interactions with the residents."* The second expert commented, *"Specifically, when questioned, staff rarely reported that they had not been shown how to implement the plans nor were they observed carrying out BSP procedures and provided feedback to the authors of the plans. This issue is directly related to the seemingly infrequent presence of Mentor behavioral personnel in the homes and face-to-face interactions with the home staff."*

Both experts also commented on consumers spending too much time at the residence. One expert commented, *"The one point of concern identified by consumers was boredom and the lack of activities during the day and that too much time was spent at the residence."* The second expert commented in a more diplomatic manner, *"There are also living situations in which consumer participation in common activities of daily living is much more prevalent."*

Both experts identified positive attributes with both experts commenting favorably on the physical homes as clean, in good repair, and in suitable neighborhoods. It also appeared consumers spoke favorably about the staffs.

The April 2016 QAR identified a deficiency pattern in consumers' residential service plans. A residential service plan sets forth consumer data and a plan to provide each consumer with the life skills to improve independence and quality of life. Ten consumer's residential service plans were reviewed on two key elements indicative of effectiveness:

- "The effectiveness of the residential plan is monitored and the plan is amended when a) no progress is noted on an intervention; b) new intervention strategy, training, or support is identified; or c) the person is not satisfied with the intervention." (60% failed)

- "A quarterly report of the status of the interventions in the (residential service) plan must be completed." (70% failed)

The 2016 DDSN special assessment after the freeze identified systemic problems with both "planning" documents for each consumer's residential services and behavioral health.

The 46 unannounced home visits (23 in April 2016: 23 in June 2016) measured the following categories: outdoor conditions; indoor conditions; staff to client ratio; medical care; structured programming; and interviews with on-site staff and consumers. A critical incident category was also on the review checklist, but often was not considered during the field review. All of the categories, with the exception of structured programming, were rated "satisfactory," the highest rating. Interviews appeared positive with nominal derogatory comments. There were only a very few items within the major categories rated "unsatisfactory," and even the detailed explanation of these unsatisfactory items seemed quite nominal. The only deficiency patterns identified were:

- the item titled, "a schedule, showing specific and planned activities is posted in a conspicuous place," was rated unsatisfactory in 13 (28%) homes;

- the item titled, "activities correspond with the posted schedule," was rated unsatisfactory in 18 (39%) homes; and

- the item titled, "the facility has an appropriate staff-to-client ration," was rated unsatisfactory in six (13%) homes; all six were observed in the June 2016 unannounced review phase.

Mentor currently recognized the need to improve. Mentor has hired a new expert to manage its behavioral support program, as well as increased the ratio of front-line supervisors to direct caregivers. It recognized its high turnover in direct caregivers and field supervisors, which according to Mentor was an industry problem, has had an impact on its operations. The industry turnover issue was supported by peer providers, as illustrated by one provider commenting, 'it is hard to find employees for this type of work at $10/hour where one mistake may result in a criminal charge.'

B. <u>Quality Assurance Reviews (QAR)</u>

DDSN outsourced its QARs to an independent third party vendor, the Alliant Corporation (Alliant). Many of the requirements for the reviews are mandated from Medicaid in waiver agreements with DDSN. Alliant reviewed all community residential providers every 12-18 months and measured compliance indicators in four areas:

- Administrative Indicators (AI): comply with reporting procedures for ANE, staff training, hiring, internal unannounced quarterly visits, and the existence of a risk management and Human Rights Committee functions;

- General Agency Indicators (GAI): operations, residential service delivery, and compliance with Medicaid requirements;

- Residential Habilitation Indicators (RHI): appropriate assessment and planning for consumers' residential needs and health/behavioral support needs.

- Residential Observations (RO): observations during a visit to a residential home emphasizing the staff's interaction with consumers, particularly to ensure the residential and health/behavioral plan is implemented as written.

The below chart depicts Mentor's QA scores, stratified by its high management (HM) population and its general population (QPL) over the past four fiscal years (FYs 2013 – 2016) in comparison to statewide averages:

	TOTALS			AI			GAI			RHI			RO		
FY	HM	QPL	State	HM	QPL	State	HM	QPL	State	HM	QPL	State	HM	QPL	State
13*	85.7	85.7	93.9	66.7	66.7	99.3	85.9	85.9	93.2	79.2	79.2	90.1	100	100	99.3
14	90.4	88.8	92.7	72.7	72.7	83.8	93.9	93.1	93.4	94.0	88.2	87.0	88.9	100	88.8
15	87.2	85.5	93.6	71.4	71.4	80.6	88.1	68.2	91.3	83.3	90.5	90.8	100	100	100
16	82.4	72.6	91.0	66.7	61.1	73.1	84.4	68.2	91.3	82.1	65.0	88.7	100	100	100
Avg.	86.4	83.2	92.8	69.4	67.9	84.9	88.1	78.9	92.3	84.7	80.7	89.2	97.2	100	97.0

Review of the past four FYs depicted Mentor's relative overall performance (total HM + total QPL/2) lower than the statewide average by the following percentages: 2013--9% lower; 2014--3% lower; 2015--7% lower; and 2016--16% lower. This overall lower performance pattern than the statewide average also persisted from FY 2008 through FY 2012 as follows: 2008 – 27% lower; 2009 – 14% lower; 2010 – 24% lower; and 2011/12 – 34% lower). In each of the past eight FY QA reports, Mentor trailed the statewide average by, on average, 16%.

Interpreting the QAR's scores requires a deeper examination of the review than just the total provider score. As an illustration of a QAR, the most recent FY 2016 QA examined 79 employee hiring/training records; five HM and five QPL consumer files for provider residential and health/behavioral services; and one observational site visit to a HM and QPL residence (2 of 74) where one consumer and available staff, normally two, were interviewed. For example, in the examination of 79 staff files for training, if only one staff file was non-compliant or all 79 staff files were non-compliant, both situations were scored the same as only one "unmet" requirement. The FY 2016 review denoted not meeting the requirement for reporting ANE allegations timely by identifying 30 errors, while the same element was not met in FY 2015 with only eight errors. Both FYs 2015 and 2016 had an unmet requirement in training, yet 2015 had 10 staff (18% of sample) not provided training while 2016 had 35 staff (44% of sample) with the same deficiency. This issue will be addressed by DDSN, effective 7/1/2016. A second significant limitation was no weighting of items as to significance in the approximately 100 items measured as "met" or "unmet" to yield an overall score. A deficiency for not maintaining a critical consumer plan of care had the same weight as not documenting refresher training.

The most significant limitation of the QAR was its focus on administrative compliance and not on quality of care. Certainly, documentation of compliance with key indicators (i.e., hiring; training; consumer care plans' documentation) adds weight the provider had the ingredients in place that contribute to successful quality of care. Yet, data to truly assess quality of care would come from direct interviews or surveying consumers and staff, yet the current QAR program limits to interviewing two consumers and generally two staff in two of SC Mentors 74 facilities (3%) by non-clinician auditors.

Even with the QAR focusing on minimum contract compliance review, the results indicative more of deficient administrative capabilities did have value in loosely correlating with deficient operational capabilities. If an organizational is deficiently administratively, it is certainly an indicator of operational risk to deliver complex human services.

During interview, the Alliant QA audit team noted, unanimously, Mentor's quality of care was below peer providers based on their holistic observations, which also included Alliant's observations inside of all 74 Mentor homes while conducting annual licensing inspections. A persuasive observation was Alliant's examination of consumers' residential and behavioral health plans of care during the most recent FY 2016 QAR, where it noticed a pattern of low quality documentation for many of the plans that were technically compliant based on just being filled out completely. To corroborate this observation, the April 2016 QAR tested 10 consumers without noting one exception for a BPS plan with a 100% score for health & behavioral support services; yet, the two clinician subject matter experts' review during the same timeframe determined the BSPs were ineffective primarily due to front line workers lack of skill to implement the written "paper" plan.

C. Licensing Reviews

Mentor facilities are licensed under South Carolina state law. DDSN has discretion on frequency of requiring licensing inspections, which current policy dictates annually based on prior external audit recommendations. The inspections focus on three areas:

- Safety: physical facility inspection, such as fire safety, electrical, heating/air-conditioning, water, and pet vaccinations;
- Home environment: physical facility inspection, such as first-aid kit, flashlight, bedroom requirements, support/consumer ratios, hot water temperature, and cleanliness; and
- Health services: primarily proper management of consumer medications.

The below chart depicts Mentor's licensing scores stratified by its high management (HM) population and its general population (QPL) over the past four fiscal years in comparison to statewide averages:

	CTH I			CTH II		
Fiscal Year	HM	QPL	Statewide Avg.	HM	QPL	Statewide Avg.
2013	95.4	100.0	95.2	94.2	93.4	93.2
2014	96.2	100.0	96.1	91.2	87.1	94.7
2015	95.8	100.0	94.5	91.7	88.3	87.6
2016	96.2	100.0	92.1	90.4	84.5	88.1
Average	**95.9**	**100.0**	**94.5**	**91.9**	**88.3**	**90.9**

The data suggests Mentor's physical facilities were satisfactory and consistent with peer statewide averages. This was also observed during DDSN's 46 unannounced home visits in March and June 2016. It was noted that DDSN's third party auditor, Alliant, was physically on-site in all 74 SC Mentor facilities each year, but their audit focus was purely on the facility not requiring interviews of staff or consumers pertaining to quality of care.

D. Critical Incident & Death Reporting

DDSN's Quality Management Division tracks critical incidents (CI), which occur at DDSN facilities, county DDSN Boards, and private providers. Many types of incidents are tracked, such as accidents, medical events (i.e., choking, hospital stays), consumer on consumer assaults, or property theft. DDSN uses the metric of CI incidents per 100 consumers, which allows comparability among all providers. During FYs 14-16, Mentor's CI frequency/100 consumers was 60, while its private provider peer group average was 42. This data is not determinative of a Mentor deficiency; it is just another indicator of activity within the Mentor consumer

population. The below chart sets out Mentor and its private provider peer group CI frequency /100 consumers for FYs 14 - 16:

Provider	Fiscal Year 2014	Fiscal Year 2015	Fiscal Year 2016	3 FY Average
CHESCO	18	18	15	17
Excalibur	127	85	19	77
Lutheran Family	12	27	41	27
Mentor	43	74	62	60
Willowglen	47	29	11	29
FY Average	**49**	**47**	**30**	**42**

DDSN's Quality Management Division tracks deaths occurring at DDSN facilities, county DDSN Boards, and private providers. SLED-VAIU investigates all deaths in DDSN facilities and contracted residential programs. During FYs 14-16, Mentor served approximately 5% of the consumers in community residential settings, and recorded six deaths (3.1%) of the 191 deaths within this community.

E. Other Issue—Financial Reimbursement for High Management Consumers

This SIG review did not examine the financial reimbursement methodology for QPL or HM consumers. However, due to anecdotal information obtained incident to the ANE focus of this review, this data is being presented to raise awareness at DDSN of these issues for contemplation in future procurement contracts.

Only one county board participated in the HM program with 11 HM consumers (7%) from a population of 148 HM customers, while private providers served 137 consumers (93%). There was a perception from several interviewees that DDSN boards' reimbursement methodology created a disincentive to develop HM homes. DDSN boards operate on essentially a capitated rate model where 95% of reimbursed funds had to be applied towards service or be subject to recoupment by DDSN. A private provider's only requirement was to meet the contract requirements/standards, which creates the risk of striving to only meet minimum standards leading to potential windfall profits. However, according to DDSN, its policy exempts DDSN boards from the 95% requirement for HM homes. Regardless of the financial nuances, having the state dependent upon private providers serving 93% of the HM population requires inquiry, and it certainly creates market leverage by these providers during contract negotiations. DDSN may want to explore using a "Medicaid Loss Ratio" factor, such as the 9.5% the South Carolina Department of Health & Human Services uses with its Medicaid managed care providers to cap administrative overhead and profits at a reasonable level.

Mentor's reimbursements for approximately 200 consumers was frequently mentioned by interviewees as appearing to be excessive. However, Mentor's rates were no different from other CTH I & II providers. QPL consumers were reimbursed, on average, $200/day and HM consumers at $250/day, as well as both QPL and HM received an additional estimated $20/day from consumers for room & board expenses. Providers were paid $336/day for "forensic" consumers from the criminal justice system. For the upcoming FY 2017, Mentor's projected reimbursed costs are $17,215,555. Mentor's perceived higher contract payments appeared to be a function of just serving more consumers.

DDSN management represented the service rates contained in the current RFP contract for QPL (2011) and HM (2012) were initially based on actual costs and input from existing providers, and these rates have been increased over the years based on inflation and other factors. Given the interviewees' concerns, the SIG's prior experience with DDSN incurring problems with accurately verifying provider cost data, and the length of time (2011-2012) since the original baseline cost analysis, it may be a good time to re-examine the contract rates. Given over a hundred million dollars of annual taxpayer funds are committed, it may be prudent to obtain

independent assurance for future rate setting from an external subject matter expert using comparative benchmarks from other states and independently verify cost data used to establish rates.

V. Way Forward

Clearly Mentor had proportionately higher ANE allegations (170) and sustained criminal incidents (5) than peer facilities. The 170 ANE incident allegations was alarming for a population of 200 consumers in 74 residential facilities over nearly a three year period. However, an analysis of these 170 incidents did not indicate systemic abuse towards consumers inasmuch as the majority of the ANE reporting system contained allegations more akin to staff/facility performance issues and the vast majority of all allegations were unsustained by independent investigations.

Many factors can contribute to having a disproportional number of ANE allegations, some of which do not relate to a provider's performance. However, there is no ambiguity applying the legal criminal standard of probable cause to every provider's allegations. Mentor served 5% of the residential community training homes, yet had 29% of the population's criminally sustained incidents (5) over nearly a three year period. Of the four incidents with sufficient documentation, three (75%) indicated staff used abuse (hitting, pushing, and verbal) as a premeditated tool to gain compliance, rather than losing their temper in response to a consumer's behavior. A single incident with staff showing up for their shift apparently intent on using abusive techniques to manage their consumers is a major failure.

In many ways, the ANE issue underpinning this review was a symptom of a broader issue—Mentor contract performance. Mentor's annual QA scores over the past eight years were always below the statewide average by, on average, 16%. Mentor's first freeze in 2010 was described as, *"this signifies significant systemic problems throughout your organization."* The second 2011 freeze was described as, *"Mentor has failed to ensure the stability of its improvements signifying that real systemic change did not take place."* The third freeze was best illustrated by its nearly complete behavior support plan failure with strong indications its residential service plans were also weak. In all three freezes, DDSN identified a pattern of Mentor consumers not being sufficiently challenged to engage the world outside of the home with employment, day service, or other interests.

It is easy to use these deficiencies to paint Mentor with a broad brush, which is not accurate. The data clearly shows Mentor has satisfactory facilities with an appropriate business model to provide care for consumers. However, its weaknesses seemed to be in the consumer training and development areas. The direction to address this problem is for DDSN to shift provider contract monitoring from a minimum contract compliance audit towards a risk-based approach emphasizing outcome measures. This shift will correspondingly require a greater planning investment in future contracts with increased level of specificity in specific outcomes, along with corresponding contract measuring mechanisms to hold a provider accountable. Examples of outcome expectations and measurements include:

- Address a high contract risk of residential and behavioral health service, which is also an important consumer requirement, would be addressed similar to how DDSN's two clinicians conducted their April 2016 review – interview staff and consumers while looking at documentation to assess the quality level of service delivery.

- Address getting consumers engaged into the community (i.e., employment; day service; education; or interests) could be a process where consumers' contraindicated for community engagement are approved by DDSN; those with documented engagement are lightly sample tested; and the thrust of the audit examines documentation on Mentor's contractual duty to document how it encourages interests from the consumers non-contraindicated and still unengaged with community.

This may require a higher level of audit expertise and time, which can be more than offset by less compliance testing with longer compliance audit cycles coupled with unpredictable audit patterns to motivate providers to be audit ready "every day." Right now, providers know DDSN's licensing and QA audit rhythms and providers cycle up their efforts just prior to audits. Further, compliance expectations need to be raised under the management principle if a provider can't get simple compliance right, then it certainly reflects on a provider's ability to execute more complex and difficult operational delivery of human services. Compliance sample sizes can be reduced; any deficiencies beyond an expected normal human error should result in monetary fines and the cost of additional compliance auditing testing is born by the provider.

In the big picture, DDSN's three freezes along with increased provider engagement could be perceived as over-accommodating a distressed provider. It is fully recognized DDSN is a challenging position needing Mentor's services for those consumers other DDSN providers appear to be unwilling to serve. DDSN should certainly support its providers, but it needs to shift towards higher contract expectations reinforced with financial incentives and penalties. If the State is going to outsource, we need to do it like a business transaction to properly motivate parties to get value from the contracts. Weak contract expectations and contract monitoring focused on administrative indicators, rather than outcome performance, creates a fertile environment for complacent provider performance, or worse.

VI. Findings & Recommendations

Finding #1: During the audit period, Mentor's ANE incident allegations (170) were proportionally higher than peer facilities but not indicative of a systemic pattern of ANE in its facilities; however, its disproportionately high criminally sustained incidents (5) were indicative of relative poor performance compared to peer facilities.

Finding #2: The ANE process was effective with a low risk of under-reporting; particularly noteworthy were its components of initial allegations assessed by a highly professional law enforcement agency, SLED; investigations conducted by an independent criminal or administrative investigator; ANE training required by staff and consumers; a confidential 24 hour hotline; and criminal liability for not reporting.

Finding #3: The ANE process was deficient in oversight procedures to ensure timely resolution of all allegations by the SLED designated investigative agency, as illustrated by 41% of investigations requiring in excess of 45 days to resolve and 11% of incidents pending in excess of 90 days still unresolved at the time of the audit.

> **Recommendation #3**: DDSN should consider taking a leadership role with agencies responsible for the ANE process to establish procedures fixing responsibility with providers to contact the SLED designated investigative agency (i.e., local law enforcement, DSS, or Ombudsman) at specific intervals after the initial allegation if there is a lack of a response, such as 10 days and 30 days; contact SLED for resolution if no investigative response, such as after 45 days; and after a non-response from the investigative agency after 60 days, elevate the issue to the DDSN State Director for resolution with ANE participating agencies.

Finding #4: The ANE process's limited classifications used for allegations and independent investigator terminology can create distortions in interpreting ANE results data when aggregated, which led to DDSN reporting ANE allegations without sufficient detail for external stakeholders to fully analyze and understand the ANE process's results.

> **Recommendation #4a**: DDSN should consider taking a leadership role with agencies responsible for the ANE process to expand the current ANE reporting of only total allegations and sustained criminal

incidents to include categorizing all allegations by significance, such as allegations with a criminal nexus and administrative staff/facility performance issues.

Recommendation #4b: DDSN should consider taking a leadership role with agencies responsible for the ANE process to provide terminology guidance to administrative investigators that "verified (sustained)" equates to verifying allegation based on a specific standard (preponderance or clear & convincing evidence) and fixing accountability to a staff member; "verify (sustain)" should not be used solely based on confirming alleged incident occurred without information fixing wrongdoing accountability to staff, which creates an inappropriate inference, particularly when aggregating ANE results data.

Recommendation #4c: DDSN should consider taking a leadership role with agencies responsible for the ANE process to develop a public reporting mechanism on its web page of recurring audit results and sustained allegations with a criminal nexus in a comparative framework to facilitate stakeholders, consumers, and advocacy groups understanding provider performance, as well as motivate providers to perform.

Recommendation #4d: DDSN should consider taking a leadership role with agencies responsible for the ANE process to consider a policy permitting the LTCO the professional discretion to completely delegate an investigation to the provider which is completely de minimis in nature without any risk of an adverse impact on consumer quality of care or having an ANE implication.

Finding #5: Mentor has satisfactory facilities with an appropriate business model to provide care for consumers, but it had a pattern of weaknesses in the consumer training and development areas.

Recommendation #5: The DDSN should consider shifting provider contract monitoring from a minimum contract compliance audit towards a risk-based approach emphasizing outcome measures, which will correspondingly require a greater planning investment in future contracts with increased level of specificity in specific outcomes, along with corresponding contract measuring mechanisms to hold a provider accountable.

Finding #6: DDSN had adequate management controls to identify Mentor QPL and HM contract compliance deficiencies, but these controls only loosely correlated in accurately measuring the quality of the delivery of human services to consumers, primarily in training and development.

Recommendation #6a: DDSN should consider enhancing its audit program to measure the quality of service provided to consumers, which can be cost/effective when combined with less compliance testing, longer compliance audit cycles, and establishing an unpredictable audit pattern to motivate providers to be audit ready "every day."

Recommendation #6b: DDSN should consider administratively investigating bad ANE outcomes, whether criminally charged or not, after law enforcement completes its criminal investigation to assess providers' operational capabilities to reduce the risk of the bad outcomes and, if appropriate, fix accountability to the provider for any due diligence failure contributing to a bad ANE outcome.

Finding #7: Interviews raised concerns with anecdotal information about the methodology for QPL and HM contract reimbursement rates as appearing excessive and the lack of non-profits servicing HM consumers.

> **Recommendation #7**: DDSN should consider re-examining its methodology in the next change in contract rates, such as using an external subject matter expert consultant who can use comparative benchmarks from other states and independently verify cost data used to establish rates.

ADMINISTRATIVE NOTE:

DDSN's comments on report located at link: http://oig.sc.gov/Documents/Review-of-Allegations-Involving-SC-Mentor.pdf.

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 Appellant's **Return to Respondents' Second Petition for Rehearing** was sent to Respondents' Counsel, Kenneth P. Woodington, Esq., Davidson, Wren & Plyler, P.O. Box 8568, Columbia, SC 29202-8568; and to Amici Counsel Kathleen Warthen, Esq., Protection & Advocacy for People with Disabilities, 3710 Landmark Dr., Suite 208, Columbia, SC 29204 & Franchelle C. Millender, Esq., Millender Elder Law LLC, 1441 Main St., Suite 725, Columbia, SC 29201 by First Class United States Mail.

March 28, 2018

Patricia Logan Harrison
611 Holly Street
Columbia, SC 29205

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. 2014-001333

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.

DAVIDSON, WREN & PLYLER, P.A.

BY: /Ken Woodington/

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April 3, 2018

The South Carolina Court of Appeals

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

v.

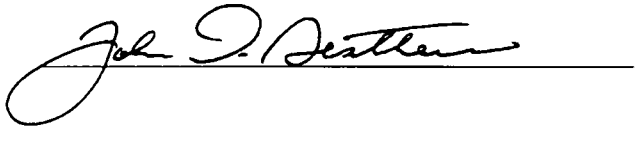
The South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stan Butkus, Respondents.

Appellate Case No. 2014-001373

ORDER

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

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



J.

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

Stephanie P. McDonald J.

D. Hamlin J.

Columbia, South Carolina

cc:
Patricia Logan Harrison, Esquire
Kenneth P. Woodington, Esquire
William H. Davidson, II, Esquire
Kathleen Ashley Warthen, Esquire
Andrew Jefferson Atkins, Esquire
Franchelle C. Millender, Esquire

FILED
2/21/18

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

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

Appellate Case No. 2014-001373

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

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

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Patricia Logan Harrison, of Columbia, for Appellant.

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

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

I.

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

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

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

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

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

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

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

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

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

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

II.

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

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

Initially, we find Mims' lawsuit commenced on May 7, 2008, the day Mims' amended complaint was filed. S.C. Code Ann. § 15-3-20(B) (2005) ("A civil action is commenced when the summons and complaint are *filed* with the clerk of court if actual service is accomplished within one hundred twenty days after filing." (emphasis added)); Rule 3(a), SCRCP ("A civil action is commenced when the summons and complaint are *filed* with the clerk of court . . . . "(emphasis added)).

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

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

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

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

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

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

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

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until the conclusion of their longest statute of limitations to file and serve an amended complaint. *See Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct. App. 2010) ("One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights." (quoting *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996)).

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

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

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

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

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

2000.

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

III.

In granting Respondents' motion for summary judgment, the circuit court dismissed Mims' § 1983 causes of action for failure to state a claim[5] and additionally found Mims did not satisfy his summary judgment burden of proving Respondents Lacy and Butkus violated Mims' civil rights. We reverse.

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

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

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

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

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

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

Mims maintains that between 2001 and 2005, he was unconstitutionally confined at residential facilities by DDSN, and while there, he received multiple personal injuries due to substandard care and neglect. Mims claims Respondents Lacy and Butkus were responsible for the harm resulting from Mims' unconstitutional confinement and substandard care because they either petitioned to have Mims

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

confined, refused to release Mims back to Ms. Mims' custody or reassign him to an alternate facility, and ultimately worked to obstruct Ms. Mims' custodianship over Mims, all while knowing about the ongoing substandard care at the facilities.

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

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

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

IV.

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

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

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

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

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

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

V.

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

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

VI.

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

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

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

v.

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

PETITION FOR REHEARING

The Respondents South Carolina Department of Disabilities and Special Needs, Stan Butkus and Kathi Lacy, (that is, all Respondents) petition the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *Estate of Edward Mims, etc., v. South Carolina Department of Disabilities and Special Needs, et. al,* Op. No. 2017-UP-422 (S.C. Ct. App. filed November 8, 2017).

The grounds for the Respondents' petition for rehearing and the specific relief requested are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

This petition for rehearing is based on the Court's decision in *Estate of Edward Mims, etc., v. South Carolina Department of Disabilities and Special Needs, et. al,* Op. No. 2017-UP-422 (S.C. Ct. App. filed November 8, 2017), the supporting memorandum filed herewith; the briefs and Record on Appeal and subsequent filings with this Court; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

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DLSCN 11/21/17

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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Kathi Lacy, and Stan Butkus, ... Respondents.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Respondents South Carolina Department of Disabilities and Special Needs, Stan Butkus and Kathi Lacy, (that is, all Respondents) have petitioned for a rehearing of this Court's recent decision in *Estate of Edward Mims, etc., v. South Carolina Department of Disabilities and Special Needs, et. al,* Op. No. 2017-UP-422 (S.C. Ct. App. filed November 8, 2017). Respondents request that this Court reconsider its opinion and affirm the decision of the circuit court for the reasons set forth herein.

1. **The opinion's holding on the statute of limitations overlooked the unnecessary disadvantage to defendants in defending against stale claims that could have been filed much earlier by the guardian.**

Defendants respectfully submit that the opinion overlooked the unwarranted prejudice to defendants that occurs when plaintiffs such as this one are given as many as seven or eight years in which to file a claim. It is well settled that "[s]tatutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs," *Stokes–Craven Holding Corp. v. Robinson*, 416 S.C. 517, 526, 787 S.E.2d 485, 490 (2016), and that "[o]ne purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his or her rights." *Id.*

In the present case, there is no question that Plaintiff's mother, who was appointed his guardian in June 2005, was aware of the injuries Plaintiff is alleged to have sustained between 2000 and 2005, although she did not file and serve a lawsuit until May 2008. In addition, Plaintiff's attorney, Ms. Harrison, was representing the guardian at least as early as the time of the guardian's appointment in June 2005. *See* R. III, 525. Nevertheless, this action was not properly instituted until May 2008, almost three years after the appointment of the guardian, and one year after the original Complaint was filed but not served.

This case therefore represents a paradigm example of a situation in which a guardian charged with protection of the rights of a disabled person slept on those

rights. The Defendants should not be penalized by having to defend these extremely stale claims in light of this years-long inaction by the guardian and her counsel, especially when there was even a false start in the form of a case filed and inexplicably never served for a year.

For reasons such as this, some courts have held that the appointment of a guardian ends the tolling of a limitations period for a disabled person. In South Carolina, this means that the action would need to be filed within one year after the disability ceased with the appointment of the guardian. S.C. Code Ann. § 15-3-40(b). The fairness of this rule has been recognized in such cases as *Stewart v. Robinson*, 115 F.Supp.2d 188, 195 (D.N.H. 2000), which held that such a rule "gives effect to society's compelling interest in effectively protecting the rights of those who are disabled . . ., while also serving the important interests underlying statutes of limitations." The same case further holds that this rule serves several interests:

> (1) it protects a ward's legal rights for an additional two years [one year in South Carolina] after a guardian acquires the legal ability to vindicate those rights; (2) it encourages guardians to act in a timely manner to preserve and prosecute claims of the ward, gather relevant evidence, and identify potential defendants; . . . and (3) it protects defendants from potentially timeless liability.

115 F.Supp.2d at 197. *See also,* cases cited in the Order below, R. I, 56-57. This Court has previously noted, admittedly in dicta, that those same authorities were

"persuasive," although the Court ultimately did not reach the issue. *Sims v. Amisub of South Carolina*, 408 S.C. 202, 217, 758 S.E.2d 187, 195 (Ct. App., Feb. 12, 2014. (The Supreme Court reviewed that decision, but also did not reach the issue.)

The opinion simply holds that "[w]e hold Mims' disability did not end when his mother was appointed guardian." Slip op. at 6 (citing cases). Defendants respectfully submit that in adopting this rule without explaining its rationale or why the rule adopted by the lower court is no longer "persuasive," as *Sims* had suggested, the Court overlooked the policy considerations set forth above. As a result, Defendants request that that conclusion be vacated, and the decision of the lower court affirmed on this issue.

2. The opinion misapprehended or overlooked certain issues related to the alleged liability of Defendants Butkus and Lacy for "fraud, actual malice, or an intent to cause harm" when the only state law claims were founded in negligence.

Defendants respectfully submit that in holding that "fraud, actual malice, or an intent to cause harm" might be present, slip op. at 10-11, quoting S. C. Code Ann. § 15-78-60(17), the opinion overlooked decisions of the South Carolina Supreme Court which have rejected those bases for liability when they are not elements of the cause of action. In the seminal case of *Eldeco, Inc. v. Charleston County School District*, 372 S.C. 470, 642 S.E.2d 726 (2007), the Supreme Court determined that "[n]one of the elements required for either cause of action . . . include 'intent to harm.'" Consequently, where "intent to harm" is not an element

of the cause of action, the immunity exception in that situation is inapplicable. *Accord, Swicegood v. Lott*, 379 S.C. 346, 665 S.E.2d 211 (Ct. App. 2008)(because "intent to harm" was not an element of the abuse of process claim, that claim could proceed against the entity). Fraud and actual malice are also not elements of Plaintiff's cause of action based on negligence.[1]

Defendants have contended that Plaintiff's Third Cause of Action, labeled "Negligent Supervision," alleged nothing more than that. This Court concluded otherwise, holding that that cause of action could also be regarded as including negligence and gross negligence. Even under that holding, however, neither fraud, malice, nor intent to harm are part of the causes of action for negligence, gross negligence, or negligent supervision, as discussed in the footnote.[2] Indeed, fraud, malice and intent to harm are logically inconsistent with the concept of negligence, which involves neglect, rather than intent. It is well settled under South Carolina law that intentional torts "cannot be committed in a negligent manner." *State Farm*

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[1] As discussed in Point 5 below, the Amended Complaint, consistent with the negligence claim it makes, did not even allege "fraud, actual malice or an intent to cause harm."

[2] The four elements of a negligence claim, set forth in such cases as *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002), do not include fraud, malice or intent to harm. Gross negligence adds the requirement of a showing of failure to exercise a slight degree of care. *Moore by Moore v. Berkeley Cty. Sch. Dist.*, 326 S.C. 584, 591, 486 S.E.2d 9, 13 (Ct. App. 1997) Negligent supervision is a type of ordinary negligence which holds a supervisor or employer liable when that person knows or should know of the need to exercise control over an employee. *Degenhart v. Knights of Columbus*, 309 S.C. 114, 117, 420 S.E.2d 495, 496 (1992).

Fire and Cas. Co. v. Barrett, 340 S.C. 1, 530 S.E.2d 132, 137 (2000). Likewise, in *Wannamaker v. Traywick*, 136 S.C. 21, 134 S.E. 234 (1926), the Supreme Court explained that the term "negligence" is "ordinarily used in common-law terminology to express the foundation for civil liability for injury to person or property, when such injury is not the result of premeditation and formed intention." 134 S.E. at 235. Thus, intent and negligence are mutually exclusive, and no claim of negligence can flow from intentionally tortious conduct. Accordingly, there is no exception under § 15-78-70(b) that applies, and Defendants Butkus and Lacy respectfully submit that the Court should hold that those Defendants are entitled to employee immunity under Section 15-78-70(a).

Defendants Butkus and Lacy also submit, in the alternative, that the opinion was in error in holding that even a scintilla of evidence of fraud, malice, or intent to harm might be present, when the opinion does not set forth any specific instances of such evidence. Slip op. at 10-11. Those Defendants would also reiterate that the court below correctly held that Plaintiff neither alleged nor proved any of those exceptions. R. I, 49. The Amended Complaint is completely devoid of any reference to fraud, malice, or intent to harm. Even on summary judgment, Plaintiff in the lower court made "only conclusory references to the need to show actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." *Id.* n. 12, citing Pl. Mem. at 23, 28, R. III, 615, 620.

3. **With regard to the three alleged injuries addressed by the circuit court, the opinion also overlooked the total absence of specific proof of cause and effect sufficient to create a jury question.**

If this were a case involving a single injury, the opinion could be expected to set forth the specific evidence that the appellate court held to create a factual issue. The present case involves more than one claimed injury, but each alleged incident of injury still warrants a discussion of the specific evidence as to each. Otherwise, if the case is indeed remanded, the parties and the circuit court will not know what has been held to constitute a scintilla of evidence.

Plaintiff had a number of medical encounters, but Plaintiff never specifically identified more than a few such encounters for which some liability was claimed. And even for those incidents, whether limited to the three discussed by the court below or extending to others, there was no evidence of disputed facts that could give rise to a jury question. In effect, the opinion holds that the mere existence of a medical encounter renders the Defendants strictly liable, or liable as a matter of res ipsa loquitor, for the occurrence of the condition that led to the encounter. This is clearly not the law.[3]

The court below examined Plaintiff's response to Defendants' Motion for Summary Judgment to determine those injuries for which Plaintiff alleged there

[3] The opinion, p. 9, makes a passing reference to alleged "systemic problems," but neither Plaintiff nor the opinion have discussed a cause and effect relationship between any such alleged problems and any specific injury.

was a jury issue, concluding that there were only three. R. I, 38-39. The court accordingly held that it would consider only those three incidents. *Id.* This Court held that there was evidence to submit those three injuries (as well as others, discussed below) to a jury, but for each of the three injuries considered by the lower court, this Court did not identify the evidence supporting its conclusions. In fact, it is logically and legally impossible for any of the three injuries to have led to liability on the part of any of the Defendants under either state or federal law. Each incident will be briefly discussed below:

a. The August 13, 2000, beating by a Babcock employee.[4]

There was no evidence at all that Butkus or Lacy had actual or constructive knowledge that the conduct of Carl Anthony, a Babcock employee, was a "pervasive and unreasonable risk" to anyone. *Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994).[5] To the contrary, there was no evidence that Anthony had ever done anything wrong before the Mims beating in August 2000. This was noted at p. 16 of the Brief of Respondents. Likewise, the order below held that "Plaintiff has

[4] In light of this Court's holding on the statutes of limitation, this claim could only be pursued under 42 U.S.C. § 1983.

[5] *Shaw*, 13 F.3d at 799, holds that the plaintiff in a Section 1983 negligent supervision case must plead and prove: (1) actual or constructive knowledge on behalf of the supervisor that the subordinate's conduct was a "pervasive and unreasonable risk" to injury to citizens like the plaintiff; (2) deliberate indifference or implied authorization of the conduct by the supervisor; and (3) an "affirmative causal link" between the supervisor's inaction and the constitutional injury suffered by the plaintiff.

shown nothing prior to 2000 that would amount to a factual or logical connection between the August 2000 incident and any acts or omissions of Defendants Butkus or Lacy." R. I, 41. As a result, it would be impossible as a matter of law for a jury to conclude that Butkus or Lacy had knowledge of a risk presented by the employment of Anthony, or that they were indifferent to or impliedly authorized any action by Anthony, or that there was any kind of a causal link between their alleged inaction and the injury by Anthony, much less an "affirmative causal link." *Shaw, supra.* For these reasons, there is simply not even a scintilla of evidence. much less more than a scintilla (as required in Section 1983 cases of this kind) that would permit this claim to go to a jury. The opinion does not specifically discuss this incident, and cites no evidence in support of its conclusion that there was a triable issue of fact on this point. In effect, the opinion holds the Defendants to a standard of either strict liability or res ipsa loquitor, a basis not recognized in South Carolina. *Merch. v. Columbia Coca-Cola Bottling Co.*. 214 S.C. 206, 208, 51 S.E.2d 749, 750 (1949).

b. The 2004 ant bite incident.

The court below held that Plaintiff had not established a Section 1983 claim based on this incident, because Plaintiff "point[ed] to no other incident involving insect bites at Kensington" and "offer[ed] no evidence or argument at all that disputes the random nature of this event or that points to any action that Defendants Butkus or Lacy wrongfully took or wrongfully failed to take." R. I, 42.

As the Order below further noted, Defendant Butkus testified at his deposition that that incident was the only one of its kind of which he was aware in his 40 years of working in the field of disabilities. *Id.*, citing R. X, 2579-80. This testimony was uncontroverted.

On appeal, Plaintiff made no reference to this incident in the course of the argument pertaining to either Section 1983 or negligence, except to refer to post-incident events. Br. of Appellant at 42. Plaintiff argued elsewhere that the court below should not have dismissed the claim based on this incident, Br. of Appellant at 15-16, but that argument was based only on certain very general statements about sanitation in reports dated 2007 and 2005, that is, one to three years after the ant bite incident. (Plaintiff's brief misstated the dates of both of those reports as being 2004, when in fact they were issued in 2007 (USC School of Public Health), R. VII, 1617, and 2005 (Carolina Medical Review). R. VI, 1409.) In any event, the reports only referred to kitchen sanitation issues, and not to a situation where ants got into a bedroom. As with the Carl Anthony incident, the opinion does not specifically discuss this incident, and cites no evidence in support of its conclusion that there was a triable issue of fact on this point. There is no suggestion that this situation was even caused by the act of a subordinate, much less that Butkus or Lacy knew of a "pervasive and unreasonable risk" caused by the unknown or nonexistent subordinate and impliedly authorized it. Given that there was no known act by any known subordinate, there could not have been an affirmative causal link or

proximate cause between any action or inaction by Butkus or Lacy and the ant bite event. As with the Anthony incident, the opinion effectively holds the Defendants to strict liability or res ipsa loquitor liability.

c. The 2005 penis injury.

The lower court held "Plaintiff has provided no evidence whatsoever as to how [the 2005 penis] injury might have been caused, much less evidence of how Defendants Butkus or Lacy might have done anything to prevent this incident." R. I, 42. The court also noted that this injury was viewed by the clinicians at Lexington Medical Center as not appearing to be the result of abuse or neglect. R. I, 42, citing R. III, 470. The court below further concluded that Plaintiff had produced "nothing to show an 'affirmative causal link' between some act or omission of the defendants and the penis injury." R. I, 43. As with the aforementioned two incidents, the opinion does not specifically discuss this incident, and cites no evidence in support of its conclusion that there was a triable issue of fact on this point.[6]

It should also be noted that this was the only injury that occurred after the

[6] The opinion, p. 3, apparently quotes from an *ex parte* Probate Court order, R. III, 525, which noted that on May 25, 2005, Plaintiff was found to have a "serious unexplained injury." This reference to the penis injury was obviously an adoption of Plaintiff's counsel's characterization, unsupported by any evidence. As noted above, the examining physician determined the injury to have been "superficial." Regardless of the whether the injury was serious or not, however, there was no evidence of how it was caused.

Kensington facility was decertified in the previous month, April 2005. In other words, if the opinion concluded that that April 2005 decertification of Kensington put DDSN on notice that something needed to be done there, the only incident that occurred after the decertification was this one for which there was no evidence of causation, so the decertification could not serve as basis for liability.[7]

As for the state law negligence claims based on this incident, it is axiomatic that "[w]hen the evidence leaves the cause of the injury unproved, it cannot be attributed to the defendant's negligence." *Bush v. Weston & Brooker Quarry Co.*, 105 S.C. 509, 90 S.E. 158, 159 (1916). Since Plaintiff unquestionably did not establish the cause of this injury, then as a matter of law, no negligence could be ascribed to these Defendants. Again, the only way Plaintiff's proof on this point would be sufficient would be if liability were to be based on strict liability or res ipsa loquitor, neither of which is a permissible basis for liability.

4. In citing other medical encounters not pled or proven by Plaintiff, the opinion impermissibly reversed the circuit court on grounds that were never presented by the Plaintiff, either in the Amended Complaint (with one exception) or at any time thereafter.

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[7] On appeal, the portion of Plaintiff's brief pertaining to the Section 1983 claim, Br. of Appellant at 25-40, did not even refer specifically to the Carl Anthony incident. Plaintiff also made no reference to the ant bite incident in the Section 1983 argument, except to refer to post-incident actions. Br. of Appellant at 42. Finally, the penis injury incident was only briefly mentioned at pp. 33-34 of the Brief of Appellant, but Plaintiff offered nothing to rebut the court's conclusion that there was no evidence that the injury was the result of an assault by anyone. The failure of Plaintiff to argue anything else on appeal is discussed in the Brief of Respondents at 31-32.

At p. 2, the opinion also referred to several other medical encounters, as follows:

1. "Bruises on his groin." Slip op. at 2. Defendants' counsel, even with word searching of the entire Record on Appeal and both of the briefs of the Appellant, has not been able to find any reference to "bruises on his groin." If the opinion was referring to a Babcock report at R. XI, 3254, that report, dated January 16, 2001, noted only the existence of a bruise on the inner right thigh, with no evidence whatsoever of causation that could support a finding of negligence.

2. "Severe vomiting." *Id.* There is only one document in the record, aside from the unsworn and unsupported chronology by Plaintiff's counsel, and that is an ER report referencing one day of vomiting on July 19, 2000. R. XI, 3318-19. One day of vomiting obviously does not establish liability under federal law. (This incident was outside the two-year statute for state law claims.)

3. Loss of 28 pounds of weight. *Id.* There is no record evidence of this, other than the unsworn and unsupported chronology by Plaintiff's counsel, R. XI, 3277, 3279, which refers only to "BC" documents from August 2000 or earlier which were not before the court below.

4. "Swollen and bruised hand." *Id.* There is no record evidence of this, other than the unsworn and unsupported chronology by Plaintiff's counsel, R. XI, 3284, which refers only to "BC" documents which were not before the court below.[8]

5. "Elevated blood pressure." *Id.* There is one actual medical record from January 2003 indicating that on one occasion the Babcock Center had Plaintiff taken to the ER because "his blood pressure was a little elevated. It was 130/108." R. XI, 3326. At the time of the report, it had returned to normal. R. XI, 3327. There is no evidence of causation, and this event, which is not even an injury, therefore cannot

[8] There is a frequent reference in the chronology to an "Exhibit 4," apparently consisting of ER and perhaps physician records, but no exhibit with that number that was presented to the court below consisted of medical records.

possibly serve as the basis for liability of any kind.

7. "Pain." *Id.* This appears to be a reference to Ms. Mims taking Plaintiff to the emergency room on November 30, 2003 (a Sunday and a day on which he was at home). It was noted the "Mother is under the impression that [Plaintiff] is in a mild degree of pain, otherwise unspecified." R. IX, 3329. Nothing was found, and the examining physician concluded that "The entire course was very uneventful and encouraging." R. IX, 3331. This encounter contains no evidence of an injury.

8. A beating by a Clusters employee in 2001. The opinion referred elsewhere (slip op. at 3) to this as being one of the three incidents considered by the circuit court, although that event occurred in 2000, not 2001. A 2001 beating was referenced in Paragraph 25 of the Amended Complaint, R. I, 77, but there is no evidence in the record pertaining to it, and it was not mentioned in Appellant's brief on appeal. The order below noted that Plaintiff had mentioned, but did not discuss, an unspecified alleged "second beating." R. I, 38 n.4.[9]

Except for Event 8 above, none of these events were even pled in the Amended Complaint. Nor were they argued in the circuit court by Plaintiff. Nor were they argued on appeal by Plaintiff. Even if the opinion had not

[9] The Court may have relied to some extent on an unsworn "chronology" prepared by Plaintiff's counsel, which refers almost exclusively to documents numbered "BC___." As noted in the Brief of Respondents, p. 31, no such documents were presented to the court below. Accordingly, for the claimed injuries that are based only on a cite to "BC" documents not in the record, there is literally no evidence in the record to support those claims.

In fact, the 3372-page record contains only 26 pages of documentation of medical encounters over the 6-year period from 2000 through 2005, other than documentation pertaining to three incidents discussed by the lower court. Those pages are all in Vol. XI of the Record on Appeal, and are at pp. 3042-44; 3048; 3254; 3257; 3259-64; and 3318-3331. The amount of irrelevant or duplicative material in the record may have given rise to an impression that there were more documented medical encounters than that in the record, but there were not.

misapprehended Plaintiff's total failure to plead (except for Event 8) or otherwise present evidence pertaining to the events listed above, there was still literally no evidence in the record that would support a finding of liability on the part of any of Butkus, Lacy or DDSN. This absence of proof of causation includes, to the extent not already mentioned herein, the allegations referenced on p. 10 of the oinion.

There is no question that there is "nothing in our precedents that would permit us to reverse on a ground that was not properly argued to us." *Town of Mt. Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830, 845 (2012)(Hearn, J., dissenting). (Emphasis in original). Likewise, it is well settled that "[t]he same ground argued on appeal must have been argued to the trial judge." *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 479 S.E.2d 67, 75 (Ct. App. 1996). The opinion appears to have misapprehended that it was reciting alleged injuries that were neither pled, nor argued in the circuit court, nor argued on appeal. Those references to the eight events listed above should therefore be deleted for those reasons.

Finally, to cite the mere fact of a medical encounter as constituting an event that can take a case to a jury is to hold the Defendants to either strict liability or res ipsa loquitor, as has already been noted with regard to the three events discussed by the lower court. In permitting this action to go forward without a showing by Plaintiff of actionable conduct by Defendants, the opinion overlooked the fact that Plaintiff's arguments, both on appeal and in the court below, failed to comply with Rule 56(e), which provides that:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

(Emphasis added.) Nothing in Plaintiff's filings in the lower court or in this Court suggested in any way that such "specific facts showing that there is a genuine issue for trial" were present in this case. Plaintiff sets forth a number of largely non-specific claims events at Babcock and usually involving others, but fails to show causation for any of his medical encounters. As the court below held, Plaintiff's assertions simply do not set forth how the alleged acts or failure to act of the Defendants amounted to actionable torts that proximately caused injury to Plaintiff. R. I, 51-52. As a result, Plaintiff's arguments and the opinion do not set forth specific facts as required by Rule 56(e).

5. Certain actions of Defendants referenced in the opinion could not have given rise to liability.

The opinion at pp. 8-9 refers to three allegations by Plaintiff relating to acts by Butkus, Lacy or DDSN. None of them, as a matter of law, could have resulted in liability of any of these Defendants, because none of those acts caused injury to Mims as a matter of law. As stated in the opinion, these allegations were that those two Defendants

> were responsible for the harm resulting from Mims' unconstitutional confinement and substandard care because they either [1] petitioned to have Mims confined,

> [2] refused to release Mims back to Ms. Mims' custody or reassign him to an alternate facility, and [3] ultimately worked to obstruct Ms. Mims' custodianship over Mims, all while knowing about the ongoing substandard care at the facilities.

Slip op. at 8-9. [10] The first of these, the petition to have Mims confined, was filed by another DDSN official, James Christian, who is not a party to this case. R. XI, 3242-43. The opinion overlooked this in apparently concluding that Butkus or Lacy filed the petition, which neither of them did. In addition, the petition and Probate Court order were consented to by Mims' mother, counsel, and his guardian ad litem. R. XI, 3245-47; Order, R. I, 44. Secondly, the claim that either Butkus or Lacy should have released Mims back to Ms. Mims' custody also fails as a matter of law, because the 2001 Probate Court Consent Order, not DDSN, ordered Mims into DDSN's custody, and anyone acting in Mims' behalf would have needed to have that Order amended or vacated, rather than asking DDSN officials to release Mims; in addition, Plaintiff has never shown that the alleged failure to release Mims or reassign him to another facility was the proximate cause of any of his injuries.[11] Finally, the opinion overlooked that the alleged "obstruction" of Ms.

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[10] The opinion also misapprehended that Plaintiff had made a claim of "unconstitutional confinement." Slip op. at 8. The Amended Complaint alleged only involuntary confinement, R. I, 76, and even that is not an accurate statement, because all of Plaintiff's representatives, including his mother, consented to his commitment to a facility. R. XI, 3245-47.

[11] As discussed at pp. 21-22 of the Brief of Respondents, the alleged failure to reassign would establish only "but for" causation, i.e., causation in fact, rather than legal causation, i.e., proximate cause. The opinion overlooked this distinction.

Mims' custodianship over Mims could not, as a matter of law and logic, have caused injury to Mims, because the alleged "obstruction" occurred after Mims was released from Babcock by Probate Court order in June 2005 and did not have any effect on the Probate Court.[12]

The opinion also cited "reports from CMS regarding certification of the facilities, as well as affidavits and depositions of Ms. Mims, Lacy, Butkus, and the affidavit of Mims' Guardian ad Litem." Sip op. at 9. However, no specific connection is made between anything in those matters cited and any alleged injury.

6. The opinion misapprehended that the discretionary relaxing of procedural rules in this appeal would not benefit a disabled person, and that the deceased disabled person's rights were capable of being protected by his guardian and his counsel.

In holding that arguably-unpreserved issues (and for that matter, issues neither pled nor otherwise raised below, much less on appeal) should nevertheless be addressed because the Plaintiff was held to be a person under legal disability, the opinion overlooked several factors.

First, by the time this action was filed and served, Plaintiff had had a guardian appointed for three years, and was also represented by counsel throughout that three-year period. Whether the appointment of a guardian technically removed

[12] The alleged "obstruction" was actually nothing more than an effort to have another person, Mims' sister, appointed. That effort not only occurred after Mims was no longer at a Babcock facility, it also made no difference, because Ms. Mims was appointed his guardian anyway. No injury whatsoever flowed from this event.

the disability or not, the fact is that Plaintiff's interests were represented by a responsible adult, that is, his guardian, as well as by counsel. As a result, there is nothing about Plaintiff's situation that would require relaxing the rules.

Moreover, even a person under legal disability is not entitled to argue unpreserved issues when his interests have been represented at all times by counsel who could have raised the issues The opinion relied on *Caughman v. Caughman*, 247 S.C. 104, 109, 146 S.E.2d 93, 95 (1965), but in that case the infant defendants were not represented in the Supreme Court (only the competing spouses were represented by counsel). Where a disabled person is represented by counsel, the Supreme Court applies normal error preservation rules, even in a criminal case. *See, e.g., In Interest of Antonio H.*, 324 S.C. 120, 477 S.E.2d 713 (1996). That rule should apply here as well, since the interests of awarding damages to the estate of the deceased plaintiff are of a far lesser order than in a criminal case.

Thirdly, this case now involves only money damages, and there is no suggestion that the money would go to a minor or disabled person, the disabled Plaintiff himself having passed away almost ten years after leaving DDSN custody. The disabled person's rights are therefore not actually the rights being protected. Relaxation of the rules is also highly prejudicial to the Defendants in this case, who were given no opportunity to address issues not actually raised by Plaintiff.

Defendants are not aware of any case in this jurisdiction in which discretionary relaxation of error preservation rules occurred in favor of awarding

damages to the non-disabled heirs of a deceased disabled person, especially when the heirs were represented by counsel. Most such cases involve the future status or treatment of a living disabled person, not a claim by his non-disabled heirs for money damages.

The case of *Cogan v. KAL Leasing, Inc.*, 546 N.E.2d 20, 25 (Ill. App. 1989), while not a South Carolina case, spells out the limits that must be placed on any relaxation of rules in favor of disabled persons (in the cited case, the person involved was actually disabled, as opposed to being non-disabled heirs):

> [P]rocedures are now available to ensure that the rights and interests of minors and incompetents are well protected. The best way for a court to fulfill its duty to protect these rights and interests is to appoint guardians for the minor or incompetent. The guardians, in turn, should hire competent counsel to vigorously protect or defend the minor's or incompetent's rights. In the present case, this is precisely what happened.

The court in that case further noted that "[s]kewing the rules of evidence or procedure merely because one party to the litigation happens to be a minor or an incompetent loses sight of the purposes those rules are to fulfill. To be more specific, the defendants in this case, [defendants] are no less entitled to a fair trial consistent with all applicable rules of procedure and evidence" than was the

disabled plaintiff. *Id.*[13]

Finally, in not requiring issue presentation and preservation, the opinion misapprehended the effect of *Spence v. Wingate*, 381 S.C. 487, 674 S.E.2d 169 (2009). That case held that a party who clearly raised an issue in the circuit court but did not prevail in that court did not need to file a Rule 59(e) motion in order to preserve the clearly-raised issue. In the present case, however, Plaintiff not only failed on appeal to claim injuries other than the three referenced, Plaintiff also failed to make any such other claims in the circuit court, as discussed herein and in the Brief of Respondents. The opinion, unless amended in this regard, would not only reverse the lower court based on an issue not expressly raised on appeal, it would also amount to a reversal on a ground not even presented in the lower court.

7. **The opinion overlooked the unpled and/or conclusory nature of most of Plaintiff's assertions.**

As noted in the Order below, R. I, 40-41, and in the Brief of Respondents at 15, Plaintiff did not plead the elements of a Section 1983 supervisory liability

[13] Two Justices of the Supreme Court have concluded in a case similar to this one that they would decline to relax the preservation requirement when the plaintiff "was at all times well-represented by counsel," coincidentally including Plaintiff's counsel in the present case. *Doe v. S.C. Dep't of Health & Human Servs.*, 398 S.C. 62, 83, 727 S.E.2d 605, 616 (2011)(Hearn and Pleicones, JJ, dissenting)(the majority did not in fact relax procedural requirements with regard to the matters decided by the majority).

claim set forth in *Shaw v. Stroud, supra.*[14] Even if Plaintiff had actually spelled out those elements in opposing summary judgment, which in fact did not happen, it is well settled that a plaintiff must formally raise his claims in the complaint rather than through other means. *See, e.g., Lyman v. CSX Transp., Inc.*, 364 F. App'x 669, 701 (2d Cir.2010) ("An opposition to a summary judgment motion is not the place for a plaintiff to raise new claims."); *Smith v. Books–A–Million*, 398 F. App'x 437, 437 (11th Cir.2010) (rejecting, on summary judgment, claim of retaliatory conduct that was not alleged in the complaint); *Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 39, 530 S.E.2d 369, 374 (2000)(summary judgment properly granted to defendant where plaintiff failed to state a cause of action). In holding otherwise, the opinion grants plaintiffs open-ended opportunities to assert anything, anytime.

Pleading aside, the elements of a Section 1983 claim, if asserted at all, were asserted only in conclusory fashion, as discussed in detail at pp. 15-22 of the Brief of Respondents. For all intents and purposes, the facts to support a Section 1983 claim were simply not pled, nor asserted in the lower court, and likewise were not

[14] The opinion held that Plaintiff can plead "ultimate facts" in a Section 1983 case, slip op. at 7, n. 5, but there is no suggestion as to how the conclusory Section 1983 cause of action in the Amended Complaint could be read to allege the facts needed to show the three parts of such a claim, set forth in n. 5, *supra*. As the Supreme Court held in *Spencer v. Miller,* 259 S.C. 453, 458, 192 S.E.2d 863, 865 (1972), "statements of ultimate facts and conclusions are not sufficient to make a genuine issue of trial."

presented on appeal.

While the Amended Complaint did at least make a reference to negligent supervision, R. I, 87, it did not include the irreducible element of the naming of a specific person who was negligently not supervised. *Bank of New York v. Sumter County*, 387 S.C. 147, 156, 691 S.E.2d 473, 478 (2010).[15] Nor did Plaintiff's filings in opposition to summary judgment name a specific employee who was not properly supervised. The opinion overlooked all of these omissions, concluding only that "[w]e find Mims presented at least a scintilla of evidence to support these [state law] claims." Slip op. at 10.

Although the Amended Complaint did not contain causes of action for ordinary negligence and gross negligence, the opinion summarily concluded that "we find Mims sufficiently pled his causes of action for negligent supervision, negligence, and gross negligence." Slip op. at 10. In so holding, the opinion misapprehended that the Amended Complaint did not contain causes (plural) of action on those three theories, but only the single cause of action for negligent supervision, with passing reference to other theories. The Amended Complaint contained only two conclusory references (each) to negligence and gross negligence. R. I, 87, 88 (Paragraphs 80, 81). There was no connection between the

[15] The Amended Complaint did not even name Carl Anthony (a Babcock employee), whose acts in any event occurred outside the applicable statute of limitations for a state law claim.

few specific allegations of injury and any specific acts or omissions of any of the Defendants. It has long been settled that "[t]o constitute a cause of action for negligence, the complaint must not only show that the defendant was negligent, but that the negligence of the defendant was the proximate cause of the injury." *Branham v. Camden Cotton Mill*, 61 S.C. 491, 39 S.E. 708, 709 (1901). The Amended Complaint contains no such allegations, and the opinion was in error in holding that it was anything other than conclusory with regard to any of its claims.

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

Plaintiff has not shown the existence of a supervisory connection between DDSN officials and Babcock Center employees. In the absence of a showing of such a connection, it was not necessary to give any further consideration to issues regarding supervisory liability. *See, e.g., Abbott v. Yurcina,* 2013 WL 4806223, at *13 (N.D.W. Va. 2013) report and recommendation adopted in part, 2013 WL 4806391 (N.D.W. Va. 2013)(prison warden was not a supervisor of employees of medical care contractor). *See* Brief of Respondent at 13 n.12. The court below held that "there is no question that Babcock Center employees are not employees of DDSN. *Young v. South Carolina Dept. of Disabilities and Special Needs*, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). R. I, 40."

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court rehear its decision and issue an opinion affirming the decision of the circuit court on one or more of the bases set forth above.

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DLSCN 11/21/17

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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

v.

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

Appellate Case No. 2014-001373

Appellant's Return Opposing Respondent's Petition for Rehearing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The only assessment in the record determined that Mims required one-on-one supervision. R. at 310. After Edward was beaten by an employee in August, 2000, a crime that was witnessed and should have been immediately reported to law enforcement if he was receiving the level of supervision ordered, and his mother attempted to remove him from the Babcock Center, DDSN initiated proceedings to prevent his discharge, maliciously informing the probate court that he was being abused or neglected at home. R. 189-190, 219. See also affidavit of GAL at R. 291-293. The record shows that Defendants Butkus and Lacy were fully aware of the dangerous conditions that existed at the Babcock Center, yet they took no action at any time to protect Mims from further harm. Mims' attacker remained in the employment of the Babcock Center and was not arrested for more than a year. R. 305-306.

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

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

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

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

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

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

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

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

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

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

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

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

S.C. Code Ann. § 15-78-70(b) (Supp. 2002) lifts the immunity normally enjoyed by governmental employees when they act outside the scope of their employment or their actions constitute fraud, malice, an intent to harm, or a crime of moral turpitude. *Pridgen v. Ward,* 391 S.C. 238, 244 (S.C.Ct.App. 2010). This Court correctly ruled that the record Mims has presented demonstrates that "fraud, actual malice, or an intent to cause harm" might be present, slip op. at 10-11, quoting S. C. Code Ann. § 15-78-60(17).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

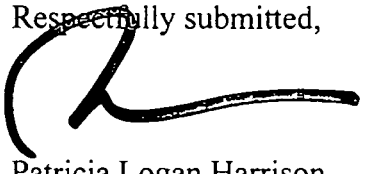
Respondents argue on page 19 that there should be no relaxation of the procedural rules, because "there is no suggestion that the money would go to a minor or disabled person," since Mims has died. But, this argument ignores his important role as a "private attorney general" to vindicate a policy that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

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

5. Conclusion.

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

Respectfully submitted,



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Attorney for the Appellant

December 11, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

December 11, 2017

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December 11, 2017

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

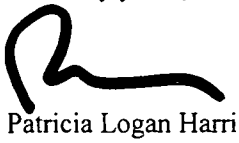
Re: **Estate of Edward Mims v. SCDDSN**
Appellate Case No. 2014-001373

Dear Ms. Kitchings:

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

Thank you for your assistance in this matter.

Sincerely yours,



Patricia Logan Harrison

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

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FROM:

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TO:

The Honorable Jenny Abbott Kitchings
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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.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Respondents South Carolina Department of Disabilities and Special Needs, Stan Butkus and Kathi Lacy, (that is, all Respondents) submit this Reply Memorandum in support of their Petition for Rehearing. As set forth below, and with the exception of its Point 1, Appellant's Return to the Petition fails to make a specific response to practically all of the points made in the Petition, and to the extent it does address those points, offers only a conclusory response. The Return makes only one specific reference to this Court's opinion. Return at 14.

1. Statute of limitations.

Defendants' contentions on the statute of limitations were set forth in full in connection with the present Petition and in the briefs. Plaintiff refers to a case cited by Defendants as involving "a single district judge," Return at 2, but Defendants and the Order below cited other cases as well. R. I, 56-57.

Plaintiff also mistakenly states that the Supreme Court of South Carolina "declined . . . to adopt" the rule that the tolling period would terminate when a guardian was appointed. Return at 2, citing *Sims v. Amisub of South Carolina,* 414 S.C. 109, 777 S.E.2d 379 (2015). That is an inaccurate characterization of what the Court did in *Sims.* The defendants in the case had argued in the alternative that the rule terminating tolling when a guardian or conservator was appointed should apply. However, the Supreme Court, like this Court in that case, did not reach that issue, because the case was barred by a different statute of limitations, § 15-3-545. 414 S.C. at 117 and 117 n. 9, 777 S.E.2d at 383, 384 n. 9.

Interestingly, the Supreme Court took note of one of the cases cited by the Defendants in this case:

> There is authority for the proposition that the appointment of a conservator who is vested with authority to bring an action on the ward's behalf effectively removes the disability. *See Stewart v. Robinson*, 115 F.Supp.2d 188 (D.N.H.2000) (holding that the medical malpractice statute of limitations is tolled on the basis of insanity only until the appointment of a capable guardian who is authorized to take possession of the disabled ward's estate and bring all related actions

necessary).

414 S.C. at 117 n.9, 777 SE.2d. at 384. *Stewart* was one of the cases this Court held in the same case to be "persuasive," although this Court, like the Supreme Court, ultimately did not reach the issue. *Sims v. Amisub of South Carolina*, 408 S.C. 202, 217, 758 S.E.2d 187, 195 (Ct. App. 2014.) The Supreme Court in *Sims* also appeared to speak disparagingly of the plaintiff's effort "to create an effective eight-year statute of limitations due to insanity. . . ." *Id.*

2. Plaintiffs have offered no response to Defendants' contention that the opinion misapprehended or overlooked certain issues related to the alleged liability of Defendants Butkus and Lacy for "fraud, actual malice, or an intent to cause harm" when the only state law claims were founded in negligence.

Defendants have contended that in holding that "fraud, actual malice, or an intent to cause harm" might be present, slip op. at 10-11, quoting S. C. Code Ann. § 15-78-60(17), the opinion overlooked decisions of the South Carolina Supreme Court which have rejected those bases for the liability of individuals when those bases are not elements of the cause of action. Memorandum in Support of Petition for Rehearing at 4-6, citing *Eldeco, Inc. v. Charleston County School District*, 372 S.C. 470, 642 S.E.2d 726 (2007) and *Swicegood v. Lott*, 379 S.C. 346, 665 S.E.2d 211 (Ct. App. 2008). As the holdings of those cases and others suggest, fraud, malice and intent to harm are logically inconsistent with the concept of negligence, which involves neglect, rather than intent. It is well settled under South Carolina law that intentional torts "cannot be committed in a negligent manner." *State Farm*

Fire and Cas. Co. v. Barrett, 340 S.C. 1, 530 S.E.2d 132, 137 (2000). *See also, Wannamaker v. Traywick*, 136 S.C. 21, 134 S.E. 234 (1926)(the term "negligence" is "ordinarily used in common-law terminology to express the foundation for civil liability for injury to person or property, when such injury is not the result of premeditation and formed intention." 134 S.E. at 235. Thus, intent and negligence are mutually exclusive, and no claim of negligence can flow from intentionally tortious conduct.

Plaintiffs' response to this contention by Butkus and Lacy with regard to state law claims was to make no response, except for one footnote on an inapposite point. Return at 11 n. 4.[1] None of the cases or concepts referenced above are mentioned at all in Plaintiff's Return. Defendants respectfully submit that the Court should regard this point involving individual liability of Butkus and Lacy under state law as effectively conceded, and that a minimum, the opinion should be modified in that regard, that is, by affirming the dismissal of the state law claims against Butkus and Lacy individually.

[1] In that footnote, Plaintiff cites *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2006), which holds that liability can arise when a defendant where the defendant "negligently or intentionally creates the risk. . . ." (emphasis added). At most, this merely supports the point Defendants have been making, which is that negligence and intent are disjunctive concepts, as the cases cited above hold.

3. Even if intentional acts and negligence were not mutually exclusive, Plaintiff's claims regarding intentional acts by Butkus and Lacy are completely conclusory, or unsupported by any evidence, or both.

Defendants Butkus and Lacy have contended that "fraud, actual malice, or an intent to cause harm" were not pled in connection with the state law claims, and that no evidence was offered in opposition to Defendants' summary judgment motion regarding such claims. Memorandum in Support of Petition for Rehearing at 5 n. 5, 6 (the reference in n. 5 to "Point 5" should have been a reference to p. 6). Even if Plaintiff could overcome the inherent inconsistency in claiming both intentional wrongdoing and negligence at the same time, Plaintiff continues to make nothing more than conclusory allegations or claims that lack record support.

Plaintiff makes a one-sentence argument that this Court correctly ruled in Plaintiff's favor on this point, Return at 14, but has not cited any evidence in the voluminous record that shows any act of Butkus or Lacy amounting to "fraud, actual malice, or an intent to cause harm." Nor are those words to be found in the Amended Complaint. This failure to provide evidence comes in spite of the fact that Plaintiff's counsel deposed both Butkus and Lacy, as well as a number of other persons. Plaintiff does continue to cite two disavowed affidavits, as discussed in the footnote. That argument goes beyond the pale in its persistent

misrepresentation of the record.[2] This Court should not countenance the retention of a claim whose only basis is demonstrably absent and instead is being misrepresented to this Court by Plaintiff's counsel. Plaintiff also recklessly asserts that "Mims has shown that Defendants Butkus and Lacy had personal, non-employment reasons for covering up the abuse Mims suffered . . .," Return at 14, but there has never been the slightest suggestion that the record contains evidence of such personal animosity.

Plaintiff also does not contest the fact that the 2001 petition to have Mims confined was filed by another DDSN official, James Christian, who is not a party to this case, R. XI, 3242-43, and not by Butkus or Lacy. Nor does Plaintiff contest that the 2001 judicial admission was the result of a Probate Court order, with the consent of Mims' mother (who was represented by counsel), the appointed counsel for Mims, and his guardian ad litem. R. III, 530-532. In effect, two attorneys and a guardian ad litem were representing the interests of Mims at that hearing. The

[2] Plaintiff asserts that "DDSN initiated proceedings to prevent his discharge, maliciously informing the probate court that he was being abused or neglected at home. R. 189-190, 219. See also affidavit of GAL at R. 291-293." Return at 9. Those citations to the record are to the affidavits of Mrs. Mims and Leigh Flynn, the GAL. The circuit court held, in a conclusion that Plaintiff has never addressed, much less rebutted, that "the Court need not consider the contentions of Plaintiff's counsel pertaining to alleged false information provided by DDSN to the Probate Court in 2001, because those contentions are based solely on portions of affidavits that the affiants later contradicted in their depositions." R. I, 44. The affiants testified that they were unaware of any false information having been provided to the Probate Court by DDSN or its employees (Flynn deposition), or by anyone (Mims deposition). *Id.*

Probate Court order held that "Upon agreement of all the parties, it appears that Ms. Mims will be unable to care are for her son in her home." R. III, 531. That court also held that "all parties have Mr. Mim's best interest in mind with proposing this Consent Order." *Id.*

Again, Plaintiff essentially does not uncontest that Plaintiff's claims of malicious acts by Butkus or Lacy cannot consistently stand alongside Plaintiff's claims that those individuals were negligent. As a result, Plaintiffs' failure to allege or prove such acts does not need to be considered, but such failure is nevertheless present, as shown above.

4. Plaintiff cites nothing in the Amended Complaint to rebut the Defendants' contention, and the holding in the circuit court, that non-supervisory negligence and gross negligence were not pled.

Plaintiff's Point 2, which runs from p. 4 through p. 13 of the Return, asserts that "Plaintiff's amended complaint pled all necessary elements of neglect, negligent supervision and gross negligence." Return at 4. However, the ensuing 10 pages do not contain a single cite to the Amended Complaint. As a result, the point that negligence and gross negligence were not pled is also an uncontested point.

5. Plaintiff's Return is devoid of any discussion of most of the incidents for which liability is claimed.

In the course of contending that there was no evidence in the record that would create a question of fact with regard to any of the incidents cited in this Court's opinion, Defendants' Petition for Rehearing set forth a detailed review of

each and every incident cited by this Court's opinion. Memorandum in Support of Pet. for Rehearing at 7-18. Plaintiff's response does not even purport to respond to most of those contentions. Instead, Plaintiff presents only a confusing mishmash of conclusory allegations. In light of the bloated record in this case and the broad, non-specific arguments put forth by Plaintiff's counsel, the overall effect may have been to create an impression that there was actually evidence to support Plaintiff's claims, when the record in fact is devoid of such evidence, as shown by the failure of the Return to cite evidence pertaining to specific incidents.

For instance, Plaintiff asserts that Butkus kept Mims in facilities where Butkus allegedly knew of abuse and neglect. Return at 15-16. However, the only cite to the record for this is a reference to pp. 2605-2611 (Vol. X), which pertains only to DDSN's objections to Ms. Mims' appointment as guardian in 2005, after Mims was no longer in a Babcock facility. Those objections, which made no difference because Ms. Mims was appointed guardian in 2005 anyway, could not have caused any injury to Mims, because he was already living at his mother's home by then. In another example, Plaintiff cites the decertification of the Clusters facility, Return at 6, but Plaintiff's own exhibits make it clear that that decertification occurred in November 2003, R. XI, 3271, ¶ 27, and that Mims had been transferred away from Clusters almost two years earlier, in March 2002. R. II,

211.[3]

The Return also offers nothing to controvert the following contentions made in the Petition for Rehearing:

a. The Return does not discuss proximate causation at all, aside from a conclusory assertion (without citation) that proximate causation was pled. Return at 10-11. Even if pled, the allegations of a pleading are insufficient to oppose a motion for summary judgment.

b. The Return does not contest Defendants' assertion that there was no evidence to indicate that Carl Anthony, who beat Mims in 2000, might commit such an act.

c. The Return does not contest Defendants' assertion that Plaintiff had not shown that the ant bite incident was proximately caused by any act or

[3] While not desiring to make this Reply overly lengthy, Defendants are constrained to point out still another misrepresentation in the Return. At p. 7, it is asserted that Butkus and Lacy "decided not to allow Mims to be released when his mother appeared at Kensington with a court order for his release." This is a reference to a short delay of an hour or two of the start of Mims' normal weekend release from Kensington one Friday evening in June 2005. First of all, the court below held that Plaintiff had made no showing regarding this incident that would survive Defendants' summary judgment motion. R. I, 45 n. 8. Defendants pointed out that this issue was abandoned on appeal, Br. of Respondents at 6 n.6, and Plaintiff has not shown otherwise. Finally, and most egregiously, it is undisputed that the "court order for his release" was not initially communicated by Plaintiff's counsel to Butkus and Lacy—in fact, this failure by Ms. Harrison to provide DDSN with a copy of the order was the entire reason for the short delay in Mims' release that night. See R. III, 591, where DDSN's General Counsel advised Ms. Harrison that any such order was "something new" and that "we are unaware of its contents."

omission by Defendants.

d. The Return does not contest Defendants' assertion that the cause of the penis injury was unknown. In lieu of that showing, the Return instead makes the highly misleading statement that "DDSN's physician, Dr. Johnson, determined that the injury to Mims' penis was not self inflicted. R. at 3064." Return at 19 n. 8 (the reference to p. 3064 of the record appears to be in error). In fact, Dr. Johnson concluded that "[i]t is possible minor scratching [by Mims himself] may have caused a small skin break on the penis, that lead to this laceration." R. III, 577. Dr. Johnson further concluded that it was unlikely that the laceration was due to abusive or negligent management. R. III, 578. His final conclusion was "Cause for laceration unknown." *Id.*

e. The Return does not discuss a single one of the other medical encounters referenced in this Court's opinion and discussed in detail in the Memorandum in Support of Pet. for Rehearing at pp. 13-15.

f. With specific regard to the federal § 1983 claim, the Return does not mention, much less discuss, the need to show "that there was an 'affirmative causal link' between the supervisor's inaction and the <u>particular</u> constitutional injury suffered by the plaintiff." *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994)(emphasis added). Despite being provided many chances, Plaintiff simply has not been able to show any specific acts of specific individuals (either supervisors or persons allegedly supervised) that led to specific injuries. The

Return is just one more instance of this failure to provide specific proof.

g. Nor does the Return address the need, unmet by Plaintiff in this case, to plead the elements set forth in *Shaw*, including an "affirmative causal link." *See, e.g., Payne v. CCOH,* 2012 WL 6801387, 5 (D.S.C. 2012)(dismissing supervisory liability in part because "none of the three elements for such liability have been pled"). All told, the Return barely mentions the § 1983 claim at all.

Finally, in many instances, the Return cites only the Amended Complaint. *See, e.g.,* Return at 17-20. The contents of the Amended Complaint, however, cannot be relied upon in opposing a motion for summary judgment, and that is the purpose for which the Return cites the Amended Complaint.

6. Plaintiff has effectively not contested Defendants' contentions regarding the inapplicability of relaxing procedural rules.

The final point in the Return is an argument that procedural rules should be relaxed because, it is claimed, Plaintiff was acting as a "private attorney general." Return at 20-21, citing *Newman v. Piggie Park Enterprises,* 390 U.S. 400 (1968). However, that attorney fee case is completely irrelevant to the issue preservation issues raised by Defendants in the present case.

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

'private attorney general,'. . . ." 390 U.S. at 402. Unlike the present case, *Piggie Park* was not a damage action. Nor did it have anything to do with relaxing procedural rules in favor of disabled persons, who were not involved in that case, and who would not benefit from the damage award in this case. This final point is therefore one more to which Plaintiff has effectively provided no response.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court rehear its decision and issue an opinion affirming the decision of the circuit court on one or more of the bases set forth above.

DAVIDSON & LINDEMANN, P.A.

BY: /s/

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December 18, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

v.

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

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondents, does hereby certify that service of the **Reply Memorandum in Support of Petition for Rehearing** in the above-captioned matter was made upon Appellant's counsel by placing a copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 18th day of December 2017:

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