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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS
Honorable G. Thomas Cooper, Jr.
Circuit Court Case No.: 2007-CP-40-03365

Appellant 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.

Volume IV

RECORD ON APPEAL

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S.C. SUPREME COURT

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Edward Mims,

Plaintiff,

v

Babcock Center, Judy Johnson,

SCDDSN, Kathi Lacy, Stanley

Butkus,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 07- CP- 40-03365

Plaintiff's Notice of and Motion
to Alter, Amend or Reconsider Judgment
Pursuant to Rule 59(e), SCRCF

TO: The Honorable G. Thomas Cooper, Jr.; and Kenneth P. Woodington, and Christian Stegmier, Attorneys for the Defendants.

YOU WILL PLEASE TAKE NOTICE that the Plaintiffs move pursuant to SCRCF 59(e) before The Honorable G. Thomas Cooper, Jr. at such time and place as his Honor may direct, for an Order Altering or Amending his Order dated January 21, 2014, which was received by Mims' counsel on January 25, 2014. Specifically, Mims seeks a ruling vacating that Order, denying defendants motions for summary judgment, and granting Mims' motion for summary judgment, which was filed on May 29, 2013.

This lawsuit was filed on May 29, 2008 and Mims filed an amended complaint on May 7, 2008. In the amended complaint, Mims alleged (1) violation of 42 U.S.C. § 1983 for violation of Mims' civil rights; (2) conspiracy; (3) negligent supervision; (4) violation of the Americans with Disabilities Act; (5) unjust enrichment. The circuit court denied defendants' motion to dismiss on June 4, 2009, but then dismissed Mims' lawsuit by order dated November 23, 2009. Upon transfer of this case to the South Carolina Supreme Court pursuant to Rule 204, which provides for transfer of a case involving an issue of significant public interest or legal principal of major importance," the Supreme Court reversed the circuit court's decision to dismiss on August 15, 2012, remanding Mims' case to the circuit court for trial. *Mims v. Babcock Center, Inc.* 399 S.C. 341, 732 S.E.2d 395 (S.C. 2012).

On remand, the parties filed cross motions for summary judgment, but only the defendants were granted a hearing on their dispositive motion. Even though Mims' counsel was not allowed to make oral arguments in support of his motion for summary judgment, all parties were subsequently ordered by this Court on June 13, 2013 to file proposed orders on their respective motions for summary judgment. Exhibit 2. The factual background and legal arguments contained in Mims' proposed order are incorporated herein by reference. Exhibit 1. Without addressing the arguments made by Mims in his motion for summary judgment or addressing the issues addressed in his proposed order, this Court granted the motions for summary judgment of the individual defendants, the Babcock Center and the South Carolina Department of Disabilities and Special Needs (DDSN). It appears that the proposed orders the

defendants submitted to the Court were signed verbatim, changing only the date.¹

The detailed factual background of this case is set forth with particularity in pages 1 through 27 of Mims' proposed order filed with this Court on July 19, 2013, which is incorporated herein by reference. Exhibit 1. The record also contains an affidavit signed by Mims' mother with a detailed chronology attached, along with supporting medical documentation. In addition to the pleadings, affidavits and evidence previously filed with the Court, Mims filed six volumes of records and other evidence, including, but not limited to reports of investigations, affidavits, depositions and medical records in support of his motion for summary judgment and in opposition of the motions filed by defendants. These volumes are numbered sequentially and they are identified as "Mims at ____" in this motion.

Since Mims' motion for summary judgment was filed, counsel has discovered additional evidence documenting the knowledge the defendants had of the constitutional injuries inflicted by their subordinates on vulnerable persons residing in Babcock Center facilities resulting from the unsafe living conditions there. Exhibit 3. The attached documents in Exhibit 3, which were discovered on the PACER website in *Babcock v. U.S.*, Case No. 3:11-cv-03155, provide new and additional evidence of "supervisory indifference or tacit authorization of subordinates' misconduct" that has been a causative factor in "the constitutional injuries they inflict on those committed to their care." *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994). Pursuant to Rule 60(b)(2), this Court may consider newly discovered evidence.²

¹ However, the order granting summary judgment to the DDSN defendants contains the signature sheet from the order granting summary judgment to the Babcock Center defendants.

² On May 2, 2013, the Honorable Cameron Currie issued an order finding that "From 2004 to 2006, SCDDSN required that Babcock Center cut approximately 50% of its residential program, which resulted in the loss of 318 residential beds." Case No. 3:11-03155, Opinion and Order. S.C.D.C. April 27, 2013. This new evidence provides at least circumstantial evidence to support Mims' claims that the one-on-one supervision required in his plan of care was terminated for reasons other than medical necessity, leaving him with inadequate supervision in a dangerous facility at Kensington. On May 23, 2013, the United States Government filed a motion in *limine* informing the district court that Babcock Center was notified of DDSN's order to downsize its residential program by 2003-2004 and these reductions in residential beds actually occurred between 2004 and 2006. Exhibit 3. Motion in Limine at footnote 1. According to the U.S. Government's motion, Babcock Center claimed that this downsizing caused "financial hardships" which rendered the Babcock Center unable to pay its fica taxes. *Id.* The United States informed the district court in this motion that Babcock Center's funding and its bed capacity were reduced "because of the allegations and audits that found a pattern of abuse, neglect, employee theft, and, most importantly, financial mismanagement." *Id.* at page 2. ECF No. 81 at 6. On page 4, the Government refers to "audit findings of physical abuse, neglect or financial mishaps" at the Babcock Center. On June 25, 2013, a jury in Columbia, South Carolina returned a verdict finding that (1) Babcock Center's failure to pay fica taxes was due to "willful neglect." *Id.* As Judy Johnson testified in her deposition in this case: "So we were forced or directed to

LEGAL STANDARD

Summary judgment is a drastic remedy and the South Carolina Supreme Court has ruled that it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. *Madison v. Babcock Center, Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006). In ruling on a motion for summary judgment, the Court must consider the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits filed by the parties. Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Id.* at 122, 708 S.E.2d at 769; see also Rule 56(c), SCRPC. "To determine whether any triable issues of fact exist, the court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party." *McLaughlin v. Williams*, 379 S.C. 451, 455-56, 665 S.E.2d 667, 670 (Ct. App. 2008). To withstand a motion for summary judgment in cases where the preponderance of the evidence standard is applicable, the non-moving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In ruling on a motion for summary judgment, the Court must view all ambiguities, conclusions and inferences in the light most favorable to the non-moving party. *Young v. SCDDSN*, 374 S.C. 360, 649 S.E.2d 488, 490 (S.C. 2007). In all events, the Courts have a special duty to zealously guard the rights of persons under a legal disability. Toal, Vafai and Muckenfuss, *Appellate Practice in South Carolina*, Second Edition (2002) at page 62.

GROUND FOR MOTION TO ALTER OR AMEND JUDGMENT

Mims respectfully requests that this Court reconsider and alter or amend its ruling granting defendants' motion for summary judgment based on the following grounds:

1. **The Court erred as a matter of law in finding that this action was commenced on May 12, 2008, because the 2008 amended complaint relates back to the original complaint filed in May of 2007.**

Because the amended complaint "arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings," the amendment clearly relates back to the date of the original pleading as to the South Carolina Department of Disabilities and Special Needs (DDSN), Stanley Butkus, the Babcock Center and Judy Johnson. SCRPC Rule 15(c). This Rule applies even where the amended complaint is filed after the statute of

increase staffing in a number of areas because it was not felt that the individuals were safe at that time." Deposition of Judy Johnson at 69. On page 112 of that deposition, Johnson admits that a 2004 newspaper article reported that the reduction in beds "comes off (sic, should be "after") state and federal reviews of Babcock homes uncovered problems ranging from financial mismanagement to theft. On page 24, Johnson admits that the Babcock Center had "payroll tax issues" going back to 2002.

limitations has expired. As the South Carolina Supreme Court noted in *Stanley v. Kirkpatrick*, the purpose of Rule 15(c) is to "salvage causes of action otherwise barred by statute of limitations." 357 S.C. 169, 592 S.E.2d 296, 298 (S.C. 2004). Mims requests that the Court reconsider its orders in light of this legal requirement requiring relation back to May 2007.

2. **This court's ruling that the appointment of a guardian ended any tolling period set provided by South Carolina Code Ann. § 15-3-40(2) violates the clear intent of the General Assembly to extend the statute of limitations for persons who are "insane" for a total of seven years from the date of discovery in a lawsuit brought against a state agency under the Tort Claims Act.**

The application of South Carolina Code Ann. § 15-3-40(2) was discussed in detail by the South Carolina Supreme Court in *Harrison v. Bevilacqua*. 354 S.C. 129, 580 S.E.2d 109 (S.C. 2003). In that case, the Supreme Court disagreed with the interpretation of South Carolina Code of Laws §15-3-40 which had been applied by the South Carolina Court of Appeals. Collins and Lacy had argued in that case that the statute "reflects a clear legislative intent to set a five year limit for the commencement of tort actions against the state by a plaintiff who is laboring under a disability other than infancy." But the Supreme Court corrected counsel's erroneous interpretation of that statute in *Harrison* and the Supreme Court's interpretation is controlling law in this case:

We disagree with the Court of Appeals' interpretation of section 15-3-40. The express language of the statute allows the time for commencement of an action to be "extended" by a maximum of five years. Thus, an insane plaintiff would apparently have seven years from discovery to bring a negligence action under the Tort Claims Act. See §§ 15-78-110, 15-3-40; see also *Fricks v. Lewis*, 26 S.C. 237, 1 S.E. 884 (1887).

Id., fn 5. Of course, the statute is tolled for an additional year in actions not covered by the Tort Claims Act. Having participated as counsel in *Harrison*, Collins and Lacy and Davison Lindeman should be familiar with this ruling. The court erred in ruling that the appointment of a guardian ends the tolling intended by the General Assembly in South Carolina Code of Laws §15-3-40. As counsel for the defendants is aware, in that case, the probate court had appointed the incapacitated person's sister as his guardian and conservator, yet the Supreme Court ruled that the tolling statute still applied, extending the statute of limitations for an *additional* five years past the deadline set by the general rule. Exhibit 4.

Defendants' argument should also be denied for important public policy reasons. There is no public guardian program in South Carolina and many persons in need of a guardian, like Mims, cannot afford to pay someone to serve in that capacity. Placing additional burdens and duties on persons who may be willing to make health care decisions, but would not be willing to take on the responsibility for prosecuting legal actions on behalf of the ward would make it even more difficult to find unpaid citizens willing to serve as guardians. In addition, such a termination of the extension of time to file a lawsuit intended by the General Assembly would encourage facilities to bring actions in the probate courts to appoint persons as guardians whose

primary concerns are protecting the facilities from lawsuits, thereby allowing the shorter statute of limitations to run to avoid liability.

3. South Carolina Code Ann. § 15-3-40(2) does not require a prior adjudication of incapacity when the cause of action accrued.

The court erred in adopting Defendants circular argument that South Carolina Code Ann. § 15-3-40(2) is not applicable because Mims was not "adjudicated to be incapacitated" until the order of the Probate Court on June 14, 2005, therefore he is not entitled to benefit from the statute because there had been no determination of incapacity. Under that standard, no one can benefit from the statute based on insanity.

This argument fails for a variety of reasons. First, it imposes an additional requirement that is not contained in the statute. If the General Assembly had intended to require an adjudication of incapacity "at the time the cause of action accrued," it would have said so and the plain meaning of the statute must prevail. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges v. Rainey*, 341 S.C. 79, 83, 533 S.E.2d 578, 581 (2000). Defendants have not cited any case supporting the agency's argument requiring adjudication at the time the cause of action accrued. Allowing an Executive Branch agency to add requirements not contained in the clear language of the statute would violate the Separation of Powers provision of the Constitution of the State of South Carolina.

In any event, the argument of defendants is wrong because **the defendants themselves** caused Mims to be adjudicated to be incapacitated in 2001. As the record reflects, after Mrs. Mims insisted that the Babcock Center employee who beat her son be prosecuted, DDSN filed an action in the Probate Court to cause him to be declared to be incapacitated and involuntarily committed to DDSN. DDSN's employee, Dr. James Christian filed a sworn petition with the Probate Court in 2001 which informed the Probate Court that Mims was "profoundly retarded." Mims at 2047. This is clearly not a close case where the capacity of the individual is in question. The Babcock Center also participated in those proceedings and they, too, should be estopped from arguing that Mims was never adjudicated to be incapacitated. Mims 2109. In determining Mims to be incapacitated, the Probate Court ruled in 2001 that: "Mr. Mims suffers from profound mental retardation, has cerebral palsy and several other severe and complex medical conditions." Mims at 2110. It is undisputed that at age 21, Mims had the mental capacity of a 20 month old infant. Mims 2119. Simply put, this argument is nothing short of frivolous and defendants were well aware when they made it to this Court that they themselves had caused Mims to be adjudicated as being incapacitated in 2001, after Mims was beaten by a Babcock Center employee in order to prevent his discharge from the Babcock Center to the care and custody of his mother. The Court should reverse its ruling acknowledging the 2001 determination of incapacity and that such a determination is not, in any event, required for the statute to apply.

4. **The court erred in not ruling that Plaintiff is entitled to rely upon facts that predate the statute of limitations period in proving his case.**

The Supreme Court has ruled that plaintiffs are entitled to present evidence of bad acts and facts occurring before the period covered by the statute of limitations and this Court erred in not so ruling. In *Madison v. Babcock Center*, the Supreme Court further discussed the issue of the statute of limitations and whether the court should consider allegations occurring before the period outside of the statute of limitations period. 371 S.C. 123, 638 S.E.2d 650, 663 (S.C. 2006). In order to avoid "future debate and confusion" over whether courts should consider events occurring prior to that starting date, the Supreme Court ruled that allegations related to defendants' initial evaluation and the admission of plaintiff to the Babcock Center in 1994 were not time-barred, even though they occurred outside of the period covered by the statute of limitations. *Id.* In that case the injury occurred on August 30, 1995, and Madison's lawsuit was filed on August 29, 1997. The Supreme Court determined that those events occurring at the Babcock Center in 1994, which occurred before the statute of limitations period began, should indeed be considered. Specifically, the Supreme Court ruled that "allegations relating to Department's alleged negligence in connection with Appellant's initial evaluation and admission in 1994 are not time-barred." *Id.*

5. **The "Facts/Procedural Background" section of the Court's order contain false or misleading information not supported by the full record.**

The Court's "Facts/Procedural Background" are not supported by the evidence in the record. For example, the orders granting summary judgment state that Plaintiff claims that he suffered "several different personal injuries" between 1999 and 2005 is not correct. Mims suffered many, many injuries as documented in in the Chronology beginning at Mims 2083. Mims brings to this Court's attention, however, that audits and investigations conducted by various federal, state and independent authorities found that many incidents were not reported by Babcock Center staff. Mims' court-appointed GAL affirmed in a sworn statement that Babcock

Center employees intentionally provided false information to her in order to involuntarily commit Mims to DDSN and that employees “intentionally withheld information from me about conditions at Clusters in 2001 and about many incidents in which Edward had been injured...,” so it is likely that many other injuries went unreported. Mims 2040.

6. The Court erred as a matter of law, thereby violating Mims’ due process rights, by failing to consider and rule upon Mims’ Motion for Summary Judgment.

Mims filed a motion for partial summary judgment, along with six volumes of evidence which do not appear to have been considered by the Court. On May 29, 2013, plaintiff’s counsel sent a letter to the Court requesting that plaintiff’s motion for summary judgment be heard on the same day as defendants, but the Court only heard defendants’ arguments and would not consider Mims’ motion for summary judgment. The Court erred as a matter of law in considering and ruling upon only defendants’ motions for summary judgment, without consideration of Mims’ motion or proposed order and giving him an equal opportunity for oral argument. This violated Mims’ due process rights and the obligation this Court has to zealously protect the rights of persons who suffer a legal disability. *Toal et al., supra*. Rule 56 of the South Carolina Rules of Civil Procedure “requires the circuit court to consider the submitted pleadings, along with depositions, answers to interrogatories, admissions, and affidavits, when ruling on summary judgment.” *Froneberger v. Smith*, No. 5168 (S.C.Ct.Ap. August 28, 2013.) As in that case, the circuit court erred as a matter of law, because it “failed to provide either further findings of fact relating to ...claims or more defined rationale explaining the grant of summary judgment.” *Id.*

7. New evidence not available to Mims at the time the Summary Judgment motions were filed supports his claims that there were pervasive patterns of abuse and neglect at Babcock Center residential facilities.

Defendants did not disclose to this Court that in an order dated May 2, 2013, while their motions for summary judgment were pending before this Court, the Federal District Court of South Carolina issued an order finding that between 2004 and 2006, Babcock Center was

required to reduce its population by 50%, resulting in the transfer of 318 disabled residents to other facilities.³ This order supports Mims' claims that there existed systemic patterns of abuse and neglect at Babcock Center residential programs and that defendants, including the individual defendants, were on notice of the dangerous conditions there. The evidence of Babcock Center's financial melt down which it claims began when it was ordered to downsize in 2004, provides at least circumstantial evidence that Mims's level of supervision was reduced for financial reasons, not based on his need for one-on-one supervision in a dangerous facility. The evidence contained in Exhibit 3 supports Mims' claims that Defendant Johnson, the Babcock Center and the DDSN defendants operated in concert to prevent Mims' release (1) to avoid financial liability for injury once he was no longer under the control and custody of defendants, and (2) to avoid loss of funding for Mims' ICF/MR bed. It documents that Butkus had the authority to remove residents from Babcock Center to protect them from harm and Mims has shown that while moving hundreds of persons out to protect their health and safety, Butkus himself made the decision to obstruct his discharge from Kensington and to challenge Mrs. Mims' petition in the Probate Court to be appointed as his legal guardian.

8. The Court erred as a matter of law and fact in dismissing Mims' §1983 and negligent supervision claims due to lack of personal involvement by defendants.

The Court erred in its findings that the individual defendants did not have sufficient personal involvement to make them liable under Mims' §1983 and negligent supervision causes of action. As the South Carolina Supreme court recognized in *Stanley v. Kirkpatrick* in 2004, § 1983 allows a civil action to recover damages for deprivation of a constitutionally protected right. , 357 S.C. 169, 592 S.E.2d 296 (S.C. 2004) ("In any § 1983 action, "a plaintiff is required

³ But, in the deposition of Babcock Center's chief financial officer, the Babcock Center reduced its bed capacity from 440 to 220. Exhibit 3 at page 15. She testified that residents paid toward the cost of their room and board. Id. at 17. According to Tyler, Babcock Center's financial problems resulted from being required to downsize. Id. at 25.

to plead three elements: (1) an official policy or custom (2) that causes the plaintiff to be subjected to (3) a denial of a constitutional right." *Citing Moore v. City of Columbia*, 284 S.C. 278, 326 S.E.2d 157 (Ct.App.1985). In its order granting summary judgment to Johnson, this Court stated "A review of the pleadings reveals it is unclear whether Plaintiff has intended to state a claim...against Judy Johnson in her official capacity in the First Cause of Action. Order granting Babcock Center defendants' motion for summary judgment at 7. The Court erred in this conclusion, as defendant Johnson is clearly sued in her individual capacity. The Amended Complaint clearly and unambiguously names Butkus, Lacy and Johnson as defendants in their individual capacities. Page 12, paragraph 64, 66 and 67. These individuals are all "persons" subject to suit for purposes of 42 U.S.C. 1983 and they have all admitted having direct involvement in Mims' case.

As to the arguments made by Defendants that they have had no personal involvement in the wrongful acts alleged in the amended complaint, Mims alleged that the individual defendants "were aware of the systemic abuse, neglect and exploitation of clients living in Babcock Center facilities" and that they "failed to report these incidents of abuse, neglect and exploitation to appropriate authorities and they have failed to take necessary action to investigate reports of abuse and neglect." Paragraph 14 and 15. He also alleged that they have "established a pattern and practice of bringing reprisals against parents who complain about services provided by the Babcock Center." Paragraph 17. These allegations are substantiated by a multitude of investigations, audits and reports that Mims has provided to the Court. Mims Volume 1, Exhibits 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15 and 17. Mims, Volume 2, Exhibits 18, 19, 20, 21 and 22. New evidence not available at the time these motions were filed supports these claims. Exhibit 3. *Babcock Center v. U.S.* PACER documents. The pattern of retaliation that Mims complained of in the amended complaint has been documented in sworn affidavits Volume 6, Exhibits 33, 34,

35, 36 and 37.

The Court erred in finding that the individual defendants did not have personal involvement in the violations of Mims' civil rights complained of in the first and second cause of action in the amended complaint. In his deposition, Defendant Butkus admitted that he knew that Edward was beaten at Clusters and that his practice was to contact the Chairman of the Babcock Center and DDSN Commissioner from his district "to let them know that something happened and that an investigation was underway." Mims 1360. Not only does it appear that Butkus was notified of this particular incident, but he also testified that he investigated to see if staff was suspended and that the investigation of the injury was underway. MIMS 1361. Butkus testified that, as a matter of practice, he would know about the injury within five days. Id. Mrs. Mims was not informed about the beating for more than a year, and his assailant, a Babcock Center employee continued to work at the facility during that time. Mims 2053, 2075, 2076. He was not arrested and Mrs. Mims was not on notice of the criminal act for more than a year, even though the beating was witnessed by Babcock Center employees. Mims 2053. The arrest warrant states: "The above facts are true and believable based upon statements given by the Defendant, and witnesses that personally observed the Def. strike or hit Mr. Mims." See also Mims 2054. Mrs. Mims believed that her son was being beaten, but she did not have knowledge of the assault by Anthony or the cover up of that crime which began on or about August 13, 2000 until 2001, thus this beating and the wrongful acts of defendants in failing to report and prosecute this crime came within the seven years allowed by the tolling of the statute of limitations.

At his deposition, Butkus testified that he could not remember whether he was told "specifically how he was abused," but he admitted that he was informed that "abuse had occurred." Because Mims was involuntarily committed to the custody and care of DDSN, Butkus himself held the key to Mims' continued confinement at Clusters and held the key to his

release and the obligation to protect him from further harm. When asked about the beating of Mims by Carl Anthony, Butkus responded: "Typically, something of that severity, I probably would have been contacted on...and yes, I would very much want to know that that had happened." Mims 1362. Butkus admitted that he had conversations with Defendant Johnson after CMS and DHEC decertified two units at Clusters. Mims 1363.

The investigation conducted by CMS in 2003 describes some of the horrors that occurred regularly at Clusters. Mims at 0063. Johnson told Butkus that "she had concerns about whether the Agency could maintain quality of service needed at the Clusters" and she even asked Butkus to have DDSN take over management at Clusters. Mims 1363. Butkus testified that "We took it over and we closed it." Mims 1364. He admitted that the standards were not being met at Clusters. Mims 1364. Butkus also admitted that he would have been informed when Mims was beaten with a belt at Clusters and he testified that he had a responsibility to see that this second beating was "thoroughly investigated" because he had a duty to "protect the consumers and users of service." Mims 1367. Butkus testified that he was "sure" that he would have been notified of "something of that severity." Mims 1367. The Court's finding that Butkus did not know of and ignore "widespread systemic problems" is simply not supported by massive amounts of evidence in the record, as well as his own admissions and the Court erred in this conclusion.

Most importantly, Butkus admitted that it was he who made the final decision to involuntarily commit Mims to DDSN and that he made the placement decisions. Mims 1369. ("The executive of the Agency's responsible for making placement decisions." Id.) When asked if he also was the individual responsible for getting someone out of placement when they were in danger, Butkus responded that "would be a separate determination" and "you need to assess the circumstances carefully to see if it was isolated or a pattern of some kind." Id. He also admitted that it was his job to consider the "mix of staff and mix of behaviors" and to "reassign people

where they can best fit.” Mims 1369 and 1370. The causal link to Butkus’ decision to involuntarily commit Mims instead of allowing him to return to the safety of his mother’s home is clear. Had Butkus, DDSN and Babcock Center not joined together to prevent Mims’ return home in 2001, none of the injuries he suffered at the Babcock Center would have occurred. Butkus has admitted, and the record documents his actual and constructive knowledge of the injuries to Mims and that his commitment to Babcock Center placed Mims as “pervasive and unreasonable risk” of harm to a citizen like Mims. *Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994). Butkus’ decision to commit Mims to prevent his return home, to place him at Clusters, his total abdication of his duty to monitor Mims’ services and condition once he was committed to the custody of the agency and, finally his decisions to obstruct Mims’ discharge in 2005 from Kensington and to challenge Mrs. Mims’ appointment as guardian show deliberate indifference to his needs and the conduct of Babcock Center personnel. He authorized the conduct by failing to require Babcock to comply with federal and state mandates for years, as documented by investigations, audits and reports conducted by federal, state and independent authorities. There can be no doubt but that actions by Butkus constituted an “affirmative causal link” between the constitutional injuries suffered by Mims, as alleged in the amended complaint and the individuals who actually physically inflicted the injuries and psychological abuse Mims suffered for years. *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

The record shows that the individual defendants repeatedly “turned a blind eye” for fear of what they might see and that they were reckless in the supervision of subordinates. *Id.* Butkus testified that DDSN received reports of critical incidents within 24 hours. Information was received by Sam Davis, who notified Defendant Kathi Lacy. Mims 1378. According to Butkus, Lacy then exercised her judgment to determine whether to pass the information on to Butkus or whether the incident was “just an unexplained random event.” Mims 1378. As State Director, it

was Butkus' job to determine "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." Mims 1378. As Director of DDSN, Butkus admitted that he was personally responsible to assure that "corrective measures needed to be taken" to prevent the event from happening again. Butkus testified that he would "learn by exception that there was a problem in the implementation of the corrective measures. In other words, if they aren't done." Mims 1381.

Butkus was likewise personally informed of the injury resulting from Mims' bed being infested with ants. Instead of conducting a thorough investigation, which would have demonstrated the dangerous conditions existing at Kensington, Butkus simply "put it in the category of this is a random event..." But investigations by DHEC and CMS showed that dangerous conditions were not random at Kensington, they were commonplace and not remedied even after Johnson was informed of the specifics. Mims 0046, 0198 and 1025. Butkus testified that he did not consider Mims' bed infestation to "rise to the level of there's a major systemic problem of some type." Mims 1382. Butkus received notification of the dangerous, life threatening conditions at Kensington each time Immediate Jeopardy was declared there, including after Mims' roommate either aspirated (according to Butkus) or choked and died. Mims 1384.

Butkus knew that Mrs. Mims had tried to get her son released from involuntary commitment, but even after the injury to his penis, which required seven stitches to repair the "gaping laceration," he attempted to obstruct his discharge. Mims 1385 and 1386. When he received notice that Mims' counsel had presented a court order authorizing his mother to remove Mims from Kensington, he ignored the order until the police were called to Kensington to assist Mrs. Mims in taking her son home.

The record documents that both Judy Johnson and Stanley Butkus were personally

involved in causing a doctor employed by DDSN to examine his penis days after the injury occurred and to "investigate" what happened. Instead of having Mims evaluated by an independent physician, Butkus directed a doctor on DDSN's payroll, Dr. Graeme Johnson, to examine Edward Mims and he relied upon his assessment to dismiss it without further investigation. 1386. Butkus also personally received information about the injury through his agency's critical injury reporting system. Mims 1387. He "asked Dr. Johnson to take a look at what was involved with it and what his determination of the situation was..." Mims 1387. He testified that the injury of Mims's penis would have come to the attention of Defendant Lacy and then to him. Mims 1387. It was Butkus' decision to refer investigation to DDSN's physician instead of law enforcement. Mims 1387. He did not recall having anyone contact Mims' treating physician and never obtained an independent examination. Mims 1388. Butkus could not remember whether he discussed this injury with Defendant Johnson - although the record contains a letter from Johnson to him requesting an inquiry - but in his testimony, he previously said that his practice was to inform the local provider and the appropriate DDSN commissioner of any such injury. Mims 1389, 1395 and 1396.

Butkus admitted having contact, either personally, or through his staff with the director of Babcock Center (before Johnson was hired) when Mims was committed to DDSN custody and care. Mims 1392. According to Butkus, involuntary admissions are "very, very rare." Mims 1392. Butkus admitted that once Mims was committed, he had "the same responsibility that we'd have toward anybody that we serve, that they're safe, free from harm, getting the services they're supposed to get when they're supposed to get it, that kind of thing." Mims 1393. As state director of DDSN, Butkus testified that he was "responsible for the agency and everything that goes on within the agency in terms of what the code requires, what our contractual commitments are under waivers or ICF/MRs, state-funded programs." Mims 1395. Every time

Butkus was notified of allegations of abuse, he was responsible for personally contacting the Chair of the agency providing the service as well as his DDSN Commissioner in the district where the injury occurred. Mims 1395 and 1396. Butkus could not recall if law enforcement was notified of the penis injury or not. Mims 1398. According to Butkus it would "rest in the CEO's hands primarily" (defendant Judy Johnson) to preserve evidence like the bloody chair. Mims 1399. He opined that the police should have been contacted "right off" to preserve evidence. Mims 1399.

Butkus was informed immediately when Mrs. Mims arrived at Kensington with a court order to release her son from that facility after notices had been sent informing parents the facility had been decertified due to another finding of Immediate Jeopardy. Mims 1400. The Court erred on page 11 of its order granting summary judgment to the Babcock Center finding that the delay in Mims returning home was "attributable to this failure to communicate by Plaintiff's counsel" about the Probate Court proceedings. This finding is patently false. The record shows that Judy Johnson was informed of the proceedings in the Probate Court and she was actually provided with the order appointing Lennie Mullis as an examiner before the hearing.⁴ Mims 2179. Despite personally receiving the court order appointing a visitor on June 7, 2005, Judy Johnson called Ms. Mullis on the morning of June 8, 2005 and left a message informing Mullis to speak with her deputy director, Dorothy Goodwin. Mims 2179. Ms. Goodwin assured Ms. Mullis that she would be allowed to examine Mims that same day, but Mullis was again denied access to Kensington when she arrived with her court order that evening. Mims 2179. After the visitor was again denied access to Mims' Babcock Center facility, an emergency hearing was held the next day, which was attended by Mrs. Mims,

⁴ The record shows that Dr. Tan Platt, then the medical director of the Babcock Center, examined Mims on February 17, 2005 and determined that he was incapacitated due to "mental deficiency." Mims 2175. He found Mims to be mentally ill or incompetent. Mims 2177.

Edward Mims' court-appointed guardian and Leigh Flynn, who had served as the court appointed guardian in 2001. Mims 2184. The guardianship statute does not require an agency providing services to be notified of a hearing. Mims 2184. The order was provided to Babcock Center and DDSN on the same day it was executed. Mims 2186 and 2187.

The proceedings for the appointment of a permanent guardian were delayed due to interference by DDSN and Babcock Center. Butkus admitted in his deposition that it was "at my direction" that DDSN counsel participated in the guardianship proceedings. Mims 1405. Butkus was involved in a meeting where the decision the agency made to oppose Mrs. Mims' petition for guardianship was discussed. Mims 1408. He testified that he and his staff determined that Mrs. Mims "wasn't capable" of taking care of her son. Id. Butkus personally made that decision because the agency determined that the "circumstances were still operating that led to the original involuntary admission" and "We hadn't seen a change in her capacity." Mims 1409. Butkus and his staff determined "that she couldn't provide the level of care that he needed in the home." Mims 1411. This was, he determined, because Mims' mother was working, she didn't have a lot of resources and her income was limited.⁵ Id. He testified that "Our assessment was that he couldn't get the care he needed." Mims 1412. Butkus determined **"he was in that facility, we felt that was best for him"** - a facility CMS and SC DHEC had determined to pose Immediate Jeopardy to its residents. Mims 1413. At the direction of the South Carolina Department of Health and Human Services, Carolina Medical Review had investigated Babcock Center ICF/MR facilities and notified Butkus that Babcock Center ICF/MRs, including Kensington, were not in compliance with federal requirements. Mims 0253. DHEC had notified

⁵ There is no evidence in the record that Mrs. Mims was late paying any creditors or that she did not have the financial resources to properly care for her son, as she had done without assistance from the time of his birth until she became temporarily ill in 1999. On the contrary, documents contained in Exhibit 3 describe the financial melt down of Babcock Center in 2005, at the time of these proceedings.

Defendant Johnson that Kensington, the facility where Mims was placed by Butkus, would be terminated from the Medicaid program on April 30, 2005. Mims 0253.

By the time Mims was injured in 2005, DHHS had notified Johnson that she was required to notify all responsible parties via telephone that Kensington failed to meet the federally mandated Medicaid participation requirements. As director of DDSN for a person involuntarily admitted to the custody of DDSN, this notice would have been sent to Defendant Butkus. Mims Vol. 5 p. 82. Letter from DHHS to Defendant Johnson dated April 29, 2005. This notice required Defendant Johnson to place a sign "in visible areas throughout" Kensington advising that "assistance will be made available for resident transfers to other participating facilities." Id. Vol. 5 at 83. That letter required Johnson to inform DHHS "on a daily basis" of changes to the patient census. Id. Butkus was copied on that letter, but instead of getting Mims out of a dangerous situation at Kensington, he took active steps to prevent him from moving out. Id. Babcock Center was receiving \$236.73 a day for Mims to remain at Kensington. Id. Letter from Hepfer to Harrison dated August 24, 2005.

As to Mims returning to live with Mrs. Mims at home, Butkus testified that "The main thing I knew was that the combination of the mom and the overall environment wasn't something that we felt, based on our professional assessment, was in his interests to be in." Mims 1415. He determined that Mrs. Mims "could not provide the care that he needed because of her resources ...not just monetary, psychological resources, certainly financial... We just didn't think that she would be able to do that." Mims 1415 and 1416. According to Butkus, "It was our judgment that based on these circumstances at that time for Edward, that it wasn't in his interest." Mims 1416. He repeated that "we thought that would be in the best interest of Edward" (for him to remain at Kensington) and to "remain in the involuntary status and stay where he was." Mims 1419. Butkus once again confirmed that he, personally was responsible

for making placement decisions regarding Mims. Mims 1420.

Butkus admitted in his deposition that he had communicated with DDSN counsel about Mims when Mrs. Mims presented her court order to remove him from Kensington and that he discussed the order with defendant Kathi Lacy. Mims 1400, 1401 and 1403. Butkus talked "about the event and so forth, what needed to be done, that kind of thing." Mims 1402. He testified that Defendant Lacy "... would dig into something right away if that was needed for a day or two." Mims 1403. Butkus admitted that he continued to be involved in the probate court proceedings through his counsel, Jim Hill. Mims 1404. The court's findings that the individual defendants did not have personal involvement at a sufficient level to make them subject to a claim under §1983 and liability for negligent supervision is clearly contradicted by the record in this case and the Court erred in dismissing them based on a lack of personal involvement.

Butkus admitted that it was "at my direction" that DDSN counsel participated in the guardianship proceedings. Mims 1405. Butkus was involved in a meeting where the decision to oppose Mrs. Mims' petition for guardianship was discussed. Mims 1408. He testified that he and his staff determined that Mrs. Mims "wasn't capable" of taking care of her son. Id. Butkus personally made that decision because the agency determined that the "circumstances were still operating that led to the original involuntary admission" and "We hadn't seen a change in her capacity." Mims 1409. Butkus and his staff determined "that she couldn't provide the level of care that he needed in the home." Mims 1411. This was because Mims' mother was working, she didn't have a lot of resources and her income was limited. Id. He testified that "Our assessment was was that he couldn't get the care he needed." Mims 1412. Butkus determined **"he was in that facility, we felt that was best for him."** Mims 1413. At that time, Carolina Medical Review had notified Butkus that Babcock Center ICF/MRs were not in compliance with federal requirements and DHEC had notified Defendant Johnson that Kensington, the facility where

Mims was placed by Butkus, would be terminated from the Medicaid program on April 30, 2005. Mims 0253. According to the admissions of Johnson and her chief financial officer, Babcock Center was in a state of financial crisis, not paying its debts, or even paying the IRS the fica taxes it had collected from employees' paychecks. Exhibit 3.

By this time, DHHS had notified Johnson that she was required to notify all responsible parties via telephone that Kensington failed to meet the federally mandated Medicaid participation requirements and that they should move their family members out of Kensington. As director of DDSN for a person involuntarily admitted to the custody of DDSN, this notice would have been provided to Defendant Butkus. Mims Vol. 5 p. 82. Letter from DHHS to Defendant Johnson dated April 29, 2005. This notice required Defendant Johnson to place a sign "in visible areas throughout" Kensington advising that "assistance will be made available for resident transfers to other participating facilities." Id. Vol. 5 at 83. That letter required Johnson to inform DHHS "on a daily basis" of changes to the patient census. Id. Butkus was copied on that letter, but instead of getting Mims out of a dangerous situation at Kensington, he took active steps to prevent him from moving out. Id. Medicaid was being billed \$236.73 a day for Mims to remain at Kensington ICF/MR. Id. Letter from Hepfer to Harrison dated August 24, 2005. Not only was that particular ICF/MR a dangerous place to live, but the Medicaid Act and the Americans with Disabilities Act required that Mims be provided the choice to live outside of an institution.

As to Mims returning to live with Mrs. Mims at home, Butkus testified that "The main thing I knew was that the combination of the mom and the overall environment wasn't something that we felt, based on our professional assessment, was in his interests to be in." Mims 1415. He determined that Mrs. Mims "could not provide the care that he needed because of her resources ...not just monetary, psychological resources, certainly financial... We just

didn't think that she would be able to do that." Mims 1415 and 1416. According to Butkus, "It was our judgment that based on these circumstances at that time for Edward, that it wasn't in his interest." Mims 1416. He repeated that "we thought that would be in the best interest of Edward" (for him to remain at Kensington) and to "remain in the involuntary status and stay where he was." Mims 1419. Butkus once again confirmed that he, personally was responsible for making placement decisions regarding Mims. Mims 1420.

In her deposition, Defendant Lacy also was personally involved in Mims' case and she admitted having discussions with Director Butkus about the decision not to allow him to leave Kensington. Page 23 of the deposition that begins at Mims 836. Lacy admitted having discussions about Mims' release with an employee at Babcock Center. Id. at page 27 of Lacy Deposition. Although DDSN was not a party to the guardianship proceedings in the probate court in 2005, Defendant Lacy was personally involved in those proceedings, which resulted in months of delay and additional costs in having Mrs. Mims appointed as her son's guardian. On September 28, 2005, general counsel for DDSN, Jim Hill, filed a document titled "Objections" with the Probate Court. This brief acknowledges that defendant Kathi Lacy herself attended and testified at a hearing in the Probate Court on June 24, 2005 and that she "presented a recording of events..." to the court. Mims 2189.

DDSN informed the court in its "Objections" that Mims' mother was "a poor candidate for guardian..." and that, besides, guardianship is not needed. Mims 2191 and 2192. DDSN informed the Court that "There has been no showing that Edward has gone lacking for care and supervision." Mims 2192. These "Objections" were filed by DDSN after Federal and State authorities had repeatedly found residents at Kensington to be in "Immediate Jeopardy" and at a time when DDSN knew that the rate of substantiated cases of abuse and neglect at Babcock Center had spiraled from double the state-wide average to four times the state-wide average.

Mims 0046, 0198, 01250. See DHHS Audit of DDSN at 0359, page 19, which describes the rate of abuse in Babcock Center facilities: "In FY 2003 the rate of substantiated incidents of abuse was almost double the statewide average per 100 residential consumers and in FY 2004 it was four times the statewide average."

Lacy testified that she was responsible for providing oversight and assuring that DDSN abuse policies were being followed. She was herself responsible for tracking trends and would "dig deeper into the data to get a better idea about why a certain provider might be at the statewide average or below and above." Id. at 66. Lacy was made aware of the findings of Carolina Medical Review that Babcock was out of compliance with federal standards. Id. at 70. She was responsible for "risk management" and "getting the reports of abuse and neglect." Id. at 82 and 83. She confirmed that Butkus had the "final authority over where people are placed." Id.

The record also shows that Defendant Johnson had personal involvement in the violation of Mims' rights. Johnson is responsible for the day to day operations of the Babcock Center. Mims 0978. She admitted in her affidavit that audits had found significant problems in protecting the health and safety of Babcock Center residents and she testified under oath that the Babcock Center was on the brink of financial disaster in 2004 and 2005, (at the time Mrs. Mims was attempting to remove her son from Kensington). Mims 1033. Lacy admitted that a 2006 audit by DHHS found that Babcock Center did not "adequately address or correct all finding in its first corrective action plan" and that significant deficiencies were found. Mims 1035 and 1036. Babcock's Board Chairman, Sue Slater, testified that Johnson, as director, was responsible for reviewing client beatings and that the ultimate responsibility to make sure employees do what they are supposed to do to protect the health and welfare of residents was Johnson's. Mims 1578 and 1580. Chairman Slater testified that:

Houses were in terrible condition, not only at Clusters, but lots of houses were in terrible condition, broken windows, holes in the floor, all those kinds of things.

Mims 1584. According to the Chairman, Clusters closed "Because we felt it was not a good place to give good care," despite DDSN having given Babcock Center half a million or more dollars to get up to standard. Mims 1587 She testified that Johnson "was always involved" in discussions when an employee beat a consumer. Mims 1593. When asked "Where does the buck stop?" the Chairman responded "With her." Mims 1593. The Chairman was called when Babcock refused to discharge Mims pursuant to the probate court order authorizing his mother to remove him. Mims 1612. She called Defendant Johnson, who told her "she'd take care of it." Mims 1613. The Chairman remembered that the court-appointed visitor was not allowed into his residence and she discussed this decision with Johnson. Mims 1616, 1618 and 1619. This is credible evidence in the record to show Johnson's personal involvement.

The court's conclusion that Mims' discharge from Kensington was delayed due to lack of notice of the guardianship proceedings in the Probate Court is clear error. The examiner who had been appointed by the probate court to examine Mims, Lennie Mullis, signed a sworn statement stating that she faxed her court order to Defendant Johnson on June 7, 2005, when she was denied access into Mims' facility. Mims 2179. On June 8, 2005, Defendant Johnson left Mullis a message about her examining Mims. Mims 2179. Johnson's direct report, Dorothy Goodwin informed Mullis that Mullis would be able to examine Mims at the facility at 6:00 p.m. that evening, but Mullis was again denied access to the facility when she returned, despite having been ordered by the court to examine Mims. Mims. 2180.

Defendants' arguments that there is no "suggestion of direct participation" in any of the alleged events at the Babcock Center are contradicted by these records and the Court should reverse its ruling, finding that the individuals had sufficient personal involvement to make them liable under § 1983 and Mims claims for negligent supervision.

9. **The Court erred as a matter of law in its findings that Mims failed to provide sufficient evidence to support his cause of action for supervisory negligence.**

The Court erred in its conclusion that Mims failed to establish that "a specific person created an undue risk of harm" and that Mims claims were based only on "isolated incidents." *Bank of New York v. Sumter County*, 387 S.C. 147, 156, 691 S.E.2d 473, 478 (2010). Mims provided extensive evidence showing that the harms Mims suffered were foreseeable and due to the bad acts of the individual defendants, the Babcock Center and DDSN. The South Carolina Court of Appeals recently held that "The modern doctrine of *respondeat superior* makes a master liable to a third party for injuries caused by the tort of his servant committed within the scope of the servant's employment." *Froneberger, supra*. In that case, the Court held that:

The modern doctrine of *respondeat superior* makes a master liable to a third party for injuries caused by the tort of his servant committed within the scope of the servant's employment." *S.C. Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 179, 348 S.E.2d 617, 621 (Ct. App. 1986). "An act falls within the scope of the servant's employment if it was reasonably necessary to accomplish the purpose of the servant's employment, and it was done in furtherance of the master's business." *Wade v. Berkeley Cnty.*, 330 S.C. 311, 319, 498 S.E.2d 684, 688 (Ct. App. 1998). Accordingly, "the master is liable for the torts of his servant even when the servant acts against the express instructions of his master, so long as the servant acts to further the master's business." *Id.* "What is within the scope of employment may be determined by implication from the circumstances of the case." *Id.* "Any doubt as to whether the servant was acting within the scope of his authority when he injured a third person must be resolved against the master, at least to the extent of requiring that the question be submitted to the jury." *Id.*

In any event, the Fourth Circuit has held that "supervisory officials may be held liable in certain circumstances for the constitutional injuries inflicted by their subordinates." *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994). This liability is not based upon *respondeat superior* but upon "a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict on those committed to their care." *Id.* at 798, citing *Slakan v. Porter*, 737 F.2d 368 (4th Cir. 1984), cert. denied, 470 U.S. 1035, 105 S.Ct. 1413, 84 L.Ed.2d 796 (1985); 737 F.2d at 372-73. Indeed,

supervisory liability can extend "to the highest levels of state government," and the Fourth Circuit has recognized that supervisory liability ultimately is determined "by pinpointing the persons in the decision making chain whose deliberate indifference permitted the constitutional abuses to continue unchecked." *Id.*, citing *Slakan*, 737 F.2d at 376. See *Spell v. McDaniel*, 591 F.Supp. 1090, 1109-10 (E.D.N.C.1984) (determining issue on supervisory liability is whether defendant proximately caused a violation of the plaintiff's rights by doing something or failing to do something he should have done). The Fourth Circuit has noted that this issue is ordinarily one of fact, not law, thus, it should not be decided in a motion by defendants for summary judgment. *Id.* See *Avery v. County of Burke*, 660 F.2d 111, 114 (4th Cir.1981).

The Fourth Circuit has set forth three elements necessary to establish supervisory liability under Sec. 1983: first, the supervisor must have 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; second, 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 finally, there must be an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff. *Id.* at 799. In this case, Mims has clearly documented the personal knowledge of Butkus, Lacy and Johnson of the conduct engaged by subordinates which put Mims and citizens like him at great risk of harm. Audit after audit confirmed the failure to protect the health and welfare of residents of DDSN programs, in particular Babcock Center residential programs. Mims 0359, 0416, 0490 and 0583. Indeed, DDSN reported that Babcock Center had four times the average rate of substantiated cases of abuse and neglect in 2004 (up from double the rate in 2002) and Butkus had ordered Johnson to downsize their residential programs by 50% on December 15, 2004, just months before the injury to Mims' penis. Mims 1445. Butkus personally made that decision to

require half of Babcock's residents to go somewhere else, yet he also personally determined that Mims would not be allowed to leave Kensington, even after dangerous conditions had been found to exist in survey after survey of that facility, by both state and federal oversight organizations. Mims 0198, 0208, 0250 and 0252.

A plaintiff may demonstrate deliberate indifference by showing the supervisor's "continued inaction in the face of documented widespread abuses." *Id.* at 373. *Shaw* at 199. Mims has clearly met that test in this case, not only by showing that he was, individually, subjected to repeated abuses, but by demonstrating that again and again federal, state and independent authorities reported widespread abuses and that Johnson and others at the Babcock Center failed to correct them or to prevent further harm to Mims and other vulnerable adults. A supervisor is not "expected to guard against the deliberate criminal acts of his properly trained employees when he has no basis upon which to anticipate the misconduct." But in this case, the federal Medicaid agency documented, just a few months before Mims' penis injury, that his roommate's death was not thoroughly investigated, the facility was not adequately staffed and staff was not properly trained. Mims 0204. That report stated that "the facility failed to take appropriate actions to ensure client protections." *Id.* When criminal acts, or incidents which might have resulted from criminal acts, occurred, instead of reporting them to law enforcement, defendants retaliated against persons who tried to expose the abuse. Mims 2015, 2038, 2074, 2214 and 2258. Instead of correcting problems, the rate of abuse grew from double to four times the statewide average during the first few years Johnson was director at Babcock Center. Mims 0359. The level of problems intensified as time went on. See Reports and Investigations in Volume 1 and Volume 2 and news reports in Volume 5 at 1911.

A supervisor's continued inaction in the face of documented widespread abuses, provides an independent basis for finding he either was deliberately indifferent or acquiesced in the constitutionally offensive conduct of his subordinates and plaintiff has demonstrated that indifference through repeated surveys and audits of which Butkus, Lacy and Johnson were aware and failed to take action to correct. *Shaw* at 199. The *Unequal Justice* report by Protection & Advocacy documented that these problems were systematic throughout the programs DDSN operated during the time period when Mims injuries occurred and the individual defendants acted in concert to obstruct his release from Kensington and DDSN custody. Specific problems involving abuse and neglect of Babcock Center residents had been reported in a 2003 audit by DDSN. Mims 0124. A federal survey reported in 2004 revealed money being stolen from residents (Mims 0151) and horrific physical injuries that were either unexplained or resulted

from assault (Mims 0152 to 0163). CMS had reported the failure of staff to report abuse and a staff member being fearful of reporting abuse. Mims 0157. CMS substantiated the allegations that Babcock Center failed to protect clients from repeated beatings and failed to report negligent supervision at Clusters. Mims 0164 to 0167. (Ed M. refers to the plaintiff in this report at Mims 0164.) In this report, CMS reported the failure to "ensure clients were not neglected, and placed at risk of harm." Mims 0174. It was substantiated that another client was beaten with a belt and that this client was raped by the same assailant. Mims 0175 and 0177. Plaintiff has well documented actual knowledge that subordinates of Butkus, Lacy and Johnson were engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to citizens like the plaintiff and their response was so inadequate that it showed "deliberate indifference to or tacit authorization of the alleged offensive practices." *Slakan*, 737 F.2d at 373.

Plaintiff has established through extensive credible documentation that the risk of harm was "pervasive" and "unreasonable" and that not only were other residents harmed, but Mims himself suffered repeated injuries from assaults by others as well as many "unexplained" injuries. *Id.* at 373-74. What makes Mims case even more egregious was that Butkus had caused him to be involuntarily committed based on false information provided to the court-appointed GAL in 2001. This occurred after Mims' mother insisted on pursuing holding the employee who beat Mims accountable for the assault. Mims 2038 and 2039. The GAL testified at the probate court hearings in 2007, where Butkus and Lacy attempted to obstruct Mrs. Mims being appointed as his permanent guardian, that she recommended that Mims be involuntarily admitted in 2001 "based on this false information which had been provided to me by employees of the Babcock Center and the Department of Disabilities and Special Needs. Mims 2040. ("After Edward was injured at another Babcock Center facility (Kensington) in 2005, I was provided with evidence showing that Babcock Center employees had intentionally provided false information to me in 2001 in order to prevent Edward from returning to the custody of his mother." Mims 2040). This GAL testified that she had represented "a number of residents of Babcock Center who had been abused or neglected by Babcock Center employees and it was my opinion that Edward was not safe there." Mims 2041.)

While the record is totally devoid of any evidence that Butkus, who acknowledged that he was responsible for placement decisions, had made any effort to monitor Edward's health and safety between the date of his involuntary admission in 2001 and the court order giving his mother the authority to remove him from Babcock Center in 2005, when Mrs. Mims was

appointed as her son's guardian, Butkus suddenly became concerned for Mims' welfare if he returned to live with his mother. This is further evidence of obstruction of justice and intimidation of a witness. (Edward's mother signed a sworn statement stating that she was threatened with her weekend visits being terminated if she did not agree to the involuntary admission in 2001. Mims 2076.) Senator David Thomas signed a sworn statement stating that his office had been flooded with calls after the Legislative Audit Council report was released in 2008 from families who "reported to me and my staff that they were fearful of retaliation by DDSN." Mims 2017).

10. The court erred in its ruling in favor of Defendants on the issue of proximate cause.

It is undeniable that the beatings Mims suffered at Babcock Center and injuries like his bed being infested by ants would not have occurred but for DDSN and Babcock Center teaming up to involuntarily commit him to DDSN custody. But for the fraudulently obtained involuntary admission in 2001, the record shows that Edward would have been removed from the Babcock Center by his mother and would not have suffered any more of these injuries after he was beaten by Carl Anthony. Mims' mother literally begged for his return home in November of 2001. He was beaten with a belt two months later, suffering 27 marks all over his body, including lashes leaving whelps across his face. Mims 2091 and 2112.

It is undeniable that Defendant Butkus held the key to Mims' release and, as the holder of that key, he was personally responsible for injuries that resulted from his failure to protect Mims from harm. He was not just a supervisor in this case, Butkus, by making the decision to involuntarily commit Mims to DDSN became personally liable for his care, because he was, admittedly, the person admittedly responsible for making all placement decisions. Lacy personally participated in the probate court proceedings attempting to obstruct the appointment of his mother as guardian. Amended Complaint, paragraph 50. Johnson attempted to obstruct the court-appointed examiner from meeting with Mims at the Kensington facility. As a result of these active efforts of the individual defendants and the agency (which was not a proper party to the proceedings) filing objections to Mrs. Mims being appointed as guardian, the expenses of the guardianship were increased. Mims alleged that these individual defendants entered into a conspiracy to deny Adult Day Health Care (operated by a private company that is a qualified provider of Medicaid services) services in an attempt to force Edward back into the Babcock Center day program. Amended Complaint at 51, 52 and 53. Mims has met all prongs of the criteria to show supervisory liability. In *Slakan*, the Fourth Circuit noted that the "proof of

causation may be direct ... where the policy commands the injury of which the plaintiff complains ... [or] may be supplied by [the] tort principle that holds a person liable for the natural consequences of his actions." *Slakan*, 737 F.2d at 376 (quoting *Wellington*, 717 F.2d at 936). In *Stroud*, the Fourth Circuit held a supervisor liable where he had knowledge of just three incidents where his employee had used excessive force which posed an unreasonable risk of harm to victims. *Supra*. Mims has documented that Butkus, Lacy and Johnson knew of years of unabated violations of the constitutional rights of Mims and other residents of the Babcock Center. As recognized by the federal district court, Babcock Center was ordered to downsize by one-half due to its high rate of abuse and neglect. Exhibit 3.

11. The Court erred in granting defendants' motion for negligent supervision and denying plaintiff's motion for summary judgment on this cause of action.

In a negligence action, a plaintiff must show that the (1) defendant owes a duty of care to the plaintiff, (2) defendant breached the duty by a negligent act or omission, (3) defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) plaintiff suffered an injury or damages. *Bishop v. South Carolina Dep't of Mental Health*, 331 S.C. 79, 502 S.E.2d 78 (1998); *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 269 S.C. 479, 238 S.E.2d 167 (1977); W. Keeton, D. Dobbs, R. Keeton, and D. Owen, *Prosser and Keeton on the Law of Torts*, 164-65 (1984). The court must determine, as a matter of law, whether the law recognizes a particular duty. In *Stroud*, the Fourth Circuit found that the plaintiff's death was a natural and foreseeable consequence of the supervisor's failure to investigate, or even to address, the pervasive violent propensities of one of his officers. *Supra*. As in *Stroud*, Butkus, Lacy and Johnson were aware of the constant and dangerous threat to Mims' welfare. He has presented sufficient evidence to withstand summary judgment on the elements of notice of the pervasive and unreasonable risks of harm, deliberate indifference to that risk and of causation and a reasonable jury could find that these defendants, like *Stroud*, acted with deliberate indifference and that a causal link exists *Stroud* at 800.

In *Madison v. Babcock Center*, the South Carolina Supreme Court held that to establish a causal link, defendants' negligence "does not have to be the sole proximate cause of the plaintiff's injury; instead, the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury. 638 S.E.2d 650, 662, 371 S.C. 123 Citing *Hughes v. Children's Clinic, P.A.*, 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977). Ordinarily, the question of proximate cause is one of fact for the jury, and it may be resolved either by direct or circumstantial evidence. The trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence. *Childers*, 248 S.C. at 324, 149 S.E.2d at 765; *McNair v. Rainsford*, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct.App.1998). In this case, Mims argues that the only reasonable inference that

can be drawn from the evidence is that the Court should grant his motion for summary judgment and deny defendants' motions for summary judgment. *Id.*

In *Bridges v. Keller*, the Fourth Circuit recognized the existence of claims for supervisory liability, or "unconstitutional policy administration," when those elements are met. *Bridges v. Keller*, Case No. 12-7514 (4th Cir. 2013). Plaintiff in this case has proven the existence of "predicate constitutional violations" required to show supervisory liability. *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012).

12. The Court erred in its determination that Mims has not established material facts demonstrating that defendants are liable for negligent supervision.

The Court erred in its determination that Mims has failed to cite specific evidence to support his claim for negligent supervision. In *Madison v. Babcock Center*, the South Carolina Supreme Court held that Babcock Center and DDSN both have a duty of care to protect its residents which may be litigated in an action for negligence. 638 S.E.2d 650 (S.C. 2006). In that case, the Court held that a resident of the Babcock Center may succeed in a negligence action against these same defendants, i.e. the Babcock Center and DDSN, by showing that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages. *Id.* Plaintiff has pled these elements and has provided this court with extensive credible evidence to support his claims for negligence in this case. The fact that Babcock Center and DDSN have a duty of care to its residents has been clearly established in *Madison*. Mims has provided extensive evidence showing that defendants have acted negligently in the operation of residential programs at the Babcock Center, in fact DDSN actually reduced the number of beds by one half due to the high rate of abuse and neglect at the Babcock Center.⁶ The Babcock Center even argued to the district court in *Babcock Center v. U.S.* that this reduction caused it to default on mortgages, to go into deep debt and to be unable to pay fica taxes (including those already collected from employees). The judge and the jury in

⁶ Plaintiff certainly does not suggest that this action by was the appropriate remedy for the violations of Babcock Center residents' civil rights and the negligent supervision occurring at the Babcock Center, any more than the Court would have remedied the wrongs of segregation by allowing half of the black children who were plaintiffs in *Brown v. Board of Education* to attend white schools, requiring the other half to remain in segregated schools or allowing a child care center to keep only half of the children who were subjected to injury, leaving the other half to fend for themselves. 347 U.S. 483 (1954). But the agency's recognition of the harm and rate of abuse and neglect certainly provides strong evidence supporting Mims claim for negligent supervision and violation of his civil rights.

the federal district court had little sympathy for that argument.

In reaching its decision, the Court overlooked multiple investigations, audits and reports substantiating the prevalence of abuse and neglect at the Babcock Center and in other DDSN programs. Mims 0017, 0046, 0063, 0074, 0087, 0098, 0149, 0198, 0208, 0250, 0252, 0255, 0283, 0359, 0416 and 0490. These reports clearly document that the injuries to Mims were foreseeable and that defendants failed to take appropriate action to protect him from harm. The Supreme Court has ruled that it was their duty to do so. *Madison, supra*. Mims has identified specific persons who have created the risk of undue harm, including, but not limited to Johnson, Lacy and Butkus. There is no evidence in the record to support the Court's finding that the injuries to Mims were nothing more than "isolated incidents" - the record includes repeated attacks on Mims, as well as systemic abuse and neglect of Mims and other residents of the Babcock Center. The Supreme Court has previously held that DDSN cannot contract away its responsibility to keep Babcock Center residents safe from harm. *Madison, supra*.

Madison, the plaintiff, alleged causes of action for negligence, gross negligence, and willful indifference against Respondents. In the complaint, Madison alleged:

...among other things, that both Babcock Center and Department owed a duty of care to Appellant, which they breached by *failing to exercise sufficient control and supervision over Appellant and other Babcock Center residents*. Appellant alleges both entities *failed to properly supervise facility staff, both failed to heed the previous warnings of Appellant's mother about inappropriate sexual contacts between Appellant and current or former male residents of Babcock Center, and both ignored the requests of her parents that she be released from Babcock Center*.

Id 132 and 133. Like *Hotel California*, residents of the Babcock Center have not been allowed to leave once they check in.

As in Mims' case, the warnings and complaints of *Madison's* mother fell on deaf ears. In that case, Madison alleged that she contracted a sexually transmitted disease due to the negligent supervision of the Babcock Center and DDSN. *Id*. The South Carolina Supreme Court ruled that Babcock Center had "a duty to exercise reasonable care in supervising and providing care and treatment to clients in its custody." *Id*. at 656. While recognizing that under South Carolina common law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger, the Supreme Court in *Madison* recognized five exceptions to this rule: (1) where the defendant has a special relationship to the victim; (2) where the defendant has a special relationship to the injurer; (3) where the defendant voluntarily undertakes a duty; (4) where the defendant negligently or intentionally creates the risk; and (5) where a statute imposes

a duty on the defendant. *Id. Citing Faile v. S.C. Dept. of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002) (listing cases and authority supporting each proposition). In *Madison*, the the Supreme Court recognized that "An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance. *Id.* 657. *Jensen v. Anderson County Dept. of Soc. Servs.*, 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991); *Miller v. City of Camden*, 317 S.C. 28, 33-34, 451 S.E.2d 401, 404 (Ct.App.1994). The Court held that:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." Restatement (Second) of Torts §§ 323 (1965). In addition, "[o]ne who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him." Restatement (Second) of Torts § 324 (1965).

Id. 136 to 137. The Supreme Court held that Madison fell within the first, third, fourth, and fifth exceptions specified in *Faile*, as well as within the circumstances outlined in Restatement (Second) of Torts §§ 323 -324 . *Id.* at 657. As in *Madison*, the Babcock Center had a special relationship with Mims because he was a client with special needs and disabilities and was admitted for care and treatment at the center. *Id.* DDSN has a special relationship with the Babcock Center. *Id.* The Babcock Center voluntarily undertook the duty of supervising and caring for Mims and Madison as provided in its contractual relationship with Department. Also as in this case: "Babcock Center allegedly acted negligently in creating the risk of injury to Appellant by not properly supervising her and allowing improper sexual contacts between Appellant and men." Also as with Madison, " the center had a statutory duty to exercise reasonable care in supervising Appellant." *See e.g.* S.C.Code Ann. §§ 44-20-30(2), (11), and (16) (2002) (defining client, mental retardation, and residential programs); S.C.Code Ann. §§ 44-20-710 to -1000 (2002) (addressing licensing of facilities and programs for mentally disabled persons); S.C.Code Ann. §§ 44-26-10 to -220 (2002) (rights of mental retardation clients). There defendants also had duties to Mims imposed by federal law in the Medicaid Act and its regulations.

The following statement applies equally to Mims as with Madison: "In short, Babcock

Center undertook a duty, for consideration, to render services to Appellant which the center should have recognized as necessary for the protection of Appellant. Thus, Babcock Center had a duty to control Appellant's conduct to the extent necessary to prevent her from harming herself or to prevent others from harming her while staying at the center." *Id.* safe environment in actions brought under 42 U.S.C. §1983." *Id.*

In its memorandum, Defendants ignore the fact that the Supreme Court instructed them in *Madison* that:

... under the common law, a private 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. *See Lee v. Dept. of Health and Rehabilitative Servs.*, 698 So.2d 1194, 1199 (Fla.1997) (mentally retarded woman who became pregnant while in custody of state agency stated cause of action for negligence against agency employees who allegedly failed to follow agency's rules and carry out their assigned duties in supervising patients); *Butler v. Circulus, Inc.*, 557 S.W.2d 469, 475 (Mo.App.1977) (mentally retarded minor plaintiff who was resident and student at defendant's licensed institution stated cause of action for negligence against defendant for failing to supervise employees who allegedly physically and mentally abused plaintiff as part of a behavior modification program); Restatement (Second) of Torts §§§§ 323 -324 ; *cf. Rogers v. S.C. Dept. of Parole & Comm. Corrections*, 320 S.C. 253, 464 S.E.2d 330 (1995) (holding that common law duty to warn arises when a person being released from custody has made a specific threat of harm directed at a specific individual); *Youngberg v. Romeo*, 457 U.S. 307, 319, 102 S.Ct. 2452, 2460, 73 L.Ed.2d 28 (1982) (under substantive component of Fourteenth Amendment's Due Process Clause, state must provide involuntarily committed mental patients with services necessary to ensure their reasonable safety from themselves and others, as well as freedom from undue restraint); *Id.* at 138 to 139.

The Supreme Court held in *Madison* that "Gross negligence is ordinarily a mixed question of law and fact." *Faile*, 350 S.C. at 332, 566 S.E.2d at 545 (citing *Clyburn v. Sumter County School Dist. # 17*, 317 S.C. 50, 451 S.E.2d 885 (1994)). But, in Mims' case, "the evidence supports but one reasonable inference," which is that the defendants acted negligently, carelessly, recklessly and that these actions were willful and wanton, causing injury to Mims. Thus, this Court should grant Mims' motion for summary judgment. But, if that motion is not granted, the issue must be resolved by a jury and it would be inappropriate to award summary judgment to these defendants based on the record in this case.

13. Plaintiff's claims are not barred by the Tort Claims Act

The Court erred in finding that Plaintiff's lawsuit is barred under the Tort Claims Act, because the tolling statute contained at South Carolina Code § 15-3-545 extends the liability of DDSN and its employees back as far as May 2000, before Mims was involuntarily committed and placed by DDSN and defendant Butkus at the Babcock Center. The Tort Claims Act is the exclusive civil remedy available for any tort committed by a government entity, its employees, or its agents while acting within the scope of the employee's official duty. *Wells v. City of Lynchburg*, 331 S.C. 296, 302, 501 S.E.2d 746, 749 (Ct.App.1998); see S.C.Code Ann. § 15-78-200. The Act provides that "[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages contained herein." S.C. Code Ann. § 15-78-40 (2005). "Governmental entity" is defined by the Act as: "the State and its political subdivisions." Id. § 15-78-30(d). The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense." *Steinke v. South Carolina Dep't of Labor, Licensing, and Regulation*, 336 S.C. 373, 520 S.E.2d 142, 152. (1999).

The issue of whether the Babcock Center is entitled to protection under the Tort Claims Act was discussed by the South Carolina Court of Appeals in *Smith v. Regional Medical Center of Orangeburg and Calhoun Counties*:

Nevertheless, *Smith* argues *Madison v. Babcock Center, Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006), requires a finding that TRMC may be liable as a government entity for the acts of its independent contractor. We disagree. *Madison* specifically held that a governmental entity to which the immunity exemptions of the TCA applied is not liable for the acts or omissions of its independent contractor. Id. at 142-43, 638 S.E.2d at 660. However, the court found a governmental entity could be liable for a duty directly owed, independent of any acts or omission of the independent contractor. Id. (stating this duty "may include (1) adequately supervising the provision of services by another entity or (2) its own conduct in relation to prior notice of inappropriate care of its clients by such entity"). Essentially, if the duty breached is one owed [394 S.C. 116] directly by the governmental entity to the client, the TCA's immunity may not insulate the entity from liability.

394 S.C. 110, 713 S.E.2d 656 (S.C.App. 2011). The Court clearly erred as a matter of law and fact in its conclusion that the Tort Claims Act bars any claim against the Babcock Center or Judy Johnson and the controlling case specifically dealt with whether the Babcock Center was covered by the Act. In addition, the order finding Johnson and Babcock Center to be covered by

the act conflicts with the order granting DDSN summary judgment which specifically finds that Johnson and employees of Babcock Center are not employees of DDSN. Order at page 20 citing *Young v. South Carolina Department of Disabilities and Special Needs*, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007).

In any event, Mims has presented material facts, which must be considered in the light most favorable to the plaintiff, showing that all of the individual defendants acted outside of the scope of their official duties in this case by retaliating against Mims and his mother and subjecting him to unconstitutional conditions and, thus, they are individually liable to Mims, in addition to any liability of the Babcock Center or DDSN.⁷ *Pridgen v. Ward*, 391 S.C. 238, 243, 705 S.E.2d 58, 61 (Ct.App.2010). Plaintiff has presented material facts which support Mims allegations that Butkus, Lacy and Johnson have committed acts of fraud, malice, intent to harm and/or a crime of moral turpitude. Thus, the jury may determine that they have liability outside of the Tort Claims Act. In *Pridgen v. Ward*, *supra*, and *Anthony v. Ward*, both the state and federal court held that the state officials who were defendants were not covered by the Tort Claims Act, because their acts were intentional and outside of the scope of their employment. *Anthony v. Ward*, Case No. 07-1932 (4th Cir. July 7, 2009). Because plaintiff has provided material facts showing that these individual defendants have acted outside of the scope of their employment and this issue should be submitted to the jury.

14. Mims claim for violation of the Americans with Disabilities Act is not moot or barred by the statute of limitations.

Mims has alleged violations of the Americans with Disabilities Act because the defendants have failed to provide necessary services in the most integrated setting appropriate to his needs and has operated their programs in such a way to prevent Mims and other persons from remaining in their homes by failing to pay caregivers of home based services commensurate with funding paid for caregivers who provide institutional services. Amended Complaint at

⁷ Section 15-78-70(b) of the Tort Claims Act provides:

1. 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.

S.C.Code Ann. § 15-78-70(b) (2005). Section 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).

paragraphs 82 to 89. Mims alleges that these practices have caused Plaintiff to be at risk of returning to an institution and that he has suffered serious harm and threats of harm in violation of the Americans with Disabilities Act. *Fisher v. Oklahoma Health Care Authority*, 335 F3d 1175, 1185 (10th Cir. 2003); *Pashby v. Deliah*, 709 F.3d 307, 322 (4th Cir. 2013). He has alleged that DDSN and the Babcock Center have operated their programs so as to keep their institutions and workshops full. Amended Complaint at 86. He has alleged that providing the services he has requested would not fundamentally alter the nature of the services, programs or activities of the State. Paragraph 87. Mims alleges that these violations of the Americans with Disabilities Act are subject to repetition, yet they have evaded review, thus they cannot be moot. *Doe v. Kidd*, 032411 FED4, 10-1191 (4th Cir. March 24, 2011).

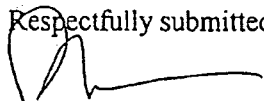
Since his lawsuit was filed, DDSN has established further reductions to services and rates, increasing the risk of his return to a congregate setting. *Peter B. v. Sanford*, Case No. 6:10-cv-00767-JMC (S.C.D.C. March 7, 2011). The statute of limitations is not an issue in this claim, because the violations are ongoing. In any event, however, even if the statute of limitations in ADA cases is one year (which Mims does not admit), the tolling statute due to his insanity extends Mims claims back to 2001 and the record is replete with violations of the ADA that are subject to repetition, but have evaded review. *Doe v. Kidd*, 501 F.3d 348 (4th Cir. 2007).

CONCLUSION

For the reasons set forth above and those contained in Plaintiff's amended complaint, his motion for summary judgment and his proposed order on that motion, Mims prays that this Court alter or amend its order to deny defendants' motions for summary judgment and that Plaintiffs motion on the causes of action for violation of § 1983 and negligent supervision be granted, with a jury trial scheduled without further delay on Mims other causes of action.

Plaintiff's counsel certifies that consultation with opposing counsel would serve no useful purpose and consultation is not required for a motion for a new trial. South Carolina Rules of Civil Procedure Rule 11(a).

Respectfully submitted,


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February 4, 2014

LIST OF EXHIBITS

Exhibit 1	Order directing Plaintiff and Defendants to file proposed order within 28 days	1
Exhibit 2	Proposed Order of Plaintiff requesting Partial Summary Judgment	2
Exhibit 3	Documents in <i>Babcock Center v. United States</i>	
	<i>Babcock Center v. United States</i> , Case No. 3:11-0721, May 2, 2013	72
	<i>Babcock Center v. United States</i> Docket	88
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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

Margaret Mims

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2007-CP-40-03365

Babcock Center Inc.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☒ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Voluntary Dismissal); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: Dismissed without prejudice.
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other.
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other.

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT OF THIS RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court.

MUA Proposed Orders due within 28 days from P and D attorney.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To Be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the clerk may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge: G. L. Grier Judge Code 2126 Date 6-5-13

For Clerk of Court Office Use Only

This judgment was entered on the 6 day of June, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this 6 day of June, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Patricia Logan Harrison, Peter Protonapas

ATTORNEY(S) FOR THE PLAINTIFF(S)

Joel Collins, Leslie Cotter, William Davidson, Kenneth Woodington, Christian Stegmaier

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter LaToya Perry

Clerk of Court Jeanette W. McBride

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

Civil Action No. 2007-CP-40-3365

Edward Mims, by and through his legal
guardian, Margaret Mims,
Plaintiff

PROPOSED
ORDER DENYING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT
AND GRANTING PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY JUDGMENT

vs.

Babcock Center, Inc., Judy Johnson, the
South Carolina Department of Disabilities
and Special Needs, Kathi Lacy and Stan
Butkus,
Defendants.

I. Introduction.

As the federal magistrate determined in *Peter B. v. Sanford*: "This is a fact intensive and messy case. From its procedural and statutory dimensions to its medical ones, it is substantial." 6:10-cv-00767-JMC-BHH, Report and Recommendation of Magistrate Judge Bruce Howe Hendricks (S.C.D.C. November 24, 2010) (referred to herein as *Peter B. R&R*), adopted by order of Federal District Court Judge Michelle Childs in No. 6:10-CV-00767, 2011 WL 824584 at *1 (D.S.C. March 7, 2011).

In this case, Defendants have moved for summary judgment and plaintiff has filed a cross motion for partial summary judgment on the Third Count of the Amended Complaint alleging negligent supervision. For the reasons set forth below, Defendants' motion for summary judgment is denied and the Plaintiff's motion for partial summary judgment is hereby granted.

Rule 56 of the South Carolina Rules of Civil Procedure provides that a party may move for summary judgment upon all of any part of the claim. Rule 56(c) provides that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any: "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Exhibit 2

Madison v. Babcock Center, 371 S.C. 123, 638 S.E.2d 650 (S.C. 2006). Summary judgment may be granted on the issue of liability alone, even though there is a genuine issue as to the amount of damages. Rule 56(c). The Court may ascertain what material facts exist that are without substantial controversy and what material facts are actually and in good faith controverted. Rule 56(d). In responding to a motion for summary judgment, an adverse party may not rest upon mere allegations or denials contained in the pleadings, but must set forth specific facts showing that there is a genuine issue for trial. The Court must “view all ambiguities, conclusions, and all inferences arising in and from the evidence in a light most favorable to the non moving party...” *Young v. S.C. Department of Disabilities and Special Needs*, 649 S.E.2d. 488, 490 (S.C. 2007).

II. Factual background related to DDSN system and the Babcock Center

A. The DDSN System

All federal Medicaid funding in South Carolina is distributed through the South Carolina Department of Health and Human Services (DHHS), which contracts with the South Carolina Department of Disabilities and Special Needs (DDSN) to administer Medicaid programs that provide ICF/MR services for persons who have mental retardation, as well as Medicaid waiver services for these persons in participants’ homes and communities. In South Carolina, DDSN has the responsibility to “coordinate services and programs with other state and local agencies for persons with intellectual disability, related disabilities, head injuries, and spinal cord injuries.” S.C. Code of Laws 44-20-250. DDSN carries out these duties by negotiating and contracting with local agencies, county boards of disabilities and special needs, as well as private organizations and foundations to plan and provide a range of services. *Id.* S.C. Code of Laws 44-

20-375 provides for the establishment of local disabilities and special needs Boards (DSN Boards), which are public entities that are charged with working with DDSN to carry out these responsibilities.

S.C. Code § 44-20-385 provides that local DSN Boards are the administrative, planning, coordinating, and service delivery bodies for county disabilities and special needs services that are funded in whole or in part by state appropriations to the department or funded from other sources under the department's control. Each local DSN board must submit its annual plan and projected budget to DDSN for approval and consideration of funding. *Id.* Local DSN Boards are required by statute to review and evaluate the disabilities and special needs services in the county, pursuant to Chapter 20 of Title 44. Local boards must provide DDSN with records, reports, and access to its sponsored services and facilities as the department may require and they must submit their sponsored services and facilities to licensing requirements of the department or to the licensing requirements of other state or local agencies having this legal authority. *Id.*

Medicaid funded residential services are provided by DDSN in institutional settings, called ICF/MR (Intermediate Care Facility/Mental Retardation) facilities, and in various less restrictive settings in the community through a separate Medicaid Home and Community Based Waiver Program. 42 C.F.R. 483.400 et. seq. and 42 C.F.R. 441.300 et. seq. See LAC Audit of DDSN at page 5, Mims 0505. Federal regulations contain extensive and very specific "Conditions of Participation" which must be met by operators of ICF/MR facilities. 42 C.F.R. 483.410 to 483.480. According to Defendant Johnson, ICF/MR residents "function at the severe or profound level of mental retardation and present behavior issues often on a daily basis." Mims

1879.

ICF/MR services are costly. Even after terminating Mims "one-on-one" services, DDSN was paying Babcock Center \$65,567 per year for treatment at Kensington. Mims 1861. But in July of 2002, Babcock Center was paying an additional \$27,254 in "outlier" funds to pay for Mims' one-on-one supervision, for a total cost of \$92,821 per year. Plaintiff's Motion for Partial Summary Judgment at Exhibit 3. Mims was one of only 13 "permanent outliers", out of 800 persons receiving services from the Babcock Center, during FY 2002. Id. In South Carolina, the South Carolina Department of Health and Environmental Control licenses ICF/MR facilities and conducts surveys to assure compliance with federal and state laws. Mims 1897. The federal Medicaid Agency, CMS (Centers for Medicare and Medicaid Services) also conducts surveys of ICF/MR facilities to assure compliance with federal requirements. Mims 0199.

The Medicaid Act requires that persons who meet level of care requirements for ICF/MR services must be given the choice of either receiving services in an institutional setting (ICF/MR or nursing home) or receiving those services in less restrictive settings (in their own homes or communities through the home and community based waiver program.) 42 C.F.R. 441.302(d)(2). The United States Supreme Court ruled in *Olmstead v. L.C.* that requiring persons who choose to live in the community to remain segregated in an institution is a form of discrimination that violates the Americans with Disabilities Act. *Olmstead v. L.C.*, 527 U.S. 581 (1999). In *Peter B. v. Sanford*, the Magistrate Judge recognized that:

Title II of the Americans with Disabilities Act of 1990 (ADA), prohibits discrimination by public entities against individuals with disabilities. See 42 U.S.C. § 12132. The United States Supreme Court has held that prohibited discrimination under the ADA includes "unnecessary segregation" and "unjustified institutional isolation of personal disabilities." *Olmstead v. L.C.*, 527 U.S. 581, 600-02 (1999). The Supreme Court's determination was based, in part, on the Department of Justice regulation, usually

referred to as the "integration mandate," which requires states to administer services "in the most integrated setting appropriate to the needs of the qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (amended at 75 F.R. 56164-01, adding a section "h" to § 35.130).

Peter B. v. Sanford, 6:10-cv-00767-JMC -BHH, November 24, 2010, adopted by district court in Preliminary Injunction at Entry 95, March 7, 2011. The most integrated setting is defined as "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." *Olmstead*, 527 U.S. 581, 592 (citing 28 C.F.R. pt. 35, App. A. p. 450, redesignated App. B at 75 F.R. 56164-01). In other words, the creation of obstacles to the ability to live normally in their community on account of a person's disability constitutes discrimination. *Peter B.*, R&R at 11. The Supreme Court emphasized in *Olmstead* that Congress recognized in the Preamble of the ADA that "society has tended to isolate and segregate individuals with disabilities" and that the issue continues to be a "serious and pervasive social problem." *Id.* at 600. At all times while Mims was judicially committed to the care and custody of DDSN, he was confined at the Babcock Center in an ICF/MR, first at Clusters, then at Kensington.

B. The Babcock Center

The Babcock Center is a private, non-profit corporation based in Columbia that provides residential and other services for people with autism, intellectual disabilities, head or spinal injuries, and related disabilities. Mims 0102. In 2002, Babcock Center was the largest provider of DDSN services in the State, with a budget of \$41,496,373, of which 84% was Medicaid

funding. Mims 0102. No public body may approve or disapprove its board members. ("SCDDSN fails to note that so long as Babcock Center remains as a private, non-profit, 501(c)(3) organization, no public body may approve or disapprove its board members." Memo of Babcock Center at Mims 1880.) Although there is no statutory basis for doing so, DDSN "grandfathered" Babcock Center as a DSN Board and Mims has alleged that it provides Babcock preferential treatment not provided to other private corporations. Mims 1880. According to the audit conducted by the South Carolina Legislative Audit Council, the Babcock Center was not created by local ordinance, but instead DDSN granted the corporation that status (as a local DSN board) because it existed prior to the establishment of local boards. See also Mims 1865, Letters at 1864, 1865, 1868 and 1878. LAC audit of DDSN dated December, 2008 at 3 and 4.

C. Surveys of Clusters and Kensington

In 2003, federal and state authorities conducted surveys at both of these Babcock Center ICF/MR's (Clusters and Kensington) and they declared that the residents who had been placed those facilities were in "Immediate Jeopardy." Mims 0046 NS 0063. The federal government defines "Immediate Jeopardy" as "A situation in which the provider's noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment or death to a resident." Mims 0153. Defendant Johnson testified that "Immediate Jeopardy" means that they feel the folks are in imminent harm..." Mims 962. A 2003 survey of Kensington found that Babcock Center "failed to ensure that all allegations of mistreatment as well as injuries of unknown source were reported..." and that timely investigations were not

conducted. Mims 055 and 56. In a survey of Clusters conducted in February of 2003, surveyors reported that inappropriate sexual behaviors were not being properly addressed, thereby placing residents at risk of harm. Mims 0058 and 0061. Clusters was closed in late 2003 or early 2004, after the federal Medicaid agency found threats to the health and safety of clients there and issued yet another citation declaring Immediate Jeopardy. Mims 0064. Findings at Clusters also included the failure of staff to provide one-on-one supervision where that level of supervision was required by clients' plans of care. Mims 0068.

D. 2003 Limited Scope Audit of the Babcock Center

In October of 2003, DHHS issued a Limited Scope Audit of Babcock Center. Mims 0098. In this audit, DHHS reported that the Babcock Center did not have a policy to define and report serious resident-on-resident abuse to external authorities, that they failed to report these incidents as required by state law and they failed to follow up on correction plans. Mims 0100. In this audit, DHHS repeated the finding that staffing ratios required by vulnerable clients were inadequate and that the Babcock Center did not properly monitor these more vulnerable clients to assure their health and welfare. Mims 0101.

Mims alleges and he has provided audits in support of his claims that DDSN, that its director, Defendant Lacy and the director of the Babcock Center had knowledge of the high rate of substantiated cases of abuse, neglect and exploitation of clients in Babcock Center facilities. In its own investigations, DDSN determined that in 2003 the rate of cases of substantiated abuse,

neglect and exploitation at the Babcock Center was double the state-wide average. DHHS audit of DDSN at 19 (Audit begins at Mims 0359). According to DDSN's own investigations, the rate of substantiated cases of abuse of residents at the Babcock Center had grown from two to four times the state-wide average between 2003 and 2004. Id. See also Mims 1902.

E. CMS investigations in 2004

The severity of the danger to residents of Babcock Center ICF/MR facilities was recognized by the federal agency responsible for the administration of the Medicaid program, CMS, in an investigation report dated March 13, 2004. Mims 0150. CMS found that Babcock Center failed to investigate injuries of an unknown source in its ICF/MR's. Mims 00158. CMS confirmed widespread injuries in ICF/MR's and the failure of the Babcock Center to provide one-on-one supervision to clients determined to need that level of supervision. Mims 00158.

After CMS issued its findings, in March of 2004, DDSN ordered Babcock Center to reduce its residential bed capacity by 25%. Mims 1882. This reduction in bed capacity "was necessary in order to reduce significantly the operational component at Babcock so as to make it a more manageable size to ensure the health and safety of residents." Id. Butkus claims to have taken over Clusters and closed the facility. Mims 1363 and 1364. According to Butkus, during this time, he was personally "monitoring their progress and working with them to resolve programmatic issues which have arisen since that time." Mims 1882. Butkus also worked closely with the director of DHHS in dealing with Babcock Center's problems. Id.

F. Federal survey of Kensington in October, 2004

After Mims' roommate died at Kensington in the fall of 2004, CMS investigated his death and the care being provided to other residents there. CMS determined "that the conditions found at Kensington do, in fact, pose Immediate Jeopardy to the health and safety of clients." Mims 0199. (Emphasis as included in CMS findings.) CMS then notified Babcock Center that its certification as a Medicaid provider to residents of Kensington, the facility where Butkus had placed Mims, would be terminated on November 3, 2004 unless it could demonstrate that corrections were made within 23 days. Id. CMS found the remaining 7 residents at Kensington were "at potential risk of serious harm," that Babcock Center failed to ensure the protection of all clients at Kensington by failing to thoroughly investigate the death of a client and failing to provide protection for all clients pending the results of the investigation. Mims 0201. CMS cited the Babcock Center in this survey for failing to properly train Kensington staff and for not providing sufficient staffing at the facility where Mims had been confined at the direction of Defendant Butkus. Mims 0204. Butkus testified that he assessed Mims and kept him at Kensington because he determined that Mrs. Mims "didn't have a lot of resources" so that she could not care for him at home. Mims 1411.

G. Carolina Medical Review (CMR) investigations of Babcock Center ICF/MR facilities

After CMS issued its findings reviewing Babcock Center ICF/MR's, in 2004, DHHS contracted with Carolina Medical Review (CMR), the federally designated quality improvement

organization for the State of South Carolina, to review those ICF/MR facilities. Mims 0208. During this time, Butkus was assuring legislators that he was busy correcting problems at the Babcock Center. Mims 1882. CMR followed up on CMS' March 2004 report, to determine whether these facilities were in compliance with federal regulations. Mims 0210. In preparation for the release of CMR's findings, in early December of 2004, Defendants Butkus and Johnson and Babcock Center Board Chairman Sue Slater met with members of the South Carolina House of Representatives and the Senate in an attempt to convince these legislators that they were taking action to correct the problems federal and state authorities had found at the Babcock Center. Mims 1873 and 1875. At this meeting, Defendant Butkus assured these legislators that he was ordering Babcock Center to downsize its residential program by 50%, instead of the 25% reductions he had ordered in March of 2004. Mims 1875 and 1445.

But soon after this meeting, Slater sent a letter to Babcock Center families assuring them that "Abuse of any kind is not tolerated!" at the Babcock Center and she asked families to contact their legislators to oppose the downsizing Butkus had ordered. *Id.* In this letter, Slater assured families that "...should you be dissatisfied and want to have another provider, Babcock Center will work to help make a transfer happen." *Id.*

On December 17, 2004, Butkus assured legislators that he was implementing "additional, specially selected health and safety indicators" at the Babcock Center. Mims 1882. He assured these legislators that DDSN would "contract or arrange for independent investigators to review allegations of abuse and neglect" at the Babcock Center and that he was encouraging families to

report concerns about potential human rights violations to Protection and Advocacy. Id. Butkus reported that DDSN would "assess the need for updated training for Babcock Center staff." Id. Significantly, he assured legislators that "DDSN will implement recommendations that may follow DHHS' independent review of ICF/MR programs run by the Babcock Center." Id.

Importantly, Butkus and the Babcock Center assured families that "DDSN will respect families' choices as long as we are confident that quality services are being received. Health and safety and the well-being of individuals remain the top priority." Id. The December 20, 2004 letter from Defendant Johnson to Senator Jake Knotts provides further evidence of the personal involvement of Defendants Stan Butkus and Kathi Lacy in addressing problems at the Babcock Center. Mims 1876. After the CMS investigation was released in March of 2004, the Babcock Center had "asked SCDDSN to assist in developing baseline data on which to objectively measure the progress, or lack thereof, of its endeavors to continue improving each area of service and support." Id. According to Johnson, DDSN provided "baseline data" in September 2004 and Babcock Center agreed to provide a "quarterly status report to SCDDSN." Id. Defendant Lacy was the official at DDSN who was personally responsible for tracking the monitoring of abuse and neglect. Mims 1423.

But, despite these serious health and safety problems, Butkus and DDSN never terminated Babcock Center's unauthorized preferential status as a "grandfathered" DSN Board, although the Richland Lexington DSN Board is the statutorily appointed Board in those counties. On December 20, 2004, Johnson assured Senator Knotts that:

It is Babcock Center's intention to ensure governmental authority and control. Babcock Center has been treated by SCDDSN as a public, County Disabilities and Special Needs Board, almost since it was incorporated more than thirty years ago.

Id. But, within days, in her Comments on DDSN's December 17, 2004 action plan, Johnson contradicted the information she had provided to Senator Knotts by saying:

SCDDSN fails to note that so long as Babcock Center remains a private, non-profit, 501(c)(3) organization, no public body may approve or disapprove its board members.

Mims 1880.

On January 18, 2005, Carolina Medical Review (CMR) released its critical findings of its investigations of Babcock Center ICF/MR facilities, reporting that there was "no comprehensive set of policies and procedures for the administration of Babcock Center programs, as required by the federal Conditions of Participation." Mims 0210. By this time, Clusters had been closed, but Kensington, where Mims had been placed, was one of the ICF/MR facilities that was investigated by CMR. According to this report, CMR reviewers were informed that "Babcock refers to SCDDSN policies for guidance and has not 'felt the need' for a comprehensive set of administrative policies and procedures." Mims. 0210. CMS reported that Babcock Center ICF/MR's had a "vast number of staff with multiple disciplinary actions who appear to receive excellent employee evaluations..." Id. Between November 1, 2002 and November 24, 2004, there were 85 reported cases of abuse in the ICF/MR's operated by the Babcock Center (not including Babcock Center's less restrictive community homes). Mims 0220. CMR found that the Babcock Center had failed to follow up on cases of abuse and neglect in its ICF/MR's and that it

failed to develop and implement policies to assure consistent investigations. Id and 0210.

CMR criticized Kensington for having residents who had widely disparate care needs housed together with vulnerable clients like Mims. Mims 0213, 0224 and 0225. Clients who could not defend themselves, were inappropriately housed with aggressive clients. This violated federal regulations at 42 C.F.R. 483.470 which requires:

The facility must not house clients of grossly different ages, developmental levels, and social needs in close physical or social proximity ...

42 C.F.R. 483.470. CMR reported that "particularly at ...Kensington" "residents who had what appeared to be widely disparate care needs were observed..." Mims 0240. CMR also found that sanitation was lacking in these Babcock Center ICF/MR facilities. Mims 0213. When surveyors visited Kensington, they found buckets with standing mop water, no toilet paper and trash observed in the hallways - at a facility where state taxpayers were providing funding per capita of more than \$65,000 per year. Mims 0247. Although policies required annual review of infection control procedures, in 2005, CMR reported that Babcock Center's infection control manual had not been reviewed since 1993. Mims 0247.

The conclusion reached by CMR in January of 2005 was that Babcock Center was not meeting the minimal conditions of participation in the Medicaid program, a condition which is required by federal regulations for Medicaid funding to continue. Mims 0214. State officials and legislators were informed of these deficiencies by the director of DHHS on January 19, 2005. Mims 0214 and letters contained in Vol. 5 to Defendant Johnson, the Commissioner of DHEC,

the Regional Office of CMS, two Senators Peeler and and members of the House of Representatives. Id.

H. March 2005 declaration of Immediate Jeopardy at Kensington

Two months later, in March of 2005, a survey of Kensington reported that conditions at the Babcock Center ICF/MR where Mims lived remained out of compliance. Mims 0251. Centers for Medicare & Medicaid Services survey form dated March 8, 2005. On April 29, 2005, the South Carolina Department of Health and Human Services notified Defendant Johnson that a second follow up visit on April 27, 2005 found that deficiencies cited at Kensington had not been corrected and that 2 additional violations of standards were cited. Mims 0253. Defendant Johnson sent a letter on May 3, 2005 to Babcock Center "Parents/Family Members" informing them that they had been directed to "begin planning for relocating the residents" at Kensington because DHEC had recommended that the facility be decertified effective April 30, 2005. Mims 0254.

I. April 2005 Immediate Jeopardy and notice of decertification of Kensington

On April 29, 2005, Defendant Johnson was notified by the Director of the South Carolina Department of Health and Human Services that Mims' ICF/MR, Kensington, had not made corrections required by DHEC and that its contract with Medicaid would be terminated the following day. Mims 1897. DHHS ordered Defendant Johnson to immediately notify responsible parties of all residents of the termination of Kensington's Medicaid certification and

Babcock Center's failure to "meet the federally mandated Medicaid participation requirements."

Mims 1897. Johnson was required to "post public notices in visible areas throughout your facility advising that your Medicaid agreement has terminated and that assistance will be made available for resident transfers to other participating facilities." Mims 1898. Because Mims had been involuntarily committed to the Babcock Center, Defendant Butkus was the "responsible party" for Mims, and he was copied on this letter. Mims 1898. Only Defendant Butkus had the authority to move Mims from Kensington, since he had been involuntarily committed to DDSN and Butkus was responsible for making placement decisions. Mims 1420.

J. 2005 "Unequal Justice for Persons with Disabilities Report by P&A

In October of 2005, Protection & Advocacy for People with Disabilities, Inc. (P&A) released a report of its two year investigation of DDSN programs titled "Unequal Justice for South Carolinians: Abuse and Neglect Investigations." Mims 0284. P&A described its investigation as "an in-depth review of the entities that respond, or fail to respond, to allegations of abuse, neglect and exploitation" in the DDSN system. Mims0288. Their Report found:

Physical Abuse. Sexual Abuse. Neglect. Misuse of medications. Few incidents are reported. Fewer are properly investigated. Rarely are offenders held accountable. Those who should protect people with disabilities often fail to do so.

Mims. 0287. P&A discovered in this investigation that "DDSN exercises little control over the delivery of services by boards or contract providers" and that it has "created policies and procedures that are inadequate in some places and not followed in others." Mims 0287 and

0288. P&A reported that "Investigations conducted by contract agencies were seriously flawed."

Mims 0289. In one case reported by P&A, DDSN failed to investigate sexual abuse and failed to protect the victim. Mims 0289. The conclusion of P&A was that "Some of South Carolina's most vulnerable citizens are needlessly suffering, even dying." Mims 1905.

K. 2007 USC School of Public Health study of DDSN's programs

This systemic study of the DDSN system was followed up by a study contracted by DHHS conducted by the USC School of Public Health and released in 2007. Mims 417. Key Informants, Consumers and Advocates reported:

Problems with facility cleanliness and maintenance, finding that some homes lack basic necessities like soap, pests such as lice, cockroaches and *ants as hazards to client safety and welfare.* (Emphasis added.)

Concern about abuse and neglect attributable to a lack of monitoring of staff and insufficient training.

Problems with food preparation and failing to adhere to guidelines for clients due to deficient staff training and staff not being effectively monitored.

Clients being ignored or misunderstood by staff.

Insufficient background checks that could endanger clients and providers "so desperate to obtain staff, potentially dangerous violations are being overlooked, and in doing so, putting the client's safety at risk.

Lack of monitoring and accountability related to reports of abuse and neglect.

Insufficient staff to client ratios resulting from administrative decisions to under-staff facilities to minimize costs and not fully understanding the needs of clients.

Plans of care not being followed and staff being unwilling or unable to adhere to the plan, with no recourse for families.

Failure to protect rights of parents and advocates, with family members reporting difficulty obtaining accurate and timely information from providers and staff.

Lack of choice of providers.

Failure to meet medical needs of clients, with non-medical staff making medical decisions, medical assessments not being completed and medical plans not being followed.

Failure to document and complete forms and paperwork.

Mims 0440 and 0441.

III. Factual findings related to Plaintiff

A. Admission to Babcock Center

It is uncontradicted that Mims is a person who has profound mental and physical disabilities. His mother voluntarily admitted Mims to the Babcock Center when she was hospitalized in 1999. In its pre-admission screening, the Babcock Center determined that Mims required "one-one accountability." Mims 004502 attached to Plaintiff's Memorandum in Support of Summary Judgment filed May 29, 2013. The Babcock Center physician ordered that Mims "required 1:1 staffing at day program." Mims 2058. Babcock Center was receiving \$92,821 a year to provide these services to Mims. Plaintiff's Motion for Partial Summary Judgment at Exhibit 3. But sometime between Mims' admission to Kensington in 2002 and April, 2004, DDSN terminated his one-on-one supervision. According to an April 26, 2004

letter:

Outlier funds spent in FY 2002 for one-on-one supervision following incident with another consumer. Mr. Mims subsequently moved, was assessed for 30 days, and determined one-on-one staffing was no longer needed and was discontinued.

Mims 1861. Mrs. Mims was never informed of this "assessment" nor was she informed that the level of supervision provided to Mims was being reduced. This letter was sent by DDSN Official Lois Park Mole after Mims' mother again asked to move him from Kensington. M. 1860. There is no evidence in the record provided by the parties of any assessment actually being conducted to overrule the determination by Mims' physician that his need for supervision had changed between the July, 2002 contract and his injury in April of 2005. Mims' mother first learned that his level of supervision had been reduced when she attempted to move him from Kensington in April of 2004. Mims 1860.

Mims' records document that almost immediately after being admitted to the Babcock Center, Mims began suffering explained bruises and scratch marks. Mims 2083. He was "hit in the face with an openhanded slap by another resident and treated in the emergency room in December of 1999, just two months after arriving at Clusters. Mims 2083. Once his mother's health improved, Mims would spend weekends at home. Mims 2039. Mrs. Mims made allegations that he was being mistreated by employees at Clusters. Id. On January 15, 2000, Mims weighed 103 pounds. BC Nurses notes at Mims 0001654 attached to memorandum in support of Plaintiff's motion for summary judgment. But, by mid-August that same year, Mims'

weight had dropped to 81 pounds. Mims 2085. It is uncontradicted that on August 13, 2000, Mims was beaten by Babcock Center employee Carl Anthony, who more than a year later pled guilty to assault.. Although this beating by Carl Anthony was witnessed by others at the Babcock Center, Mims' mother was not informed of the injury when it occurred and law enforcement was not called. Mims 2075. The warrant that was not issued for more than a year states: "The above facts are true and believable based upon statements given by the Defendant and witnesses that personally observed the def. Strike or hit Mr. Mims." Mims 2053. According to the warrant, Anthony "did knowingly and willfully strike or hit Edward about the head." Mims 2053. On September 4, 2000, Mrs. Mims protested her son going back to Babcock Center. Mims 2085. She wrote to DDSN on April 3, 2001, asking that her son be returned home. Mims 2104.

B. Involuntary Commitment proceedings in Probate Court

According to Mrs. Mims, it was because she had reported that Edward was being beaten and abused at Clusters, the Babcock Center terminated his weekend visits home in 2001 and the record shows that Babcock joined together with DDSN to prevent his release by filing a Petition in the Probate Court to involuntarily commit him to the custody of DDSN. Mims 2076. The Probate Court Order substantiates that it was the request that Mims be discharged from the Babcock Center that "precipitated" DDSN filing a Petition involuntarily committing him to the custody of the agency. DDSN's Petition stated:

That Edward James Mims who is presently found at Babcock Center, Inc., The Clusters,

Lexington, South Carolina, is ...mentally retarded and in need of the South Carolina Department of Disabilities and Special Needs services; and because of this condition, should be so adjudged and treated in a facility or program of the South Carolina Department of Disabilities and Special Needs.

Mims 2047. According to this Petition, the reasons for involuntarily committing him to DDSN were that:

Mr. Mims is 29 years old and profoundly retarded. His health is fragile and carries diagnosis of cerebral palsy, seizures, hypertension, esophagitis/erosion disease.

Mims 2047. When the DDSN psychologist who evaluated Mims for the Probate Court proceedings went to Clusters, Mims had "assumed a fetal position." Mims 2107. Also Mims 2076. He was nonverbal and this psychologist determined that he had the mental age of a two year old. Mims 2107.

Attorney M. Leigh Flynn was appointed as Mims' guardian ad litem in the probate court proceedings in 2001: Mims 2043. Attorney Flynn met with employees at Clusters and with legal counsel for DDSN to discuss Mims' situation and his treatment needs. Mims 2039. According to her affidavit, Clusters employees withheld information from her about the conditions at Clusters and the many incidents where Mims was injured in order to convince her to recommend involuntary commitment. Mims 2040. Employees at Clusters told the GAL that Mims was being abused or neglected by his mother and that she was unable to provide for his care. Id. Neither the Babcock Center employees nor DDSN legal counsel informed Attorney Flynn that Mims had been beaten by a Babcock Center employee and that the beating had been witnessed but not

reported to Mrs. Mims or law enforcement. Id. The GAL recommended involuntary commitment to DDSN based on the inaccurate and incomplete information that had been provided to her. Id.

According to Mrs. Mims, the Babcock Center and DDSN told her that if she did not agree to her son being involuntarily committed to DDSN, her visits with her son would not be restored. Mims 2076. The Court issued an order finding that:

Mr. Mims suffers from profound mental retardation, has cerebral palsy and several other severe and complex medical conditions. Mr. Mims is medically fragile, takes a number of medications and requires close monitoring and assistance.

Mims 2051. (Emphasis added.) At the hearing, DDSN and the Babcock Center "expressed that her home needs to be in safe condition" and that she would not be allowed to have her son home for weekend visits unless she allows "staff from SCDDSN and/or Babcock Center to enter her home and to advise and assist Mrs. Mims in making her home a safer place for her son to visit." (As noted on page 13, when CMR surveyed Kensington, surveyors found "CMR also found that sanitation was lacking in these Babcock Center ICF/MR facilities. Mims 0213. When surveyors visited Kensington, they found buckets with standing mop water, no toilet paper and trash observed in the hallways - at a facility where state taxpayers were providing funding per capita of more than \$65,000 per year. Mims 0247).

After being involuntarily committed to DDSN, Mims continued to experience "unexplained" injuries at Clusters and he would come home with bruises and other injuries.

Mims 2076. Mims sustained many injuries and was taken to the emergency room multiple times without his mother being notified. Mims 2077. On May 10, 2001, a DDSN psychologist evaluated Mims and reported that he could not be left unattended and that "he is on one-on-one care at Clusters." Mims 2088. On November 16, 2001, Mims' mother wrote to the Attorney General for the State of South Carolina again asking that her son be returned home. Mims 2112. She wrote "I am afraid what going to happen to my son at Babcock Center" and "Please Mr. Condon, let my son come back home." Id.

Less than three weeks later, on or about December 3, 2001, Mims was beaten about the face and back. Mims 2056, 2057 (note color photo on page 17 of attachments of Affidavit of Leigh Flynn filed on March 6, 2009). Other unexplained injuries occurred during the month of December. On December 27, 2001, DDSN responded to Mrs. Mims' November 16, 2001 letter requesting his discharge. Mims 2117. DDSN informed Mims' mother that her son's "significant special needs and complex medical conditions required more staffing and supervision than any one person could possibly provide." Mims 2117. This letter reported that "several different people have to be awake and around him all the time." Id.

On January 25, 2002, Mims was again beaten with a belt at Clusters. Mims 2128. He was treated for his injuries at the Lexington Medical Center and had 27 marks noted over his body. Mims 2091. Injuries continued to occur at Clusters throughout his confinement there.

C. Transfer from Clusters to Kensington ICF/MR

Mims was transferred, without notice to or consent of his mother, to Kensington ICF/MR on March 20, 2002. Mims 2092. Unexplained injuries continued at Kensington. Mims 2092. The Babcock Center determined that the body audits Mrs. Mims had requested violated his rights and they attempted to obstruct his mother's request that body audits be performed. Mims 2092. In April of 2004, Mims' mother asked that he move to a less restrictive facility in the community operated by UCP or Lutheran Family Services. Mims 1860. In July of 2004, Mims was taken to the emergency room for treatment of ant bites all over his body from ants found in his bed. Mims 2093. In August of 2004, Defendant Johnson wrote to Mrs. Mims apologizing for not informing her of an injury to his back. Johnson assured Mrs. Mims that: "The staff will be retrained on the importance of notifying families when an injury occurs." Mims at 0488. In September of 2004, Mims' roommate, who was planning to move out of the institution and into a home in the community with Mims, died suddenly. Mims 0198.

Immediate jeopardy was declared at Kensington in October of 2004 after his roommate's death and CMS determined that his death was not thoroughly investigated, Kensington was not adequately staffed and that staff was not properly trained. Mims 0198. See also Mims 1982. Immediate Jeopardy was again declared at Mims' ICF/MR in March of 2005. On April 29, 2005, Kensington was notified that its certification was being terminated and that plans must be made to transfer all residents to other facilities. Mims 0252.

Less than one month after the director of DHHS notified Johnson and Butkus that

Kensington was being decertified, on May 27, 2005, Mims was left unattended in his room and he was found sitting in a chair without pants on with an injury to his penis. Seven stitches were required to repair the 4 cm long "gaping laceration." M. 2122. According to Defendant Butkus, it was Defendant Johnson's responsibility to preserve evidence and to report the unexplained injury to law enforcement. Mims 1399. Five days later, there had been no follow up by the police to the report Mrs. Mims made. Mims 2167. Defendants Johnson and Butkus communicated in late May and early June about the injury and decided to have DDSN's medical consultant conduct an investigation. Mims 2167. The Babcock Center did not make a report to the State Ombudsman until May 31, 2005, after Mrs. Mims and the social worker at Lexington Medical Center made a report.¹ Mims 2095. Defendants Lacy and Butkus also conferred with one another about the injury to Mims' penis. Mims 00737.

Although DHHS had ordered Defendant Johnson to notify families that Kensington had been decertified and that its residents would be moved, Defendants failed to move Mims out of the facility after the injury to his penis which occurred on May 27, 2005.

On June 1, 2005, Defendant Judy Johnson wrote to Defendant Butkus asking for an

¹ A social worker at Lexington Medical Center reported the injury to the Ombudsman. Mims _____. An internal investigation conducted by the Babcock Center reported that "Ms. Mims decided to make a report to the police department. The police officer called the Kensington facility and talked with the staff stating that they needed to ensure that Edward received proper wound care and that an internal investigation was completed. The officer, name unknown, stated that he would follow up with the facility in a few days. As of June 2, 2005 there has been no additional contact from the police department." Mims 2165.

"independent investigation" of the laceration. Mims 2167. Butkus arranged to have the medical consultant for SCDDSN conduct the "independent evaluation." Mims 2167 and 2168. This "independent investigator" reviewed notes provided by the Babcock Center and notes from the ER visit, he performed a "brief examination" of Mims and talked only to Babcock Center staff. Mims 2168. He did not contact Mims' physician, the physician who treated Mims at Lexington Medical Center or any of the staff at the hospital or Mrs. Mims. Mims 2168. He did not contact the police. Id. This investigator determined that Mims' injury was not self-inflicted and that the injury "is an unexplained problem that had no antecedents." Mims 2170. His report does not mention that there were signs on the facility notifying the public that it had been decertified and that residents should be transferred. Mims 2163. ("DHHS has informed us to that our our Medicaid agreement has been terminated due to the failure of Kensington I to meet the federally mandated Medicaid participation requirements." Mims 2163.)

Mrs. Mims petitioned the probate court to be appointed as her son's guardian after this injury occurred. The probate court appointed Lennie Mullis as an examiner to visit Mims and to make a report back to the Court about Mims' condition. But Defendant Johnson would not allow the court-appointed examiner into the facility to visit Mims on June 6, 7 or 8, 2005. Mims 2179. The examiner made three trips to the facility, the court order was faxed to Defendant Johnson on June 7, but Mullis was not allowed to see Mims on any of these visits. Mims 2179 and 2180. On June 9, 2005, the probate court issued an emergency order appointing Mrs. Mims as his temporary guardian. Mims 2096.

Defendants Butkus and Lacy conferred about the injury to Mims' penis. Mims 1387 and 1401. When Mrs. Mims arrived at Kensington on June 10, with the court order for her son's release, Butkus refused to allow him to leave because "we had a preexisting responsibility of the Court." Mims 1400. Between the date of Mims' admission in 2001 and the injury to his penis in 2005, there is no other evidence of Butkus monitoring his care or attempting to communicate with Mims or his mother.

Butkus made the decision to oppose Mrs. Mims' petition for appointment as permanent guardian which was filed in the probate court. Mims 1405. Butkus admitted that he is personally responsible for making placement decisions. Mims 1369. He determined that Mims should not be released back to his mother's care because "we felt that the same situation that was present when we went for involuntary admission were (sic) still operating." Mims 1411. According to Butkus, it would not be safe for Mims to return to his mother's home because "she was working, she didn't have a lot of resources, income was limited, things of that nature." Mims 1411. He determined that Mims should instead remain at Kensington, which had been decertified, according to the letters of the directors of DHHS and the Babcock Center and the Director of the Division of Certification at DHEC. Mims 2162 and 2163.

Plaintiff reported that because of the refusal of the Babcock Center and DDSN to allow Mims to leave Kensington, the probate court held an emergency meeting at the court on Sunday, June 12, 2005. According to Mims' records, this meeting was attended by general counsel for

DDSN, Kathi Lacy, two Babcock Center attorneys and the director of the Babcock Center residential program. Mims 2096. Mims reports that on July 6, 2005, general counsel for DDSN "challenged Probate Court's authority to release Edward Mims from judicial admission at a meeting in chambers with the Judge who issued the judicial admission order." Mims 2096. But on July 11, 2005, DDSN finally "voluntarily" released Mims from judicial admission. Mims 2096. Then on September 28, 2005, DDSN filed a document with the probate court captioned "Objections" with the probate court arguing that Mims did not need a guardian and that his mother should not be appointed. Mims 2188. In these "objections," DDSN questioned Mrs. Mims' "capacity to manage his affairs and his estate." Mims 2191. DDSN complained to the court of Mrs. Mims' "demand for discharge without pre-arranged services, her age and poor health" which "make her a poor candidate for guardian." Mims 2191. Instead, DDSN asked the court to appoint Mims' sister who had little contact with him, but she had worked for the Babcock Center. Mims 2191. This document that was prepared by DDSN's counsel claimed that:

Guardianship is not needed. Guardianship in this case, it is submitted, was a way to move Edward out of the Babcock Center...

There has been no showing that Edward has gone lacking for care and supervision by not having a guardian.

It is not enough to want to be the guardian of an incapacitated person; there must also be a direct, realistic need for care and supervision that would otherwise be lacking without the appointment of a guardian.

Mims 2192. According to DDSN, Mrs. Mims had a conflict in being appointed as his guardian because of the 2001 involuntary commitment order and he requested the recusal of the probate judge. Id. DDSN general counsel expressed "serious concerns" which should be addressed by the Court, again questioned the need for a guardian, asking that the Court appoint Mims' sister if a guardian were to be appointed. Mims 2193.

The court-appointed visitor found Mrs. Mims' home to be clean and in good condition. Mims 1667. The attorney who had been appointed by the 2001 probate court proceedings as Mims' guardian ad litem (GAL) appeared at the hearing and testified that Mims should be returned to the custody of his mother and that the court appoint Mrs. Mims as her son's guardian. Mims 2040. She testified that information had been withheld from her in 2001 in order to obtain her recommendation for his involuntary commitment. Mims 2041. The 2001 GAL testified that Mims was not safe at the Babcock Center because of the history of abuse and neglect at its facilities. Mims 2041. At the hearing, counsel for DDSN appeared and argued again that Mrs. Mims should not be appointed and that Mims' funds should be used to pay his sister, a former employee of the Babcock Center, to serve as his guardian. Mims 1668. The Court determined that DDSN was not a party to the guardianship proceeding and removed the agency's attorney and other persons except for the GAL, Mrs. Mims and her attorney from the courtroom. Mims 1668. The 2005 GAL also recommended that Mrs. Mims be appointed as her son's guardian.

Mims' sister, who DDSN proposed as Mims' guardian, testified that she had not seen her

brother since June 2005 and the last time before that was the spring of 2004. Mims 1668. Mims had never been to her home in Columbia and she had not visited him on holidays for many years. Mims 1668. The sister testified that she had never been close to her brother and that she would place him in a DDSN facility if appointed as his guardian. Id. The court appointed Mrs. Mims as her son's permanent guardian. Mims 1669.

IV. Defendants' motion for summary judgment is denied

A. Genuine issues of fact exist related to Plaintiff's claims for violation of Section 1983

DDSN and the Babcock Center are not subject to suit under the § 1983 claim however, Butkus, Lacy and Johnson have been sued in their individual capacities. A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. *Madison v. Babcock Center*, 638 S.E.2d 650, 655, 371 S.C. 123 (2006). But, considering the evidence in a light most favorable to Mims, Defendants have failed to prove that no triable issues of fact exist. Summary judgment is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues. Id. citing *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). Plaintiff has provided evidence which may be determined by a jury to support his claim for violation of his civil rights under § 1983. The individual defendants have acted

under color of state law and Plaintiff has provided material evidence to show that his right to be free from abuse and neglect and to live in the community has been violated.

B. Mims' Claims Are Not Barred by the Statute of Limitations

The South Carolina Supreme Court has ruled that the Amended Complaint was properly served on the Defendants and that Court reversed the trial court's dismissal of this lawsuit. *Mims v. Babcock Center et. al.*, 399 S.C. 341, 732 S.E.2d 395 (S.C. 2012). SCRCP Rule 15(c) provides that "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading." Mims' original complaint named Stanley Butkus, Judy Johnson and the Babcock Center as defendants and the claims in the amended complaint arose out of the same conduct, transactions and occurrences as those in the original complaint. *Id.* 343, 396. Thus, claims against those defendants relate back to the original filing date of May 29, 2007. As to Defendants Lacy and DDSN, they were not named as an defendants in the original complaint, and the claims, as they relate to Lacy and DDSN, do not relate back to the date of the original complaint. Therefore, those defendants added in the amended complaint may be liable for claims arising after May 7, 2001. *Jackson v. Doe*, 342 S.C. 552, 537 S.E.2d 567, 570. (Ct.App.2000). In any event, all of the Defendants except Johnson are clearly subject to liability for acts since Mims was involuntarily committed to DDSN on July 3, 2001, which occurred within the statute of limitations.²

² Although evidence of Defendant Lacy's personal involvement in Mims' case may not have occurred until after the injury to his penis in 2005, when she took an active part in the attempt to prevent Mrs. Mims being appointed as guardian, Lacy was responsible for oversight

Because of Mim's disabilities, the statute of limitations is tolled for five years before it begins to run. South Carolina Code of Laws § 15-3-40. *Harrison v. Bevilacqua*, Section. 354 S.C. 129, 135, 580 S.E.2d 109 (S.C. 2003). That section provides that the statute "cannot be extended" for more than five years. *Id.* Thus, it is clear that the Supreme Court has interpreted the statute as adding five years to the number of years contained in the applicable statute of limitations. As to Butkus and the Babcock Center, only those claims for injury occurring before May 29, 1999 are barred. As to Lacy and DDSN, claims for injury are barred only as to those injuries occurring before May 7, 2001. Johnson assumed the office of Executive Director of the Babcock Center in the spring of 2002, so that claims against her would relate only to those acts occurring after the date she began her employment there.

However, the barring of plaintiff's claims for wrongful acts occurring before these dates does not bar Mims from presenting evidence to the jury of occurrences prior to these dates. In *Madison*, the Supreme Court discussed the statute of limitations and whether the court should consider allegations occurring before the period covered by the statute of limitations, but after Madison was admitted to the Babcock Center. *Madison* at 663, 148. In *Madison*, the statute of limitations began to run on August 30, 1995 and her lawsuit was filed on August 29, 1997. But, the Supreme Court clearly ruled that *facts* related to the the initial evaluation and the admission of plaintiff to the Babcock Center in 1994 were not time-barred and could be admitted into evidence at trial.

- C. **The individual Defendants are "persons" and Plaintiff has provided sufficient facts documenting their personal involvement sufficient for this Court to submit Mims case to the jury.**

of the management of abuse and neglect for DDSN programs during the time Mims was placed at Clusters.

State officials may be liable under § 1983 where they are sued in their individual capacity for actions taken “under color of any statute, ordinance, regulations, custom, or usage.” 42 U.S.

1983. In *Hafer v. Melo*, the United States Supreme Court held that:

Personal-capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under color of state law. Thus,

[o]n the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.

502 U.S. 21, 25. Mims has alleged that the individual defendants have acted under color of state law to deprive him of important federal rights, including, but not limited to, the right to liberty, the right to receive care in a safe setting where he is protected from abuse and neglect, the right to be free from retaliation and the right to receive Medicaid services in compliance with the requirements of the Medicaid Act. He has provided extensive credible documentation of the violation of these rights and Defendants have failed to produce evidence to rebut the evidence he has produced. As recognized by Wright and Kane officials sued in their individual capacity under § 1983:

..have no Eleventh Amendment protection and they may be held personally liable for damages under § 1983 for actions taken in their official capacities.

Federal Practice and Procedure: Federal Practice Deskbook § 24.

As Wright and Kane have recognized, a private person who is a “willful participant in a joint activity with the state is acting under color of state law.” *Id.* In *Dennis v. Sparks*, the United States Supreme Court held that “to act ‘under color of’ state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful

participant in joint action with the State or its agents. Private persons, like Defendant Johnson, jointly engaged with state official in the challenged action, are acting 'under color' of law for purposes of § 1983 actions." 449 U.S. 24, 28. Thus, Defendant Johnson, having acted jointly with the other state actors to violate Mims' rights, may be sued under § 1983 in her individual capacity.

D. Defendants are not immune from prosecution under § 1983 due to lack of personal involvement

Contrary to Defendants' arguments, this case is also not about a "slight delay" in Mims being permitted to go home on the day Mrs. Mims delivered the court order to the Babcock Center. Mims' mother complained of his being subjected to confinement where he was isolated from non-disabled persons in a segregated facility for years, where he was repeatedly beaten and suffered other painful injuries. Even after Mrs. Mims secured her son's release from the Babcock Center, the individual Defendants attempted to obstruct her appointment as permanent guardian and they refused to provide the services his physician had ordered, forcing Mims into expensive administrative litigation with DHHS that lasted for a year before he was awarded adult day health care services. Mims has alleged that all of the individual defendants "were aware of the systemic abuse, neglect and exploitation of clients living in Babcock Center facilities, that they "failed to report these incidents of abuse, neglect and exploitation to appropriate authorities and they have failed to take necessary action to investigate reports of abuse and neglect." Paragraph 14 and 15 of Amended Complaint. The many audits and investigations by federal and state authorities substantiates those claims that the officials at the top were consciously indifferent to

the injuries being suffered by Mims and others in Babcock Center programs. He also alleged that these individual defendants have "established a pattern and practice of bringing reprisals against parents who complain about services provided by the Babcock Center." Paragraph 17. The allegations of retaliation are supported by sworn affidavits signed by a former State Senator (Mims 2016) who conducted Senate hearings after the audit of the South Carolina Legislative Audit Council revealed extensive problems at DDSN,, Mims' mother and two other parents of adult children served by DDSN. Mims 2214 and 2258.

Mims has alleged and provided evidence to support his claims that the involvement of Johnson, Lacy and Butkus was not limited to supervisory acts over the bad acts of others, but that they were themselves personally involved in the alleged wrongful acts which violated Mims' rights. Contrary to Defendants claims that the depositions do not suggest their participation in the alleged events, the depositions presented by Mims contain evidence showing that these individuals were directly involved in the decisions related to Mims.

Defendant Butkus has admitted that he is responsible, in his capacity as director of DDSN, for placement decisions and that he made the decision after Kensington was decertified that Mims should remain there because the conditions in his home that were present at the time of his removal had not changed. (Dr. Butkus could not remember whether DDSN had done a home study in 2005. Mims 1409.) He testified that: "Our assessment was that he couldn't get the care he needed." (If he were living at home.) Mims 1412. Butkus determined **"he was in that facility, we felt that was best for him."** Mims 1413. He testified that the "combination of physical, psychological and other resources we felt was inadequate..." at Mims home and that it

was best for him to "remain in the involuntary status and stay where he was." Mims 1416, 1419 and 1420. By remaining under involuntary confinement, Mims would never have the opportunity to sue Defendants for injuries he suffered due to their neglect.

At the time Butkus determined that Mims should remain at Kensington, not only had CMS declared Immediate Jeopardy after the death of his roommate, but Carolina Medical Review had notified Butkus personally that Babcock Center ICF/MRs were not in compliance with federal requirements. In addition to these findings, DHEC had also notified Defendant Johnson that Kensington, the facility where Mims was placed by Butkus, would be terminated from the Medicaid program on April 30, 2005. Mims 0253.

Because Mims was involuntarily committed to DDSN, only Defendant Butkus held the key to his release and he had a duty to monitor his case, to provide safe living conditions and to place Mims in the least restrictive setting where he would not be segregated from non-disabled persons. Butkus admitted that he and Defendant Lacy were involved in the decision not to allow Mims to leave Kensington when Mims' mother arrived with a court order requiring release into her custody.

Butkus also admitted that it was "at my direction" that DDSN's lawyer participated in the guardianship proceedings. Mims 1405. He was personally involved in a meeting where the decision to oppose Mrs. Mims' petition for guardianship was discussed with Defendant Lacy and general counsel for DDSN and he himself determined that Mims' mother was "not capable" of taking care of him. Mims 1408.

On the day of one of the probate court hearings, Lacy informed the probate court that her

office had determined that Mims was not eligible for adult day health care services, which had been ordered by his physician. Mims has alleged that this was done in retaliation to force him to attend a Babcock Center day program. Butkus testified that it was Defendant Lacy's job to inform him of every serious injury within days of its occurrence. Lacy and her staff were in charge of quality assurance. Mims 1424.

Defendant Johnson also participated in the effort to prevent Mims from being released from Kensington, at a time when Immediate Jeopardy had been declared at the facility. DHHS had already notified her to inform families of their right to remove their loved ones from the facility. Both Johnson and the chairman of her board of directors admitted that Johnson is the person responsible for assuring compliance with regulations and the safety of residents at the Babcock Center. Defendant Butkus testified that "the Agency director is responsible for the agency and everything that goes on within the agency in terms of what the code requires, what our contractual commitments are under the waivers or ICF/MRs, state-funded programs." Mims 1395.

According to the Chairman of the Babcock Center, Clusters was closed "Because we felt it was not a good place to give good care," despite the Babcock Center recently having received a half a million or more dollars from DDSN to get the facility up to standards when it closed. Mims 1587. The Chairman testified that Johnson was "always involved" in discussions when there is a physical altercation between an employee and a client. Mims 1593. When asked "Where does the buck stop?" the Babcock's Chairman responded "With her" (i.e. Judy Johnson). Mims 1593. Johnson was called by her Chairman when Mims' mother arrived at Kensington

with a court order to remove him from the facility. Mims 1612. Johnson assured the Chairman that "she'd take care of it." Mims 1613. The Chairman called Defendant Johnson when Babcock refused to discharge Mims pursuant to the probate court order that authorized his mother to remove him. Mims 1612. She called Defendant Johnson, who told her "she'd take care of it." Mims 1613. The Chairman of the Babcock Center admitted that the court-appointed visitor was not allowed into his residence and she discussed this decision with Johnson. Mims 1616, 1618 and 1619. There is credible and probative evidence in the record to demonstrate Johnson's personal involvement in negligently supervising Clusters and Kensington. Defendant's claim that there is no "suggestion of direct participation" is simply contradicted by the record.

In any event, the Fourth Circuit has held that "supervisory officials may be held liable in certain circumstances for the constitutional injuries inflicted by subordinates." *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994). This liability is not based on *respondent superior*, but on a "recognition that supervisory indifference or tacit authorization of subordinate's misconduct may be a causative factor in the constitutional injuries they inflict on those committed to their care." *Id.* at 798. Supervisory liability can extend to "the highest levels of state government" and the Fourth Circuit has recognized that supervisory liability ultimately is determined "by pinpointing the persons in the decision making chain whose deliberate indifference permitted the constitutional abuses to continue unchecked." *Id.*

In addition to liability which attaches as a result of their personal involvement in the violation of Mims' rights, if the allegations Mims has made are true, these Defendants may be liable under the theory of *respondent superior*. Mims has provided evidence showing that all

three individual Defendants were consciously indifferent to his need for safety and supervision. Supervisory liability claims are premised upon allegations that the supervisor knew or should have known about the danger that a subordinate engaged in unconstitutional conduct, had the authority to take steps to prevent it, yet failed to do so. As the South Carolina Supreme Court recognized in *Washington v. Whitaker* even the "...failure to adequately train is actionable under § 1983." 317 S.C. 108, 451 S.E.2d 894 (S.C. 1994). CMS documented in the investigations conducted after Mims' roommate died in the fall of 2004 that the Babcock Center had failed to train the staff at Kensington and that the facility was understaffed. Mims 0198.

In *Washington*, the jury award of actual and punitive damages was upheld by the Supreme Court against an officer who supervised the execution of the search warrant and ordered the searches, but did not actually participate personally in strip searches during a drug raid that was conducted pursuant to a court-issued search warrant. The South Carolina Supreme Court quoted the United States Supreme Court case of *Harlow v. Fitzgerald*:

[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 410 (1982). In this case, Mims alleges that these individual defendants have violated his "clearly established" Constitutional rights, "the contours of which [were] sufficiently clear in light of pre-existing law that a reasonable public official would know that his actions violate the right." *Timberlake by Timberlake v. Benton*, 786 F.Supp. 676, 685 (M.D.Tenn.1992). Mims has alleged that these Defendants violated his right to liberty and the pursuit of happiness, his right to equal protection of the laws

and his right to be free from segregation which are guaranteed by the Fourteenth Amendment. Mims has also alleged that his right to personal privacy and dignity were violated by these Defendants, which rights are guaranteed by the Fourth Amendment. Defendants have failed to prove that no material fact exists to support Mims' claims or that they are entitled to judgment as a matter of law.

Just as a warrant to search does not absolve an officer from liability under § 1983, a probate court order involuntarily committing Mims to DDSN does not absolve these Defendants from their obligation to provide safe and humane care for Mims and to comply with federal and state laws in providing services to him. In *Washington*, the Supreme Court held that "the focus is whether the warrant was executed in a reasonable manner." *Id.* at 899. Mims has alleged that these Defendants knew or should have known that his confinement and conditions of treatment were unreasonable and that they violated his statutory and Constitutional rights. *Id.* at 899. Because these Defendants implicitly authorized, approved and knowingly acquiesced to the wrongful acts and conditions alleged, the jury should determine their liability. ("Under § 1983, supervisory liability may be established upon a showing that the defendant implicitly authorized, approved or knowingly acquiesced to the strip search." *Id.*)

Mims has presented evidence, which shows actual or constructive knowledge on behalf of these supervisors that their subordinate's conduct put him at a "pervasive and unreasonable risk" of harm, that these Defendants acted with deliberate indifference or impliedly authorized the conduct complained of in this case and that there was an "affirmative causal link" between the supervisors' inaction and the constitutional injury Mims suffered. *Shaw v. Stroud*, 13 F.3d

791 (4th Cir. 1994). In October of 2004, shortly after the death of Mims' roommate, when it would be expected that the Babcock Center would be on high alert, CMS found that the facility was understaffed, staff was not properly trained and that the Babcock Center failed to thoroughly investigate his death. Mims 0198.

Had Defendant Butkus exercised his right to remove Mims from Clusters and Kensington into a safe placement in the community and properly monitored his care, when Immediate Jeopardy was declared in October of 2004, he would not have suffered all of the injuries detailed in the records after that date which have been presented to this Court. Mims 2083. (Mrs. Mims affidavit states that "Exhibit 1 contains a true and accurate chronology of incidents which occurred while Edward was in the custody of the South Carolina Department of Disabilities and Special Needs and was living at the Babcock Center." Mims 2075.) The Defendants have admitted in their depositions that they had actual knowledge of the acts that Mims claims to have violated his rights, including, but not limited to refusing to discharge him from Kensington, and that the individual Defendants acted in concert to force him to remain isolated in a dangerous facility.

The examiner who had been appointed by the probate court to examine Mims, Lennie Mullis, provided an affidavit affirming that she faxed her court order to Defendant Johnson on June 7, 2005, after being denied access into Mims' facility when she appeared at the facility with her court order. Mims 2179. On June 8, 2005, Defendant Johnson herself left Mullis a message responding to her request to examine Mims. Mims 2179. Then Johnson's direct report, Dorothy Goodwin, informed Mullis that she would be able to examine Mims at the facility at 6:00 p.m.

that evening, but, when she arrived Mullis was again denied access to Mims, despite having a court order to examine him. Mims. 2180.

Defendants' arguments that there is no "suggestion of direct participation" by these defendants in any of the alleged events at the Babcock Center are clearly contradicted by these records. In any event, the Fourth Circuit has held that "supervisory officials may be held liable in certain circumstances for the constitutional injuries inflicted by their subordinates." *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994). This liability is not based upon *respondeat superior* but upon "a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict on those committed to their care." *Id.* at 798, citing *Slakan v. Porter*, 737 F.2d 368 (4th Cir.1984), cert. denied, 470 U.S. 1035, 105 S.Ct. 1413, 84 L.Ed.2d 796 (1985); 737 F.2d at 372-73. Indeed, supervisory liability can extend "to the highest levels of state government," and the Fourth Circuit has recognized that supervisory liability ultimately is determined "by pinpointing the persons in the decision making chain whose deliberate indifference permitted the constitutional abuses to continue unchecked." *Id.*, citing *Slakan*, 737 F.2d at 376. See *Spell v. McDaniel*, 591 F.Supp. 1090, 1109-10 (E.D.N.C.1984) (determining issue on supervisory liability is whether defendant proximately caused a violation of the plaintiff's rights by doing something or failing to do something he should have done). The Fourth Circuit has noted that this issue is ordinarily one of fact, not law, thus, it should not be decided in a motion by defendants for summary judgment. *Id.* See *Avery v. County of Burke*, 660 F.2d 111, 114 (4th Cir.1981).

The Fourth Circuit has set forth three elements necessary to establish supervisory liability

under Sec. 1983: first, the supervisor must have 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; second, 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 finally, there must be an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff. Id. at 799.

In this case, Mims has well documented the personal knowledge of Butkus, Lacy and Johnson of the conduct engaged by subordinates which put Mims and citizens like him at great risk of harm. Audit after audit confirmed the failure of these defendants to protect the health and welfare of residents of DDSN programs, in particular Babcock Center residential programs. Mims 0359, 0416, 0490 and 0583. Indeed, DDSN recognized and reported that Babcock Center had four times the average rate of substantiated cases of abuse and neglect in 2004 (up from double the rate in 2002) and Butkus had ordered Johnson to downsize their residential programs by 50% on December 15, 2004 based on these findings. Mims 1445. Butkus personally made that decision to require half of Babcock's residents to move to another provider, yet, at the same time, he personally decided to exercise his authority to force Mims to remain in a facility that was known to him to be dangerous. He determined that Mims would not be allowed to leave Kensington, even after dangerous conditions had been found to exist in survey after survey of that facility, by both state and federal oversight organizations. Mims 0198, 0208, 0250 and 0252.

A plaintiff may demonstrate deliberate indifference by showing the supervisor's

"continued inaction in the face of documented widespread abuses." *Id.* at 373. *Shaw* at 199. A supervisor is not "expected to guard against the deliberate criminal acts of his properly trained employees when he has no basis upon which to anticipate the misconduct." But in this case, the federal Medicaid agency documented, just a few months before the injury to Mims' penis, that his roommate's death had not been thoroughly investigated, that the facility was not adequately staffed and that staff at Kensington was not properly trained. Mims 0204. CMS' finding of Immediate Jeopardy reported that "the facility failed to take appropriate actions to ensure client protections" and Butkus, Lacy and Johnson were all well aware of these findings. *Id.*

A supervisor's continued inaction in the face of documented widespread abuses, provides an independent basis for finding he either was deliberately indifferent or acquiesced in the constitutionally offensive conduct of his subordinates and plaintiff has demonstrated that level of indifference here through repeated surveys and audits of which Butkus, Lacy and Johnson were aware and failed to take action to correct. *Shaw* at 199.

The Unequal Justice report by Protection & Advocacy documented that these problems were systematic throughout the programs DDSN operated during the time period when the injury to Mims' penis occurred and these individuals attempted to obstruct his release from the facility. Specific problems involving abuse and neglect of Babcock Center residents had consistently been reported since a 2003 audit by DDSN identified grave problems. Mims 0124. A federal survey reported in 2004 revealed widespread theft of funds belonging to Babcock Center residents by Babcock staff (Mims 0151) and horrific physical injuries that were either unexplained or resulted from assault (Mims 0152 to 0163).

CMS had reported the failure of staff to report abuse and a staff member being fearful of

reporting abuse. Mims 0157. CMS substantiated the allegations that Babcock Center failed to protect clients from repeated beatings and failed to report negligent supervision at Clusters. Mims 0164 to 0167. (Ed M. refers to the plaintiff in this report at Mims 0164.) In this report, CMS reported the failure to "ensure clients were not neglected, and placed at risk of harm." Mims 0174. It was substantiated that another Babcock Center client was beaten with a belt and that this client was raped by the same assailant. Mims 0175 and 0177. It was documented that the 78 year old victim was found beating on the walls of his Babcock Center residence and saying "I want out of this hell hole" and "I pray for Jesus to send me to heaven or hell." Mims 0178. It is difficult to imagine a more unconstitutional confinement. After this episode, the elderly resident was found to have a broken finger. Mims 0178. Plaintiff has well documented actual knowledge that subordinates of Butkus, Lacy and Johnson were engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to citizens like the plaintiff and their response was so inadequate that it showed "deliberate indifference to or tacit authorization of the alleged offensive practices." *Slakan*, 737 F.2d at 373.

Plaintiff has established through extensive credible documentation that the risk of harm in Babcock Center residences, in particular in those two institutions where Butkus placed Mims (Clusters and Kensington). Negligent care was "pervasive" and "unreasonable" in those facilities. Not only were other residents harmed, but Mims himself suffered repeated injuries from assaults by others as well as many "unexplained" injuries. *Id.* at 373-74. What makes Mims' case even more egregious was that Butkus had obtained the involuntary commitment based on false and/or misleading information that had been provided to the court-appointed GAL

in 2001 and Plaintiff has alleged that Defendants threatened his mother that his home visits would be terminated if she did not agree to the commitment. Mims 2038 and 2074. The event that initiated this action was Mims' mother insisting on prosecuting the Babcock Center employee who was witnessed beating Mims at Clusters. Mims 2038 and 2039. The GAL testified at the probate court hearings in 2007, where Butkus and Lacy attempted to obstruct Mrs. Mims being appointed as his permanent guardian, that she recommended that Mims be involuntarily admitted in 2001 "based on this false information which had been provided to me by employees of the Babcock Center and the Department of Disabilities and Special Needs. Mims 2040. The 2001 GAL testified that she had represented "a number of residents of Babcock Center who had been abused or neglected by Babcock Center employees and it was my opinion that Edward was not safe there." Mims 2041.)

The record is totally devoid of any evidence that Butkus, who acknowledged that he was responsible for placement decisions, made any effort to monitor Edward's health and safety between the date of his involuntary admission in 2001 and the date of the court order giving his mother the authority to remove him from Babcock Center in 2005. But when Mrs. Mims obtained a court order to release Mims from confinement, Butkus suddenly became concerned his welfare and safety if he returned to live with his mother. Once Mrs. Mims was appointed as Mims' permanent guardian, she could pursue litigation against DDSN and Babcock Center. His actions are further evidence of obstruction of justice and intimidation of a witness. (Edward's mother signed a sworn statement stating that she was threatened with her weekend visits being terminated if she did not agree to the involuntary admission in 2001. Mims 2076.) The record

contains a sworn statement signed by Senator David Thomas stating that his office had been flooded with calls after the Legislative Audit Council audit of DDSN was released in 2008 from families who "reported to me and my staff that they were fearful of retaliation by DDSN." Mims 2017.

"But for" the fraudulently obtained involuntary admission in 2001, the record shows that Edward would have been removed from the Babcock Center by his mother and would not have suffered any more of these injuries after he was beaten by Carl Anthony. Mims' mother literally begged for his return home in November of 2001, as she had previously requested in April 2001. Mims 2104. Soon after her request was again denied by DDSN, Mims was beaten with a belt just two months later, suffering 27 marks all over his body. Mims 2091, 2112 and 2117.

It is undeniable that Defendant Butkus held the key to Mims' release and that, as the holder of the key to his confinement, Butkus was personally responsible for injuries that resulted from his failure to protect Mims from harm. Butkus was not just a supervisor who was removed from the bad acts in this case. Butkus made the decision himself to involuntarily commit Mims to DDSN. If he had been truly concerned about Mims' welfare in 2001, he could have then assisted another family member in having a guardianship established. Once he obtained the order of commitment, there is no evidence in the record that Butkus did anything to monitor or protect Mims for four years, even though Butkus received, personally, multiple reports of serious injuries and abuse. As director of DDSN, Butkus also received copies of the reports and audits disclosing more and more serious harms in their facilities. Butkus became personally liable for his care, because he has admitted that he was the person responsible for making placement

decisions.

As a result of the joint efforts of the individual defendants and the agency filing a document captioned "Objections," the appointment of a permanent guardian was delayed for months and the expenses of the guardianship were increased. Then, once these Defendants lost the battle regain custody of Mims and their ability to prevent Mrs. Mims from being appointed as Mims' guardian, they entered into a conspiracy to deny Adult Day Health Care (operated by a private company that is a qualified provider of Medicaid services) services in an attempt to force Edward back into the Babcock Center day program. Amended Complaint at 51, 52 and 53.

Mims has met the third prong of the criteria to show supervisory liability. In *Slakan v. Porter*, the Fourth Circuit noted that the "proof of causation may be direct ... where the policy commands the injury of which the plaintiff complains ... [or] may be supplied by [the] tort principle that holds a person liable for the natural consequences of his actions." 737 F.2d at 376.

The injuries Mims suffered were directly caused by the bad acts of these individual defendants. In *Stroud*, the Fourth Circuit held a supervisor liable where he had knowledge of just three incidents where his employee had used excessive force which posed an unreasonable risk of harm to victims. *Supra*. In Mims case, there were hundreds of incidents involving residents of Clusters and Kensington over a period of years.

The audits Mims has filed provide independent support to his claims that these Defendants knew about the conduct, they facilitated it, approved it, condoned it, or turned a blind eye for fear of what they might see. This is also not a case where the supervisor was far up the chain without knowledge of what violations were going on below. The Defendants were all

directly involved in the violations of which Mims complains.

E. Mims has alleged a conspiracy that violated of 42 U.S.C. 1985 and Defendants have failed to prove that there is no issue of material fact.

Mims has alleged that these Defendants joined together in a conspiracy to deprive him of the equal enjoyment of rights secured by the law to all, that he has been injured by their wrongful acts as a consequence of this conspiracy. He alleges that DDSN brought the involuntary commitment proceedings to prevent his mother from having the authority to question or bring an action against the agencies for the abuse and neglect he suffered at the Babcock Center. The scheme took both agencies working in tandem, Babcock Center provided the residence and DDSN obtained the involuntary commitment order.

Defendants argue that since *Ashcroft v. Iqbal* “there is some doubt as to whether a claim for conspiracy can be viable at all.” 129 S.Ct. 1937 (2009). But the Fourth Circuit has not adopted Defendants’ reading of *Ashcroft*, and has since recognized the existence of such conspiracy claims, as recently as April of 2013. *Gandy v. Robey*, Case No. 11-2248 (4th Cir. April 4, 2013). (Although the Fourth Circuit did not find supervisory liability to be present, it did not rule that such a claim has been extinguished.). The Court applied the elements established in *Stroud*. In *Bridges v. Keller*, the Fourth Circuit recently recognized the existence of claims for supervisory liability, or “unconstitutional policy administration,” when those elements are met. *Bridges v. Keller*, Case No. 12-7514 (4th Cir. 2013). Plaintiff in this case has proven the existence of “predicate constitutional violations” required to show supervisory liability. *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012). He was deprived of liberty, happiness and equal

protection non-disabled persons enjoy to be free from assault.

Defendants argue that Mims' conspiracy complaint fails because he has not shown that defendants were "motivated by a specific class-based invidiously discriminatory animus to [deprive the plaintiff[s] of equal enjoyment of rights secured by the law to all." Defendants' Memorandum at 16. On the contrary, Mims has alleged that he was subjected to the alleged violations because of his disability. Defendants' argument fails because Mims has clearly stated in his complaint facts showing that he is a member of a class of persons who have historically experienced discrimination, as a person who has mental retardation and other disabilities. In the Bill of Rights of Long Term Care Residents, the South Carolina Code of Laws provides in 44-81-20 that "The General Assembly finds that persons residing within long-term care facilities are isolated from the community and often lack the means to assert their rights fully as individual citizens." Mims has alleged that because of his disability, he was stripped of his right of liberty and to be free from abuse and exploitation when he was forced to remain in an institution under an involuntary commitment order obtained through false pretenses when Mims' mother reported that he was being abused at the Babcock Center.

Citizens of South Carolina who do not have disabilities and who do not participate in DDSN programs expect to be provided with protection from assault and theft when they are in their homes or go out into the community. Plaintiff has provided credible evidence, in the form of audits, surveys and investigations by state and federal officials, showing that persons who, like Mims, have mental retardation and live in DDSN programs have been systemically subjected to physical and sexual assaults and psychological abuse without prompt and

independent investigation by law enforcement or protection from government and private entities that profit from their presence there. He has provided affidavits which, if believed to be true, as they must in response to Defendants' motion for summary judgment, these affidavits document that families have been subjected to retaliation by DDSN and its agents. Mims 2015, 2074, 2214 and 2258. Plaintiff alleges in his complaint that these individual Defendants joined together to deprive him and other similarly situated persons of the equal enjoyment of the right to liberty and freedom from abuse and exploitation that are secured by the law to all non-disabled persons.

Defendants contend that Mims has not proven that he is a member of a protected class. But, in *Lake v. Arnold I*, the Third Circuit established that "42 U.S.C. S 1985(3) is sufficiently broad to protect the mentally retarded as a class." 112 F.3d 682 (3d Cir. 1997) (*Lake I*). In that case, Elizabeth Lake, who has mental retardation, was sterilized by doctors at the direction of her father and step-mother. When Elizabeth later learned that she was sterile, she sued her father and step-mother as well as the hospital and doctors involved in her surgery under 42 U.S.C. §§ 1983 and 1985(3) and state law. The Third Circuit ruled that "§§ 1983 and 1985(3) are designed to compensate victims whose federal constitutional or statutory civil rights have been violated and to prevent future abuses of state power[.]" *id.* at 369. In that case, the court determined that mentally retarded persons are a protected class and that forced sterilization exemplified the discrimination against such persons that §§ 1983 and 1985(3) were designed to remedy. That court held that:

The history of discrimination against individuals with disabilities, while less noted that

racial or sex discrimination, is no less a story of a group that has traditionally suffered not only physical barriers but the badge of inferiority emplaced by a society that often shuns their presence.

Id. The Third Circuit recognized that Congress found in enacting the Americans with Disabilities Act that:

Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated the position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

Id. citing 42 U.S.C. 1201(a)(7).

Defendants argument that “the Fourth Circuit “has rarely, if ever found that a plaintiff has set forth sufficient facts to establish a section 1985 conspiracy” ignores *Anthony v. Ward*, a case brought against employees of another state agency in South Carolina in the Fourth Circuit where the Court upheld a \$510,000 jury verdict for violation of 42 U.S.C. 1985. No. 07-1932 (4th July 7, 2009). That lawsuit was brought against state officials who conspired to terminate Anthony’s employment with the South Carolina Department of Corrections. In a case arising out of the same set of facts, another employee, Henry Pridgen, brought an action for conspiracy against these officials in the state court *Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (S.C.App. 2010). The jury returned a verdict for \$372,000 in favor of Pridgen, finding that the defendant state officials conspired against him. This verdict was affirmed by the South Carolina Court of Appeals. Id.

The allegations Mims have made are not conclusory. On the contrary, he has supported

his allegations with very specific factual allegations and uncontradicted evidence of Defendants' systemic violations of the rights of disabled participants in DDSN programs, in addition to medical evidence documenting how Mims himself has been personally injured as a result of this alleged conspiracy.

F. The Babcock Center is not entitled to protection under the Tort Claims Act.

The Tort Claims Act provides that "[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages contained herein." S.C. Code Ann. § 15-78-40 (2005). "Governmental entity" is defined by the Tort Claims Act as "the State and its political subdivisions." *Id.* § 15-78-30(d). Section 15-78-20(b) provides: "The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein." The entity claiming limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense."

[CaseView.aspx?&fcount=258&DocId=604&Index=%5c%5c192%2e168%2e1%2e175%5cdtsearch%5cIndex%5cSC%5cSCCASENC&HitCount=12&hits=c6+c7+c8+b29+b2a+b2b+b99+b9a+b9b+c00+c01+c02+&fn=27256&id=1&ct=2&scd=SCHealthPromotionSpecialists,LLC](#) v.

South Carolina Board of Dentistry, 27263 (June 12, 2013).

In determining that the Board of Dentistry is covered by the Tort Claims Act, the Supreme Court considered that the Board was created by the General Assembly as the statewide regulatory authority. S.C. Code Ann. § 40-15-10 (2011); *see id.* § 40-1-20(3) (defining "Board" to mean "the group of individuals charged by law with the responsibility of licensing or

otherwise regulating an occupation or profession within the State"). Several members of the Board are appointed by the Governor and its funds are controlled by the State Treasurer. S.C. Code Ann. § 40-15-20 (providing for Governor's appointment of Board members); *id.* § 40-15-50 ("All fees received by the board become the property of the state general fund and must be deposited to the account of the State Treasurer. The expenditures of the board must be from state appropriations. All fines imposed by the Board must be deposited into a special account to be held by the State Treasurer for the purpose of the payment of administrative costs upon the approval of the Budget and Control Board."). Funds are not appropriated to the Babcock Center by the South Carolina General Assembly and the State Treasurer does not hold its funds.

In concluding that the Dentistry Board is covered by the Tort Claims Act, the Court considered the following factors: "whether the entity functions statewide, whether the entity performs the work of the state, whether the entity was created by the legislature, and whether the entity is subject to local control." 81A C.J.S. *States* § 552 (Supp. 2013) (footnote omitted). Additionally, we have examined "the character of the power delegated to the entity, and the nature of the function performed by the entity." *Id.* Applying these tests, the Court should rule that the Babcock Center is not covered by the Tort Claims Act. To ignore the procedures established by statute by the General Assembly would permit the director of a state agency to usurp the power granted to the legislative branch in the South Carolina Constitution and violate the separation of powers mandate.

DDSN has no authority to grant its co-conspirator immunity under the Tort Claims Act by simply illegally treating the Babcock Center as a DSN Board. There is no provision in the South Carolina Code of Laws to "grandfather" any organization as a DSN Board that does not meet the statutory requirements enacted by the General Assembly. As the South Carolina

Supreme Court recognized in *Young v. South Carolina Department of Disabilities and Special Needs*, South Carolina Code of Laws Sections 44-20-20 and-375 "establish and recognize a statewide network of local boards of disabilities and special needs." 374 S.C. 360, 649 S.E.2d 488 (S.C. 2007). As noted in that case, South Carolina Code of Laws 44-20-385 provides that the local DSN Boards are:

1.

[T]he administrative, planning, coordinating, and service delivery body for county disabilities and special needs services funded in whole or in part by state appropriations to the department or funded from other sources under the department's control. It is a body corporate in deed and in law with all the powers incident to corporation....

The Court held that the plain language of the statutes and ordinances establishes the Board as a separate entity from DDSN. *Id.* at 491. As provided in South Carolina Code of Laws § 44-20-375:

(A) Before July 1, 1992, county boards of disabilities and special needs must be created within a county or within a combination of counties by ordinance of the governing bodies of the counties concerned. The ordinance must establish the number, terms, appointment, and removal of board members and provide for their powers and duties in compliance with state law and the process for appointing board members which existed on January 1, 1991, must be preserved in the ordinance. However, where the county legislative delegation or county council recommends board members to the appointing authority, the delegation may transfer its authority to recommend to the council or the council may transfer its authority to the delegation. If there is a transfer, preservation of the authority to recommend existing on January 1, 1991, is not required, and the new recommending authority must be contained in the ordinance.

DDSN has no statutory or regulatory power to appoint any member of a local DSN Board and there is no ordinance empowering the Babcock Center as a DSN Board. The Babcock Center is a private corporation and none of its members are appointed, or are subject to removal, by the

General Assembly, any governmental entity or the Governor. The County Ordinances in Richland and Lexington County recognize a totally separate entity, the Richland Lexington Disabilities and Special Needs Board, as the local DSN County Board. DDSN's empowerment of the Babcock Center as a DSN Board violates this statute and it conflicts with the authorization of the rightful DSN Board, the Richland Lexington DSN Board which is authorized by ordinance.

Paragraph (C) of that statute provides for grandfathering of existing DSN Boards, but only where it is created by ordinance in compliance with subsection (A):

After June 30, 1992, the department shall recognize only county boards of disabilities and special needs that plan, administer, or provide services to persons with intellectual disability, related disabilities, head injuries, and spinal cord injuries within a county or combination of counties which are created or established pursuant to this section, including those whose members are appointed by the Governor. A county board of disabilities and special needs created by ordinance before January 1, 1991, is considered created pursuant to this section, provided the ordinance includes and complies with the provisions of subsection (A).

Subsection (D) of that statute provides that "A county board of disabilities and special needs is a public entity." The Babcock Center is not a public entity, but it is a private corporation whose board of directors is not appointed by any governmental entity. ("...no public body may approve or disapprove its board members." Mims 1880.) The General Assembly did carve out two counties as exceptions to the general rule, Dorchester and Georgetown. Had the General Assembly intended to authorize the Babcock Center to act as a local DSN Board, it would have made an exception, as it did for these two counties.

Thus, as a private corporation whose board is not appointed by either county council or the legislative delegation, the Babcock Center cannot legally claim entitlement under the Tort

Claims Act.

G. Plaintiffs' claims against the individual Defendants are not covered by the Tort Claims Act

As to the individual defendants, Mims has alleged that they have acted with evil motives and intent and that they have shown reckless and callous indifference to Plaintiff's federally-protected rights. The Tort Claims Act does not protect an employee who acts outside of the scope of his official duties, or where the employee's acts constituted fraud, malice, intent to harm or a crime of moral turpitude. *Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (S.C.App. 2010). S.C.Code Ann. § 15-78-70(b) (2005). Section 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). Plaintiff has raised a genuine issue of material fact.

In *Pridgen*, the South Carolina Court of Appeals found that all that was required was circumstantial evidence to support the jury's finding that the state employees acted outside of the scope of their employment with an intent to harm the plaintiff, based on personal motives. All that is necessary was sufficient evidence for a jury to infer from the relationship of the Appellants, as well as the nature of their actions, that they intended to harm the plaintiff and that they conspired to have his employment terminated for personal reasons, wholly disconnected from the furtherance of the state agency's business. Accordingly, the Court of Appeals determined that the state employees were not entitled to immunity under the Tort Claims Act as a matter of law.

As in *Pridgen v. Ward*, *supra*, and *Anthony v. Ward*, both the state and federal court held

that the state officials who were defendants were not covered by the Tort Claims Act, because their retaliatory acts were intentional and outside of the scope of their employment. *Anthony v. Ward*, 07-1932 (4th Cir. July 7, 2009). In attempting to obstruct the appointment of Mims' mother as his legal guardian, which would result in Babcock Center losing hundreds of dollars a day in income and would provide Mrs. Mims the legal authority to sue the Defendants for their wrongful acts, Defendant Johnson prevented the court-appointed examiner from entering Mims' residence to carry out her duties. Lacy and Butkus acted jointly to refuse to allow Mims to leave the facility - which had repeatedly been cited with Immediate Jeopardy citations - based on Butkus' determination that Mims could not be protected if he were to return to the care and custody of his mother. In the probate court proceedings in 2005, the GAL testified that she was misled by the Defendants in 2001 to believe that Mrs. Mims might have been neglecting her son, when the truth was that the defendants were on notice of repeated injuries and beatings at Clusters. Plaintiff has provided evidence, which viewed in the most favorable light to Mims, supports his claims that the individual defendants acted outside of the scope of their employment and the Babcock Center and individual Defendants are not protected by the Tort Claims Act.

H. Plaintiff's claims relate back to the date the original complaint was filed

Defendants argument ignores the clear and unambiguous requirements set forth by the General Assembly in the tolling statute contained at South Carolina Code § 15-3-545. As discussed above, this statute would extend the liability of the Babcock Center back to May 7, 2000, even if it were covered by the Tort Claims Act, which it is not. Defendants also ignore the "relation back" rule established by the Supreme Court in SCRCR Rule 15(c). This Rule provides that "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings,

the amendment relates back to the date of the original pleading.”

I. Mims has alleged that Defendants’ violation of the Americans with Disabilities Act is continuing.

Mims has alleged that Defendants have operated programs in violation of the Americans with Disabilities Act and that these violations are continuing. Even recently, the current director of the Babcock Center has refused Mims’ request for services in the home that are needed to avoid institutionalization when his mother was again hospitalized by applying arbitrary caps which have not been promulgated as regulation. Mims 1907. Because Defendants have not established reasonable standards, reasonable pay and provided home based services with reasonable promptness and because Defendants have not provided services in the amount, duration and scope necessary to meet the goals of the Medicaid waiver program (remaining out of institutional settings), Mims will continue to be at risk fo institutionalization. Defendants have ignored the rulings of the South Carolina Administrative Law Court that these caps are unenforceable, because they establish a binding norm which must be promulgated as regulation to be enforceable. *Hickey v. DHHS*, Docket No. 10-ALJ-08-0650AP (SCALC July 19, 2011); *Edge v. DHHS*, Docket No. 10-ALJ-08-0501-AP (SCALC October 29, 2010), *Eubanks v. DHHS*, Docket No. 10-ALJ-08-0502-AP (SCALC October 29, 2010), *Morgan v. DHHS*, Docket No. 10-ALJ-0503-AP(SCALC October 29, 2010).

Mims has alleged that Defendants have violated the Americans with Disabilities Act in the administration of DDSN programs. He alleges that Defendants Johnson, Lacy and Butkus and SCDDSN have not provided Plaintiff with needed services in the most integrated setting appropriate to the needs of Plaintiff and that they have thereby violated the Rehabilitation Act and Americans with Disabilities Act. Also, Mims alleges that Defendant DDSN has operated its programs in such a way so as to maintain the monopoly of the local DSN Boards and to prevent Plaintiff and other disabled persons from remaining in their homes by failing to provide payment to caregivers of home-based services which is commensurate with funding provided for institutional services. He alleges that Defendants' official practices have caused Plaintiff to be unnecessarily segregated and at risk of returning to an institution operated by the Defendants where Plaintiff has suffered serious harm and threats of harm in order to keep its institutions and workshops full.

Since Mims was released from custody of the State in 2005, each year DDSN has certified that his needs can be met in the community and his guardian has chosen for him to receive services outside of an institution. *Olmstead v. L.C., supra*. The burden then shifts to the Defendants to prove that providing needed services to Plaintiff would not fundamentally alter the nature of the services, programs or activities of the State. *Id.* and *Peter B. v. Sanford, supra*. Defendants have failed to meet their burden to demonstrate that it would fundamentally alter the State's system to provide Mims the services he needs to remain at home in the community.

Mims has alleged violations of the Americans with Disabilities Act because the

defendants have failed to provide necessary services in the most integrated setting appropriate to his needs and has operated their programs in such a way to prevent Mims and other persons from remaining in their homes by failing to pay caregivers of home based services commensurate with funding DDSN pays for caregivers who provide institutional services. Amended Complaint at paragraphs 82 to 89. Mims alleges that these practices have caused Plaintiff to be at risk of returning to an institution and that he has suffered serious harm and threats of harm in violation of the Americans with Disabilities Act. *Fisher v. Oklahoma Health Care Authority*, 335 F3d 1175, 1185 (10th Cir. 2003) ; *Pashby v. Deliah*, 709 F 3d 307, 322 (4th Cir 2013). He has alleged that DDSN and the Babcock Center have operated their programs so as to keep their institutions and workshops full. Amended Complaint at 86. Mims has alleged that providing the services he has requested would not fundamentally alter the nature of the services, programs or activities of the State. Paragraph 87. *Peter B. v. Sanford*, 6:10-cv-00767-TMC (SCDC Nov 24, 2011); adopted in Entry 95 (SC DC March 7, 2011). Mims alleges that these violations of the Americans with Disabilities Act are subject to repetition, yet they have evaded review.

A violation of the ADA occurs when individuals who have disabilities, who choose to live in the community are not provided services needed to prevent risk of entry into an institution. *Peter B. v. Sanford*, 6:10 cv 007670JMC BHH, Entry 71 (S.C.D.C. November 24, 2011) adopted in Entry 95, (S.C.D.C. March 7, 2011) and *Pashby v. Delia*, 709 F.3d 307, 322 (4th Cir. 2013). Mims' claims for violation of the ADA are based not only on those violations occurring before he was discharged from Kensington, he claims that they are continuing now.

For example, he claims that when Mims' mother was recently hospitalized and he required respite care for two weeks, DDSN limited the number of hours of PCA and respite services, based on its policy which limits the number of hours of home based services, but it allows unlimited days in ICF/MR facilities. Exhibit 1, Letter from Beverly Buscemi denying request for additional hours dated May 7, 2013.

Mims' claims for violations of the ADA are not time barred. This is not only because of the tolling statute, but also because Defendants were violating the Act when the lawsuit was filed, and those violations are continuing.

J. This lawsuit is not time barred by the appointment of a guardian in 2005.

Defendants' argument that Plaintiff was not adjudicated incompetent until 2005 ignores the plain fact that it was DDSN that caused Mims to be adjudicated to be incompetent in 2001, in order to involuntarily commit him to their custody. Mims 2047. His disability is life long and it began at birth. The probate court ruled that Mims "suffers from profound mental retardation, has cerebral palsy and several other severe and complex medical conditions." Mims 2051. This argument is clearly without merit.

K. The adjudication of Mims' incapacity in 2005 does not affect the tolling statute.

Defendants argue that "it is clear that he was not adjudicated to be incapacitated until the order of June 14, 2005." Defendants' Brief at 22. Defendants overlooked the fact that DDSN made the decision to have Mims not only adjudicated to be incapacitated in 2001, but Butkus took away his mother's right to determine where Mims would live for four years. Mims 2045.

and 2047. The Richland County Probate Court Order was based on a psychological report where a DDSN psychologist found that Mims is "profoundly mentally retarded and has complex medical needs." Mims 2051. According to his school records, Mims has an age equivalent of a 20 month old child. Mims 2070. See also report of DDSN psychologist, Meredith Cleveland at Mims 2073. Defendants' argument that Mims had "all the rights of citizenship unless and until the person is adjudicated to be incompetent" at pages 22 and 23 ignores their own act of having him involuntarily committed. An emergency appointment was made on June 14, 2005 to authorize Mims' temporary guardian to secure his release from the Babcock Center. Mims 2184. Due to the delays caused by DDSN and the Babcock Center (see "Objections" at Mims 2188), Mrs. Mims was not appointed as Mims' full guardian until December 19, 2005. Mims 2195.

Because of the five year extension of time resulting from the tolling statute, all acts complained of in this action are covered within the statute of limitations. The disabled person is the true owner of the action and the appointment of a guardian does not eliminate the extension after one year. *Pardy v. U.S.*, 548 F.Supp. 682 (S.C. Ill. 1982)

L. Appointment of a Guardian in 2005 does not affect the tolling statute.

Defendants cite no South Carolina authority for its argument that appointment of a guardian terminates the tolling period provided for in South Carolina Code of Laws 15-3-40. Their reliance on *Stephens v. Draffin* is misplaced. 327 S.C. 1, 5, 488 S.C.2d 307, 309 (1997). In that case, a patient and his wife, who were neither incompetent sued the husband's doctor for negligence. Nothing in that case discusses the tolling of the statute of limitations required by

South Carolina Code of Laws Section 15-3-40 and neither of the plaintiffs were mentally incompetent. Under DDSN's theory, the agency could Petition the probate court for the appointment of someone who would not bring an action against DDSN or the Babcock Center and simply ride out the statute of limitations, thereby depriving the disabled person, who had no capacity to object to the appointment, of his rights under the tolling statute. While a guardian may bring an action in the courts on behalf of the ward, pursuant to Rule 17(c) of the South Carolina Rules of Civil Procedure, a guardian is charged by the court only to protect his person. South Carolina Code of Laws 62-5-304 authorizes the probate court to appoint a guardian where "the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person." Only a conservator has a duty to protect the financial interests of an incapacitated person, but nothing in South Carolina law obliges a conservator to do so or suggests that the tolling statute would be shortened by such appointment. South Carolina Code of Laws 62-5-424. No conservator has ever been appointed for Mims.

In *Lombard v. Eunice Kennedy Shriver Center for Mental Retardation*, the court held that the appointment of a guardian does not remove one's disability, thus the fact that the plaintiff's guardian could have brought the suit earlier did not alter the tolling effect. 556 F. Supp 677 (D. Mass. 1983). Likewise, in *Paavola v. Saint Joseph Hosp. Corp.*, the court held that the state statutory saving provision applicable to plaintiffs who have a mental disability are not removed by the appointment of a guardian. 119 Mich. App. 10, 325 N.W.2d 609 (1982). The court considered defendants' arguments in light of the significant public policy of protecting and

preserving the substantive rights of mentally incompetent persons and the absence of evidence of legislative intent to suggest that the exemption from the running of the statute of limitations is to end upon the appointment of a guardian. *Id.* See also *Professional Rehabilitation Associates v. State Farm Mut. Auto. Ins. Co.*, 228 Mich. App. 167, 577 N.W.2d 909 (1998). In *Desert State Life Management Services v. Association of Retarded Citizens*, the Supreme Court confirmed that the tolling statutes preserve the ability of the incapacitated person to bring claims on their own behalf until the disability is removed and that the appointment of a guardian did not have the effect of starting the running of the period of limitation tolled by the virtue of the disability of mental incapacity. 939 F. Supp. 835 (D.N.M. 1996).

In *Harrison v. Bevilacqua*, the South Carolina Supreme Court opined that "an insane plaintiff would apparently have seven years from discovery to bring a negligence action under the Tort Claims Act." See §§ 15-78-110, 15-3-40; see also *Fricks v. Lewis*, 26 S.C. 237, 1 S.E. 884 (1887). Defendant DDSN is liable for wrongful acts falling within seven years of the filing of the original complaint and the remaining Defendants are liable for wrongful acts falling within eight years of the filing of the original complaint.

M. Plaintiff has alleged unjust enrichment and defendants material issues of fact exist for this claim to be presented to the jury.

A claim for unjust enrichment requires the showing that the plaintiff has "conferred" a benefit, not a showing that the plaintiff has paid money to the defendant. The records plaintiff has presented document that these defendants were "conferred" benefits through the payment of

Medicaid funds that had been paid on behalf of the plaintiff and that they failed to provide the services that they were paid to provide. Defendants have failed to prove that there is no material fact to support plaintiff's claim for unjust enrichment. A review of the audits plaintiff has provided documents that it would be inequitable for these defendants to retain funds for services realized. In the event of a recovery under this claim, DHHS certainly could argue that it is entitled to recoupment, but that is not a question that should be answered at this junction.

Medicaid is an insurance program through which the Defendants have been paid. When a plaintiff's medical costs are paid by a private insurance company, a Defendant who commits a wrongful act cannot avoid a claim for unjust enrichment because the payment source was a third party. The issue of recoupment would be between Mims and DHHS, but Defendants are no less liable for unjustly obtaining funds for services, particularly one-on-one supervision, billed but not provided to Mims.

V. Plaintiff is entitled to partial summary judgment.

A. Plaintiff has provided expert evidence in support of his claims for negligence.

Defendants' *res ipsa loquitur* argument is without merit. In *Merchant v. Columbia Coca-Cola Bottling Co.*, cited by Defendants, the South Carolina Supreme Court held that there was sufficient evidence to submit the claims to the jury. 214 S.C. 206, 51 S.E. 2d 749 (1949). In this case, Plaintiff has provided professional and expert opinions in the form of audits and investigations which have been conducted by state and federal authorities that support his claims that Defendants violated their duty of care to Mims. In addition, Mims provided a sworn affidavit from an RN with twenty-two years of experience in critical care, trauma and home-care

nursing and experience reviewing medical records to determine whether appropriate services are being provided. She stated that, based on her review of Mims medical records, the decision that one-on-one supervision was medically necessary to protect his health and welfare was most appropriate. According to this nurse, due to his inability to defend himself, it would be contraindicated and dangerous to place him in a setting with persons who are physically or sexually aggressive. According to this RN, the likelihood that Mims would be injured was foreseeable in the ICF/MR facilities where he was placed by DDSN and the Babcock Center and it does not appear, from the records she reviewed, that appropriate actions were taken to protect Mims from harm. Her affidavit states that Immediate Jeopardy is a serious finding and it was the duty of the Babcock Center and SCDDSN to move him to a safe facility once they were on notice that federal standards were not met. This nurse also affirmed that "It is well known in the disability community that DDSN officials have established a pattern and practice of retaliating against family members who expose abuse, neglect or exploitation in DDSN programs and there is a pervasive fear among families that their services will be cut or other retaliatory action will be taken.

The South Carolina Supreme Court established criteria for bringing a negligent supervision claim against these two Defendants and nowhere in *Madison v. Babcock Center* did the Court indicate the necessity of having particular evidence presented before trial. *Supra*. In any event, Plaintiff in this case has provided more than sufficient professional affidavits to meet any minimum standard.

B. Defendants are liable for negligent supervision

In *Madison v. Babcock Center*, the South Carolina Supreme Court held that Babcock Center and DDSN both have a common law duty of care to protect its residents from harm which may be litigated in an action for negligence. 638 S.E.2d 650 (S.C. 2006). In that case, the Court held that a resident of the Babcock Center may succeed in a negligence action against these same defendants, i.e. the Babcock Center and DDSN, by showing that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages. *Id.* Plaintiff has pled these elements and has provided this court with extensive credible evidence to support his claims for negligence in this case.

Madison, the plaintiff in that case, alleged causes of action for negligence, gross negligence, and willful indifference against Respondents. In the complaint, Madison alleged:

...among other things, that both Babcock Center and Department owed a duty of care to Appellant, which they breached by *failing to exercise sufficient control and supervision over Appellant and other Babcock Center residents*. Appellant alleges both entities *failed to properly supervise facility staff, both failed to heed the previous warnings of Appellant's mother about inappropriate sexual contacts between Appellant and current or former male residents of Babcock Center, and both ignored the requests of her parents that she be released from Babcock Center.*

Id. 132 and 133. As in Mims' case, the warnings of risk of harm made by Madison's mother fell on deaf ears at DDSN and the Babcock Center. In that case, Madison, a person with cognitive disabilities, alleged that she contracted a sexually transmitted disease as a result of the Babcock Center's failure to provide adequate supervision. *Id.* The South Carolina Supreme Court held that Babcock Center had "a duty to exercise reasonable care in supervising and providing care

and treatment to clients in its custody.” *Id.* at 656. The Supreme Court also recognized that under South Carolina common law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger. *Id.* at 656. But, the Court recognized five exceptions to this rule: (1) where the defendant has a special relationship to the victim; (2) where the defendant has a special relationship to the injurer; (3) where the defendant voluntarily undertakes a duty; (4) where the defendant negligently or intentionally creates the risk; and (5) where a statute imposes a duty on the defendant. *Id. Citing Faile v. S.C. Dept. of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002) (listing cases and authority supporting each proposition). All of these elements are present in Mims’ case.

In the *Madison* opinion, the Supreme Court recognized that “An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance. *Id.* 657. *Jensen v. Anderson County Dept. of Soc. Servs.*, 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991); *Miller v. City of Camden*, 317 S.C. 28, 33-34, 451 S.E.2d 401, 404 (Ct.App.1994). The Supreme Court held that:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other’s reliance upon the undertaking.” Restatement (Second) of Torts § 323 (1965). In addition, “[o]ne who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor’s charge, or (b) the actor’s discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him.” Restatement (Second) of Torts § 324 (1965).

Id. 136 to 137. The Supreme Court held that Madison fell within the first, third, fourth, and fifth exceptions specified in *Faille*, as well as within the circumstances outlined in Restatement (Second) of Torts § 323 -324 . Id. at 657.

As with Mims, the Babcock Center had a special relationship with Appellant because Madison was a client with special needs and disabilities and was admitted for care and treatment at the center. Id. DDSN has a special relationship with the Babcock Center. Id. The Defendants voluntarily undertook the duty of supervising and caring for Mims and the Defendants owed a duty to protect Mims from harm. Also as in this case: "Babcock Center allegedly acted negligently in creating the risk of injury to Appellant by not properly supervising her and allowing improper sexual contacts between Appellant and men." Also as with Madison, "the center had a statutory duty to exercise reasonable care in supervising Appellant" and no issue of material fact contradicts Mims claim that Defendants have violated those duties. *See e.g.* S.C.Code Ann. §§ 44-20-30(2), (11), and (16) (2002) (defining client, mental retardation, and residential programs); S.C.Code Ann. §§ 44-20-710 to -1000 (2002) (addressing licensing of facilities and programs for mentally disabled persons); S.C.Code Ann. §§ 44-26-10 to -220 (2002) (rights of mental retardation clients). There defendants also had duties to Mims imposed by federal law in the Medicaid Act and its regulations.

The following statement applies equally to Mims as with Madison: "In short, Babcock Center undertook a duty, for consideration, to render services to Appellant which the center should have recognized as necessary for the protection of Appellant. Thus, Babcock Center had a duty to control Appellant's conduct to the extent necessary to prevent her from harming herself or to prevent others from harming her while staying at the center." Id. Plaintiff has documented an expansive history of audits and investigations which prove that these Defendants are guilty of

negligent supervision of the Clusters and Kensington facilities and the Babcock Center facilities in general. In addition, Plaintiff has documented a long history of injuries to Mims which prove that the Babcock Center and documentation that DDSN has failed to provide proper supervision, they failed to train staff and failed to properly investigate injuries.

In *Madison* the Supreme Court held that:

... under the common law, a private 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. *See Lee v. Dept. of Health and Rehabilitative Servs.*, 698 So.2d 1194, 1199 (Fla.1997) (mentally retarded woman who became pregnant while in custody of state agency stated cause of action for negligence against agency employees who allegedly failed to follow agency's rules and carry out their assigned duties in supervising patients); *Buller v. Circulus, Inc.*, 557 S.W.2d 469, 475 (Mo.App.1977) (mentally retarded minor plaintiff who was resident and student at defendant's licensed institution stated cause of action for negligence against defendant for failing to supervise employees who allegedly physically and mentally abused plaintiff as part of a behavior modification program); Restatement (Second) of Torts §§ 323 -324 ; *cf. Rogers v. S.C. Dept. of Parole & Comm. Corrections*, 320 S.C. 253, 464 S.E.2d 330 (1995) (holding that common law duty to warn arises when a person being released from custody has made a specific threat of harm directed at a specific individual); *Youngberg v. Romeo*, 457 U.S. 307, 319, 102 S.Ct. 2452, 2460, 73 L.Ed.2d 28 (1982) (under substantive component of Fourteenth Amendment's Due Process Clause, state must provide involuntarily committed mental patients with services necessary to ensure their reasonable safety from themselves and others, as well as freedom from undue restraint)...

Id. at 138 to 139.

As the Supreme Court recognized in *Madison*, the "care, treatment, and rights of mentally retarded or disabled persons, are governed by a comprehensive scheme of statutes and regulations." See e.g. S.C.Code Ann. §§ 44-20-10 to -1170 (2002 & Supp.2005) (S.C. Mental Retardation, Related Disabilities, Head Injuries, and Spinal Cord Injuries Act); S.C.Code Ann. §§ 44-21-10 to -80 (2002) (Department of Disabilities and Special Needs Family Support Services); S.C.Code Ann. §§ 44-23-10 to -1150 (2002 & Supp.2005) (provisions applicable to

both mentally ill and mentally retarded persons); S.C.Code Ann. §§ 44-26-10 to -220 (2002) (rights of mental retardation clients); and 26 S.C.Code Ann. Regs. 88-105 to 88-920 (Supp.2005) (regulations promulgated by Department of Disabilities and Special Needs). The Department's operations and responsibilities also are affected by its own internal standards, policies, and guidelines it has promulgated for particular programs as a result of statutes or regulations. *Id.* In addition, these programs must comply with all applicable federal laws contained in the Medicaid Act. *Doe v. Kidd I*, 501 F.3d 348 (4th Cir. 2007).

As in this case, DDSN argued in *Madison* that it was not liable for the torts committed by its independent contractor, the Babcock Center. *Id.* at 660. S.C.Code Ann. § 15-78-60(20) (2005) provides that a governmental entity is not liable for an "act or omission of a person other than an employee including but not limited to the criminal actions of third persons." But the Supreme Court disagreed "... because Department owes a common law duty of care directly to Appellant." *Id.* The fact that an independent contractor provided services to Madison, or even the fact a third party may have committed a criminal act in harming Appellant, does not affect the existence of Department's duty. *Id.* Where DDSN is "negligent in its duty, which may include 1) adequately supervising the provision of services by another entity or 2) its own conduct in relation to prior notice of inappropriate care of its clients by such entity, Department may be held liable for breach of its common law duty provided such negligence creates a foreseeable risk of and causes injury." *Id.* at 660. Mims has met his burden of proving that these Defendants acted negligently in meeting his burden of proof. Defendant has failed to rebut the many audits and investigations or to provide a reasonable explanation for multiple Mims' injuries. Mims is entitled to judgment.

as a matter of law on the issue of whether the Defendants have breached their duty to him..

In *Madison v. Babcock Center*, the South Carolina Supreme Court held that to establish a causal link, defendants' negligence "does not have to be the sole proximate cause of the plaintiff's injury; instead, the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury. 638 S.E.2d 650, 662, 371 S.C. 123 Citing *Hughes v. Children's Clinic, P.A.*, 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977) . Ordinarily, the question of proximate cause is one of fact for the jury, and it may be resolved either by direct or circumstantial evidence. The trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence. *Childers*, 248 S.C. at 324, 149 S.E.2d at 765; *McNair v. Rainsford*, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct.App.1998) . In this case, Mims argues that the only reasonable inference that can be drawn from the evidence is that the Court should grant his motion for summary judgment and deny defendants' motions for summary judgment. Id. The audits provided by Plaintiff document violation of many of these standards, as well as repeat violations subsequent to being cited and Immediate Jeopardy being declared. Defendants have clearly breached their duty to Mims.

The Supreme Court held in *Madison* that "Gross negligence is ordinarily a mixed question of law and fact." Faile, 350 S.C. at 332, 566 S.E.2d at 545 (citing *Clyburn v. Sumter County School Dist. # 17*, 317 S.C. 50, 451 S.E.2d 885 (1994)). But, in Mims' case, " the evidence supports but one reasonable inference," which is that the defendants acted negligently, carelessly, recklessly and that these actions were willful and wanton, causing injuries over a long period of time to Mims. Even the Chairman of the Babcock Center, Sue Slater, admitted that:

Houses were in terrible condition, not only at Clusters, but lots of houses were in terrible

condition, broken windows, holes in the floor, all those kinds of things.
Mims 1584. According to the Chairman of the Babcock Center, Clusters closed "Because we felt it was not a good place to give good care," despite DDSN having given Babcock Center half a million or more dollars to get the facility up to standard. Mims 1587. The Court takes notice of the condition of Babcock's facilities and the fact that even after Babcock Center's substantiated rate of abuse and neglect climbed from double to four times the statewide rate.

Plaintiff has demonstrated that Defendants' wrongful acts were the proximate cause of his injuries. Although Babcock Center employees and general counsel for DDSN misled the 2001 GAL into believing that abuse or neglect may be occurring in the home, there has been no evidence of that and the record does not contain a single "unexpained" injury since Mims left the Babcock Center. In *Madison v. Babcock Center*, the South Carolina Supreme Court held that to establish a causal link, the negligence "does not have to be the sole proximate cause of the plaintiff's injury. 638 S.E.2d 650, 662, 371 S.C. 123. The evidence of proximate cause presented by the Plaintiff warrants a finding of summary judgment in favor of the Plaintiff in this case. The only reasonable inference to be drawn from the evidence presented is that Defendants' wrongful acts are the proximate cause of his injuries. In *McNair v. Rainsford*, the South Carolina Court of Appeals held that:

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997); *Baugus v. Wessinger*, 303 S.C. 412, 401 S.E.2d 169 (1991). Even when there is no dispute as to [330 S.C. 342] evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Tupper*, supra. However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Trico Surveying, Inc. v. Godley Auction Co.*, 314 S.C. 542, 431 S.E.2d 565 (1993); *Rothrock*, supra. All

ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant. *True v. Monteith*, 327 S.C. 116, 489 S.E.2d 615 (1997); Tupper, *supra*.

330 S.C. 332, 342, 499 S.E.2d 488, 493 (Ct. App. 1998). There is no genuine issue of fact existing on which reasonable minds could differ on the issue of whether Defendants breached their duty to Mims and negligently supervised him. The facts are plain, palpable and indisputable that show that the Department of Disabilities, the Babcock Center, Judy Johnson, Stanley Butkus and Kathi Lacy breached their duties to Mims and that this breach caused Mims harm. The injuries include a sexual trauma with a 4 cm tear on his penis, being placed in a bed covered with ants resulting in ant bites all over his body, being beaten by one or more employees and other residents and a host of other "unexplained" injuries identified in Plaintiff's pleadings.

Mims motion for summary judgment for gross negligence is granted and the issue of the amount of actual and punitive damages to be paid to Mims shall be submitted to the jury. The Plaintiff is the prevailing party and is entitled to fees and costs as such.

VI. Conclusion

The Court denies Defendants motion for summary judgment and grants Plaintiff's motion for summary judgment. The Plaintiff is the prevailing party in this case and the amount to be awarded to Plaintiff shall be determined by a jury.

IT IS SO ORDERED!

Honorable Thomas G. Cooper
Circuit Court Judge

July __, 2013

**Babcock Center, Inc. v. United States, C/A 3:11-01721-CMC, 3:11-03155-CMC
(SCDC)**

Babcock Center, Inc., Plaintiff,

v.

**United States of America, acting by and through its agency, the Internal Revenue Service,
Defendant.**

Babcock Center, Inc., Plaintiff,

v.

**United States of America, acting by and through its agency, the Internal Revenue Service,
Defendant.**

C/A Nos. 3:11-01721-CMC, 3:11-03155-CMC

United States District Court, D. South Carolina, Columbia Division.

May 2, 2013

OPINION AND ORDER

CAMERON McGOWAN CURRIE, District Judge.

This matter is before the court on motion for summary judgment and partial motion to dismiss filed by Defendant, the United States of America, on November 30, 2012.^[1] Dkt. No. 43. Plaintiff Babcock Center, Inc. ("Babcock Center") filed a response on January 4, 2013 (Dkt. No. 54), and a corrected response on January 8, 2013 (Dkt. No. 57). Defendant replied on January 18, 2013. Dkt. No. 61. For reasons stated below, Defendant's motion for summary judgment is granted in part and denied in part, and Defendant's motion to dismiss is denied.

FACTS

The material facts are not in dispute. Babcock Center is a private, nonprofit organization, which serves people with mental retardation, autism, head and spinal cord injuries, and related lifelong disabilities. Dkt. No. 57 at 2. Babcock Center's mission is "to empower and support these mentally disabled or handicapped individuals to fulfill his or her full potential." *Id.* Babcock Center provides mentally disabled or handicapped individuals with room and board, and "the training and skills necessary for their personal success." *Id.* "[S]everal hundred disabled individuals rely on Babcock Center for essential services and fulfillment of their needs." Dkt. No. 57 at 2. Babcock Center is mostly funded by grants from the South Carolina Department of Disabilities and Special Needs ("SCDDSN").^[2] *Id.*

From 2004 to 2006, SCDDSN required that Babcock Center cut approximately 50% of its residential program, which resulted in the loss of 318 residential beds. Babcock Center lost certain residential properties, which were returned to SCDDSN, and the funding associated with the bed

reduction.^[3] *Id.* at 2. Babcock Center reduced staff to the extent allowed by state regulations. By early 2007, the reduction in size had been completed. However, the reduction in funding, as well as a change in the timing of funding from SCDDSN,^[4] caused significant cash flow issues in 2007 and 2008. *Id.* During that period, Babcock Center failed to deposit and pay payroll taxes for twenty-three pay periods.^[5] During those two years, Babcock Center deducted funds from employee paychecks but did not remit those funds to the IRS.^[6]

The Internal Revenue Service ("IRS") assessed Babcock Center penalties as mandated by 26 U.S.C. §§ 6651(a)(2) and 6656(a). Babcock Center eventually paid the payroll taxes as well as the penalties, with the exception of the tax quarter ending December 31, 2008. Babcock Center filed this refund suit seeking a refund of penalties paid or an abatement of penalties for tax periods ending March 31, 2007; June 30, 2007; September 30, 2007; December 31, 2007; June 30, 2008; September 30, 2008; and December 31, 2008.^[7] Babcock Center does not dispute that it failed to (1) make timely deposits toward its liabilities for federal payroll taxes and (2) timely pay those liabilities. Rather, Babcock Center asserts a statutory defense, arguing that Babcock Center is entitled to a refund of penalties because its failures were "due to reasonable cause and not due to willful neglect." 26 U.S.C. §§ 6651 (a)(2) and 6656 (a). Babcock Center also seeks preliminary and permanent injunctive relief against IRS collection efforts. In the event all penalties are not refunded, Babcock Center seeks an order requiring the IRS to reallocate Babcock Center's tax payments in a way that will reduce penalties owed. The United States, acting on behalf of the IRS, counterclaimed to reduce to judgment the unpaid balance of federal taxes, penalties, and interest for the tax period ending December 31, 2008.

The United States moved for summary judgment arguing Babcock Center is unable to prove that (1) it qualifies for the reasonable cause exception to the payment of penalties and (2) the IRS inappropriately allocated Babcock Center's tax payments to inflate the penalties owed. The United States also argues that it is entitled to summary judgment on its counterclaim for taxes and penalties for the tax quarter ending December 31, 2008. Babcock Center responds that genuine disputes of material fact exist, which preclude summary judgment on all grounds.

The United States moved to dismiss Babcock Center's claims for preliminary and permanent injunctive relief against IRS collection efforts, arguing that the Anti-Injunction Act prohibits such relief, particularly for tax periods not involved in this action. The United States also moved to dismiss Babcock Center's claim for refund for the tax quarter ending December 31, 2007, arguing that Babcock Center did not first file a claim for refund with the IRS for this period as is required before bringing suit in district court. Babcock Center responds that an exception to the Anti-Injunction Act applies and that, although it did not file a formal claim for refund for the fourth quarter of 2007, Babcock Center submitted an informal claim, which is sufficient to put the IRS on notice. The United States did not address Babcock Center's arguments in opposition to dismissal in its reply.

STANDARDS

Summary Judgment. Summary judgment should be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). It is well established that summary judgment should be granted "only when it is clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts." *Pulliam Inv. Co. v. Cameo Properties*, 810 F.2d 1282, 1286 (4th Cir. 1987).

The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the court must view the evidence before it and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Rule 56(c)(1) provides as follows:

(1) A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations..., admissions, interrogatory answers or other materials; or

(b) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1).

A party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). Therefore, "[m]ere unsupported speculation... is not enough to defeat a summary judgment motion." *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 62 (4th Cir. 1995).

The non-moving party cannot create a genuine issue of material fact by presenting his or her own conflicting versions of events. *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984) ("A genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct."). This rule applies equally to the testimony of non-party witnesses presented by the non-moving party. See *Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970, 974-77 (4th Cir. 1990) (affirming trial court's rejection of expert's affidavit testimony which contradicted his sworn deposition testimony).

Motion to Dismiss. A motion under Federal Rule of Civil Procedure 12(b)(6) should be granted only if, after accepting all well-pleaded allegations in the complaint as true, it appears certain that the plaintiff cannot prove any set of facts in support of its claims that entitles it to relief. See *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). Although the court must take the facts in the light most favorable to the plaintiff, it "need not accept the legal conclusions [the plaintiff would draw] from the facts." *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008) (quoting *Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000)). The court may also disregard any "unwarranted inferences, unreasonable conclusions, or arguments." *Id.*

DISCUSSION

Motion for Summary Judgment

I. Refund of Penalties.

Penalties shall be imposed if a taxpayer fails to deposit and pay taxes when due, "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." 26 U.S.C. §§ 6651(a)(2)

and 6656(a).^[9] To succeed in an action for refund of penalties, Babcock Center must prove by a preponderance of the evidence that its failures to deposit and pay payroll taxes were caused by "reasonable cause and not due to willful neglect." Babcock Center must prove both (1) the absence of willful neglect and (2) the existence of reasonable cause. *United States v. Boyle*, 469 U.S. 241, 245 (1985). The United States Supreme Court has described the taxpayer's burden in proving reasonable cause as a "heavy burden." *United States v. Boyle*, 469 U.S. 241, 245 (1985). Further, when a taxpayer fails to deposit trust fund taxes, the taxpayer "must provide strong justification to avoid penalties." *Diamond Plating Co. v. United States*, 390 F.3d 1035, 1039 (7th Cir. 2004) ("We also note that some of the delinquent taxes were trust fund taxes. Rather than remitting these taxes to the government on a quarterly basis after withholding them from employee wages, Diamond Plating used the funds for operating expenses."). "[I]t will be the rare case where the government is made the unwilling partner in a floundering business, ... without the employer incurring the duty to pay a penalty for having made such a choice." *Q.E.D., Inc. v. United States*, 55 Fed.Cl. 140, 146 (Fed. Cl. 2003) (quoting *Brewery*, 33 F.3d at 593).

A. Absence of Willful Neglect. The United States Supreme Court has defined willful neglect as "a conscious, intentional failure or reckless indifference." *Boyle*, 469 U.S. at 245. In other words, Babcock Center must prove that its failures were neither the result of "carelessness, reckless indifference, nor intentional failure." *Id.* at 246 n. 4.

There is evidence that, with the exception of the tax quarter ending December 31, 2008, Babcock Center made a conscious decision not to deposit and pay certain payroll taxes in 2007 and 2008 based on financial difficulties, not as a result of carelessness or reckless indifference. Former CFO Linda Tyler was responsible for seeing that payroll tax deposits were made when Babcock Center issued payroll checks, which was bimonthly. Ms. Tyler testified that she would decide each pay period whether Babcock Center was able to deposit its payroll taxes.^[9] Tyler Dep. 31-33. The court, therefore, assumes for purposes of this motion that Babcock Center's failures to deposit and pay payroll taxes in 2007 and 2008 were not due to willful neglect, except in the last quarter of 2008 as described below.

The United States presents evidence that Babcock Center's failures to deposit and pay payroll taxes in the last quarter of 2008 were due to carelessness or reckless indifference. The United States identifies testimony explaining that the missed payments in the last quarter of 2008 were caused by confusion between management as to who was responsible for depositing and paying the payroll taxes. See Tyler Dep. 43:21-25 ("So in finance we thought the taxes [in the last tax quarter of 2008] were being paid when some of them were not, and I found out that they were not being paid right before I left."); Dkt. No. 43-2 at 246-47 (Tucker Dep. 27:23-28:2) ("... there was like a disconnect during the time. I think at that point there was a time when L[inda] Tyler assumed that I was handling the taxes, which that's where I think was the misconnect because I was under HR at that time and she was the finance director."). Babcock Center has failed to identify a genuine dispute of material fact as to the reason for missed deposits and payments in the last quarter of 2008.^[10] For this reason, the court finds that Babcock Center's failures to deposit and pay payroll taxes in the last quarter of 2008 were due to willful neglect. Babcock Center is, therefore, not entitled to a refund or abatement of penalties for the tax quarter ending December 31, 2008. The United States' motion for summary judgment is granted for the tax quarter ending December 31, 2008.

B. Reasonable Cause.¹¹¹ In addition to showing that Babcock Center's failures to deposit and pay payroll taxes were not due to willful neglect, Babcock Center also must show reasonable cause to obtain a refund of penalties. To demonstrate reasonable cause, Babcock Center must make "a satisfactory showing that [it] exercised ordinary business care and prudence in providing for payment of [its] tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship... if [it] paid on the due date." 26 C.F.R. 301.6651-1(c)(1). See also *Staff IT, Inc. v. United States*, 482 F.3d 792, 799 (5th Cir. 2007). The Treasury Regulations further explain "reasonable cause."

A failure to pay will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship (as described in § 1.6161-1(b) of this chapter) if he paid on the due date. In determining whether the taxpayer was unable to pay the tax in spite of the exercise of ordinary business care and prudence in providing for payment of his tax liability, consideration will be given to all the facts and circumstances of the taxpayer's financial situation, including the amount and nature of the taxpayer's expenditures in light of the income (or other amounts) he could, at the time of such expenditures, reasonably expect to receive prior to the date prescribed for the payment of the tax. Thus, for example, a taxpayer who incurs lavish or extravagant living expenses in an amount such that the remainder of his assets and anticipated income will be insufficient to pay his tax, has not exercised ordinary business care and prudence in providing for the payment of his tax liability. Further, a taxpayer who invests funds in speculative or illiquid assets has not exercised ordinary business care and prudence in providing for the payment of his tax liability unless, at the time of the investment, the remainder of the taxpayer's assets and estimated income will be sufficient to pay his tax or it can be reasonably foreseen that the speculative or illiquid investment made by the taxpayer can be utilized (by sale or as security for a loan) to realize sufficient funds to satisfy the tax liability. A taxpayer will be considered to have exercised ordinary business care and prudence if he made reasonable efforts to conserve sufficient assets in marketable form to satisfy his tax liability and nevertheless was unable to pay all or a portion of the tax when it became due.

Treas. Reg. § 301.6651-1(c)(1). The regulations also explain that consideration should be given to the nature of the tax:

In determining if the taxpayer exercised ordinary business care and prudence in providing for the payment of his tax liability, consideration will be given to the nature of the tax which the taxpayer has failed to pay. Thus, for example, facts and circumstances which, because of the taxpayer's efforts to conserve assets in marketable form, may constitute reasonable cause for nonpayment of income taxes may not constitute reasonable cause for failure to pay over taxes described in section 7501[trust fund taxes] that are collected or withheld from any other person.

Treas. Reg. § 301.6651-1(c)(2).

The Treasury Regulations also define "undue hardship:"

The term "undue hardship" means more than an inconvenience to the taxpayer. It must appear that substantial financial loss, for example, loss due to the sale of property at a sacrifice price, will result to the taxpayer for making payment on the due date of the amount with respect to which the extension is desired. If a market exists, the sale of property at the current market price is not ordinarily considered as resulting in an undue hardship.

Treas. Reg. § 1.6161-1(b). "Evidence of financial trouble, without more, is not enough" to establish undue hardship. *Synergy Staffing, Inc. v. United States*, 323 F.3d 1157, 1160 (9th Cir. 2003).^[12] A taxpayer seeking a refund of penalties must "come forward with evidence of what funds it did have on hand each time a payroll tax was due" and "produce evidence of how it spent those funds in lieu of paying its taxes." *Id.* Several courts have noted that "financial difficulties as substantial as the potential ruin of a corporation" may constitute reasonable cause." *St. Paul Cathedral School v. United States*, No. CV-07-3021, 2008 WL 5121928, *6 (E.D. Wash. Dec. 5, 2008) (quoting *Van Camp*, 251 F.3d at 868).

The United States argues that, despite financial difficulties, Babcock Center is unable to demonstrate reasonable cause.^[13] First, the United States maintains that Babcock Center's reduction in funding and in size occurred between 2004 and 2006, but the failures to deposit and pay payroll taxes occurred in 2007 and 2008. Dkt. No. 46 at 3.^[14] Second, the United States contends that Babcock Center's payroll procedures resulted in late deposits of payroll taxes.^[15] Third, the United States argues that Babcock Center management did not prioritize the payment of payroll taxes. The United States contends that Babcock Center consistently chose to pay other creditors before the IRS. The United States maintains that the CFO during 2007 and 2008 testified that when there was choice between paying the payroll taxes or paying other bills, Babcock Center chose to pay other bills.^[16] See Tyler Dep. 33:14-16 ("where it was either pay the bills or pay the taxes[,] we paid the bills."). For example, the United States highlights a particular creditor, AT&T, and argues that Babcock Center made arrangements to pay a balance of \$65,000 over a three-month period beginning in April 2008. Based on these reasons, the United States argues that Babcock Center has not met its "heavy burden" of proving that its failures to deposit and pay payroll taxes were due to reasonable cause.

Because of the 50% reduction of funding from SCDDSN in 2004-2006, Babcock Center contends it suffered cash flow problems in 2007 and 2008 and was unable to deposit and pay its payroll taxes when due. Babcock Center argues that it acted with ordinary business care and prudence, but was still unable to meet its tax obligations. Babcock Center maintains that it exhausted available credit. See Tyler Dep. 81: 6-14 ("I think there was a line of credit, if I remember correctly. I think it might have been maxed."); Norman Dep. 38:3-6 ("But the problem was the Babcock Center was maxed out on its lines of credit, were [sic] getting declined by the bank or several banks when they applied for credit.").^[17] Babcock Center also maintains that it sold off properties during the relevant time period to raise operating funds, including to pay its payroll taxes.^[18] Babcock Center contends that it was limited in its ability to reduce employees as state regulations mandate a certain employee-to-client ratio. It also contends that it did not spend extravagantly or invest in speculative assets. Although Babcock Center acknowledges that it paid some employee bonuses during 2007 and 2008, it maintains that they were *de minimis* (\$200 or less) performance bonuses for lower level employees. Babcock Center contends that it paid the bills necessary to provide adequate care for its disabled clients, such as food, housing, and staff. Babcock Center argues

that telephone service is essential to providing for the health and safety of its disabled clients and it was, therefore, necessary to pay AT&T before the IRS.^[19]

Babcock Center relies on *East Wind Indus., Inc. v. United States*, 196 F.3d 499 (3d Cir. 1999), one of the few cases in which reasonable cause has been found. Dkt. No. 57 at 17-19. In *East Wind*, the taxpayer manufactured military clothing and goods for the United States Department of Defense ("DOD"). 196 F.3d at 501. A variety of other federal agencies administered the contracts for DOD ("Defense Agencies"). *Id.* After 15 years of timely paying payroll taxes, *East Wind*^[20] failed to pay its payroll taxes for six years, 1982-1988. *Id.* *East Wind* filed a refund suit, arguing that reasonable cause existed for the late payment and deposits of payroll taxes. *Id.* The basis for *East Wind*'s argument was that it was a forced participant in and later victim of a bribery scheme by employees of the Defense Agencies. *Id.* at 501-02.

East Wind explained that employees of the Defense Agencies began soliciting illegal bribes in the late 1970's, which eventually became monetary bribes, amounting to more than 50% of *East Wind*'s business. *Id.* In the beginning, *East Wind* participated in the bribes but eventually refused to pay the bribes, at which point *East Wind* did not receive new contracts from the Defense Agencies.^[21] *Id.* at 502. When it refused to pay the bribes, the Defense Agencies did not pay *East Wind* monies owed, payments were intentionally delayed, and inventory was wrongfully rejected. *Id.* *East Wind*'s Vice President, Mario D'Antonio, was eventually contacted by the Federal Bureau of Investigation to cooperate in an investigation of the corrupt employees of the Defense Agencies. *Id.* D'Antonio went undercover for two years, which included withdrawing *East Wind* from the competitive bidding process. *Id.* at 502-03. D'Antonio pled guilty to violating the False Claims Act and paid \$2000 in fines, avoiding imprisonment. *Id.* at 503. *East Wind* received \$2.1 million from the Defense Agencies as part of a global settlement agreement. *Id.* From this settlement, *East Wind* paid the outstanding payroll taxes and penalties owed to the IRS. *Id.* As a result of losing the contracts, late payment for contracts completed, and the payment of bribes, *East Wind* was unable to pay its payroll taxes when due. *Id.*

The Third Circuit found that, upon consideration of the facts and circumstances, *East Wind* established that payment of the taxes when due would have resulted in undue hardship because there was insufficient cash flow to pay payroll taxes, the reduced work force, and essential creditors. *Id.* at 509. The court noted that *East Wind* was "at the mercy of the Defense Agencies as to whether [it] would have sufficient cash flow to operate the business." *Id.* at 509-510. Had the Defense Agencies paid *East Wind* what was owed under the contracts, *East Wind* would have had sufficient funds to pay its payroll taxes and other debts when due. *Id.* at 511. The Third Circuit also found that *East Wind* exercised ordinary business care and prudence for the following reasons: (1) all income received by *East Wind* on government contracts was used to pay either the IRS or employee wages; (2) *East Wind* "did not pay suppliers, rent, health and welfare premiums, employees' union dues, and workers' compensation insurance premiums;" (3) utility companies were not paid until companies threatened to shut off service; (4) *East Wind* did not pay any of its suppliers from 1982-96, which was over \$7 million owed; (5) D'Antonio secured a mortgage on his personal residence and sold personal assets to obtain cash to pay creditors; (6) *East Wind*'s bookkeeper provided a \$65, 000 loan of her personal funds; and (7) D'Antonio sought legal and financial advice as to the bribery scheme and cash flow issues. *Id.* at 510. Accordingly, the court found that *East Wind* was entitled to a refund of penalties. *Id.* at 512-13.

Babcock Center argues that like *East Wind*, it too was dependent on government funding for adequate cash flow, and that the reduction in government funding caused the cash flow issues.^[22] Babcock Center argues, however, that unlike private companies, it was unable to reduce its operations to alleviate its cash flow problem. Babcock Center cites its mission of providing care for disabled persons. It contends that it could not reduce the number of employees because of a state-mandated employee-to-client ratio^[23] and could not delay the payment of creditors because they were providing essential and necessary services to its disabled clients.

There is some evidence that Babcock Center did not pay creditors on time, creditors threatened to stop providing services or goods to Babcock Center, and Babcock Center negotiated payment plans with creditors.^[24] See Norman Dep. 46:4-24. There is also some evidence that the creditors that were paid were essential and necessary to survival of Babcock Center. See Tyler Dep. 33:17-34:2). The United States contends that Babcock Center preferred other creditors above the IRS. Babcock Center acknowledges that it preferred other creditors, but argues that it had to pay these creditors to provide for its disabled clients. The United States highlights only one creditor, AT&T, as being a non-essential creditor. Babcock Center offers a reasonable explanation as to why telephone service was essential and necessary. In light of testimony stating that Babcock Center only paid essential creditors, and the absence of other challenges to Babcock Center's payment of creditors, the United States has failed to show the absence of a genuine dispute of material fact. Whether Babcock Center prioritized other creditors above the IRS and whether the creditors that were paid were essential and necessary to Babcock Center's survival are factual disputes proper for jury consideration.

Based on the evidence submitted, Babcock Center may have difficulty proving which creditors were paid, which creditors were not, and why the creditors that were paid were essential and necessary.^[25] However, viewing the evidence in light most favorable to Babcock Center, the court denies summary judgment as to Babcock Center's claims for refunds for penalties paid for the tax quarters ending March 31, 2007; June 30, 2007; September 30, 2007; December 31, 2007; June 30, 2008; and September 30, 2008.

II. Reduction of Penalties. The United States moves for summary judgment on Babcock Center's claim that the IRS misapplied payments for tax liabilities for 2007, arguing that Babcock Center has produced no evidence to support that claim.^[26] On March 24, 2009, Babcock Center mailed three letters to the IRS, along with three checks. The first letter explained that the enclosed check in the amount of \$86.17 was for interest for the quarter ending March 31, 2007. The second letter explained that the enclosed check in the amount of \$69,489.20 was for taxes owed for the quarter ending June 30, 2007. The letter stated that this "should be directly applied to the amount due for unpaid taxes." The third letter explained that the enclosed check in the amount of \$611,981.47 was for taxes owed for the quarter ending September 30, 2007. Again, the letter stated that this "should be directly applied to the amount due for unpaid taxes." The IRS applied the respective payments to the tax quarters indicated in the letter. An overpayment of \$17,462.03 resulted for the tax quarter ending June 30, 2007, and the IRS applied that overpayment to the tax period ending September 30, 2007.^[27] The United States argues that, because the letters did not contain instructions on how to apply the overpayments, the IRS had the discretion to apply the payments "as it wishe[d]." Dkt. No. 43-1 at 25.

In response, Babcock Center merely states that the IRS failed to apply the payments as directed by "written instructions," and "did not apply the payments to tax alone as admitted in its brief." Dkt. No. 57 at 28. Without citing any evidence, Babcock Center argues that "[t]here is a genuine issue of fact as to the amounts allegedly due from Babcock Center for 2007 and 2008." *Id.* Babcock Center has not, however, identified a genuine issue of material fact.⁽²⁶⁾ Even assuming that Babcock Center's March 24, 2009, letters reflect an intent to pay only outstanding tax liabilities and not penalties and/or interest, Babcock Center has failed to demonstrate how the payments were misapplied. In other words, Babcock Center has failed to establish what portion of the payments was applied to tax liability, penalties, and interest. The court, therefore, grants the United States' motion for summary judgment on Babcock Center's claim for reallocation of payments to the IRS.

III. The United States' Counterclaim. The United States brought, pursuant to 28 U.S.C. §§ 1340, 1345 and 26 U.S.C. § 7402, a counterclaim to reduce to judgment the amount of the remaining taxes, penalties, and interest due and owing by Babcock Center for the tax quarter ending December 31, 2008. The United States maintains that Babcock Center owes \$134,752.12 as of November 12, 2012. Babcock Center's entire response appears below:

Because there exists genuine issues of material facts regarding the failure to timely pay or deposit due to reasonable cause and not due to willful neglect, and because furthermore there remain issues of material fact regarding amounts allegedly owing by Babcock Center for the periods ending in 2007 and 2008, the IRS is not entitled to judgment as a matter of law.

Dkt. No. 57 at 28. Because Babcock Center cannot prove the absence of willful neglect for the tax quarter ending December 31, 2008, the court granted summary judgment in favor of the United States for this tax period. In the absence of any evidence that the amounts assessed by the IRS for taxes, penalties, and interest are incorrect, the United States' motion for summary judgment as to its counterclaim is granted. The United States is, therefore, entitled to a judgment in its favor in the amount of \$134,752.12.

Motion to Dismiss

I. Injunctive Relief.

The United States moved to dismiss Babcock Center's claims for preliminary and permanent injunctive relief against IRS collection efforts, arguing that the Anti-Injunction Act prohibits such relief, particularly for tax periods not involved in this action. The Anti-Injunction Act provides, "[e]xcept as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). Babcock Center responds that an exception to the Anti-Injunction Act applies, citing 26 U.S.C. § 6330(e)(1), which provides:

[T]he levy actions which are the subject of the requested hearing and the running of any period of limitations under section 6502 (relating to collection after assessment), section 6531 (relating to criminal prosecutions), or section 6532 (relating to other suits) shall be suspended for the period during which such hearing, and appeals therein, are pending....

Notwithstanding the provisions of section 7421(a), the beginning of a levy or proceeding during the time the suspension under this paragraph is in force may be enjoined by a proceeding in the proper court, including the Tax Court.

The United States did not respond to Babcock Center's argument in reply. Based on the failure to address this argument in reply, the court denies the United States' motion to dismiss Babcock Center's claims for injunctive relief.^[29]

II. Tax Quarter Ending December 31, 2007.

The United States also moved to dismiss Babcock Center's claim for refund for the tax quarter ending December 31, 2007, arguing that Babcock Center did not first file a claim for refund with the IRS for this period as is required before bringing suit in district court. Dkt. No. 43-1 at 28 (citing 26 U.S.C. §7422(a)). On April 4, 2010, Babcock Center sent a claim for refund and request for abatement for the tax period January 31, 2007 through September 30, 2007. Dkt. No. 44 at 6 (Form 843). All accompanying documents for the claim for refund (cover letter, and memorandum in support) also specifically list the tax periods as ending March 31, 2007, June 30, 2007, and September 30, 2007. Dkt. No. 44 at 1, 7, 9, 10. Babcock Center argues that, although it did not file a formal claim for refund for the fourth quarter of 2007, Babcock Center referenced the tax quarter ending December 31, 2007 "in its appeal before the Internal Revenue Service Office of Appeals." Dkt. No. 57 at 29 (citing Dkt. No. 57-15 at 1). The cited reference is included in a "Statement of Facts and Law Supporting Request for Abatement of Penalties" dated December 4, 2009, and lists the tax period as "03/2007, 06/2007, 09/2007" at the top of the document. The reference is included in the text as follows:

The government funding can be sporadic and intermittent. In striving to carry out Babcock Center's mission, budgeting and cash management are difficult due to the nature of its funding. Such has been the case over the last few years, including the quarters ending June 30, September 30, and December 31, 2007, resulting in Babcock Center's inability to make timely payment and deposit of its payroll tax liabilities.

Dkt. No. 57-15 at 1. Babcock Center argues that, based on this reference, "the Commissioner was on notice that Babcock Center sought refund and abatement of the penalties and interest pertaining to this quarter." *Id.* at 29. Babcock Center argues that, assuming the omission on Form 843 disqualifies the claim as a formal claim for the period ending December 31, 2007, the claim should be allowed as an informal claim. *Id.* (citing *Newton v. United States*, 163 F.Supp. 614, 619 (Ct. Cl. 1958) (In determining whether an informal claim has been made, "each case must be decided on its own peculiar set of facts with a view towards determining whether under those facts the Commissioner knew, or should have known, that a claim was being made."); *Angelus Milling Co. v. Commissioner*, 325 U.S. 293, 297 (1945) ("[t]he Commissioner's attention should have been focused on the merits of the particular dispute" by the alleged informal claim)). The United States does not address this issue in its reply. Without adequate briefing on whether Babcock Center made an informal claim for the last quarter of 2007, the court denies the United States' motion to dismiss Babcock Center's refund claim for tax quarter ending December 31, 2007.

CONCLUSION

For reasons stated above, the United States' motion for summary judgment is granted as to Babcock Center's claim for the tax quarter ending December 31, 2008 and as to the United States' counterclaim in the amount of \$134,752.12 for taxes, penalties, and interest owed by Babcock Center for the tax quarter ending December 31, 2008. The United States' motion for summary judgment is also granted as to Babcock Center's claim for reallocation of payments made to the IRS. The United States' motion for summary judgment is denied as to the claims for refunds for tax quarters ending March 31, 2007; June 30, 2007; September 30, 2007; December 31, 2007; June 30, 2008; and September 30, 2008. The United States' motion to dismiss is denied in full.

This case will proceed to jury trial beginning July 24, 2013. Jury selection is May 30, 2013. Other pretrial deadlines may be found in the Third Consent Amended Scheduling Order.

IT IS SO ORDERED.

Notes:

^[1] Babcock Center filed two separate actions, one for penalties assessed for 2007 and one for 2008. These cases were consolidated. All references to the docket are to the main case, 3:11-01721.

^[2] Babcock Foundation is a 501(c)(3) corporation that supports Babcock Center. It enables individuals to donate to Babcock Center, often supporting client needs that are not covered by Medicaid, such as clothing or equipment. See Dkt. No. 43-2 at 22 (Tyler Dep. 18:1-10) ("If a consumer has to get eyeglasses and it's not time for them to get another pair under Medicaid rules, then the foundation would purchase it for them."). The record does not contain any evidence of the assets of the Babcock Foundation.

^[3] Babcock Center maintains that it "lost all investments in those properties," which were returned to SCDDSN. Babcock Center has provided no evidence as to why the return of these properties would have contributed to Babcock Center's cash flow issues, except as to the corresponding loss of funding to support clients that previously resided in these properties.

^[4] Babcock Center cites to the affidavit of Babcock Center's current Chief Financial Officer ("CFO") Charles Norman, as evidence of the change in the timing of funding. Dkt. No. 57 at 3 (citing Dkt. No. 57-5 at 2 (Norman Aff. § 7)). Mr. Norman's affidavit states, without explanation, that "during the time in question period, a change in the timing and amount of funding from government grants caused further cash flow problems up to One Million (\$1,000,000) Dollars." Norman Aff. § 7. It appears from deposition testimony of Mr. Norman and former CFO Linda Tyler that SCDDSN previously paid Babcock Center once a month at the beginning of the month and then changed to twice a month. Dkt. No. 43-2 at 222-32 (Norman Dep. 42:25-43:2) ("And then there's 2004 through 2006 where they changed from once a month prospectively to two weeks prospectively."); Tyler Dep. 72:1-13 ("And they changed the way they paid us. They used to pay us one month prospectively, and then they changed it to where we were going to get two payments with one payment right at the very beginning or right before the beginning of the month, another payment right at the middle, which made it a little more difficult because typically the payments that we were receiving from DDSN covered the payroll, at least the amount that we owed employees. So it made it harder because we didn't have that extra chunk right at the beginning of the month to try to pay some of our vendors."). Ms. Tyler stated that this change occurred in May or June of 2008. Tyler Dep. 102:2-21.

^[5] Many of the unpaid payroll taxes were trust fund taxes. As explained by the Fourth Circuit:

The Internal Revenue Code requires employers to withhold social security and federal excise taxes from their employees' wages. See 26 U.S.C. §§ 3402(a), 3102(a) (2006); *Plett v. United States*, 185 F.3d 216, 218 (4th Cir. 1999). The employer holds these monies in trust for the United States. 26 U.S.C. § 7501(a) (2006). Accordingly, courts often refer to the withheld amounts as "trust fund taxes"; these monies exist for the exclusive use of the government, not the employer. See *Plett*, 185 F.3d at 218. Payment of these trust fund taxes is "[n]ot excuse[d]" merely because "as a matter of sound business judgment, the money was paid to suppliers... in order to keep the corporation operating as a going concern-the government cannot be made an unwilling partner in a floundering business." *Collins v. United States*, 848 F.2d 740, 741-42 (6th Cir. 1988).

Erwin v. United States, 591 F.3d 313 (4th Cir. 2010) (describing trust fund taxes in a responsible person case, i.e., where personal liability is imposed on certain officers or agents of the employer for nonpayment of a corporation's taxes).

^[6] Babcock Center contends that it never retained the employees' portion of payroll taxes in the operating account:

Babcock Center prepared its payroll on a "net" basis. The Center has two checking accounts - general operating and payroll. On the date of each "pay day", Babcock Center would generate payroll checks from the payroll account and a funds transfer would be made from the operating account to the payroll account to cover these checks. Accordingly, the payroll account was a "zero-based" account. When sufficient funds were available to pay the payroll taxes due as calculated, a deposit would be made from the operating account. (Exh. 4, Norman Aff., Para. 13.) Contrary to the Government's assertion, "trust fund portions" were not retained in the general operating account.

Dkt. No. 57 at 9-10. However, Babcock Center did not place the employees' portion in a separate account. Tyler Dep. 29:19-22 ("There was a separate payroll account for the checks to sweep through and the direct deposits to sweep through, but the payroll taxes came out of the operating, if I remember correctly.").

^[7] Babcock Center was also assessed penalties for the tax quarters ending March 31, 2009 and September 30, 2009. After appealing to the IRS, Babcock Center received an abatement of \$50, 108.34 of the \$62, 635.42 penalty. See Dkt. No. 57-11.

^[8] Neither "willful neglect" nor "reasonable cause" are defined in the Internal Revenue Code.

^[9] Ms. Tyler testified that she would meet with the person who made the transfers of payroll taxes to the IRS every payday. They would talk "about how much money did we have, what could we pay, what could we not pay." Tyler Dep. 31:9-11. See also *id.* at 34:1-2 ("It was either keep the place running or pay the taxes.").

^[10] Ms. Tyler avers by affidavit that she would review and analyze Babcock Center's cash position to determine whether to pay payroll taxes when due. Dkt. No. 57-6 at 2 (Tyler Aff. § 5). She also avers that "[p]ayroll tax deposits that were made late during 2007 and 2008 were due to insufficient cash on hand to make these deposits timely and continue to pay for food, shelter, care and health and safety of the disabled individuals." *Id.* at § 6. To the extent that Babcock Center attempts to use Ms. Tyler's affidavit to create a genuine issue of material fact as to the reason for the failures to deposit and pay in the tax quarter ending December 31, 2008, the court rejects such attempt and relies on Ms. Tyler's deposition testimony, which preceded her affidavit and is corroborated by Ms. Tucker's deposition testimony. See *In re Family Dollar FLSA Litigation*, 637 F.3d 508, 512 (4th Cir. 2011) (disregarding witness's affidavit and relying on witness's deposition testimony where affidavit was contradictory to prior deposition testimony); *id.* ("But it cannot create a dispute about a fact that is contained in deposition testimony by referring to a subsequent affidavit of the deponent contradicting the deponent's prior testimony, for it is well established that a genuine issue of fact is not created where the only issue of fact is to determine which of the two conflicting versions of a party's testimony is correct.").

^[11] In determining whether "reasonable cause" exists under 26 U.S.C. §§ 6651 (a)(2) and 6656(a), "what elements constitute reasonable cause is a question of law; whether those elements are present is a question of fact." *Conklin Bros. v. United States*, 986 F.2d 315, 317 (9th Cir. 1993) (citing *Boyle*, 469 U.S. at 249 n. 8).

^[12] The United States urges the court to adopt a bright-line rule adopted by the Sixth Circuit that "financial difficulties can never constitute reasonable cause to excuse the penalties for nonpayment of withholding taxes by an employer." *Brewery, Inc. v. United States*, 33 F.3d 589, 592 (6th Cir. 1994). The Fourth Circuit has not addressed this issue. All other Circuits to address this issue have declined to adopt the bright-line rule and instead have adopted a facts-and-circumstances review of the taxpayer's financial hardship. See *Van Camp & Bennion v. United States*, 251 F.3d 862, 863 (9th Cir. 2001); *East Wind Indus., Inc. v. United States*, 196 F.3d 499, 505, 508 (3d Cir. 1999); *Fran Corp. v. United States*, 164 F.3d 814, 818 (2d Cir. 1999). For reasons stated in *Fran Corp.*, 164 F.3d at 818, the court considers all facts and circumstances of Babcock Center's financial situation.

^[13] It is clear that Babcock Center had financial difficulties in 2007 and 2008. Both sides have submitted charts outlining the financial condition of Babcock Center during 2007 and 2008. The United States' chart shows the balance of Babcock Center's operating account and the general ledger on the payroll dates, and the following date, in which a deposit was not made. Babcock Center's chart shows the same balances, as well as payroll liability not yet recorded, unrestricted cash balances, outstanding accounts payable, and tax liability due, among others. The court assumes for purposes of this motion that Babcock Center's chart is accurate. For many, but not all, of the payroll dates, there was adequate unrestricted cash to pay the payroll taxes. Babcock Center, however, had outstanding accounts payable on the payroll dates. If Babcock Center had paid all of its accounts payable, then there would not have been enough money to pay the payroll taxes when due. Babcock Center has successfully demonstrated financial difficulty during most of 2007 and 2008. The finding that Babcock Center was experiencing financial difficulty, however, is not alone sufficient to establish undue hardship.

^[14] See *Francis P. Harvey & Sons, Inc. v. IRS*, 2004 WL 2915309, *15 (D. Mass. 2004) ("There must be temporal proximity between the taxpayer's untimely payments and the pendency of the contract dispute... [a]fter the passage of time, the company may no longer be said to be suffering from an acute condition (a short-term financial crisis) but a chronic one (a long-term inability to meet its obligations except by unauthorized borrowing from the Treasury).").

^[15] When it was issuing paper checks, Babcock Center often issued additional payroll checks to correct for errors, such as failure to pay for overtime or include leave time. Babcock Center would not immediately deposit the tax liability on these additional checks but would add the tax liability to the next payroll deposit, which resulted in penalties. Mr. Norman testified that Babcock Center's payroll procedures were the reason why some of the taxes "were repeatedly late over a five or six-year period." Norman Dep. 30:24-25. In a later affidavit, Mr. Norman avers that "Babcock's payroll procedures concerning supplemental payroll checks did not result in properly assessed penalties." Norman Aff. § 17. Mr. Norman states that although the supplemental checks "created discrepancies between Babcock Center records and those of the Internal Revenue Service, the discrepancies were explained and accounted for." *Id.*

^[16] The current CFO, Mr. Norman, explained what he understood to be the priority of bill payment during 2007 and 2008:

Q. So do you know what process that they were using in 2007 and 2008, did anyone tell you, to determine which bills to pay if there were not funds to pay all of them?

A. Well, the procedure was then I think the same as when I came in 2009, you know. You'd have a certain list of priorities, make sure your staff is paid because they're the ones providing the care. And then directly below that any issues that are directly related to the care and support of those individuals. Utility bills, food, groceries, transportation, household supplies. And then below that any structural things that pertain to life, health or safety issues would have been addressed.

And then from there we would have looked at things that were essential for the company, our liability coverage for our vehicles, our property insurance for the facilities, employee benefits. And then the vendors would just take a pecking order down below that as the cash was available.

Q. And would tax payments sort of fall within the pecking order?

A. Mm-hmm.

Norman Dep. 27:10-28:7.

^[17] Ms. Tyler also testified that Babcock Center borrowed \$500,000 from the Babcock Foundation at some point prior to June 2007 to help Babcock Center meet its payroll obligations. Tyler Dep. 63:4-64:3. Ms. Tyler explained that the loan was to assist with Babcock Center's payroll obligations, not to assist with the payment of payroll taxes. Tyler Dep. 63:18-19.

^[18] Although there is evidence of the sale of properties, testimony indicates that proceeds from the sale of properties were remitted to SCDDSN, as SCDDSN originally provided the funds to purchase the properties. See Tyler Dep. 111:11-15 ("I can't remember if any of those properties sold while I was there, but if they had sold[,] the money would have gone back to DDSN because DDSN gave them the money to purchase it in the first place."); Dkt. No. 43-2 at 135 (Johnson Dep. 23:18-22) ("The Department - to the best of my recollection, the Department of Disabilities and Special Needs and the Housing Trust Fund, the two entities that purchased those properties, received those funds."). Babcock Center submitted affidavits that contradict this testimony. See Dkt. No. 57-2 at 3 (Johnson Aff. § 8) ("When these properties were sold, Babcock Center did not return the proceeds of the sales to the State Department of Disabilities and Special Needs, but kept the funds to meet current operating expenses."); Norman Aff. § 8 (same).

^[19] Babcock Center relies on the affidavit and report of Certified Public Accountant Clifton Bodiford to support its contention that "[i]f Babcock Center had paid their [sic] employment taxes when due, it would have had insufficient funds to pay its staff and essential creditors to remain in operation." Dkt. No. 57 at 7 (citing Bodiford Aff. § 4). To the extent that Babcock Center attempts to offer Mr. Bodiford as an expert on what creditors were essential to Babcock Center's operations, Mr. Bodiford testified that he did not "look at specifically who was being paid" but rather the total expenses from the income statements. Dkt. No. 61-1 at 46-47 (Bodiford Dep. 46:17-47:2). See also *id.* at 52:4-8 ("Q: Did you look specifically at who payments were being paid to in the [general] ledger? A: No. I might have seen who some of them were paid to, but I wasn't specifically looking at that."). Mr. Bodiford testified that he does not purport to be an expert on Babcock Center's operations, nonprofit organizations, or organizations that provide services for the disabled. *Id.* at 43:17-44. The court finds that Mr. Bodiford is not qualified to opine on what would have happened to Babcock Center had it timely paid its payroll taxes or which creditors were essential or necessary.

The court, however, does not reject Mr. Bodiford's opinion that Babcock Center "did not have sufficient monies to pay 2007 [and 2008] payroll taxes on a timely basis." Dkt. No. 57-7 at 5 (Bodiford Expert Report for 2007); Dkt. No. 57-7 at 13 (Bodiford Expert Report for 2008). It is undisputed that Babcock Center was experiencing financial difficulty in 2007 and 2008. As stated previously, financial difficulty is not enough to establish the reasonable cause exception to tax penalties.

^[20] The taxpayers in this case were affiliated companies, East Wind Industries, Inc. and Delaware East Wind, Inc. For ease, the court simply refers to the taxpayers as East Wind.

^[21] East Wind, however, was awarded contracts when it was the only bidder.

^[22] As of 2007, the first delinquent deposit and payment of payroll taxes at issue in this case, the reduction in services had been completed. For one reason or another, Babcock Center was unable to operate successfully within its reduced budget. Unlike *East Wind*, however, Babcock Center was not owed money from the government for services or contracts performed. It

has not argued that it anticipated more funding during 2007-2008, but rather that it had difficulty operating within the new budget. Babcock Center has not shown an isolated event resulting from an unexpected funding cut, but rather a continuous problem of failing to timely deposit and pay payroll taxes when due, including until the third quarter of 2009. See Dkt. No. 57-11 at 5 (IRS noting that Babcock Center was assessed significant failure to deposit penalties for "eleven of the previous twelve quarters").

^[23] The court observes that Babcock Center's Form 990s indicate that salaries of the executive director (Ms. Johnson) and financial services director (Ms. Tyler) were not reduced between 2006 and 2007. See Dkt. No. 57-19 at 5 (2006: Johnson, \$155, 249; Tyler, \$78, 346); Dkt. No. 57-20 (2007: Johnson, \$159, 678; Tyler, 80, 067). In fact, both employees received a salary increase. At some point in 2008, Mr. Norman replaced Ms. Tyler. In 2008, Ms. Johnson's salary was reported as \$158, 399 and Mr. Norman's was reported as \$80, 000. Dkt. No. 57-21 at 7.

^[24] Babcock Center submitted a report of "aged" accounts payable from August 15, 2008 to the end of 2008. Dkt. No. 57-22 at 11-39. It shows that many bills were paid on time, and some were past due by 60 or 90 days. However, this report of a portion of the time period at issue does not show why certain creditors were paid on time and others were not. Further, although Babcock Center repeatedly states that its accounts payable were over \$921, 000 at the end of 2008, only \$87, 652.57 was over 90 days past due. Dkt. No. 57-22 at 39.

^[25] Babcock Center has submitted, and the court has reviewed, "aged" accounts payable from August 15, 2008 to end of 2008, check registers for 2007 and the last tax quarter of 2008, general ledger for 2007-2008, and accounts payable balance for year end for 2007 and 2008. Despite the submission of over 1000 pages, Babcock Center failed to summarize or otherwise attempt to show which creditors were paid and why. Based on review of these documents, there is evidence that Babcock Center continued to pay numerous and diverse creditors, including Dish Network, Time Warner Cable, Dell Marketing, and Trophy and Awards. Further, it is unclear who will testify as to the essential and necessary creditors.

^[26] Babcock Center seeks an order "requiring Defendant to re-allocate previously designated payments from the Plaintiff so as to minimize Plaintiff's tax burden" and a "refund of any overpayment arising out of re-allocation of Plaintiff's payments." Am. Compl. at 6.

^[27] The United States contends that, when the IRS received the \$86.17 payment for interest incurred for the tax quarter ending March 30, 2007, all taxes, penalties, and interest for this tax quarter had been paid. It is unclear whether this \$86.17 payment was applied to a different tax period or returned to Babcock Center.

^[28] Babcock Center cites "Disputed Fact § 23," which is a reference to its brief, to identify a factual dispute. Dkt. No. 57 at 28. Paragraph 23 is a one-sentence paragraph that states that the annual tax returns reflect that Babcock Center operated at a loss in 2007 and 2008. *Id.* at 13. The court assumes that the intended citation was to paragraph 25, which states that "[t]he IRS did not apply payments to taxes as instructed thereby wrongfully inflating the alleged amounts due. (Ex. 4, Norman Aff., Para. 18.)" *Id.* Paragraph 18 of Mr. Norman's affidavit, in turn, states that "[t]he IRS did not apply payments to taxes as instructed thereby wrongfully inflating the alleged amounts due." Norman Aff. § 18. This conclusory statement, without explanation, is not enough to create a genuine issue of material fact in light of the evidence cited by the United States.

^[29] Babcock Center also stated that "[t]he IRS should be enjoined from further collection action pending final resolution of this matter." Dkt. No. 57 at 29. Babcock Center, however, has not filed a motion for preliminary injunction requesting such relief.

APPEAL,CLOSED,JURY

U.S. District Court
District of South Carolina (Columbia)
CIVIL DOCKET FOR CASE #: 3:11-cv-03155-CMC

Babcock Center Inc v. United States of Amercia, The
Assigned to: Honorable Cameron McGowan Currie
Lead case: 3:11-cv-01721-CMC
Member case: (View Member Case)
related Case: 3:11-cv-01721-CMC
Case in other court: 13-02056
Cause: 28:7402 Refund of Taxes

Date Filed: 11/18/2011
Date Terminated: 06/26/2013
Jury Demand: Plaintiff
Nature of Suit: 870 Taxes
Jurisdiction: U.S. Government Defendant

Date Filed	#	Docket Text
11/18/2011	<u>1</u>	COMPLAINT against United States of Amercia, The (Filing fee \$350 receipt number 0420-3735178) filed by Babcock Center Inc. (Attachments: # <u>1</u> Notice of Filing)(cbru,) (Entered: 11/18/2011)
11/18/2011	<u>3</u>	Local Rule 26.01 Answers to Interrogatories by Babcock Center Inc.(cbru,) (Entered: 11/18/2011)
11/18/2011	<u>4</u>	Summons Issued as to United States of Amercia, The. (cbru,) (Entered: 11/18/2011)
11/23/2011	<u>5</u>	SUMMONS Returned Executed <i>Affidavit of Personal Service upon Office of the US Attorney</i> by Babcock Center Inc. United States of Amercia, The served on 11/22/2011, answer due 1/23/2012. (Attachments: # <u>1</u> Affidavit of Service)(Sullivan, Edward) (Main Document 5 replaced on 11/23/2011) (cbru,). (Attachment 1 replaced on 11/23/2011) (cbru,). Modified to make document filed as attachment the main document and to make the document filed as the main document an attachment on 11/23/2011 (cbru,). (Entered: 11/23/2011)
12/01/2011	<u>6</u>	SUMMONS Returned Executed <i>Affidavit of Personal Service upon Commissioner of Internal Revenue</i> by Babcock Center Inc. (Attachments: # <u>1</u> Affidavit, # <u>2</u> Certified Return Receipt)(Sullivan, Edward) Modified to edit text on 12/2/2011 (cbru,). (Entered: 12/01/2011)
12/07/2011	<u>8</u>	SUMMONS Returned Executed <i>Certificate of Mailing on Office of Attorney General</i> by Babcock Center Inc. (Attachments: # <u>1</u> Certificate of Mailing, # <u>2</u> Certified Return Receipt)(Sullivan, Edward) Modified to edit text on 12/7/2011 (cbru,). (Entered: 12/07/2011)
01/20/2012	<u>10</u>	LETTER EXTENDING TIME TO ANSWER United States of Amercia, The answer due 2/13/2012. (Barnett, John) (Entered: 01/20/2012)
02/13/2012	<u>12</u>	AMENDED COMPLAINT against United States of America, The filed by Babcock Center Inc. (Sullivan, Edward) Modified to edit text on 2/13/2012 (cbru,). Modified to edit text on 2/13/2012 (cbru,). (Entered: 02/13/2012)
02/28/2012	<u>13</u>	ANSWER to <u>12</u> Amended Complaint, COUNTERCLAIM against Babcock Center Inc by United States of America, The.(Barnett, John) (Entered: 02/28/2012)
03/01/2012	<u>14</u>	Local Rule 26.01 Answers to Interrogatories by United States of America, The.(Barnett, John) (Entered: 03/01/2012)
03/02/2012	<u>15</u>	CONFERENCE AND SCHEDULING ORDER: Rule 26 Report due by 4/6/2012, Motions to Amend Pleadings due by 6/1/2012, Plaintiffs ID of Expert Witness due by 6/29/2012, Defendants ID of Expert Witnesses Due by 7/27/2012, Records Custodian Affidavit due by 7/27/2012, Discovery due by 9/21/2012, Motion in Limine due by 2/11/2013, Motions due by 10/5/2012, Rule 26(a)(3) Disclosures due by 12/14/2012, Jury Selection Deadline 3/4/2013, ADR Statement due by 11/2/2012, Mediation Due by 11/30/2012. Signed by Honorable Cameron McGowan Currie on 3/2/2012. (cbru,) (Entered: 03/02/2012)

03/19/2012	<u>16</u>	ANSWER to Counterclaim <u>13</u> by Babcock Center Inc.(Sullivan, Edward) (Entered: 03/19/2012)
04/06/2012	<u>17</u>	Rule 26(f) Report by Babcock Center Inc, United States of America, The.(Sullivan, Edward) Modified to add filer listed on document on 4/6/2012 (cbru,). (Entered: 04/06/2012)
04/06/2012	<u>18</u>	Local Rule 26.03 Answers to Interrogatories by Babcock Center Inc.(Sullivan, Edward) (Entered: 04/06/2012)
04/06/2012	<u>19</u>	Local Rule 26.03 Answers to Interrogatories by United States of America, The.(Barnett, John) (Entered: 04/06/2012)
04/06/2012	<u>21</u>	Joint Rule 26 Outline of Discovery Plan by Babcock Center Inc, United States of America, The.(Barnett, John) (Entered: 04/06/2012)
04/09/2012	<u>22</u>	TEXT ORDER granting (32) Motion to Consolidate Cases in case 3:11-cv-01721-CMC. The scheduling order filed in case 3:11-cv-3155-CMC will apply to the consolidated cases. Signed by Honorable Cameron McGowan Currie on 4/9/2012. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(cbru,) (Entered: 04/09/2012)
04/09/2012	<u>23</u>	NOTICE regarding case consolidation. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(cbru,) (Entered: 04/09/2012)
06/29/2012	<u>25</u>	PLAINTIFF'S ID OF EXPERT WITNESSES by Babcock Center Inc. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Sullivan, Edward) (Entered: 06/29/2012)
08/03/2012	<u>27</u>	MOTION for Extension of Time by Babcock Center Inc, United States of America, The. Response to Motion due by 8/20/2012. (Attachments: # <u>1</u> Affidavit) Proposed order is being emailed to chambers with copy to opposing counsel. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Sullivan, Edward) (Entered: 08/03/2012)
08/03/2012	<u>28</u>	SECOND CONSENT AMENDED SCHEDULING ORDER (Discovery due by 11/16/2012, Motions due by 11/30/2012, ADR Statement due by 12/28/2012, Mediation Due by 1/25/2013, Rule 26(a)(3) Disclosures due by 2/8/2013, Motion in Limine due by 4/8/2013, Jury Selection Deadline 4/29/2013). Motions granted: (40 in 3:11-cv-01721-CMC, 27 in 3:11-cv-03155-CMC) MOTION for Extension of Time filed by Babcock Center Inc, United States of America, The. Signed by Honorable Cameron McGowan Currie on 8/3/2012. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(ssam,) (Entered: 08/03/2012)
11/30/2012	<u>31</u>	MOTION for Summary Judgment , MOTION to Dismiss for Lack of Jurisdiction (Response to Motion due by 12/17/2012.) by United States of America, The. (Attachments: # <u>1</u> Notice Regarding All Attachments to motion) No proposed order.(Barnett, John) Modified to correct filing date and response due date on 12/3/2012 (cbru,). (Entered: 12/03/2012)
12/03/2012	<u>32</u>	TEXT ORDER: It has been brought to the Court's attention that while filing its Motion for Summary Judgment and Partial Motion to Dismiss in the lead case after hours on Friday, November 30, 2012, counsel for defendant encountered technical difficulties with the CM/ECF system that prevented him from "spreading" the entry to this, the member case. As Friday was the deadline for filing dispositive motions, and as defendant did file its motion in the lead case by the deadline and then followed up by filing the motion in the member case today, the Clerk is directed to modify the filing date and response due date of the motion filed in this case to match that in the lead case. Additionally, as the attachments to the motion are voluminous, the court will allow the defendant to file them in the lead case only. Signed by Honorable Cameron McGowan Currie on 12/3/2012. (cbru,) (Entered: 12/03/2012)
12/12/2012	<u>33</u>	MOTION for Extension of Time to File Response/Reply as to (43 in 3:11-cv-01721-CMC, 31 in 3:11-cv-03155-CMC) MOTION for Summary Judgment, MOTION to Dismiss for Lack of Jurisdiction (<i>partial</i>) by Babcock

		Center Inc. Response to Motion due by 1/2/2013. (Attachments: # <u>1</u> Affidavit of Edward Sullivan)No proposed order.Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Sullivan, Edward) Modified to link correct event to associated event on 12/12/2012 (cbru,). (Entered: 12/12/2012)
12/12/2012	<u>34</u>	TEXT ORDER granting (48) Motion for Extension of Time to File Response/Reply re (43 in 3:11-cv-01721-CMC) MOTION for Summary Judgment MOTION to Dismiss for Lack of Jurisdiction (partial) in case 3:11-cv-01721-CMC; granting (33) Motion for Extension of Time to File Response/Reply re (31 in 3:11-cv-03155-CMC) MOTION for Summary Judgment MOTION to Dismiss for Lack of Jurisdiction in case 3:11-cv-03155-CMC. Response to Motion due by 1/4/2013. Signed by Honorable Cameron McGowan Currie on 12/12/2012.Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(cbru,) (Entered: 12/12/2012)
12/28/2012	<u>35</u>	ADR STATEMENT/CERTIFICATION by Babcock Center IncAssociated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Sullivan, Edward) (Entered: 12/28/2012)
12/28/2012	<u>36</u>	ADR STATEMENT/CERTIFICATION by United States of America, The, United States of America, TheAssociated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Barnett, John) (Entered: 12/28/2012)
01/04/2013	<u>37</u>	Consent MOTION to Appear Pro Hac Vice by Amanda Norris by United States of America, The, United States of America, The. Response to Motion due by 1/22/2013. (Attachments: # <u>1</u> Application/Declaration for Pro Hac Vice Admission)No proposed order.Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Barnett, John) (Entered: 01/04/2013)
01/04/2013	<u>38</u>	Consent MOTION For Relief from Judge's Standing Order to Conduct Mediation by United States of America, The, United States of America, The. Response to Motion due by 1/22/2013. No proposed order.Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Barnett, John) (Entered: 01/04/2013)
01/04/2013	<u>39</u>	RESPONSE in Opposition re (43 in 3:11-cv-01721-CMC) MOTION for Summary Judgment MOTION to Dismiss for Lack of Jurisdiction (partial), (31 in 3:11-cv-03155-CMC) MOTION for Summary Judgment MOTION to Dismiss for Lack of Jurisdiction. Response filed by Babcock Center Inc.Reply to Response to Motion due by 1/14/2013 (Attachments: # <u>1</u> Exhibit 1.Affidavit of Judith Johnson, # <u>2</u> Exhibit 2.Deposition Transcript Lynda Tyler, # <u>3</u> Exhibit 3.Deposition Transcript Judith Johnson, # <u>4</u> Exhibit 4.Affidavit of Charles Norman, # <u>5</u> Exhibit 5.Affidavit of Lynda Tyler, # <u>6</u> Exhibit 6.Affidavit of Clifton Bodiford, # <u>7</u> Exhibit 7.Defendants Responses to First Requests for Admissions, # <u>8</u> Exhibit 8.Property Sales Documentation, # <u>9</u> Exhibit 9.Minutes, # <u>10</u> Exhibit 10.Internal Revenue Service correspondence, # <u>11</u> Exhibit 11.Deposition Transcript - Simmons, # <u>12</u> Exhibit 12.Babcock Center Constitution, # <u>13</u> Exhibit 13.Babcock Center Bylaws, # <u>14</u> Exhibit 14.2007 IRS Administrative Appeal, # <u>15</u> Exhibit 15.Tax Court Filings, # <u>16</u> Exhibit 16.Expert Report- 2007 case, # <u>17</u> Exhibit 17.Expert Report- 2008 case, # <u>18</u> Exhibit 18.Form 990 2006, # <u>19</u> Exhibit 19.Form 990 2007, # <u>20</u> Exhibit 20.Form 990 2008, # <u>21</u> Exhibit 21.Listings of Accounts Payable, # <u>22</u> Exhibit 22.Check Registers, # <u>23</u> Exhibit 23.Form 843 2007, # <u>24</u> Exhibit 23.-1 Form 843-2007, # <u>25</u> Exhibit 24.Form 843 -2008, # <u>26</u> Exhibit 25.Angelus Milling Co. v Commissioner, 325 U.S. 293 (1945), # <u>27</u> Exhibit 26.Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), # <u>28</u> Exhibit 27.Brewery, Inc. v United States, 33 F.3d 589 (6th Cir. 1994), # <u>29</u> Exhibit 28.Custom Stairs & Trim v. Commissioner, (T.C. Memo 2011-0155) 2011, # <u>30</u> Exhibit 29.East Wind Industries, Inc., v. United States, 196 F.3d 499 (3rd Cir. 1999), # <u>31</u> Exhibit 30.Erwin v. United States, 591 F.3d 313 (4th Cir. 2010), # <u>32</u> Exhibit 31.Kuehn v. Untie States, 480 F.2d 1319 (Ct Claims 1973), # <u>33</u> Exhibit 32.Lyon v. United States, 68 F.Appx 461 (4th Cir. 2003) (unpublished opinion), # <u>34</u> Exhibit 33.Matsushita Elec. Indus. Co. v Zenith Radio Corp., 475 U.S. 574 (1986), # <u>35</u> Exhibit 34.Newbill v. United States, 41 F.Appx 184 (4th Cir. 2011) (unpublished opinion, # <u>36</u> Exhibit 35.Newton v. United States, 164 F. Supp. 614 (Ct. Cl. 1958), # <u>37</u> Exhibit 36.Overstreet v. Kentucky Cent. Life Ins. Co., 950 F2d 931 (4th Cir. 1991), # <u>38</u> Exhibit 37.Pacific Wallboard &Plaser Co. v. United

		States, 319 F. Supp. 2d 11187(D. Or. 2004), # <u>39</u> Exhibit 38. Provenz v. Miller, 102 F.3d 1478 (9th Cir. 1996), # <u>40</u> Exhibit 39. Russell v. Microdyne Corp., 65 F.3d 1229 (4th Cir. 1995), # <u>41</u> Exhibit 40. Simmons v Commissioner, T.C. Memo. 2009-208, Doc 2009-20571, 2009 TNT 177-17, # <u>42</u> Exhibit 41. United States v Boyle, 469 U.S. 241 (1985), # <u>43</u> Exhibit 42. General Ledger Listing, # <u>44</u> Exhibit 43. AP Balance for Year End 2007, # <u>45</u> Exhibit 44. AP Balance for Year End 2008) Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Sullivan, Edward) Modified to remove duplicative text on 1/7/2013 (cbru,). (Entered: 01/04/2013)
01/07/2013	<u>40</u>	TEXT ORDER granting (53) Motion For Relief from Judge's Standing Order to Conduct Mediation in case 3:11-cv-01721-CMC; granting (38) Motion For Relief from Judge's Standing Order to Conduct Mediation in case 3:11-cv-03155-CMC. Signed by Honorable Cameron McGowan Currie on 1/7/2013. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(cbru,) (Entered: 01/07/2013)
01/07/2013	<u>41</u>	TEXT ORDER granting (52) Motion to Appear Pro Hac Vice in case 3:11-cv-01721-CMC; granting (37) Motion to Appear Pro Hac Vice in case 3:11-cv-03155-CMC. Signed by Honorable Cameron McGowan Currie on 1/7/2013. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(cbru,) (Entered: 01/07/2013)
01/08/2013	<u>42</u>	CORRECTED RESPONSE in Opposition re (43 in 3:11-cv-01721-CMC) MOTION for Summary Judgment MOTION to Dismiss for Lack of Jurisdiction (partial), (31 in 3:11-cv-03155-CMC) MOTION for Summary Judgment MOTION to Dismiss for Lack of Jurisdiction. Response filed by Babcock Center Inc. Reply to Response to Motion due by 1/18/2013 (Attachments: # <u>1</u> Listing of Exhibits, # <u>2</u> Exhibit 1. Affidavit of Judith Johnson, # <u>3</u> Exhibit 2. Deposition Transcript Lynda Tyler, # <u>4</u> Exhibit 3. Deposition Transcript Judith Johnson, # <u>5</u> Exhibit 4. Affidavit of Charles Norman, # <u>6</u> Exhibit 5. Affidavit of Lynda Tyler, # <u>7</u> Exhibit 6. Affidavit of Clifton D. Bodiford, CPA, # <u>8</u> Exhibit 7. Defendants Responses to First Requests for Admissions, # <u>9</u> Exhibit 8. Property Sales Documentation, # <u>10</u> Exhibit 9. Minutes November 26, 2007 Board of Directors, # <u>11</u> Exhibit 10. Internal Revenue Service correspondence, # <u>12</u> Exhibit 11. Deposition Transcript - Simmons, # <u>13</u> Exhibit 12. Babcock Center Constitution, # <u>14</u> Exhibit 13. Babcock Center Bylaws, # <u>15</u> Exhibit 14. 2007 IRS Administrative Appeal, # <u>16</u> Exhibit 15. Tax Court Filings, # <u>17</u> Exhibit 16. Expert Report- 2007 case, # <u>18</u> Exhibit 17. Expert Report- 2008 case, # <u>19</u> Exhibit 18. Form 990 2006, # <u>20</u> Exhibit 19. Form 990 2007, # <u>21</u> Exhibit 20. Form 990 2008, # <u>22</u> Exhibit 21. Listings of Accounts Payable, # <u>23</u> Exhibit 22 (part 1). Check Registers, # <u>24</u> Exhibit 22 (part 2). Check Registers, # <u>25</u> Exhibit 23. Form 843 2007, # <u>26</u> Exhibit 24. Form 843 -2008, # <u>27</u> Exhibit 25. Angelus Milling Co. v Commissioner, # <u>28</u> Exhibit 26. Anderson v. Liberty Lobby, Inc., # <u>29</u> Exhibit 27. Brewery, Inc. v United States, # <u>30</u> Exhibit 28. Custom Stairs & Trim v. Commissioner, # <u>31</u> Exhibit 29. East Wind Industries, Inc., v. United States, # <u>32</u> Exhibit 30. Erwin v. United States, # <u>33</u> Exhibit 31. Kuehn v. United States, # <u>34</u> Exhibit 32. Lyon v. United States, # <u>35</u> Exhibit 33. Matsushita Elec. Indus. Co. v Zenith Radio Corp, # <u>36</u> Exhibit 34. Newbill v. United States, # <u>37</u> Exhibit 35. Newton v. United States, # <u>38</u> Exhibit 36. Overstreet v. Kentucky Cent. Life Ins. Co, # <u>39</u> Exhibit 37. Pacific Wallboard & Plaser Co. v. United States, # <u>40</u> Exhibit 38. Provenz v. Miller, # <u>41</u> Exhibit 39. Russell v. Microdyne Corp, # <u>42</u> Exhibit 40. Simmons v Commissioner, # <u>43</u> Exhibit 41. United States v Boyle, # <u>44</u> Exhibit 42. General Ledger Listing/Report, # <u>45</u> Exhibit 42-1. General Ledger Listing/Report, # <u>46</u> Exhibit 42-2. General Ledger Listing/Report, # <u>47</u> Exhibit 42-3. General Ledger Listing/Report, # <u>48</u> Exhibit 42-4. General Ledger Listing/Report, # <u>49</u> Exhibit 42-5. General Ledger Listing/Report, # <u>50</u> Exhibit 42-6. General Ledger Listing/Report, # <u>51</u> Exhibit 42-7. General Ledger Listing/Report, # <u>52</u> Exhibit 43. AP Balance for Year End 2007, # <u>53</u> Exhibit 44. AP Balance for Year End 2008) Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Sullivan, Edward) Modified to edit text on 1/9/2013 (cbru,). (Entered: 01/08/2013)
01/15/2013	<u>43</u>	Joint MOTION to Amend/Correct (41 in 3:11-cv-01721-CMC, 28 in 3:11-cv-03155-CMC) Scheduling Order by Babcock Center Inc, United States of America, The. Response to Motion due by 2/1/2013. Proposed order is being

		emailed to chambers with copy to opposing counsel. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC (Barnett, John) Modified to remove duplicative text on 1/15/2013 (cbru,). (Entered: 01/15/2013)
01/16/2013	<u>44</u>	THIRD CONSENT AMENDED SCHEDULING ORDER (Motion in Limine due by 5/6/2013, Rule 26(a)(3) Disclosures due by 3/8/2013, Jury Selection Deadline 5/28/2013, ADR Statement due by 1/25/2013, Mediation Due by 2/22/2013) Motions granted: (58 in 3:11-cv-01721-CMC, 43 in 3:11-cv-03155-CMC) Joint MOTION to Amend/Correct (41 in 3:11-cv-01721-CMC, 28 in 3:11-cv-03155-CMC) Scheduling Order. Signed by Honorable Cameron McGowan Currie on 1/16/2013. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(cbru,) (Entered: 01/16/2013)
01/18/2013	<u>46</u>	REPLY to Response to Motion re (43 in 3:11-cv-01721-CMC) MOTION for Summary Judgment MOTION to Dismiss for Lack of Jurisdiction (<i>partial</i>), (31 in 3:11-cv-03155-CMC) MOTION for Summary Judgment MOTION to Dismiss for Lack of Jurisdiction Response filed by United States of America, The, United States of America, The. (Attachments: # <u>1</u> Exhibit G (Deposition Transcript of Clifton Bodiford))Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Barnett, John) Modified to remove duplicative text on 1/22/2013 (cbru,). (Entered: 01/18/2013)
03/01/2013	<u>49</u>	Consent MOTION for Extension of Time <i>To File and Exchange Fed. R. Civ. P. 26(a)(3) Pretrial Disclosures</i> by Babcock Center Inc. Response to Motion due by 3/18/2013. (Attachments: # <u>1</u> Affidavit of Edward D. Sullivan, # <u>2</u> Proposed Order)Proposed order is being emailed to chambers with copy to opposing counsel.Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Sullivan, Edward) Modified to edit text on 3/1/2013 (cbru,). (Entered: 03/01/2013)
03/01/2013	50	TEXT ORDER granting (64 in 3:11-cv-01721-CMC, 49 in 3:11-cv-03155-CMC) Consent MOTION for Extension of Time <i>To File and Exchange Fed. R. Civ. P. 26(a)(3) Pretrial Disclosures</i> (Rule 26(a)(3) Disclosures due by 3/29/2013) Signed by Honorable Cameron McGowan Currie on 3/1/2013. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(cbru,) (Entered: 03/01/2013)
03/27/2013	<u>52</u>	Consent MOTION to Appear Pro Hac Vice by Thomas K. Vanaskie by United States of America, The, United States of America, The. Response to Motion due by 4/15/2013. (Attachments: # <u>1</u> Affidavit (Application/Declaration))No proposed order.Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Barnett, John) (Entered: 03/27/2013)
03/27/2013	<u>53</u>	Consent MOTION to Appear Pro Hac Vice by Philip M. Schreiber by United States of America, The, United States of America, The. Response to Motion due by 4/15/2013. (Attachments: # <u>1</u> Affidavit (Application/Declaration))No proposed order.Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Barnett, John) (Entered: 03/27/2013)
03/28/2013	54	TEXT ORDER granting (67) Motion to Appear Pro Hac Vice, granting (68) Motion to Appear Pro Hac Vice in case 3:11-cv-01721-CMC; granting (52) Motion to Appear Pro Hac Vice, granting (53) Motion to Appear Pro Hac Vice in case 3:11-cv-03155-CMC. Signed by Honorable Cameron McGowan Currie on 3/28/2013. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(cbru,) (Entered: 03/28/2013)
03/29/2013	<u>55</u>	RULE 26(a)(3)PRETRIAL DISCLOSURES by United States of America, The, United States of America, The. Objections to PreTrial Disclosures due by 4/15/2013. (Attachments: # <u>1</u> Spreadsheet of documents that the United States may offer as exhibits at trial. (See Paragraph 3.A.))Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Barnett, John) (Entered: 03/29/2013)
03/29/2013	<u>56</u>	RULE 26(a)(3)PRETRIAL DISCLOSURES by Babcock Center Inc. Objections to PreTrial Disclosures due by 4/15/2013. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Sullivan, Edward) (Entered: 03/29/2013)

04/11/2013	<u>57</u>	NOTICE of Hearing: Jury Selection set for 5/30/2013 09:30 AM in Columbia # 2, Matthew J. Perry Court House, 901 Richland St, Columbia before Honorable Cameron McGowan Currie Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(cbru,) (Entered: 04/11/2013)
04/12/2013	<u>59</u>	SUPPLEMENT by United States of America, The, United States of America, The to (43 in 3:11-cv-01721-CMC) MOTION for Summary Judgment MOTION to Dismiss for Lack of Jurisdiction (<i>partial</i>), (31 in 3:11-cv-03155-CMC) MOTION for Summary Judgment MOTION to Dismiss for Lack of Jurisdiction <i>Notice of Correction</i> . Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Barnett, John) Modified to remove duplicate text on 4/12/2013 (cbru,). (Entered: 04/12/2013)
04/15/2013	<u>60</u>	OBJECTIONS byBabcock Center Inc to(70 in 3:11-cv-01721-CMC, 55 in 3:11-cv-03155-CMC) Pretrial Disclosures,. (Attachments: # <u>1</u> Addendum Objections to United States' Documents)Associated Cases: 3:11-cv-03155-CMC, 3:11-cv-01721-CMC(Sullivan, Edward) (Entered: 04/15/2013)
04/15/2013	<u>61</u>	OBJECTIONS byUnited States of America, The, United States of America, The to(71 in 3:11-cv-01721-CMC, 56 in 3:11-cv-03155-CMC) Pretrial Disclosures. (Attachments: # <u>1</u> Exhibit (Chart of United States' objections to Plaintiff's specific exhibits (Documents Plaintiff Expects to or May Offer)))Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Barnett, John) (Entered: 04/15/2013)
04/22/2013	<u>63</u>	NOTICE of Hearing: Jury Trial set for 6/24 - 6/28/2013 09:30 AM in Columbia # 2, Matthew J. Perry Court House, 901 Richland St, Columbia before Honorable Cameron McGowan Currie. The parties are directed to refer to this court's website at www.scd.uscourts.gov to review Judge Currie's jury information located in the "Form Orders and Operational Orders" link, which can be found in the "District Judges" section. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(cbru,) (Entered: 04/22/2013)
05/02/2013	<u>64</u>	OPINION AND ORDER granting in part and denying in part (43) Motion for Summary Judgment; denying (43) Motion to Dismiss for Lack of Jurisdiction in case 3:11-cv-01721-CMC; granting in part and denying in part (31) Motion for Summary Judgment; denying (31) Motion to Dismiss for Lack of Jurisdiction in case 3:11-cv-03155-CMC. Signed by Honorable Cameron McGowan Currie on 5/2/2013. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(cbru,) (Entered: 05/02/2013)
05/06/2013	<u>65</u>	MOTION in Limine by United States of America, The, United States of America, The. Response to Motion due by 5/23/2013. (Attachments: # <u>1</u> Memo in Support, # <u>2</u> Exhibit A (IRS penalty letter to Plaintiff, with facsimile cover page), # <u>3</u> Exhibit B (deposition transcript of David Kammerer), # <u>4</u> Exhibit D (deposition transcript of Andy Maurer), # <u>5</u> Exhibit E (deposition transcript of Charles Norman, with exhibit index and concordance))Proposed order is being emailed to chambers with copy to opposing counsel. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Barnett, John) (Entered: 05/06/2013)
05/06/2013	<u>66</u>	MOTION in Limine and <i>Memorandum of Law in Support</i> by Babcock Center Inc. Response to Motion due by 5/23/2013. (Attachments: # <u>1</u> Listing of Newspaper Articles)Proposed order is being emailed to chambers with copy to opposing counsel. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Sullivan, Edward) (Main Document 81 replaced on 5/7/2013) (cbru,). (Attachment 1 replaced on 5/7/2013) (cbru,). Modified to edit text on 5/7/2013 (cbru,). (Additional attachment(s) added on 5/7/2013: # <u>2</u> "State Briefs", # <u>3</u> "Federal Medicaid Funds Pulled from Babcock Center", # <u>4</u> "Babcock Plans to Downsize", # <u>5</u> "Across South Carolina", # <u>6</u> "Across the Region", # <u>7</u> "Across South Carolina", # <u>8</u> "Facility That Cares for Mentally Disabled Forgets to Pick Up Resident", # <u>9</u> "State Agencies Conduct Federal Investigation of Babcock Center", # <u>10</u> "Babcock Worker Charged with Neglect", # <u>11</u> "Second Babcock Home to Lose Funds", # <u>12</u> "Babcock Might Close Home", # <u>13</u> "Babcock Directors Should End Attacks", # <u>14</u> "Babcock Center headquarters moving", # <u>15</u> "Inquiries Into Abuse Fall Short Study Say; Report critical of process, agencies") (Entered: 05/06/2013)

05/23/2013	<u>68</u>	TRIAL BRIEF by Babcock Center Inc. (Attachments: # <u>1</u> Exhibit 1 – Witness List & Deposition Designations, # <u>2</u> Exhibit 2 – Trial Exhibits w Objections, # <u>3</u> Exhibit 3 – Proposed Voir Dire, # <u>4</u> Exhibit 4 – Proposed Jury Instructions, # <u>5</u> Unreported Case Cited in Jury Instr.) Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Cooper, Lindsey) Modified to edit text on 5/24/2013 (cbru,). (Entered: 05/23/2013)
05/23/2013	<u>71</u>	TRIAL BRIEF by United States of America, The, United States of America, The. (Attachments: # <u>1</u> Exhibit List, # <u>2</u> Proposed Voir Dire Questions, # <u>3</u> Proposed Jury Instructions, # <u>4</u> Proposed Verdict Form (Special Interrogatories)) Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Barnett, John) (Entered: 05/23/2013)
05/23/2013	<u>72</u>	RESPONSE in Opposition re (81 in 3:11-cv-01721-CMC, 66 in 3:11-cv-03155-CMC) MOTION in Limine <i>and Memorandum of Law in Support</i> Response filed by United States of America, The, United States of America, The. Reply to Response to Motion due by 6/3/2013 Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Barnett, John) (Entered: 05/23/2013)
05/23/2013	<u>73</u>	RESPONSE in Opposition re (65 in 3:11-cv-03155-CMC, 80 in 3:11-cv-01721-CMC) MOTION in Limine. Response filed by Babcock Center Inc. Reply to Response to Motion due by 6/3/2013 Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Sullivan, Edward) Modified to link correct event to associated event on 5/24/2013 (cbru,). (Entered: 05/23/2013)
05/24/2013	<u>74</u>	DELETION OF DOCKET ENTRY NUMBER 84 & 85 in 3:11-cv-1721-CMC, 69 & 70 in 3:11-cv-3155-CMC. Reason: Duplicative filings. Documents previously filed as attachments to entry #84 in 3:11-cv-1721-CMC and #68 in 3:11-cv-3155-CMC. Modified filing date to that of original filing: N/A Response due date modified to that of original filing: N/A Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(cbru,) (Entered: 05/24/2013)
05/29/2013	<u>75</u>	REQUEST TO STRIKE FOR CAUSE (<i>Joint</i>) by Babcock Center Inc, United States of America, The, United States of America, The. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Cooper, Lindsey) (Entered: 05/29/2013)
05/30/2013	<u>76</u>	Minute Entry. Proceedings held before Honorable Cameron McGowan Currie: Jury Selection held on 5/30/2013. 12 jurors selected. Jurors reminded to call CAP after 5:30 p.m. on 6/21/2013 for further reporting instructions. Trial to begin on 6/24/2013 at 9:30 a.m. Court sets telephone conference on Motions in Limine for 6/5/2013 at 2:00 p.m. Court Reporter Jenny Williams. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(ssam,) (Entered: 05/30/2013)
05/30/2013	<u>77</u>	Panel Strike List. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(ssam,) (Entered: 05/30/2013)
05/30/2013	<u>78</u>	Jury List. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(ssam,) (Entered: 05/30/2013)
05/30/2013	<u>79</u>	NOTICE of Hearing on Motion (81 in 3:11-cv-01721-CMC, 66 in 3:11-cv-03155-CMC) MOTION in Limine <i>and Memorandum of Law in Support</i> , (80 in 3:11-cv-01721-CMC, 65 in 3:11-cv-03155-CMC) MOTION in Limine : Telephone Conference set for 6/5/2013 02:00 PM. Plaintiff shall initiate the call and have all parties on the line prior to contacting the Court at 803-253-3680. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(ssam,) (Entered: 05/30/2013)
06/03/2013	<u>80</u>	REPLY to Response to Motion re (81 in 3:11-cv-01721-CMC, 66 in 3:11-cv-03155-CMC) MOTION in Limine <i>and Memorandum of Law in Support</i> Response filed by Babcock Center Inc. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Sullivan, Edward) (Entered: 06/03/2013)
06/04/2013	<u>81</u>	OPINION AND ORDER: The court dismisses Babcock Center's claim for refund of penalties paid for the fourth quarter of 2007 (tax period ending December 31, 2007) for lack of jurisdiction. Signed by Honorable Cameron

		McGowan Currie on 6/4/2013. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(cbru,) (Entered: 06/04/2013)
06/05/2013	<u>82</u>	Minute Entry. Proceedings held before Honorable Cameron McGowan Currie: granting in part and denying in part (80) Motion in Limine; granting in part and denying in part (81) Motion in Limine in case 3:11-cv-01721-CMC; granting in part and denying in part (65) Motion in Limine; granting in part and denying in part (66) Motion in Limine in case 3:11-cv-03155-CMC; Telephone Conference held on 6/5/2013 in case 3:11-cv-01721-CMC. Court Reporter Gary Smith. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(ssam,) (Entered: 06/05/2013)
06/17/2013	<u>83</u>	SUPPLEMENTAL OBJECTIONS by United States of America, The, United States of America, The to (71 in 3:11-cv-01721-CMC, 56 in 3:11-cv-03155-CMC) Pretrial Disclosures, (83 in 3:11-cv-01721-CMC, 68 in 3:11-cv-03155-CMC) Trial Brief. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC. Filing corrected for event type (cbru,) (Entered: 06/17/2013)
06/17/2013	<u>84</u>	MOTION for Reconsideration re (81 in 3:11-cv-03155-CMC, 96 in 3:11-cv-01721-CMC) Order, (79 in 3:11-cv-01721-CMC, 64 in 3:11-cv-03155-CMC) Order on Motion to Dismiss/Lack of Jurisdiction, Order on Motion for Summary Judgment by Babcock Center Inc. Response to Motion due by 7/5/2013. (Attachments: # <u>1</u> Deposition Testimony of Lynda Tyler, # <u>2</u> Deposition Testimony of Karen Tucker, # <u>3</u> Account Transcript for December 31, 2008, # <u>4</u> Account Transcript for September 30, 2008, # <u>5</u> IRS Letter dated May 2, 2008 to Babcock Center Representative Amy Cain, # <u>6</u> Form 843, Claim for Refund and Request for Abatement for Period October 1, 2007 to December 31, 2007) Proposed order is being emailed to chambers with copy to opposing counsel. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Sullivan, Edward) Modified to edit text on 6/18/2013 (cbru,). (Entered: 06/17/2013)
06/18/2013	<u>85</u>	TEXT ORDER: The court directs the United States to file a response to Plaintiff's motion for reconsideration (Dkt. No. 99 in 3:11-1721, 84 in 3:11-3155) by close of business on June 19, 2013. (Response to Motion due by 6/19/2013) Signed by Honorable Cameron McGowan Currie on 6/18/2013. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(cbru,) (Entered: 06/18/2013)
06/19/2013	<u>86</u>	RESPONSE in Opposition re (84 in 3:11-cv-03155-CMC, 99 in 3:11-cv-01721-CMC) MOTION for Reconsideration re (81 in 3:11-cv-03155-CMC, 96 in 3:11-cv-01721-CMC) Order, (79 in 3:11-cv-01721-CMC, 64 in 3:11-cv-03155-CMC) Order on Motion to Dismiss/Lack of Jurisdiction, Order on M Response filed by United States of America, The, United States of America, The. Reply to Response to Motion due by 7/1/2013 Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Barnett, John) Additional attachment filed as entry <u>87</u> on 6/19/2013 (cbru,). (Entered: 06/19/2013)
06/19/2013	<u>87</u>	Additional Attachments to Main Document (86 in 3:11-cv-03155-CMC, 101 in 3:11-cv-01721-CMC) Response in Opposition to Motion. First attachment description: USX165.0020 (Form 2866 re Pl's 941 taxes for period ending Dec 31, 2007). Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Barnett, John) (Entered: 06/19/2013)
06/19/2013	<u>88</u>	TEXT ORDER: If Babcock Center intends to file a reply to the United States' response to its motion for reconsideration, it shall do so by 11:00 a.m. on June 20, 2013. If a reply is filed, Babcock Center shall address the United States' argument that Babcock Center's recent attempt to cure the jurisdictional defect as to the fourth quarter of 2007, by filing a formal claim with the IRS on June 14, 2013, is ineffective. See Dkt. No. 101 at 5-6. (Reply to Response to Motion due by 6/20/2013) Signed by Honorable Cameron McGowan Currie on 6/19/2013. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(cbru,) (Entered: 06/19/2013)
06/20/2013	<u>89</u>	REPLY to Response to Motion re (84 in 3:11-cv-03155-CMC, 99 in 3:11-cv-01721-CMC) MOTION for Reconsideration re (81 in 3:11-cv-03155-CMC, 96 in 3:11-cv-01721-CMC) Order, (79 in

		3:11-cv-01721-CMC, 64 in 3:11-cv-03155-CMC) Order on Motion to Dismiss/Lack of Jurisdiction, Order on M Response filed by Babcock Center Inc. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Sullivan, Edward) (Entered: 06/20/2013)
06/20/2013	<u>90</u>	OPINION AND ORDER denying (99) Motion for Reconsideration in case 3:11-cv-01721-CMC; denying (84) Motion for Reconsideration in case 3:11-cv-03155-CMC. Signed by Honorable Cameron McGowan Currie on 6/20/2013. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(ssam,) (Entered: 06/20/2013)
06/24/2013	<u>92</u>	Minute Entry. Proceedings held before Honorable Cameron McGowan Currie: Jury Trial held on 6/24/2013. 12 jurors seated and sworn. Preliminary instructions. Opening statements. Witnesses/exhibits. Court in recess until 9:15 a.m. on 6/25/2013. Court Reporter Jenny Williams. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(ssam,) (Entered: 06/24/2013)
06/24/2013	<u>93</u>	DEPOSITION of Judith Johnson, M.Ed., taken on 9/18/2012 by United States of America, The. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(ssam,) (Entered: 06/25/2013)
06/24/2013	<u>94</u>	DEPOSITION of Linda Tyler taken on 9/17/2012 by United States of America, The. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(ssam,) (Entered: 06/25/2013)
06/25/2013	<u>95</u>	DEPOSITION of Clifton Bodiford taken on 9/21/2012 by United States of America, The. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(ssam,) (Entered: 06/25/2013)
06/25/2013	<u>96</u>	Jury Instructions. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(ssam,) (Entered: 06/25/2013)
06/25/2013	<u>97</u>	Minute Entry. Proceedings held before Honorable Cameron McGowan Currie: Jury Trial completed on 6/25/2013. Witnesses/exhibit. Plaintiff rests. Plaintiff's motion for directed verdict denied and Defendant's motion for directed verdict denied. Defense rests. Closing arguments. Jury instructions. Deliberations held and completed. Verdict published. Court Reporter Jenny Williams. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(ssam,) (Entered: 06/25/2013)
06/25/2013	<u>99</u>	JURY VERDICT. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(ssam,) (Entered: 06/25/2013)
06/25/2013	<u>100</u>	ORDER RETURNING EXHIBITS. Signed by Honorable Cameron McGowan Currie on 6/25/2013. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(ssam,) (Entered: 06/25/2013)
06/25/2013	<u>101</u>	RECEIPT by Babcock Center Inc for trial exhibits. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(ssam,) (Entered: 06/25/2013)
06/25/2013	<u>102</u>	RECEIPT by United States of America, The for trial exhibits. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(ssam,) (Entered: 06/25/2013)
06/26/2013	<u>103</u>	JUDGMENT in favor of United States of America, The against Babcock Center Inc, on its claims for refund of penalties paid for the first quarter of 2007 (tax period ending March 31, 2007), second quarter of 2007 (tax period ending June 30, 2007), third quarter of 2007 (tax period ending September 30, 2007), second quarter of 2008 (tax period ending June 30, 2008), and third quarter of 2008 (tax period ending September 30, 2008). JUDGMENT is also entered in favor of United States of America, The against Babcock Center Inc, on Plaintiff's claim for refund of penalties paid for the fourth quarter of 2007 (tax period ending December 31, 2007). SUMMARY JUDGMENT in favor of United States of America, The against Babcock Center Inc as to Plaintiff's claims for refund of penalties for the fourth quarter of 2008 (tax period ending December 31, 2008) and for reallocation of payments made to the IRS. SUMMARY JUDGMENT is also entered in favor of United States of America, The against Babcock Center Inc as to the counterclaim for taxes, penalties, and interest owed by Babcock Center the fourth quarter of 2008 (tax period ending December 31, 2008) and Counter Claimant recover the

		amount of One Hundred Thirty-Four Thousand, Seven Hundred Fifty-Two and 12/100 (\$134,752.12) dollars. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(ssam,) (Entered: 06/26/2013)
06/27/2013	<u>104</u>	Proposed Jury Instructions by Babcock Center Inc. (Attachments: # <u>1</u> Exhibit Plaintiff's Proposed Revisions to Jury Instructions, # <u>2</u> Exhibit Explanation for Plaintiff's Revisions) Associated Cases: 3:11-cv-03155-CMC, 3:11-cv-01721-CMC(Sullivan, Edward) (Entered: 06/27/2013)
06/27/2013	<u>105</u>	OBJECTIONS by Babcock Center Inc. (Attachments: # <u>1</u> Exhibit Plaintiff's Supporting Correspondence) Associated Cases: 3:11-cv-03155-CMC, 3:11-cv-01721-CMC(Sullivan, Edward) (Entered: 06/27/2013)
07/12/2013	<u>106</u>	MOTION to Alter Judgment in re (119 in 3:11-cv-01721-CMC, 103 in 3:11-cv-03155-CMC) Judgment, Summary Judgment by United States of America, The, United States of America, The: Response to Motion due by 7/29/2013. No proposed order. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Barnett, John) Modified to remove duplicative text on 7/15/2013 (cbru,). (Entered: 07/12/2013)
07/29/2013	<u>107</u>	RESPONSE to Motion re (122 in 3:11-cv-01721-CMC, 106 in 3:11-cv-03155-CMC) MOTION to Alter Judgment in re (119 in 3:11-cv-01721-CMC, 103 in 3:11-cv-03155-CMC) Judgment, Summary Judgment,,,,,, Response filed by Babcock Center Inc. Reply to Response to Motion due by 8/8/2013 Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(Sullivan, Edward) (Entered: 07/29/2013)
07/30/2013	<u>108</u>	ORDER granting (122) Motion to Alter Judgment in case 3:11-cv-01721-CMC; granting (106) Motion to Alter Judgment in case 3:11-cv-03155-CMC. Signed by Honorable Cameron McGowan Currie on 7/30/2013. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(cbru,) (Entered: 07/30/2013)
07/30/2013	<u>109</u>	AMENDED JUDGMENT in favor of United States of America, The against Babcock Center Inc, on its claims for refund of penalties paid for the first quarter of 2007 (tax period ending March 31, 2007), second quarter of 2007 (tax period ending June 30, 2007), third quarter of 2007 (tax period ending September 30, 2007), second quarter of 2008 (tax period ending June 30, 2008), and third quarter of 2008 (tax period ending September 30, 2008). JUDGMENT is also entered in favor of United States of America, The against Babcock Center Inc, on Plaintiff's claim for refund of penalties paid for the fourth quarter of 2007 (tax period ending December 31, 2007). SUMMARY JUDGMENT in favor of United States of America, The against Babcock Center Inc as to Plaintiff's claims for refund of penalties for the fourth quarter of 2008 (tax period ending December 31, 2008) and for reallocation of payments made to the IRS. SUMMARY JUDGMENT is also entered in favor of United States of America, The against Babcock Center Inc as to the counterclaim for taxes, penalties, and interest owed by Babcock Center the fourth quarter of 2008 (tax period ending December 31, 2008) and Counter Claimant recover the amount of One Hundred Thirty-Four Thousand, Seven Hundred Fifty-Two and 12/100 (\$134,752.12) dollars, as of November 15, 2012, plus interest pursuant to 26 U.S.C. §§ 6621 and 6622 until paid. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(cbru,) (Entered: 07/30/2013)
08/23/2013	<u>111</u>	NOTICE OF APPEAL as to (119 in 3:11-cv-01721-CMC, 119 in 3:11-cv-01721-CMC, 103 in 3:11-cv-03155-CMC, 103 in 3:11-cv-03155-CMC) Judgment, Summary Judgment,,,,,, (109 in 3:11-cv-03155-CMC, 125 in 3:11-cv-01721-CMC) Judgment,,,, (81 in 3:11-cv-03155-CMC, 96 in 3:11-cv-01721-CMC) Order, (79 in 3:11-cv-01721-CMC, 79 in 3:11-cv-01721-CMC, 79 in 3:11-cv-01721-CMC, 79 in 3:11-cv-01721-CMC, 64 in 3:11-cv-03155-CMC, 64 in 3:11-cv-03155-CMC, 64 in 3:11-cv-03155-CMC, 64 in 3:11-cv-03155-CMC) Order on Motion to Dismiss/Lack of Jurisdiction, Order on Motion for Summary Judgment,,,, (105 in 3:11-cv-01721-CMC, 90 in 3:11-cv-03155-CMC) Order on Motion for Reconsideration, by Babcock Center Inc. - Filing fee \$ 455; receipt number 0420-4898433. The Docketing Statement form, Transcript Order form and CJA 24 form may be obtained from the Fourth Circuit website at

		www.ca4.uscourts.gov (Sullivan, Edward) (Entered: 08/23/2013)
08/23/2013	<u>112</u>	Transmittal Sheet for Notice of Appeal to USCA re (111 in 3:11-cv-03155-CMC, 127 in 3:11-cv-01721-CMC) Notice of Appeal,, The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. (cbru,) (Entered: 08/23/2013)
09/17/2013	<u>114</u>	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings. telephone conference held on June 5, 2013, before Judge Cameron McGowan Currie. Court Reporter/Transcriber Gary Smith, Telephone number/E-mail (803) 256-7743, Gary_Smith@scd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Parties have 7 calendar days from the filing of the transcript to file with the court a Notice of Intent to Request Redaction.. Redaction Request due 10/8/2013. Redacted Transcript Deadline set for 10/18/2013. Release of Transcript Restriction set for 12/16/2013. (gsmith,) (Entered: 09/17/2013)
10/04/2013	<u>115</u>	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings. Trial - Volume 1 of 2 -for dates of 06-24-13, before Judge Cameron McGowan Currie, re <u>111</u> Notice of Appeal, Court Reporter/Transcriber Jennifer H. Williams, RPR, Telephone number/e-mail Jenny_Williams@scd.uscourts.gov or 803.351.9742. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Parties have 7 calendar days from the filing of the transcript to file with the court a Notice of Intent to Request Redaction. <i>Does this satisfy all appellate orders for this reporter? Y</i> Redaction Request due 10/25/2013. Redacted Transcript Deadline set for 11/4/2013. Release of Transcript Restriction set for 1/2/2014. (jwil,) (Entered: 10/04/2013)
10/04/2013	<u>116</u>	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings. Trial - Volume 2 of 2 -for dates of 06-25-13, before Judge Cameron McGowan Currie, re <u>111</u> Notice of Appeal, Court Reporter/Transcriber Jennifer H. Williams, RPR, Telephone number/e-mail Jenny_Williams@scd.uscourts.gov or 803.351.9742. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Parties have 7 calendar days from the filing of the transcript to file with the court a Notice of Intent to Request Redaction. <i>Does this satisfy all appellate orders for this reporter? Y</i> Redaction Request due 10/25/2013. Redacted Transcript Deadline set for 11/4/2013. Release of Transcript Restriction set for 1/2/2014. (jwil,) (Entered: 10/04/2013)
03/17/2014	<u>123</u>	ORDER returning exhibits (Exhibits to be picked up by 3/24/2014) Signed by Honorable Cameron McGowan Currie on 3/17/2014. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(cbru,) (Entered: 03/17/2014)
03/26/2014	<u>124</u>	RECEIPT by United States of America, The for exhibit. Associated Cases: 3:11-cv-01721-CMC, 3:11-cv-03155-CMC(cbru,) (Entered: 03/26/2014)

General Docket
 United States Court of Appeals for the Fourth Circuit

Court of Appeals Docket #: 05-1570 Nature of Suit: 3440 Other Civil Rights Doe v. Kidd Appeal From: United States District Court for the District of South Carolina at Columbia Fee Status: fee paid		Docketed: 05/27/2005 Termined: 09/19/2007
Case Type Information: 1) Civil Private 2) private 3) null		
Originating Court Information: District: 0420-3 : CA-03-1918 Court Reporter: Dan Mayo, Official Court Reporter Court Reporter: Kurt McKaughan, Official Court Reporter Court Reporter: Gary N. Smith, Official Court Reporter Court Reporter: Janet Woodward, Court Reporter Coordinator Presiding Judge: Margaret B. Seymour, U. S. District Court Judge Date Filed: 06/09/2003 Date Order/Judgment EOD: 04/22/2005		
Date NOA Filed: 05/23/2005		
Prior Cases: None		
Current Cases: None		

SUE DOE Plaintiff - Appellant	Patricia L. Harrison, Attorney Direct: 803-256-2017 Email: plh.cola@att.net [COR NTC Retained] 611 Holly Street Columbia, SC 29205-0000
v.	
LINDA KIDD Defendant - Appellee	William Henry Davidson, II, Attorney Direct: 803-806-8222 Email: wdavidson@dml-law.com [COR NTC Retained] DAVIDSON & LINDEMANN, PA 1611 Devonshire Drive P. O. Box 8568 Columbia, SC 29202-8568
	Kenneth Paul Woodington Email: kwoodington@dml-law.com [COR NTC Retained] DAVIDSON & LINDEMANN, PA 1611 Devonshire Drive P. O. Box 8568 Columbia, SC 29202-8568
STAN BUTKUS Defendant - Appellee	William Henry Davidson, II, Attorney Direct: 803-806-8222 [COR NTC Retained] (see above)
	Kenneth Paul Woodington [COR NTC Retained] (see above)
KATHI LACY Defendant - Appellee	William Henry Davidson, II, Attorney Direct: 803-806-8222 [COR NTC Retained] (see above)
	Kenneth Paul Woodington [COR NTC Retained] (see above)

**SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND
SPECIAL NEEDS**

Defendant - Appellee

William Henry Davidson, II, Attorney
Direct: 803-806-8222
[COR NTC Retained]
(see above)Kenneth Paul Woodington
[COR NTC Retained]
(see above)**ROBERT F. KERR**

Defendant - Appellee

William Henry Davidson, II, Attorney
Direct: 803-806-8222
[COR NTC Retained]
(see above)Kenneth Paul Woodington
[COR NTC Retained]
(see above)**SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN
SERVICES**

Defendant - Appellee

William Henry Davidson, II, Attorney
Direct: 803-806-8222
[COR NTC Retained]
(see above)Kenneth Paul Woodington
[COR NTC Retained]
(see above)

SUE DOE

Plaintiff - Appellant

v.

LINDA KIDD; STAN BUTKUS; KATHI LACY; SOUTH CAROLINA
DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS; ROBERT KERR;
SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES

Defendants - Appellees

05/27/2005	☐ 1	Civil case docketed. (MFT)
05/27/2005	☐ 2 3 pg, 64.4 KB	Docketing notice issued. [05-1570] ~ [4193165] (MFT)
06/13/2005	☐ 4	Counsel of record form filed by Kenneth Paul Woodington for Appellee Linda Kidd, Appellee Stan Butkus, Appellee Kathi Lacy, Appellee SC Dept Disabilities, Appellee Robert F. Kerr, Appellee SC Dept HHS. (MFT)
06/13/2005	☐ 5	Counsel of record form filed by William Henry Davidson for Appellee Linda Kidd, Appellee Stan Butkus, Appellee Kathi Lacy, Appellee SC Dept Disabilities, Appellee Robert F. Kerr, Appellee SC Dept HHS. (MFT)
06/13/2005	☐ 6	Negative disclosure statement filed by Appellee Linda Kidd, Appellee Stan Butkus, Appellee Kathi Lacy, Appellee SC Dept Disabilities, Appellee Robert F. Kerr, Appellee SC Dept HHS [05-1570] (MFT)
06/16/2005	☐ 7	Counsel of record form filed by Patricia L. Harrison for Appellant Sue Doe. (MFT)
06/16/2005	☐ 8	Negative disclosure statement filed by Appellant Sue Doe [05-1570] (MFT)
06/20/2005	☐ 11	Docketing statement filed by Appellant Sue Doe [11] T/S needed [Y/N]: y T/S already on file?: y. [05-1570] ~ [4205633] (TAF)
06/21/2005	☐ 12 2 pg, 57.53 KB	Record on appeal follow-up notice sent to the district court [05-1570] Record on appeal now due 7/5/05. (TAF)
06/21/2005	☐ 13 3 pg, 43.08 KB	Briefing order filed. Copies to all parties. [05-1570] ~ [4205640] Appellant(s) brief/joint appendix due 8/1/05 for Sue Doe. (TAF)
06/28/2005	☐ 15	Record on appeal filed. Pleadings: vol. 1 Transcript: vol. 2 Exhibits: vol. 3. Box(es): 1. [05-1570] ~ [4210181] (MFT)
07/26/2005	☐ 16 2 pg, 27.74 KB	ORDER FILED [4226061] to extend time to file appellant(s) brief/appendix until 2/1/06 [16]. Appellant(s) brief/joint appendix now due 2/1/06 for Sue Doe. Copies to all parties. ~ [4226061] [05-1570] (MFT)
01/20/2006	☐ 17 2 pg, 27.96 KB	ORDER FILED [4322824] to extend time to file appellant(s) brief/appendix until 8/1/06 [17]. Appellant(s) brief/joint appendix now due 8/1/06 for Sue Doe. Copies to all parties. ~ [4322824] [05-1570] (CT)
07/17/2006	☐ 18 2 pg, 27.96 KB	ORDER FILED [4428910] to extend time to file appellant(s) brief/appendix until 9/1/06 [18]. Appellant(s) brief/joint appendix now due 9/1/06 for Sue Doe. Copies to all parties. ~ [4428910] [05-1570] (CT)
08/29/2006	☐ 20	Motion filed by Appellant Sue Doe to proceed under FRAP 30(c) [20]. ~ [4452356] [05-1570] (DSO)
08/30/2006	☐ 22 2 pg, 28.1 KB	ORDER FILED [4452653] granting motion to proceed under FRAP 30(c) [20] Copies to all parties. ~ [4452653] [05-1570] (DSO)
08/30/2006	☐ 23 3 pg, 33.55 KB	Rule 30(c) briefing order filed. Copies to all parties. [05-1570] ~ [4452676] Appellant page-proof brief due 9/1/06 for Sue Doe. (DSO)
09/01/2006	☐ 30	Page proof brief filed by Appellant Sue Doe. Copies of brief: 4 # brf pages: 55 Sufficient[Y/N]?: y. n. Method of filing w/ court: pm. Date of Service on parties: 9/1/06 Type of service on parties: pm. Appellee page-proof brief due 10/4/06 for SC Dept HHS, for Robert F. Kerr, for SC Dept Disabilities, for Kathi Lacy, for Stan Butkus, for Linda Kidd. [05-1570] ~ [4490604] (CT)
09/20/2006	☐ 25	Motion filed by Appellee Linda Kidd, Appellee Stan Butkus, Appellee Kathi Lacy, Appellee SC Dept Disabilities, Appellee Robert F. Kerr, Appellee SC Dept HHS to extend time to file 30c appellee(s) brief until 10/16/06 [25]. ~ [4464181] [05-1570] (CT)
09/20/2006	☐ 26 2 pg, 28.24 KB	ORDER FILED [4464190] granting motion to ext time to file 30c E's br [25] Rule 30(c) appellee(s) brief now due 10/16/06 for SC Dept HHS, for Robert F. Kerr, for SC Dept Disabilities, for Kathi Lacy, for Stan Butkus, for Linda Kidd. Copies to all parties. ~ [4464190] [05-1570] (CT)
10/12/2006	☐ 31	Page proof brief filed by Appellee Linda Kidd, Appellee Stan Butkus, Appellee Kathi Lacy, Appellee SC Dept Disabilities, Appellee Robert F. Kerr, Appellee SC Dept HHS. Copies of brief: 9 # brf pages: 58. Sufficient [Y/N]?: y. SEALED[Y/N]?: n. Method of filing w/ court: cd Date of Service on parties: 10/12/06 Type of service on parties: pm [05-1570] ~ [4490608] (CT)
10/26/2006	☐ 32	Page proof reply brief filed by Appellant Sue Doe. Copies of brief: 4 # brf pages: 62 Sufficient[Y/N]?: y. n. Method filing w/ court: pm Date of Service on parties: 10/26/06 Type of service on parties: pm [05-1570] ~ [4490652] (CT)
11/02/2006	☐ 34	Rule 30c brief filed by Appellant Sue Doe. Copies of brief: 6 # brf pages: 47. Sufficient[Y/N]?: y. SEALED [Y/N]?: n. Method of filing w/ court: cd Date of Service on parties: 11/2/06 Type of service on parties: cd [05-1570] ~ [4490683] (CT)
11/02/2006	☐ 35	Rule 30c joint appendix filed by Appellant Sue Doe. Copies of apx: 6 # apx pages: 395. Sufficient[Y/N]?: y. SEALED vol.[Y/N]?: n. 2-sided copying[Y/N]?: y. Method of filing w/ court: cd Date of Service on parties: 11/2/06 Type of service on parties: cd [05-1570] ~ [4490686] R30c appellee(s) brief due 11/15/06 for SC Dept HHS, for Robert F. Kerr, for SC Dept Disabilities, for Kathi Lacy, for Stan Butkus, for Linda Kidd. (CT)
11/02/2006	☐ 36	Rule 30c appellant(s) reply brief filed by Appellant Sue Doe Copies of brief: 6 # brf pages: 70. Sufficient [Y/N]?: y. n SEALED[Y/N]?: Method of filing w/ court: pm Date of Service on parties: 11/2/06 Type of service on parties: cd [05-1570] ~ [4490691] (CT)

11/10/2006	☐ 37	Rule 30c brief filed by Appellee Linda Kidd, Appellee Stan Butkus, Appellee Kathi Lacy, Appellee SC Dept Disabilities, Appellee Robert F. Kerr, Appellee SC Dept HHS. Copies of brief: 8 # bnf pages: 57 . Method of filing w/ court: cd Date of Service on parties: 11/10/06 Type of service on parties: pm [05-1570] ~ [4492885] (CT)
11/27/2006	☐ 38	Motion filed by Appellant Sue Doe to file supplemental appendix [38] Supplemental appendix tendered? (Y/N): y. ~ [4498936] [05-1570] (CT)
11/29/2006	☐ 40 3 pg, 76.83 KB	ORDER FILED [4499840] granting motion to file supplemental appendix [38] Copies to all parties. ~ [4499840] [05-1570] (CT)
11/29/2006	☐ 41	Supplemental appendix filed by Appellant Sue Doe. Copies of apx: 6 #apx pages: 8. Exhibit vol.: II. Sufficient?[Y/N]: y. SEALED vol.[Y/N]? n [05-1570] ~ [4499976] (CT)
02/16/2007	☐ 48	Case tentatively calendared for oral argument Term: 5/07 Place: Richmond. NOTIFY OF CONFLICT BY: 2/26/07. [04-2414, 04-2417, 04-2418, 04-2420, 04-4618, 04-4619, 04-4620, 06-1563, 05-1570, 05-1715, 05-2112, 06-1799, 05-2201, 06-1043, 05-2300, 06-1860, 05-2343, 06-1160, 05-2418, 05-2432, 05-4508, 05-4550, 05-4757, 05-5166, 05-5238, 05-7635, 05-7636, 05-7709, 06-16, 06-17, 06-1009, 06-1069, 06-1128, 06-1140, 06-1151, 06-1175, 06-1857, 06-1227, 06-2056, 06-1263, 06-1321, 06-1405, 06-1475, 06-1481, 06-1523, 06-1545, 06-1552, 06-1569, 06-1587, 06-1601, 06-1691, 06-1607, 06-1608, 06-1615, 06-1625, 06-1627, 06-1646, 06-1654, 06-1668, 06-1683, 06-1720, 06-1728, 06-1739, 06-1764, 06-1883, 06-1802, 06-1818, 06-1836, 06-1829, 06-1854, 05-1868, 06-1881, 06-1917, 06-1913, 06-1916, 05-1990, 06-1924, 06-1929, 06-1939, 06-1991] ~ [4538151] (JLC)
03/26/2007	☐ 52	Case calendared for oral argument. Case calendared for oral argument on: 5/24/07. [05-1570] ~ [4555921] (JLC)
05/24/2007	☐ 53	Oral argument heard. Panel: Honorable Robert B. King, Honorable Roger L. Gregory, Honorable Frank D. Whitney, Kenneth Paul Woodington for Appellee SC Dept HHS, Appellee Robert F. Kerr, Appellee SC Dept Disabilities, Appellee Kathi Lacy, Appellee Stan Butkus, Appellee Linda Kidd, Patricia L. Harrison for Appellant Sue Doe Courtroom Deputy: JLE. [05-1570] (JLE)
07/05/2007	☐ 58	Supplemental authorities (FRAP 28(j)) filed by Appellees Linda Kidd, Stan Butkus, Kathi Lacy, SC Dept Disabilities, Robert F. Kerr, and SC Dept HHS [58] [05-1570] (CT)
07/05/2007	☐ 60	Errata filed by Appellees Linda Kidd, Stan Butkus, Kathi Lacy, SC Dept Disabilities, Robert F. Kerr, and SC Dept HHS. [05-1570] (CT)
08/02/2007	☐ 62	Supplemental authorities (FRAP 28(j)) filed by Appellant Sue Doe [62] [05-1570] (CT)
08/06/2007	☐ 64	Supplemental authorities (FRAP 28(j)) filed by Appellant Sue Doe [64] [05-1570] (CT)
09/19/2007	☐ 71	Published, authored opinion filed. Copies to all parties. [05-1570] (TAF)
09/19/2007	☐ 72 33 pg, 200.2 KB	Judgment order filed. Decision: affirmed in part, vacated in part, and remanded with dissenting and concurring opn. EOD Date: 9/19/07. ~ [4649344] [05-1570] (TAF)
10/02/2007	☐ 73	Petition filed by Appellees Linda Kidd, Stan Butkus, Kathi Lacy, SC Dept Disabilities, Robert F. Kerr, and SC Dept HHS for rehearing. Number copies filed: 20 [73].. for rehearing en banc. Number of copies filed: 20 [73] ~ [4656187] [05-1570] (CT)
10/03/2007	☐ 75	Petition filed by Appellant Sue Doe for rehearing. Number copies filed: 4 [75]. ~ [4657210] [05-1570] (CT)
10/09/2007	☐ 77 2 pg, 61.05 KB	Untimely/insufficient bill of costs filed by Appellant Sue Doe. (Insufficiency: late) Remedy by: motion. [05-1570] ~ [4658958] Follow-up due on 10/16/07. (CT)
10/16/2007	☐ 78 2 pg, 29.5 KB	COURT ORDER filed [4662773] denying motion for rehearing [75] EOD Date: 10/16/07., denying motion for rehearing [73] EOD Date: 10/16/07., denying motion for rehearing en banc [73] EOD Date: 10/16/07. Copies to all parties. ~ [4662773] [05-1570] (CT)
10/24/2007	☐ 79 2 pg, 27.48 KB	Mandate issued. ~ [4667285] [05-1570] (CT)
10/24/2007	☐ 80 2 pg, 27.84 KB	Record on appeal returned to USDC at Columbia SC. Pleadings: Vol. 1 T/S: Vol. 2 Exhibits: Vol. 3 # of Boxes: 1. [05-1570] ~ [4667286] (CT)
03/10/2008	☐ 81 1 pg, 16.14 KB	SUPREME COURT REMARK--petition for writ of certiorari denied. Action 1 Disposition Date: 03/03/2008 [05-1570] (DHB)

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AO 450 (SCD 04/2010) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of South Carolina

Babcock Center, Inc.

Plaintiff

v.

The United States of America, by and through its
agency, The Internal Revenue Service

Defendant

Civil Action No. 3:11-1721-CMC

3:11-3155-CMC

JUDGMENT IN A CIVIL ACTION

The court has ordered that:

☐ Plaintiff (name) _____ recover from Defendant (name) _____ the amount of _____ dollars (\$___), which includes prejudgment interest at the rate of ___ %, plus postjudgment interest at the rate of ___ %, along with costs.

☐ Plaintiff recover nothing, the action be dismissed on the merits, and Defendant (name) _____ recover costs from the plaintiff (name) _____.

■ Plaintiff, Babcock Center, Inc., take nothing of Defendant, The United States of America, acting by and through its agency, The Internal Revenue Service, on its claims for refund of penalties paid for the first quarter of 2007 (tax period ending March 31, 2007), second quarter of 2007 (tax period ending June 30, 2007), third quarter of 2007 (tax period ending September 30, 2007), second quarter of 2008 (tax period ending June 30, 2008), and third quarter of 2008 (tax period ending September 30, 2008) and this action is dismissed with prejudice as to those claims.

■ summary judgment is entered in favor of Defendant, The United States of America, acting by and through its agency, The Internal Revenue Service, as to Plaintiff's claims for refund of penalties for the fourth quarter of 2008 (tax period ending December 31, 2008) and for reallocation of payments made to the IRS. Plaintiff, Babcock Center, Inc., shall take nothing of Defendant, The United States of America, acting by and through its agency, The Internal Revenue Service, and this action is dismissed with prejudice as to those claims.

■ summary judgment is entered in favor of Counter Claimant, The United States of America, acting by and through its agency, The Internal Revenue Service, as to the counterclaim for taxes, penalties, and interest owed by Babcock Center the fourth quarter of 2008 (tax period ending December 31, 2008). Counter Claimant, The United States of America, acting by and through its agency, The Internal Revenue Service, recover from the Counter Defendant, Babcock Center, Inc., the amount of One Hundred Thirty-Four Thousand, Seven Hundred Fifty-Two and 12/100 (\$134,752.12) dollars.

■ Plaintiff, Babcock Center, Inc., take nothing of Defendant, The United States of America, acting by and through its agency, The Internal Revenue Service, on its claim for refund of penalties paid for the fourth quarter of 2007 (tax period ending December 31, 2007) and this action is dismissed without prejudice as to that claim.

105-106

This action was:

■ tried by a jury, the Honorable Cameron McGowan Currie, United States District Judge, presiding. The jury having rendered a verdict on Plaintiff's claims for refund of penalties for the first quarter of 2007 (tax period ending March 31, 2007), second quarter of 2007 (tax period ending June 30, 2007), third quarter of 2007 (tax period ending September 30, 2007), second quarter of 2008 (tax period ending June 30, 2008), and third quarter of 2008 (tax period ending September 30, 2008).

☐ tried by the Honorable _____ presiding, without a jury and the above decision was reached.

■ decided by the Court, the Honorable Cameron McGowan Currie, United States District Judge, presiding. The Court having heard and granted in part Defendant's motion for summary judgment, having heard and granted Counter Claimant's motion for summary judgment, and having dismissed Plaintiff's claim for refund of penalties paid for the fourth quarter of 2007 (tax period ending December 31, 2007) for lack of jurisdiction.

Date: June 26, 2013

LARRY W. PROPES, CLERK OF COURT

s/Sara K. Samsa

Signature of Clerk or Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Babcock Center, Inc.,	)	C/A Nos. 3:11-01721-CMC
	)	3:11-03155-CMC
Plaintiff,	)	
v.	)	
	)	
The United States of America, acting by and	)	VERDICT
through its agency, the Internal Revenue	)	
Service,	)	
	)	
Defendant.	)	
_____	)	

1(a). Has Babcock Center proven by a preponderance of the evidence that its failure to timely deposit and pay its payroll taxes for the first quarter of 2007 (period ending March 31, 2007) was not due to willful neglect?

Yes _____ No ✓

If no, proceed to Question 2(a).

If yes, proceed to Question 1(b).

1(b). Has Babcock Center proven by a preponderance of the evidence that its failure to timely deposit and pay its payroll taxes for the first quarter of 2007 (period ending March 31, 2007) was due to reasonable cause?

Yes _____ No _____

- 2(a). Has Babcock Center proven by a preponderance of the evidence that its failure to timely deposit its payroll taxes for the second quarter of 2007 (period ending June 30, 2007) was not due to willful neglect?

Yes _____ No ☒

If no, proceed to Question 3(a).

If yes, proceed to Question 2(b).

- 2(b). Has Babcock Center proven by a preponderance of the evidence that its failure to timely deposit its payroll taxes for the second quarter of 2007 (period ending June 30, 2007) was due to reasonable cause?

Yes _____ No _____

- 3(a). Has Babcock Center proven by a preponderance of the evidence that its failure to timely deposit and pay its payroll taxes for the third quarter of 2007 (period ending September 30, 2007) was not due to willful neglect?**

Yes _____ No ☒ _____

If no, proceed to Question 4(a).

If yes, proceed to Question 3(b).

- 3(b). Has Babcock Center proven by a preponderance of the evidence that its failure to timely deposit and pay its payroll taxes for the third quarter of 2007 (period ending September 30, 2007) was due to reasonable cause?**

Yes _____ No _____

- 4(a). Has Babcock Center proven by a preponderance of the evidence that its failure to timely deposit its payroll taxes for the second quarter of 2008 (period ending June 30, 2008) was not due to willful neglect?

Yes _____

No ☒ _____

If no, proceed to Question 5.

If yes, proceed to Question 4(b).

- 4(b). Has Babcock Center proven by a preponderance of the evidence that its failure to timely deposit its payroll taxes for the second quarter of 2008 (period ending June 30, 2008) was due to reasonable cause?

Yes _____

No _____

- 5(a). Has Babcock Center proven by a preponderance of the evidence that its failure to timely deposit its payroll taxes for the third quarter of 2008 (period ending September 30, 2008) was not due to willful neglect?

Yes _____ No ☒

If no, your deliberations are complete. Please sign the verdict form and advise the court security officer that you have reached a verdict.

If yes, proceed to Question 6(b).

- 5(b). Has Babcock Center proven by a preponderance of the evidence that its failure to timely deposit its payroll taxes for the third quarter of 2008 (period ending September 30, 2008) was due to reasonable cause?

Yes _____ No _____

Your deliberations are complete. Please sign the verdict form and advise the court security officer that you have reached a verdict.

Redacted

Foreperson

Columbia, South Carolina
June 25, 2013

ORIGINAL

1

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

BABCOCK CENTER, INC.,

Plaintiff,

vs. CIVIL ACTION NO. 3:11-cv-01721-CMC

UNITED STATES OF AMERICA,

Defendant.

DEPOSITION OF: JUDITH JOHNSON, M.Ed

DATE: September 18, 2012

TIME: 2:05 P.M.

LOCATION: Edward D. Sullivan Law Office
1331 Elmwood Avenue, Suite 305
Columbia, SC

TAKEN BY: Counsel for the Defendant

REPORTED BY: LORI S. MORTGE,
Certified Court
Reporter, CCR

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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ORIGINAL

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20
21
22
23
24
25 (INDEX AT REAR OF TRANSCRIPT)

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STIPULATION

It is stipulated by and between Counsel that this deposition is being taken in accordance with the Federal Rules of Civil Procedure; that all objections as to Notice of this deposition are hereby waived; that all objections except as to form are reserved until the time of trial.

* * * * *

DR. JUDITH JOHNSON

being first duly sworn, testified as follows:

EXAMINATION

BY MS. NORRIS:

Q. We'll get started, then. I just introduced myself but I will say again for the record I'm Amanda Norris with the Department of Justice in the tax division. Can I get you to state and spell your name for the record?

A. Judy Johnson. J-U-D-Y J-O-H-N-S-O-N.

Q. And you are here with Eddie Sullivan who's Babcock Center's attorney; correct?

A. Yes.

Q. Have you had your deposition taken before?

A. Yes, ma'am.

Q. So you probably know the drill, but I'm

4

1 going to go through my brief instructions. If you
2 have any questions, let me know. I'm going to ask
3 you a series of questions, show you some documents
4 and ask you to answer to the best of your knowledge
5 and ability and to the best you can remember for
6 each question.

7 If you need me to repeat myself,
8 clarify, slow down, anything, just let me know. I'm
9 happy to do so. I will ask you to answer with
10 verbal answers rather than pointing, head nod,
11 uh-huh, huh-uh. We do that all the time, I know,
12 and I may ask you to clarify if you do one of these
13 things whether that was a yes or no so that we have
14 the best record for everyone for when we're reading
15 it later.

16 If you need me to go back -- I find a
17 lot of times in these tax cases sometimes we might
18 be talking about things and you can't remember. You
19 see a document half an hour later and you say, wait
20 a second, this reminds me of something we talked
21 about earlier. Just let me know, I'm happy to go
22 back to that. I might have you answer the question
23 we're on first and go back to that, but I'm happy to
24 do that at any point.

25 If you need a break at any point let me

1 know, I probably will take one midway through the
2 deposition and then another five-minute break at the
3 end just to review my notes. If you need one at any
4 other time, feel free to say so.

5 Do you have any questions about how
6 we're going to do this?

7 A. No, ma'am.

8 Q. All right. Is there any reason, such as
9 medication or medical condition, that your answers
10 would be anything other than accurate and truthful
11 today?

12 A. No.

13 (GOVT. EXH. 115, Subpoena to Dr. Judith
14 Jackson, dated August 30, 2012, was
15 marked for identification.)

16 BY MS. NORRIS:

17 Q. I'm going to start out quickly by
18 showing you Exhibit 115. Have you seen this exhibit
19 before?

20 A. Yes, ma'am.

21 Q. All right. It is the subpoena for your
22 presence here today; correct?

23 A. Yes.

24 Q. I'll ask you to turn to the last page of
25 that document. Have you seen this document request

6

1 before?

2 A. Yes, ma'am. I have.

3 Q. Have you turned over any documents that
4 you found that would be responsive to that last
5 page?

6 A. All documents were turned over to my
7 attorney.

8 Q. Okay. And can you just explain very
9 briefly what the Babcock Center document retention
10 policy is for any financial documents?

11 A. I -- I'm not sure.

12 Q. Do you have any period of time that you
13 would keep financial statements for or any certain
14 period of time you would keep any e-mails?

15 A. Yes, ma'am. We do have a policy that
16 addresses that, but I just can't recite it.

17 Q. Okay. Do you have any e-mails related
18 to tax matters during the 2007 through 2008 calendar
19 years?

20 A. Not that I can recall.

21 Q. Okay. And can you just briefly describe
22 what you and others at the Babcock Center have done
23 to attempt to find any documents that would be
24 responsive to our discovery requests?

25 A. Most of the documents were furnished by

1 my director of -- senior director of administration
2 who's worked with our attorney in responding to the
3 request for documents.

4 Q. And who's your senior director of
5 administration, just for the record?

6 A. Chuck.

7 Q. Norman?

8 A. Yes. I was going to say Chuck Norris.
9 Chuck Norman, yes.

10 Q. Norris is my last name, so I can see how
11 you can get confused there. All right. Just a few
12 questions first about your background. What's the
13 highest level of education that you've completed?

14 A. I have a doctorate in education
15 administration.

16 Q. When did you complete that?

17 A. 1981.

18 Q. And I'm just briefly going to walk
19 through your employment history. We'll start with
20 when you completed your doctorate in 1981. What
21 type of work did you do after that?

22 A. I -- at that time I was the, let's see,
23 administrator of residential services at Coastal
24 Center in Summerville, South Carolina.

25 Q. And what's Coastal Center?

1 A. It's an institution supporting folks
2 with developmental disabilities.

3 Q. And can you just briefly describe for me
4 what your role was?

5 A. I was over the day-to-day operations at
6 that program as it related to the residential
7 program.

8 Q. And did that require you to determine
9 any financial policy or work with finances in the
10 organization?

11 A. Not so much. I had a budget to which I
12 was responsible for, but I was primarily responsible
13 for the folks that did the hands-on supervision and
14 oversight of people's disabilities.

15 Q. So you didn't work in any capacity with
16 any tax matters?

17 A. No. Not at that time.

18 Q. And how long did you say you were at
19 Coastal Center?

20 A. Until -- let's see -- 1988.

21 Q. 1988. And where did you work after you
22 left the Coastal Center?

23 A. I was hired to be the deputy state
24 director for the Department of Disabilities and
25 Special Needs.

1 Q. That was here in South Carolina?

2 A. Yes, ma'am.

3 Q. Okay. And, just again, briefly what
4 were your duties there?

5 A. I was over the programs and supports for
6 all South Carolina citizens with disabilities that
7 receive funding through the Department of
8 Disabilities and Special Needs. I was responsible
9 for the program oversight, policy development.

10 Q. So did that -- did you interact at all
11 with the taxes in that capacity?

12 A. No, I did not.

13 Q. And how long did you stay in that
14 position?

15 A. Until 1996.

16 Q. And where did you work next?

17 A. Then I joined Normal Life, Incorporated.
18 It was a private for profit corporation, same
19 industry, supporting people with disabilities in six
20 states.

21 Q. What was your title there?

22 A. Regional director.

23 Q. What were your duties?

24 A. I was over the operations in Florida,
25 Georgia and Louisiana. And it was programmatic in

10

1 terms of the same kind of things I had been doing,
2 overseeing the day-to-day operations of supports for
3 people with disabilities.

4 Q. So did you -- were you involved at all
5 with any tax matters --

6 A. No.

7 Q. -- in that position? Okay. And how
8 long did you work there?

9 A. Eighteen months.

10 Q. So until about 1998?

11 A. Yes.

12 Q. And where did you work after Normal
13 Life?

14 A. American -- no. ResCare, which
15 purchased Normal Life.

16 Q. Okay.

17 A. So it was part of an acquisition.

18 Q. Did you stay in the same position then?

19 A. Only over two states, but yes.

20 Q. How long did you work for ResCare?

21 A. Nine months.

22 Q. So about 1990, then?

23 A. Approximately.

24 Q. And after that where did you work?

25 A. American Rehabilitation Services.

1 Q. And what was your title there?

2 A. I initially started out as a vice
3 president, was there for a coup -- a year and then
4 was promoted to the chief operating officer.

5 Q. And what were your daily duties -- we'll
6 start with vice president.

7 A. Vice president --

8 Q. What did you oversee in that role?

9 A. I oversaw the operations in Florida and
10 Georgia for this company that was also over six
11 states, just different states. And then when I
12 became the executive vice president/chief operating
13 officer I was over all of the day-to-day operations
14 in those six states.

15 Q. Were you working with tax or financial
16 matters?

17 A. No, I was not. We had a CFO.

18 Q. Okay. And how long did you stay with
19 the American Rehabilitation Services?

20 A. Until 2002.

21 Q. Okay. Where did you work after that?

22 A. The Babcock Center.

23 Q. Okay. What was your position when you
24 started at Babcock Center?

25 A. President and CEO.

12

1 Q. And has that remained your title the
2 entire time?

3 A. Yes, ma'am.

4 Q. And that's your current title?

5 A. Yes, ma'am.

6 Q. Can you briefly describe for me what
7 your duties are as president and CEO?

8 A. I'm over the entire operation. I
9 oversee programs and services, financial matters,
10 work with the boards of directors, liaison for
11 public relations.

12 Q. What percentage of your time, just an
13 estimate is fine, do you think that you're dealing
14 with financial matters in that job?

15 A. Probably about 20 percent.

16 Q. All right. If I could just have you
17 give me just a brief description of the Babcock
18 Center. It's been around since about 1970; is that
19 correct?

20 A. Yes, ma'am.

21 Q. And can you just briefly describe for
22 the record what the Babcock Center does?

23 A. Babcock Center is a 501(c)(3) private
24 not for profit corporation that provides services --
25 lifelong services to people with developmental

1 disabilities, head and spinal cord injuries.

2 Q. Okay. And at its largest do you
3 remember how large Babcock Center was as far as
4 number of individuals you're treating?

5 A. Residentially our largest capacity was
6 634 individuals. Day support was approximately
7 1100, to the best of my recollection.

8 Q. And at what point in time was it at its
9 largest size?

10 A. When I arrived.

11 Q. That would have been about 2002?

12 A. 2002, yes.

13 Q. Okay. How many employees did Babcock
14 Center have in 2002, if you remember?

15 A. I don't.

16 Q. And about how many individuals does
17 Babcock Center serve now?

18 A. Residentially approximately 320.
19 Vocationally around 700.

20 Q. And how many employees does Babcock
21 Center have now?

22 A. About 725, 750, in that range.

23 Q. How is Babcock Center funded?

24 A. Primarily through the Department of
25 Disabilities and Special Needs who takes State

14

1 dollars and matches it with Federal dollars to the
2 Department of Health and Human Services. That's our
3 major source of funding.

4 Q. Approximately what percent? Over 90
5 percent?

6 A. Oh, yeah. Probably 95 or more percent.

7 Q. And you said the State and Federal
8 matching?

9 A. Yes, ma'am.

10 Q. What are any other sources of income?

11 A. We have contracts with other vendors.
12 For example, we're over the collections for one of
13 the counties where we manage their recycling
14 centers, nine of the elevens. We have a special
15 contract with Lexington County.

16 Q. And so the Babcock Center residents or
17 their day support clients are who run those
18 contracts?

19 A. Right. People with and without
20 disabilities, but there are staff and then people
21 that we support on those sites.

22 Q. Okay. And about how much per year
23 currently are you receiving from those programs?

24 A. I think -- I think that's about half a
25 million dollars a year.

1 Q. Has that been pretty consistent over the
2 past?

3 A. Yes..

4 Q. Would that have been pretty consistent
5 in 2007 and 2008?

6 A. Yes. A little COLAs, but not much.

7 Q. Any other sources of income?

8 A. We have other contracts, much, much
9 smaller. The largest is the one that I gave you.

10 Q. Okay. Did Babcock Center receive much
11 in the way of donations from individuals, corporate
12 donations, anything like that?

13 A. The Babcock Center itself?

14 Q. The Babcock Center itself.

15 A. Very little.

16 Q. About how much a year?

17 A. It would be a guess.

18 Q. Under \$200,000, over \$200,000?

19 A. Babcock Center? Typically under
20 \$200,000.

21 Q. All right. Now we just differentiated
22 between the Babcock Center and the Babcock
23 Foundation. First can you describe basically what
24 the Babcock Foundation does?

25 A. That's what I was answering your

16

1 questions about the Babcock Center. The Babcock.
2 Center Foundation is our fund-raising arm that has a
3 separate 501(c)(3) status and supports the Babcock
4 Center through their fund-raising efforts.

5 Q. And how much do they, on average, see
6 through fund-raising each year?

7 A. Oh, my goodness. I could not do that
8 off the top of my head. I would have to see the
9 financial statements.

10 Q. All right. Does the Babcock Center
11 contribute to the Babcock Center Foundation in any
12 way financially?

13 A. The Babcock Center Foundation is housed
14 at the Babcock Center, so I think there's some in
15 kind support there. I don't know the particulars,
16 however. There are some staff that are supported
17 through both agencies or both organizations.

18 Q. Do you know how many, approximately?

19 A. I believe two.

20 Q. Okay. And does the Babcock Center
21 Foundation at all contribute financially to the
22 Babcock Center?

23 A. Yes.

24 Q. And how much do they contribute per
25 year?

1 A. It varies, depending upon the amount
2 that's either donated or the requests that are made
3 through the Babcock Center.

4 Q. What sort of activities will the Babcock
5 Center Foundation contribute to the Babcock Center
6 for?

7 A. If there are individuals that we support
8 that have no sources of income but need help for
9 surgeries, dental care, if they need furnishings for
10 their apartment, the Babcock Center Foundation will
11 help pay for that. The Babcock Center, sometimes we
12 want to beautify our houses, want to improve the
13 conditions in the houses and the foundation will
14 give us funds to do that.

15 Q. So does the Babcock Center Foundation
16 ever contribute to the operating expenses to --
17 funds to cover the operating expenses of the Babcock
18 Center?

19 A. They have. They have loaned us money
20 before.

21 Q. Do you know when those loans were?

22 A. I don't remember.

23 Q. Do you know about how much?

24 A. It was half a million dollars.

25 Q. Was that just one time?

18

1 A. Yes.

2 Q. Has there been more than one loan from
3 the Babcock Center Foundation?

4 A. I'm not aware of that. I can't
5 remember.

6 Q. Was that loan repaid --

7 A. No.

8 Q. -- by the Babcock Center?

9 A. No, it has not.

10 Q. Was that loan forgiven by the
11 foundation?

12 A. No, it's still on our books as a debt
13 owed.

14 Q. Has any amount been repaid to --

15 A. Yes.

16 Q. Do you know how much?

17 A. No.

18 Q. Would you have any records that would
19 show when payments were made on that loan?

20 A. Yes.

21 MS. NORRIS: Okay. I just ask you to
22 produce those, I can make a note. Mr. Sullivan and
23 I can talk about it after the deposition.

24 (This page contains information to be
25 supplied by counsel and/or the deponent.)

1 BY MS. NORRIS:

2 Q. Do you remember if you were repaying on
3 that note during the 2007 and 2008 calendar years?

4 A. No, I don't remember.

5 Q. Now, you mentioned earlier that at its
6 largest size the Babcock Center was about 634
7 residential clients and now it's down to about 320,
8 and the day clients or vocational clients have also
9 similarly declined. Can you describe the process by
10 which the Babcock Center downsized?

11 A. In 2002 there was an audit of the
12 Babcock Center by the Department of Disabilities and
13 Special Needs that cited some areas of concern. And
14 we worked with the Department of Disabilities and
15 Special Needs to reduce our capacity to address the
16 quality issues.

17 Q. Was that reduction also in part due to
18 financial issues at Babcock Center or was it
19 primarily quality issues?

20 A. It was primarily quality issues.

21 Q. Do you remember if there was any
22 discussion of financial issues at that time?

23 A. In the audit itself, there were
24 financial areas that were identified but I don't
25 understand when you say financial issue.

20

1 Q. Were tax issues at all discussed in the
2 2002 audit --

3 A. Not that I recall.

4 Q. -- as a result of down-sizing?

5 A. Not that I recall.

6 Q. So when did this process begin?

7 A. To the best of my recollection I think
8 it was around 2004 -- 2003/2004.

9 Q. And when was it completed?

10 A. I don't remember. I'm guessing, if you
11 want to guess, around 2007.

12 Q. Okay.

13 A. I think that's correct. I'm not sure.

14 Q. And this was a three-phase process; is
15 that correct?

16 A. Yes, ma'am.

17 Q. During the first phase do you remember
18 about what percentage of reduction was done at that
19 time?

20 A. Actually there were two plans.

21 Q. Okay.

22 A. The first plan called for approximately
23 about a 28 percent reduction in our residential
24 program.

25 Q. And there was a reduction in the

1 vocational reduction in that program?

2 A. The vocational numbers include those
3 people that are served residentially. So if they
4 moved on to another provider, then the vocational
5 program would go to the other provider as well.

6 Q. Okay. Did that plan call for a
7 reduction in the number of employees at the Babcock
8 Center?

9 A. Funding and clients is what was required,
10 by our funding agency.

11 Q. So then it was just up to the Babcock
12 Center to determine which employees needed to be
13 kept and which employees needed to be let go with a
14 reduced -- reduction in funding?

15 A. There was a variety of ways in which we
16 achieved that reduction requirement. Some of those
17 ways involved the transfer of staff to the new
18 provider. Other ways provided the closure of
19 facilities where staff completely lost their jobs.

20 Q. Was there any change in the number of
21 administrative employees after that first phase?

22 A. Yes.

23 Q. And how many?

24 A. I don't know. I can't recall.

25 Q. Okay. And how about the second -- you

22

1 said there was a second plan as well?

2 A. The second plan I believe was around
3 2004 where there -- instead of the 27 or 28 percent
4 that we had planned to reduce, we were required to
5 reduce to a total of 50 percent. Instead of 634 we
6 were down to 317 in the residential.

7 Q. And was there any reduction of staff
8 with that second plan?

9 A. Yes.

10 Q. Do you remember about how many?

11 A. No.

12 Q. Did that include a reduction of
13 administrative staff?

14 A. Yes.

15 Q. And was this reduction of staff also
16 completed by about 2007?

17 A. I believe so.

18 Q. How did these reductions affect the
19 Babcock Center financially?

20 A. It was devastating.

21 Q. Why do you say it was devastating?

22 A. It hurt us tremendously from a cash flow
23 projection as well as a tremendous amount of -- loss
24 of personnel required payout of all their vacation
25 time, hit us with our cash. We had some employees

1 that were very disgruntled because their positions
2 were eliminated so we had some lawsuits filed.

3 Q. Do you know about how much you had to
4 pay out in vacation time?

5 A. No. That was a lot.

6 Q. Do you know when these payouts were
7 primarily taking place?

8 A. As the people left, as their positions
9 were either eliminated or if they moved on to the
10 new provider.

11 Q. Did the Babcock Center sell properties
12 as part of these reduction plans?

13 A. We did.

14 Q. When you would sell those properties
15 would the Babcock Center retain the funds?

16 A. Nope.

17 Q. It didn't retain any of them?

18 A. The Department -- to the best of my
19 recollection, the Department of Disabilities and
20 Special Needs and the Housing Trust Fund, the two
21 entities that purchased those properties, received
22 those funds.

23 Q. Okay. When do you first remember
24 hearing Babcock Center was having payroll tax
25 issues?

24

1 A. When I really -- to the best of my
2 recollection 2007/2008, although we were having
3 trouble paying our bills for a long time.

4 Q. Do you know when the trouble paying your
5 bills started?

6 A. With the down-sizing.

7 Q. So that would have been about 2003 or
8 2004?

9 A. Yeah.

10 Q. Do you know if Babcock Center had any
11 trouble paying its bills before the down-sizing
12 started?

13 A. Not that I can recall.

14 Q. Were you aware that the Babcock Center
15 had payroll tax issues going back to 2002?

16 A. I've been told of that.

17 Q. Do you remember who told you that?

18 A. No.

19 Q. How recently have you been told that?

20 A. Oh. 2007, 2008. It was mentioned, but
21 you asked was I aware of them.

22 Q. Yeah.

23 A. Not until 2007/2008.

24 Q. When you first learned of the payroll
25 tax issues in 2007 or 2008 do you remember who told

1 you about them?

2 A. Not the specific person.

3 Q. Do you remember, were you at a Board
4 meeting, were...

5 A. I had meetings with my director of
6 finance and I had meetings with the Board and I had
7 meetings with the finance committee, so I can't
8 specifically pinpoint when I was first told about a
9 payroll problem.

10 Q. Were you aware that the Babcock Center
11 paid several penalties for previous tax quarters in
12 2006?

13 A. Yes. And 2007, 2008 when all this came
14 out.

15 Q. So you learned of that after those
16 penalties had been paid?

17 A. To the best of my recollection.

18 Q. Did they tell you why the Babcock Center
19 had incurred those penalties?

20 A. Did they tell us why we incurred those
21 penalties?

22 Q. Yes, that had been paid in 2006.

23 A. Because we didn't pay our payroll taxes
24 on time.

25 Q. Do you know why those weren't paid on

26

1 time?

2 A. I just know we didn't have any money.
3 We were struggling to pay all our bills.

4 Q. Okay. So do you know why the payroll
5 taxes prior to the down-sizing weren't paid on time?

6 A. No.

7 Q. When you first heard about the payroll
8 tax issues what, if anything, did you do?

9 A. What I recall is that we met with our
10 finance committee and our Board of Directors to try
11 to develop a plan where we could address our payroll
12 tax issue.

13 Q. Would that meeting be contained in
14 finance committee minutes or Board meeting minutes?

15 A. It should be.

16 Q. Do you happen to remember who was at
17 that meeting?

18 A. No.

19 Q. And this would have been in 2007 or
20 2008?

21 A. To the best of my recollection.

22 Q. Okay. Do you remember discussing any
23 payroll tax issues with anyone outside of the
24 finance committee or the Board?

25 A. Our attorney.

1 Q. Okay. Anyone other than your attorney?

2 A. Can you repeat the question?

3 Q. Did you speak with any other
4 individuals, other than the Board or the finance
5 committee, about the payroll tax issues after you
6 learned of them?

7 A. There could have been other staff
8 involved.

9 Q. Do you remember speaking to any of the
10 payroll staff?

11 A. I spoke to the payroll staff about lots
12 of stuff. I can't say that I did or did not talk
13 about this matter with them.

14 Q. Do you remember speaking to an
15 accounting firm about it?

16 A. We had an accounting firm, Derrick,
17 Stubbs & Stith, was working with us on many projects
18 and, yes, they were involved in the discussion as
19 well.

20 Q. Do you remember about how early they got
21 involved?

22 A. No, I don't. I'm sorry. Dates are a
23 challenge for me, so I apologize.

24 Q. That's okay. I appreciate you answering
25 to the best of your ability. I understand it's

28.

1 difficult sometimes to remember.

2 A. It's a long time.

3 Q. After you learned of the tax issues how
4 often would you say that you discussed that with the
5 finance committee or with the Board? Was it
6 something you discussed once and put a plan in
7 place, is this something you discussed multiple
8 times?

9 A. No, we discussed multiple times.

10 Q. Do you know about how often?

11 A. No.

12 Q. Babcock Center is paid every two weeks;
13 is that correct?

14 A. No, ma'am. We're paid twice a month.

15 Q. On the 15th and the end of the month?

16 A. Yes.

17 Q. Do you remember if the conversations
18 were as frequent as each time Babcock Center was
19 paid?

20 A. Oh, certainly not.

21 Q. Okay.

22 A. There was a period when each time people
23 were paid the question was asked were the payroll
24 taxes paid.

25 Q. Do you know when that period was?

1 A. 2007/2008 to -- almost to date.

2 Q. And who asked that question if the
3 payroll taxes were paid?

4 A. I did.

5 Q. Okay. And who did you ask?

6 A. Our director of finance, our senior
7 director of administration.

8 Q. So who was your director of finance in
9 '07 and '08?

10 A. Linda Tyler.

11 Q. And then who did you hire after
12 Ms. Tyler left?

13 A. Chuck Norman.

14 Q. So let me make sure I'm correct.
15 Sometime in 2007 and 2008 you started speaking to
16 Ms. Tyler each pay period about whether the payroll
17 taxes had been deposited?

18 A. Yes.

19 Q. And you said that does continue to this
20 date?

21 A. Yes.

22 Q. Okay. And has that been consistent
23 throughout, that twice a month you've been checking
24 in on that?

25 A. For the most part.

1 Q. You mentioned that you talked to the
2 Board after you heard about the tax issues. Do you
3 remember who the chairman of the Board was at the
4 time?

5 A. I do not.

6 Q. What was the Board's role generally in
7 financial affairs? How involved were they?

8 A. The Board itself would look at our
9 financial statements, our balance sheet, approve any
10 policy or any expenditure that was over \$50,000.

11 Q. And they did that on a monthly basis?

12 A. Yes, ma'am.

13 Q. Okay. How involved were they on the
14 day-to-day operations such as what was being paid
15 and what wasn't being paid?

16 A. Not. They were not.

17 Q. Would they have been involved in any
18 decisions to pay or to not pay the payroll taxes?

19 A. Not to my knowledge, no.

20 Q. They would have just learned about it
21 after the fact?

22 A. Yes, ma'am.

23 Q. How long would you say -- how long of a
24 time period was there between when you learned of
25 the tax liabilities or the payroll taxes hadn't been

1 paid in 2007 and 2008, between that period and when
2 you went to the Board to speak to them about the
3 problem?

4 A. I can't remember when I knew about it,
5 at the same time the Board did or not, so I can't
6 define a time between then.

7 Q. Do you know if the Board was aware of
8 the payment of tax penalties in 2006?

9 A. I don't remember.

10 Q. When you met with the Board and the
11 finance committee did you come up with a plan for
12 how you were going to deal with the payroll tax
13 problems?

14 A. Yes, but I don't remember the specifics.

15 Q. You don't remember any details of what
16 that plan was?

17 A. (Witness shakes head from side to side.)
18 I'm sorry.

19 Q. You mentioned earlier that the Babcock
20 Center was having cash flow issues after the
21 reduction plan; is that correct?

22 A. Yes. As it's occurring then and after,
23 yes.

24 Q. Was the Board kept apprised of these
25 cash flow issues?

32

1 A. Yes.

2 Q. And what sort of information were they
3 given about the tax flow issues?

4 A. Tax flow issues or tax flow --

5 Q. Tax flow, sorry.

6 A. It wasn't every month that we talked
7 about cash. It just wasn't. You know, I was
8 responsible ultimately for the day-to-day operations
9 of the Babcock Center and the Board is responsible
10 for administrating oversight and governance of the
11 Board, so it's when we were having issues about cash
12 that was directed to the Board. Periodically we'd
13 say whether cash was good or not that -- it wasn't a
14 report that we gave every month.

15 Q. So I'm sorry, I may have asked you this.
16 You weren't reporting into the Board each month
17 about whether or not the payroll taxes had been
18 deposited?

19 A. That's correct.

20 Q. Do you remember what your procedures
21 were for keeping minutes at the Board meetings and
22 the finance committee meetings?

23 A. We had a recording secretary, had the
24 staff that performed that function that would take
25 the minutes.

1 Q. And were they required to keep all
2 matters that were discussed in their notes?

3 A. Yes.

4 Q. In their minutes? So do you believe
5 that the --

6 A. Unless they went into executive session.

7 Q. Okay. Were tax issues ever discussed in
8 executive session to your memory?

9 A. Yes.

10 Q. What type of tax issue would be
11 discussed in executive session?

12 MR. SULLIVAN: I object to the form of
13 the question. I don't think you can ask questions
14 about the executive meetings. That's why they go
15 into executive session, to discuss legal matters.

16 MS. NORRIS: Are you claiming some sort
17 of a privilege?

18 MR. SULLIVAN: Well, it seems to me
19 that's why they go into executive session to discuss
20 legal matters.

21 MS. NORRIS: Is there some sort of --

22 MR. SULLIVAN: Let me ask. Was there
23 legal counsel?

24 THE WITNESS: Yeah, it was with you.

25 BY MS. NORRIS:

1 Q. Was Mr. Sullivan present at each of
2 these Board meetings?

3 A. To the best of my -- not all Board
4 meetings. When we discussed our tax issue he was
5 present at executive session.

6 Q. In 2007 and 2008 was Mr. Sullivan your
7 attorney at that time?

8 A. My date challenge, but we hired
9 Mr. Sullivan to help us with our tax issue and I
10 can't be specific with the date.

11 Q. When you record Board minutes you record
12 each individual that is present at the Board
13 meeting?

14 A. I believe we take attendance. I believe
15 the members present are listed on the minutes, but I
16 can't be 100 percent if that's accurate.

17 Q. So if Mr. Sullivan had been present at
18 the meetings would his name have shown up in the
19 attendance?

20 A. I believe so, but without seeing -- if I
21 could see it -- I believe there's a section that
22 says guests.

23 Q. Okay.

24 A. And if there's that section, then he
25 would -- he would have been noted.

1 MS. NORRIS: Okay. We'll get back to
2 that in just a few minutes, then. I'm going to go
3 ahead and show you what we'll mark as Exhibit 3.

4 (GOVT. EXH. 3, Letter to IRS from Edward
5 D. Sullivan, dated April 30, 2010, et
6 al., Bates Stamp Numbers IRS000130 -
7 IRS000159, was marked for
8 identification.)

9 BY MS. NORRIS:

10 Q. I ask you to take a look at that
11 document.

12 A. (Reading.)

13 Q. Actually, right now I'm going to ask you
14 to turn to Pages 2 and 3 of that document. Have you
15 seen this document before?

16 A. Yes, I have.

17 Q. Is that your signature on the second
18 page?

19 A. Yes, it is.

20 Q. And that's dated April 30th, 2010; is
21 that correct?

22 A. I'm trying to find the date.

23 Q. Sorry. Bottom of the second page.

24 A. (Reading.)

25 Q. I'm sorry, the third page. My

36

1 apologies.

2 A. April 30th, yes, ma'am --

3 Q. IRS000132 for the record. And this is a
4 power of attorney form; is that correct?

5 A. Yes.

6 Q. This is naming Mr. Sullivan as your
7 power of attorney?

8 A. Yes, ma'am.

9 Q. Now, you signed this document at the
10 time that Mr. Sullivan filed the claim for refund
11 for the Babcock Center; correct?

12 A. Yes.

13 Q. And do you remember how long
14 Mr. Sullivan had been representing you at that time?

15 A. No, I don't.

16 Q. Do you remember if it was a year, two
17 years, six months?

18 A. I can't guess.

19 Q. Did you always have an attorney present
20 at the Board meetings?

21 A. No.

22 Q. About how often would you have an
23 attorney present at the Board meetings?

24 A. When we needed one.

25 Q. Okay. Do you remember if taxes were

1 ever discussed at a time when an attorney was not
2 present during executive session?

3 A. I don't remember.

4 Q. Which Board members would have taken
5 part in the executive session?

6 A. All Board members present.

7 Q. Would any non-Board members take place
8 in executive session?

9 A. Yes.

10 Q. Who would?

11 A. Whoever the Board wanted at that
12 meeting.

13 Q. So did everyone who was present at most
14 Board meetings then take place in the executive
15 session as well?

16 A. Would you repeat the question?

17 Q. Would anyone that was present at a Board
18 meeting take place in that Board meeting's executive
19 session?

20 A. No. Typically Board meetings, when they
21 went into executive session, the staff left the
22 room, including the recording secretary, unless the
23 Board wanted a specific staff person to stay. I
24 stayed in all meetings.

25 Q. Okay. When did you first retain outside

38

1 accountants to help the Babcock Center or to assist
2 the Babcock Center -- well, I'll stop there. When
3 did you first retain outside accountants at the
4 Babcock Center?

5 MR. SULLIVAN: Objection, vague -- I'm
6 sorry. Objection to the form.

7 BY MS. NORRIS:

8 Q. When did the Babcock Center first retain
9 outside accountants?

10 A. For what purpose?

11 Q. For an auditing purpose.

12 A. The Babcock Center had external auditors
13 every year since I had been there and many years
14 before.

15 Q. And who were those external auditors?

16 A. Depended upon the contract that the
17 Babcock Center had with the audit firm.

18 Q. Did they produce a written audit report
19 each year?

20 A. They did.

21 Q. Do you remember who your external
22 accountants were in calendar year 2007 and 2008?

23 A. To the best of my recollection it was to
24 confirm Derrick, Stubbs & Stith.

25 Q. You believe that that firm did produce

1 an audit report in 2007 and 2008 calendar years?

2 A. They did.

3 Q. And they would have produced those
4 reports on the Babcock Center's fiscal year;
5 correct?

6 A. Yes, ma'am.

7 Q. Okay. Do you know if Babcock Center has
8 copies of those audit reports?

9 A. Yes, we do.

10 Q. I would just, again, ask you to produce
11 copies of those reports for any periods involving
12 the 2007 and 2008 calendar years.

13 A. Since I didn't bring anything to write,
14 can I ask my attorney?

15 THE WITNESS: Are you writing these
16 down?

17 MR. SULLIVAN: Yeah. We'll --

18 MS. NORRIS: I'm also keeping notes and
19 I'm just doing this to have this on the record and
20 I'll send him an e-mail or a letter afterwards with
21 the documents.

22 (This page contains information to be
23 supplied by counsel and/or the deponent.)

24 BY MS. NORRIS:

25 Q. Do you know if those audit reports

1 discuss the payroll taxes?

2 A. I believe in at least one year they do.

3 MS. NORRIS: I would also ask for any
4 audit reports, again just for the record, that
5 involve any discussions of any taxes or penalties
6 for 2008 and 2007 calendar years.

7 (This page contains information to be
8 supplied by counsel and/or the deponent.)

9 BY MS. NORRIS:

10 Q. Other than the third party auditors who
11 came in and did their audit reports each year did
12 you work with any other external accountants?

13 A. Concerning the tax liability issue?

14 Q. Concerning any tax matters.

15 A. Not that I can recall.

16 Q. Okay. Do you remember if Babcock Center
17 ever worked with any third party accountants for the
18 filing of its quarterly tax returns?

19 A. I don't know.

20 Q. Did the Babcock Center produce a budget
21 for each year?

22 A. Yes.

23 Q. And who was involved in the budget
24 process?

25 A. Pretty much all of the supervisors at

1 the Babcock Center. Management team, Board of
2 Directors ultimately approved it.

3 Q. And did your expenses exceed the
4 budgeted amount in 2007, if you remember?

5 A. I don't remember.

6 Q. Were there ever periods in the early
7 2000s where your expenses did exceed your budgeted
8 amount?

9 A. Yes.

10 Q. What was your process for dealing with
11 that? Did you have to go to the Board to get some
12 sort of authority to go over the budgeted amounts or
13 is that --

14 A. Can you repeat the question that you
15 asked?

16 Q. When the Babcock Center exceeded their
17 budget authority for a certain item, what were your
18 procedures for dealing with that?

19 A. We were not held to a line item by the
20 Babcock Center Board of Directors. The budget was a
21 plan and attempt to support the mission of the
22 Babcock Center. We did not have to go to the Board
23 for specific approval to overspend a specific line
24 on the budget.

25 Q. And was it budgeted for each year and

1 the payroll taxes would be paid?

2 A. Yes.

3 Q. Which categories did Babcock tend to
4 overspend around the time of the end of the
5 reduction?

6 A. I can't recall that here.

7 MS. NORRIS: Just for the record I would
8 ask you to produce copies of the budget for any
9 periods involving the 2007 and 2008 calendar years.

10 (This page contains information to be
11 supplied by counsel and/or the deponent.)

12 BY MS. NORRIS:

13 Q. Who had authority to exceed the budgeted
14 amounts around 2007 and 2008 on any expenses?

15 A. I'm not sure how to answer that question
16 because we didn't follow the budget by line, you
17 know. There were people with disabilities counting
18 on us to provide supervision and oversight, so if a
19 staff person didn't show up I had to have another
20 staff person to cover the shift so I might have had
21 to pay overtime. And overtime may not have been
22 budgeted, but we had to cover the shift. So not
23 every person would come to me every time a shift
24 wasn't covered to get permission. Does that kind of
25 answer your question?

1 Q. Mm-hmm. You had authority to sign
2 checks for the Babcock Center; correct?

3 A. Yes.

4 Q. And in 2007 and 2008 do you remember who
5 else did?

6 A. Not the specific names.

7 Q. Did Ms. Tyler have --

8 A. Yes.

9 Q. -- authority?

10 A. To the best of my knowledge she did.

11 Q. Do you remember if anyone else other
12 than Ms. Tyler?

13 A. I believe my -- I don't know if I had a
14 deputy at that time. So typically there's about
15 three or four of us at the Babcock Center that have
16 check writing authority -- signing authority.

17 Q. Is there anyone who has to approve
18 checks which are paid out?

19 A. It requires two signatures.

20 Q. Was there ever a time -- sorry, strike
21 that. We'll come back to that.

22 Who had authority to hire and fire
23 employees within the Babcock Center?

24 A. It depended on the position and what
25 part of the division did. Your supervisors

1 typically could hire. Firing required the
2 concurrence with Human Resources.

3 Q. So if a Babcock Center facility or home
4 wanted to hire a new staff worker, would they have
5 to -- who would have to approve that?

6 A. They would have to go through an initial
7 screening. So we take their application, we do
8 background checks, we do all kinds of background
9 checks, reference checks. Check for alcohol and
10 drugs. When we're sure that they're cleared of all
11 that, then the person on that particular shift can
12 offer employment.

13 Q. Who would actually approve the listing
14 of a new position to actually start the hiring
15 process?

16 A. Each particular location has positions
17 that are assigned. So if they became vacant, unless
18 we were under freeze -- there were many times we had
19 to freeze positions.

20 Q. Do you remember if you had to freeze
21 positions in 2007 and 2008 calendar years?

22 A. I believe we did. I can't be for sure
23 of the dates.

24 Q. Did you ever freeze hiring due to the
25 inability to meet payroll taxes?

1 A. We froze hiring because we were having
2 difficulty paying our bills.

3 Q. So generally all bills? It wasn't --

4 A. There were lots of bills we could not
5 pay.

6 Q. Okay. If you were having difficulty
7 paying all bills how did you determine which bills
8 were paid?

9 A. I let my director of finance determine
10 that.

11 Q. So that was Ms. Tyler?

12 A. Yes.

13 Q. So no one else -- there was no other
14 approval process for determining which creditors
15 were paid and weren't paid?

16 A. No, not really.

17 Q. Okay. To your knowledge, did yourself
18 or anyone else ever go to Ms. Tyler and tell her it
19 was a priority to pay the payroll taxes?

20 A. When we learned that payroll taxes were
21 not paid sometime in 2007 and 2008 we did have those
22 discussions. It was very important to try to figure
23 out how we could pay these taxes.

24 Q. Do you know if any plan was put in place
25 to figure out how to pay the taxes?

1 A. I believe I told you earlier, yes, there
2 was a plan but I can't be specific as to what it
3 was.

4 Q. Whose duty, if you know, was it for
5 actually depositing the payroll tax amounts --

6 A. I don't know.

7 Q. -- each year? Okay. Do you know in
8 determining, on a bimonthly basis, the Babcock
9 Center was not able to timely pay the payroll taxes
10 do you know which financial statements any of the
11 individuals were relying -- were relying on in
12 making those decisions?

13 A. No, I don't.

14 Q. Would they just come to you and say we
15 don't have the funds for this, what should we do
16 about it?

17 A. No.

18 Q. Once you started checking in on a
19 bimonthly basis and checking in on the payroll taxes
20 as you testified earlier, did you ever do anything
21 to verify whether Babcock Center was financially
22 able to pay the taxes or not?

23 A. There was a form that they showed us
24 that would show the routing numbers that the payroll
25 taxes had been paid and the amount that was paid,

1 and I remember signing those forms.

2 Q. So that was if the payroll taxes had
3 been paid?

4 A. Yes, ma'am.

5 Q. If they came to you or if you went to
6 them to check in after payroll taxes and they said
7 no, you didn't have the funds to pay the payroll
8 taxes this month, did you do anything to
9 independently verify that fact?

10 A. I was never told we didn't have the
11 payroll taxes to pay that month, any particular
12 month. They never came to me.

13 Q. So after you started checking in on them
14 in 2007 or 2008 none of those conversations resulted
15 in an individual telling you no, we didn't timely
16 deposit the payroll taxes?

17 A. I don't understand the question.

18 Q. Was there ever a time when you went to
19 the individual that you spoke to -- you testified
20 earlier that you started checking in after each
21 payroll twice a month. Was there ever a time when
22 you went to that individual and had that
23 conversation and they said no, we didn't timely
24 deposit or pay the payroll taxes?

25 A. After we realized that the payroll taxes

1 had not been paid because we didn't have enough
2 money to pay them, we then put a plan in place. And
3 I can't be specific about the plan, but I can
4 remember part of the plan was that they would show
5 me documentation that they, indeed, were being paid.
6 That's when I saw the routing slip, the amount that
7 was paid, and I would sign it. During that process
8 nobody came to me and said, we don't have money to
9 pay taxes.

10 Q. Okay. But the Babcock Center did
11 continue to incur deposit penalties through 2007,
12 2008 and 2009; correct?

13 A. We continued to incur penalties and
14 interest. We were paying our taxes.

15 Q. So I guess just to clarify, is it your
16 testimony that you believe the taxes were always
17 paid on time starting in 2007 and 2008 when you
18 started having these conversations with employees?

19 A. No.

20 Q. So I guess that's my question. You
21 testified earlier that you would speak to someone
22 after each payroll twice a month; correct, about the
23 payroll taxes?

24 A. After we put the plan in place, but I
25 can't tell you the dates. I'm real foggy because

1 it's been a number of years for me. I'm primarily
2 responsible for a lot of the programming oversight.
3 The details of the financial part of the operation
4 is -- has not been my ultimate -- it's my ultimate
5 responsibility but hasn't been my day-to-day
6 function.

7 Q. So after you put the plan in place -- is
8 it your testimony after you put the plan in place
9 all the payroll taxes were paid on time?

10 A. After we discussed the procedure for me
11 verifying that we were paying our payroll taxes for
12 that payroll on time, yes, to the best of my
13 knowledge that's accurate.

14 Q. So if there's a time when Babcock Center
15 wasn't paying their payroll taxes timely, that would
16 have been prior to you putting the plan in place?

17 A. To the best of my recollection, yes.

18 Q. And after -- I'm sorry. - If there was a
19 time when the Babcock Center was incurring payroll
20 tax penalties for failure to pay their payroll
21 taxes, would that have been before you knew about
22 the payroll tax issues?

23 A. Repeat the question.

24 Q. If there was a time when the Babcock
25 Center was incurring penalties for failure to

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1 deposit their payroll taxes, is it your testimony
2 that once you learned of that a plan was put in
3 place or...

4 A. I'm talking about paying the payroll
5 taxes that were due, not paying the penalties or the
6 interest that was due.

7 Q. Correct.

8 A. Okay.

9 Q. So is it your testimony that once you
10 learned of that you immediately put a plan in place?

11 A. I didn't say immediately. I know that
12 we put a plan in place, but I can't tell you when.

13 Q. So I guess what I'm trying to understand
14 is you testified that once you put a plan in place
15 all of your payroll taxes were timely paid; correct?

16 A. Payroll taxes that were due on that
17 payroll. As I recall, that is accurate.

18 Q. Okay. So during any time period that
19 the Babcock Center was still late depositing or not
20 depositing their payroll taxes, that would have been
21 before the plan was put in place?

22 A. Yes, ma'am. That's my recollection.

23 Q. So if the Babcock Center was incurring
24 payroll taxes through 2000 -- at least 2009, is it
25 your testimony then that there was no plan put in

1 place to address the payroll taxes until at least
2 2009?

3 A. I don't -- I don't know.

4 Q. Let's switch over for a few minutes to
5 the State funding. How did the State determine what
6 level of funding you would receive each year?

7 A. The Department of Disabilities and
8 Special Needs would write a budget that would have
9 to be approved by the General Assembly. And once
10 the dollars were given to the Department of
11 Disabilities they would go before their commission,
12 who was a governing body, and with specific budgets
13 for every agency in the State of South Carolina
14 providing support for people with disabilities. The
15 commission would approve those budgets and then the
16 Department would ask us to sign contracts.

17 Q. Do you know if those budgets were --
18 were they based on the number of individuals you
19 were serving?

20 A. Yes. And so they were modified almost
21 every month.

22 Q. When you had about a 50 percent
23 reduction of the number of people served between,
24 you said, about 2003 and about 2007, was there a
25 corresponding 50 percent reduction in funding?

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1 A. Not completely 50 percent in funding
2 because our residential program was cut by 50
3 percent, but not all of our day supports.

4 Q. Did you ever go to the State at any
5 point during the down-sizing or immediately
6 thereafter and say that you weren't able to fund the
7 program on that amount of funds, that you were
8 having these cash flow issues?

9 A. On many times.

10 Q. Do you know about when that was?

11 A. Not the specific date. There were many
12 conversations.

13 Q. Was that ongoing --

14 A. Yes.

15 Q. -- throughout that process?

16 A. Yes, ma'am.

17 Q. Do you remember if the Babcock Center
18 obtained any loans during the 2007/2008 calendar
19 years to help with their operating expenses?

20 A. I know in June of different years the
21 Department of Disabilities and Special Needs we
22 didn't get a check. And so meeting our payroll
23 during the month of June was always difficult so we
24 would borrow money to pay the payroll.

25 Q. Do you remember if any of that money was

1 ever used to catch up on payroll taxes?

2 A. I -- I don't know.

3 Q. Babcock Center had a line of credit as
4 well; correct?

5 A. That's correct.

6 Q. Do you know if any of that was ever used
7 to pay payroll taxes?

8 A. I don't know.

9 Q. I'll ask you a few questions just about
10 your payroll procedures. You mentioned that a
11 couple of times you received a loan, I believe it
12 was in June, to help meet payroll during those
13 months?

14 A. Yes, ma'am.

15 Q. Was there ever a time that the payroll
16 was not met?

17 A. Not that I can recall.

18 Q. And, to your knowledge, did Babcock
19 Center always withhold the Federal withholding taxes
20 from payroll -- from employees' paychecks and those
21 were paid over?

22 A. Would you repeat the question?

23 Q. There's a certain percentage of
24 withholding taxes that are required to be withheld
25 from each employee's paycheck I guess bimonthly;

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1 correct?

2 A. Yes, ma'am.

3 Q. Do you know if the Babcock Center was
4 always withholding those taxes?

5 A. If they were withholding the percentage
6 of taxes?

7 Q. Percentage of taxes, sorry.

8 A. I don't know.

9 Q. So you don't know what the Babcock
10 Center was doing with any amounts of money that
11 would be the corresponding amount of money to the
12 amount that was withheld from the employees'
13 paychecks?

14 A. We had a director of finance who oversaw
15 how bills were being paid and how our payroll was
16 being paid. She oversaw those functions. I never
17 got into the minutiae of what percent of payroll
18 taxes were being paid during that time period.

19 Q. Do you know if the Babcock Center had a
20 separate -- at any point had a separate payroll tax
21 account, checking account?

22 A. I don't know.

23 Q. So do you know if any of the withholding
24 taxes that were withheld from employees' paychecks
25 were used to pay operating expenses at Babcock

1 Center?

2 A. No, I don't.

3 Q. Do you know if any individuals received
4 bonuses in 2007 or 2008?

5 A. I don't know for sure. I don't.

6 Q. Did Babcock Center ever award bonuses to
7 any of its managers or executives?

8 A. Periodically there are bonuses that are
9 given, but they're rare and far between.

10 Q. Do you know if Babcock Center ever gave
11 any bonuses to any of its executive staff? So CEO,
12 CFO...

13 A. I received a bonus 2003 or 2004 that was
14 paid back to the Babcock Center.

15 Q. Did you receive any after that?

16 A. I have. I think I've received -- I
17 don't know how many, but I've received a few bonuses
18 since that time.

19 Q. Do you know if you received one in 2007
20 or 2008?

21 A. I don't.

22 Q. I'm sorry, I meant to ask you this. Do
23 you know if any other executives received one in
24 2007 or 2008?

25 A. I don't -- I don't remember.

1 Q. Was there ever a time that the Babcock
2 Center reduced its number of employees specifically
3 to meet payroll taxes?

4 A. Not -- I don't recall specifically to
5 meet payroll taxes.

6 Q. At the time that the Babcock Center's
7 payroll taxes weren't being paid in 2007 and 2008,
8 do you know if any other vendors weren't being paid
9 at that time?

10 A. There was a long period of time that we
11 had difficulty paying vendors. Again, it's my date
12 block that I can't tell you if it was 2007 or 2008.
13 But I would assume that year, like other few years
14 we were struggling because of the down-sizing and
15 cuts from the Department of Disability, that there
16 were vendors that were not paid. There were places
17 where we lost credit. There were vendors that
18 called me specifically.

19 Q. Do you remember who any of those vendors
20 were?

21 A. Pugaby's Air Conditioning, because they
22 called me monthly. I know Lowe's cut off our
23 credit. AT&T we had problems paying. Problems
24 paying our grocery bill. Just to name a few.

25 Q. Did you ever attempt to reduce any of

1 your expenses?

2 A. On many occasions we did.

3 Q. Specifically for the payment of payroll
4 taxes or just for the payment of operating expenses?

5 A. To be able to keep the company afloat.

6 Q. What type measures did you take to cut
7 costs?

8 A. We had reductions in force. We had
9 voluntary furloughs. We reduced benefits. Closed
10 houses. Reduced our health insurance benefits for
11 our employees, took away holidays. Reduced the 401K
12 match. I can't recite them all, but those I
13 remember.

14 Q. Okay. Do you know what would have
15 happened to the Babcock Center if you had timely
16 deposited your payroll taxes in 2007 and 2008?

17 A. We didn't have the money.

18 Q. By you didn't have the money, did that
19 mean you didn't have the money in your checking
20 account, that the money that you had was allocated
21 to other sources? What do you mean you didn't have
22 the money? Can you elaborate at all?

23 A. There was only so much money that was
24 available at the time. We had to worry about
25 providing a safe home and environment for 320 folks

1 that were counting on us. We had to feed them and
2 keep the lights on and we had to figure out how we
3 could keep it afloat.

4 Q. So do you know if that was true for each
5 of the tax quarters? And when I say that, I mean
6 the tax quarters -- the IRS tax quarters starting in
7 December and ending in January. Do you know if that
8 financial condition was the same from 2007 to 2008,
9 that you didn't have the money for each of those
10 quarters?

11 A. I don't know for each of the quarters.
12 I just know we were in financial strife for a long
13 time because of the down-sizing of Babcock Center.

14 Q. Has the Babcock Center ultimately
15 resolved its cash flow problems?

16 A. Yes.

17 Q. Can you just briefly explain what you've
18 done to be able to meet those cash flow problems?

19 A. We closed a lot of facilities or gave
20 them to other providers, particularly those
21 facilities that were costing us tons of money to
22 operate. When we were forced to downsize we tried
23 to pick those facilities that cost the most to keep
24 open. We've eliminated some management positions.
25 We've still reduced, as I mentioned earlier, our

1 benefits, we've eliminated holidays. We've, you
2 know, looked at different ways in which we could
3 establish synergies to operate the program more
4 efficiently.

5 Q. So when would you say those cash flow
6 problems were resolved, approximately?

7 A. Probably last couple of years, maybe.

8 Q. So after 2009?

9 A. Yeah, approximately.

10 Q. You said you eliminated some management
11 positions. Do you remember when that happened?

12 A. Not the specific year.

13 Q. Is it after 2008?

14 A. I can't tell you the specific year. I
15 can tell you some of the positions, but not the
16 years.

17 MS. NORRIS: Do you have the time?

18 MR. SULLIVAN: 3:25.

19 MS. NORRIS: We're going to take a short
20 break for a few minutes.

21 THE WITNESS: Great.

22 (A recess transpired.)

23 BY MS. NORRIS:

24 Q. We'll go back on the record, then, and
25 we're just going to go through a few documents here.

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1 I'll have you start at Exhibit 3, which you looked
2 at before. I'm looking at the first page of that.
3 This is a letter from your attorney to the IRS;
4 correct?

5 A. Yes, ma'am.

6 Q. And it involves your claim for refund,
7 which is the IRS Form 843, for tax periods March
8 31st, 2007, June 30th, 2007, and September 30th,
9 2007; correct?

10 A. Yes.

11 Q. Okay. I'll ask you to turn, then, to
12 Page IRS000135. Have you seen this document before?

13 A. Yes, ma'am.

14 Q. And is that your signature at the
15 bottom?

16 A. Yes, ma'am.

17 Q. Did you review this document before you
18 signed it?

19 A. Yes, I did.

20 Q. Okay. If you turn back a few more
21 pages, let me find the exact page number for you, to
22 IRS000145. That's the affidavit of Charles
23 Norman --

24 A. Yes.

25 Q. -- correct? Can you describe what

1 Mr. Norman's role is in the Babcock Center?

2 A. He's the senior director of
3 administration. And in that capacity he oversees
4 several departments, one of which is our finance,
5 our procurement, our support services and our IT
6 department.

7 Q. And so that includes your -- any tax
8 matters?

9 A. Yes, ma'am. Payroll.

10 Q. Payroll tax? Okay. When did Mr. Norman
11 start working at Babcock Center?

12 A. I don't remember.

13 Q. Do you remember --

14 A. 2008/2009 or 2009/2010.

15 Q. Okay.

16 A. One of those.

17 Q. Mr. Norman -- do you remember if
18 Mr. Norman was a Babcock Center employee in 2007?

19 A. I don't remember.

20 Q. Okay.

21 A. I don't believe that he was.

22 Q. Okay. I'll have you turn a few more
23 pages back to IRS000148.

24 A. Yes, ma'am.

25 Q. It is a statement from Philadelphia

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1 Insurance Companies; is that correct?

2 A. Yes.

3 Q. Have you seen this document before?

4 A. Not that I can recall.

5 Q. Okay. I'll have you turn to the
6 following page. Do you know if you've seen this
7 document?

8 A. Not that I can recall.

9 Q. Looking at these documents, they're both
10 cancellation notices stating that the account would
11 be cancelled if payment is not received within ten
12 days; is that correct?

13 A. Yes.

14 Q. Do you know -- would you generally see
15 these documents if they were at the Babcock Center,
16 or would someone else deal with it?

17 A. Our director of finance would deal with
18 it.

19 Q. And the director of finance would not
20 generally show the documents to you?

21 A. No.

22 Q. Do you remember if any insurance
23 accounts were cancelled?

24 A. I do know that we were having problems
25 paying our large bills, one of which was these.

1 Q. The insurance bill?

2 A. Yes, ma'am.

3 Q. But you don't know if any were actually
4 cancelled?

5 A. No, I don't.

6 Q. I'm going to refer you to Attachment E,
7 which is IRS000153. Have you seen this document
8 before?

9 A. I don't believe so.

10 Q. It's referencing closing the Pitts
11 Apartments. Do you see that about halfway down?

12 A. Yes, ma'am.

13 Q. Do you remember closing the Pitts
14 Apartments?

15 A. I do.

16 Q. Would any monies received on behalf of
17 closing the Pitts Apartments or selling the Pitts
18 Apartments go to the Babcock Center?

19 A. I don't remember. I'm sorry, I don't
20 remember.

21 Q. I'm going to ask you to turn to
22 Attachment G, which is IRS000155.

23 A. Yes, ma'am.

24 Q. Do you know what this document is?

25 A. (Reading.) I do not.

1 MS. NORRIS: Okay. I'm going to show
2 you what we'll mark as Exhibit 4. I've already
3 marked that one.

4 (GOVT. EXH. 4, Letter to IRS from Edward
5 D. Sullivan, dated May 17, 2011, et al.,
6 Bates Stamp Numbers IRS000430 -
7 IRS000436, was marked for
8 identification.)

9 BY MS. NORRIS:

10 Q. I'll give you a chance to look at that
11 document.

12 A. (Reading.)

13 Q. Have you seen that document before?

14 A. Yes, ma'am. I have.

15 Q. Okay. Do you recognize that as the
16 claim for refund that the Babcock Center filed for
17 2008 tax quarters?

18 A. Mr. Sullivan filed -- are you asking --
19 the letter or the 843?

20 Q. I guess the 843 is an attachment to the
21 letter; correct?

22 A. Yes, ma'am.

23 Q. But you did not sign these documents for
24 these quarters; correct? Exhibit 4?

25 A. To the best of my recollection, I did

1 sign these documents.

2 Q. Okay. It's referenced in the letter
3 there's three claims. And there's one for the
4 period June 30th, 2008, one for September 30th, 2008
5 and one for December 30th, 2008; is that correct?

6 A. Yes.

7 Q. December 31st I guess it is. You
8 believe you did review these documents as well?

9 A. Yes, ma'am.

10 Q. Okay.

11 A. I believe so.

12 MS. NORRIS: That's all I need for
13 Exhibit 4. I'm going to show you Exhibit 5.

14 (GOVT. EXH. 5, 2003 Form 990, was marked
15 for identification.)

16 BY MS. NORRIS:

17 Q. I'll give you a second to look over
18 this.

19 A. You have to give me an hour.

20 Q. I won't make you read all of that, I
21 promise. I refer you to Page 6 -- well, first, have
22 you seen this document before?

23 A. Yes, I believe I have. I haven't looked
24 at it all yet. (Reading.)

25 Q. I refer you to Page 6. There's a

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1 signature of an officer there. Can you read that
2 signature or do you know who that individual is?

3 A. That would be Twan B. Barber.

4 Q. That's T-W-A-N, just for the record?

5 A. Yes, ma'am.

6 Q. And what did Twan Barber do at the
7 Babcock Center?

8 A. He was our director of finance.

9 Q. And was this prior to Ms. Tyler?

10 A. Yes.

11 Q. Incidentally, do you know an individual
12 named Matt that worked at the Babcock Center?

13 A. Yes.

14 Q. What was Matt's last name?

15 A. I'm sorry. I don't remember. He wasn't
16 with us that long.

17 Q. Do you know what Matt's position was
18 with the Babcock Center?

19 A. He was our deputy director.

20 Q. You don't happen to remember what years
21 he worked there, do you?

22 A. No. I'm thinking around 2004/2005 -- I
23 was almost there. Just keep going.

24 Q. Sorry, everybody seems to be drawing a
25 blank on his last name.

1 A. I believe it was Matt Stanley.

2 Q. Stanley?

3 A. I believe that's accurate.

4 Q. And you said he was there for just a
5 short period of time?

6 A. Yes, ma'am.

7 Q. Okay. So I'm going to refer you back to
8 the first page of your 2003 Form 990. And on Line
9 1c, about a third of the way down, it shows about
10 36.6 million in grant money; is that correct?

11 A. That's what the form shows, 36,740,178.

12 Q. And do you know was this -- well, this
13 tax period is for tax period -- tax year beginning
14 July 1st, 2003 and ending June 30, 2004; correct?

15 A. I don't know. I have not seen this
16 document.

17 Q. Okay. Do you know if 36 million -- 36.6
18 million, approximately, is the amount that Babcock
19 received before, during or after the reduction --

20 A. I don't know.

21 Q. -- from the State? You're not sure?

22 A. Since it was 2003 it would be before the
23 reduction, I believe. I don't know. I just
24 don't...

25 Q. Was there any sort of formal reduction

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1 plan that was written out?

2 A. Yes.

3 Q. Okay. And I do have some letters from
4 you. Would that be in letter form or was there a
5 separate specific plan that detailed the reduction
6 in each phase?

7 A. There was a reduction plan.

8 Q. Do you know if Babcock Center has a copy
9 of that?

10 A. That's what I'm trying to recall. I'll
11 be happy to produce it if I can find it.

12 MS. NORRIS: I would ask you to produce
13 it if you do have a copy of that.

14 (This page contains information to be
15 supplied by counsel and/or the deponent.)

16 BY MS. NORRIS:

17 Q. I do have one other document I'll show
18 you about that in a minute. Okay. So the time
19 period of July 2003 to July 2004, do you think that
20 would have been before the reduction in the number
21 of people served began?

22 A. It was before the depopulization plan
23 occurred, yes.

24 Q. Okay. So I ask you to look total
25 revenue on Line -- see here -- 1d, it's showing 36.7

1 million; correct?

2 A. Yes, ma'am.

3 Q. Your total expenses on Line 17 towards
4 the bottom shows 44. -- almost 4 million; correct?

5 A. Correct.

6 Q. So do you know if the Babcock Center was
7 running at a deficit before the reduction plan
8 started?

9 A. Absolutely.

10 Q. Okay. So when -- before the reduction
11 plan began and the Babcock Center was having
12 financial issues then, what was Babcock Center's
13 plan to address these issues?

14 A. When I first came you mentioned that
15 there was an audit by the Department of Disabilities
16 and Special Needs and they identified quality
17 issues. So we were forced or directed to increase
18 staffing in a number of areas because it was not
19 felt that the individuals were safe at that time.
20 And as a result of that, we had to hire a whole lot
21 more staff than what we had. That's what caused a
22 lot of this problem, was to improve the quality and
23 the safety of the people that we supported and, as a
24 result, we were running some pretty significant
25 deficits. We also had to do some major renovations

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1 and repairs of some of our facilities and programs.

2 Q. Do you remember if the State gave you
3 any additional funds to help cover those additional
4 employees?

5 A. The additional employees? No, they did
6 not.

7 (GOVT. EXH. 8, 2006 Form 990, was marked
8 for identification.)

9 BY MS. NORRIS:

10 Q. I'm going to show you Government Exhibit
11 8, so I'll show you Government's Exhibit 8 there.
12 Have you seen this document before?

13 A. (Reading.) I don't know that I have.

14 Q. This is a Form 990 -- or appears to be a
15 Form 990 for the 2006 tax year; is that correct?

16 A. Yes, ma'am.

17 Q. Was it your practice to review the Form
18 990s before they were filed?

19 A. No.

20 Q. Do you know who would?

21 A. Our director of finance.

22 Q. Do you know if the fiscal year beginning
23 July of 2006 and ending July of 2007 was during or
24 after the reduction plan?

25 A. Not for sure.

1 Q. It had already started by that point;
2 correct?

3 A. Yes, ma'am.

4 Q. And if we look at Line 1d on the first
5 page there, it shows that there's about 29.7 million
6 in Government grants that the Babcock Center
7 received that year; is that correct?

8 A. Yes, ma'am.

9 Q. And if we look down to Line 17 again, it
10 shows that the Babcock Center's total expenses
11 during this time period was 29.3 million; correct?

12 A. Correct.

13 MS. NORRIS: I'm going to show you now
14 what we'll mark as Government's Exhibit 9.

15 (GOVT. EXH. 9, 2007 Form 990, was marked
16 for identification.)

17 BY MS. NORRIS:

18 Q. Have you seen this exhibit before?

19 A. I don't believe I have.

20 Q. Okay. I refer you again to that first
21 page -- well, actually, this appears to be Form 990
22 for the 2007 fiscal year; is that correct?

23 A. That is correct.

24 Q. Do you remember if the fiscal year
25 starting in July 2007 and ending in July -- June

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1 2008 would have been during or after the down-sizing
2 plan?

3 A. Not sure.

4 Q. Okay. This year, if we look at again 1d
5 where it shows Government grants, the Babcock Center
6 appears to have received 24.5 million; is that
7 correct?

8 A. That is correct.

9 Q. And the expenses, however, we look down
10 at Line 12 were 28.4 million; is that correct?

11 A. Actually, that's total revenue.

12 Q. I'm sorry, 29.1 million?

13 A. That's correct.

14 Q. Do you know what would have caused the
15 increase or the deficit this year to be so much --
16 I'm sorry, for the expenses to be so much higher
17 than the revenue in that year?

18 A. Not specifically for that time period.

19 Q. Okay. If I could refer you back to
20 Exhibit 8 one more time, give me one second and I
21 can tell you what page we're on. The next to the
22 last page shows Other Liabilities, and it shows
23 \$500,000 to the Bab -- that's owed to the Babcock
24 Center Foundation.

25 Do you remember if the half-million

1 dollar loan for the Babcock Center Foundation was
2 loaned in this calendar year?

3 A. I do not.

4 Q. Okay. But it shows that that
5 half-million dollar amount is still outstanding --

6 A. Yes, ma'am.

7 Q. -- is that correct? I'll ask you to
8 turn to Exhibit 9, then, and this time it is the
9 third to last page. Here it shows at the beginning
10 of the year half a million dollars was owed to the
11 Babcock Center Foundation; correct?

12 A. Correct.

13 Q. And it shows zero dollars as the
14 end-of-year amount; correct?

15 A. That is correct.

16 Q. Do you know if that loan was paid off
17 during that year?

18 A. To the best of my knowledge it has not
19 been paid off.

20 MS. NORRIS: Okay. I'll show you what
21 we'll mark as Government Exhibit 10.

22 (GOVT. EXH. 10, 2008 Form 990, was
23 marked for identification.)

24 BY MS. NORRIS:

25 Q. I'll give you a minute to look at that

1 first page. Have you seen this document before?

2 A. (Reading.) Not that I recall.

3 Q. I'll ask you to look down in the
4 signature block. It appears to be an electronic
5 signature, but your name is listed as the executive
6 director signing the return; is that correct?

7 A. Actually it has dot, dot, dot, dot, dot.

8 Q. Do you remember reviewing the 2008 Form
9 990?

10 A. I do not.

11 Q. Do you remember authorizing for your
12 signature to be E-signed?

13 A. I did not.

14 Q. In 2008 tax year?

15 MS. NORRIS: Okay. I'm going to show -
16 you what we'll mark as Government's Exhibit 12.

17 (GOVT. EXH. 12, Letter to IRS from Judy
18 E. Johnson, Ed.D., dated March 24, 2009,
19 Bates Stamp Number BAB000754, was marked
20 for identification.)

21 BY MS. NORRIS:

22 Q. Have you seen that document before?

23 A. I have.

24 Q. Can you explain to me what this is?

25 A. It's a letter that we wrote to the

1 Department of the Treasury paying back \$69,489.20 in
2 payment of taxes, and the payment direct -- should
3 be directly applied to the amount due for unpaid
4 taxes.

5 Q. Okay. And is that your signature at the
6 bottom?

7 A. It is.

8 Q. About a third of the way down the page
9 it references the tax period at issue and it says
10 June 30th, 2007; is that correct?

11 A. Yes, ma'am. It does.

12 Q. Did you draft this document?

13 A. No, I did not.

14 Q. Do you know who did draft it?

15 A. No, I do not.

16 Q. Do you remember discussing this document
17 with anyone?

18 A. With my attorney.

19 Q. Okay. Now, as you mentioned earlier,
20 the underlined sentence is that this payment should
21 be directly applied for unpaid taxes --

22 A. That's correct.

23 Q. -- is that correct? Does the letter say
24 what to do in the event that there are no unpaid
25 taxes to be paid?

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1 A. No.

2 Q. Does the letter reference any other tax
3 periods other than June 30th, 2007?

4 A. No, it does not.

5 MS. NORRIS: Okay. I'll show you
6 Exhibit 13.

7 (GOVT. EXH. 13, Letter to IRS from Judy
8 E. Johnson, Ed.D., dated March 24, 2009,
9 Bates Stamp Number IRS000428, was marked
10 for identification.)

11 BY MS. NORRIS:

12 Q. Do you recognize this document?

13 A. Yes, ma'am.

14 Q. And, again, can you just briefly explain
15 what this is?

16 A. It's a letter written to the Department
17 of Treasury Internal Revenue Service, and it
18 identifies a Check Number 117975 in the amount of
19 \$611,981.47 in payment of taxes as per the enclosed
20 copy of Notice Number CP171 dated September 15th,
21 2008.

22 Q. Is that your signature at the bottom?

23 A. Yes, ma'am. It is.

24 Q. This letter was sent the same day as the
25 previous letter; correct?

1 A. Yes, ma'am. It was.

2 Q. That's, for the record, Exhibit 12.
3 This document references period September 30th,
4 2007; is that correct?

5 A. Yes.

6 Q. And it doesn't reference any other tax
7 periods; is that correct?

8 A. It just also states in payment of taxes
9 as per the enclosed copy of Notice Number CP171,
10 dated September 15th, 2008.

11 Q. Okay. And it says that the payment
12 should be directly applied to the amount due for
13 unpaid taxes in the underlined sentence; is that
14 correct?

15 A. That's correct.

16 Q. And this letter also doesn't say what is
17 to be done with any additional amounts once the
18 unpaid taxes are paid; is that correct?

19 A. That's correct.

20 MS. NORRIS: Okay. I'm going to show
21 you one more letter. And I apologize, we're going
22 to get a little out of order here.

23 (GOVT. EXH. 134, Letter to IRS from Judy
24 E. Johnson, Ed.D., dated March 24, 2009,
25 was marked for identification.)

1 BY MS. NORRIS:

2 Q. We are Exhibit 134 and this is another
3 letter dated March 24th, 2009; is that correct?

4 A. Yes, ma'am.

5 Q. And this document -- is that your
6 signature at the bottom?

7 A. Yes, ma'am.

8 Q. And this document references the March
9 tax period 2007; is that correct?

10 A. It says period March 31st, 2007.

11 Q. Okay. Does that document reference any
12 other tax quarters?

13 A. Enclosed copy of a Notice Number CP171,
14 dated September 15th, 2008, with interest due.

15 Q. And that letter also discusses a payment
16 that's being made on March 24th; correct?

17 A. Yes, ma'am.

18 Q. Does that letter specify where that
19 payment is supposed to be applied?

20 A. The letter specifies enclosed is a copy
21 of notice which is not attached here.

22 Q. Okay.

23 A. Dated September 15th with interest due
24 totaling \$86.17.

25 MS. NORRIS: Okay. I'll show you what

1 we'll mark as Government's Exhibit 14.

2 THE WITNESS: Promise that's the last
3 one?

4 MS. NORRIS: Sorry. Not quite yet.
5 Just a few more.

6 (GOVT. EXH. 14, Bylaws, Revised 1-28-08,
7 Bates Stamp Numbers BAB000613 -
8 BAB000621, was marked for
9 identification.)

10 BY MS. NORRIS:

11 Q. I'll give you a second to look at that.

12 A. (Reading.)

13 Q. Do you recognize this document?

14 A. I do.

15 Q. Is that the bylaws of the Babcock Center
16 Board of Directors?

(17 A. I cannot testify if there's been
18 revisions since 1/28/08.

19 Q. But this is the bylaws as of 1/28?

20 A. As of 1/28/08, correct -- appear to be
21 correct, yes.

22 Q. Do you know if the Babcock Center has
23 copies of bylaws for periods prior to 1/28/08?
24 Specifically for the 2007 calendar year.

25 A. I believe that's accurate.

1 Q. Okay. I would just ask you -- I'll make
2 a note to ask you to produce those as well.

3 A. Yes, ma'am.

4 (This page contains information to be
5 supplied by counsel and/or the deponent.)

6 BY MS. NORRIS:

7 Q. Do you remember if there were any
8 substantial changes to the bylaws during this time
9 period?

10 A. I do not remember.

11 Q. Okay. I'm going to refer you to the
12 bottom of Page 614. It references the Board
13 minutes.

14 A. Yes, ma'am.

15 Q. The first sentence there is: The
16 keeping of adequate minutes is essential; is that
17 correct?

18 A. Yes, ma'am.

19 Q. And do you believe that adequate minutes
20 were and are taken at Babcock Center Board meetings?

21 A. Absolutely.

22 Q. Did you have any role in drafting this
23 document?

24 A. No.

25 Q. Okay. Have you had any role in updating

1 the document at any point?

2 A. From time to time.

3 Q. When I refer you to Page 620, it is near
4 the bottom of the page it states: Matters requiring
5 Board review and/or approval. Do you see that?

6 A. Yes, ma'am.

7 Q. And the first item under that is
8 approval of annual budget proposal and any changes
9 and approved budget resource allocations.

10 Do you see that?

11 A. Yes.

12 Q. What do you understand that to mean?

13 A. If we are going to change the budget
14 document itself, we would bring it before the Board
15 for their approval.

16 Q. Okay. But you wouldn't need the Board's
17 approval for -- for example, an overage in a line
18 item in the budget?

19 A. No, ma'am.

20 MS. NORRIS: All right. I'm going to
21 show you what we'll mark as Government Exhibit 16.
22 I promise I won't make you go through all these
23 minutes.

24 (GOVT. EXH. 16, Babcock Center Board of
25 Director's Meeting, dated January 16,

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1 2007, Bates Stamp Numbers BAB000578 -
2 BAB000580, was marked for
3 identification.)

4 BY MS. NORRIS:

5 Q. I'll give you a second to look at that.

6 A. (Reading.)

7 Q. Specifically I'm going to be asking you
8 about Page 3.

9 A. I just got there.

10 Q. I'll let you know ahead of time.

11 A. Thank you. (Reading.)

12 Q. The top of Page 3 there in that second
13 sentence it references Phase III of the downsizing.
14 Do you see that?

15 A. Yes, ma'am.

16 Q. So does that help you remember at all
17 whether Phase III of the downsizing was still going
18 on in early 2007?

19 A. It -- actually it does because it says
20 in January it's still going on.

21 Q. Okay. The first sentence in the next
22 paragraph says that cash flow looks good at that
23 time.

24 A. But it also -- look at the next
25 sentence. We have received funds from the DDSN for

1 the renovations to the new building. That's going
2 to impact our cash greatly.

3 Q. Okay. Of the funds that you received
4 from DDSN, those were -- were those allocated for
5 renovations to a new building?

6 A. That was a -- yes. We got money from
7 the Department of Disabilities and Special Needs for
8 the new building and for the renovations of the new
9 building.

10 Q. Okay. So that would have helped your
11 cash flow, but I guess I'll take a step back. Were
12 all monies received from DDSN placed into one
13 general account?

14 A. I believe so, but you'll have to ask my
15 finance director.

16 Q. Okay. So the money from DDSN for the
17 renovation of the buildings, you're saying that
18 could have helped cash flow?

19 A. Would have showed us cash, but we
20 couldn't touch it.

21 Q. Okay. So it would have increased
22 your -- the amount of money you had in the bank?

23 A. Cash in hand, yes.

24 Q. Are you saying that's money that could
25 not have been used for operating expenses?

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1 A. That's correct.

2 Q. Did you have any system of tracking
3 which funds were contained in the checking account
4 that could been used for operating expenses or
5 payroll taxes?

6 A. The finance director was responsible for
7 all of the operations of our cash and there were
8 different accounts set up to manage that account,
9 that cash.

10 Q. There were different --

11 A. I believe.

12 Q. -- bank accounts?

13 A. I believe so.

14 MS. NORRIS: Okay. I'll show you what
15 we'll mark as Government Exhibit 19.

16 (GOVT. EXH. 19, Babcock Center Board of
17 Director's Meeting, dated April 17,
18 2007, Bates Stamp Numbers BAB000586 -
19 BAB000588, was marked for
20 identification.)

21 BY MS. NORRIS:

22 Q. Exhibit 19, I will be referring you to
23 Page 2.

24 A. (Reading.)

25 Q. Under the Finance Committee report it

1 shows that the balance sheet for 2007 was reviewed
2 and discussed, and it mentions potential issues in
3 the month of June; correct?

4 A. Yes, ma'am.

5 Q. It does not mention anything about
6 taxes; is that correct?

7 A. It does not.

8 Q. Do you know if you even learned of
9 payroll tax issues at this point?

10 A. I don't recall.

11 Q. Okay. I'm going to skip back. Just for
12 the record, if you could look at Exhibit 19 one more
13 time. That's the April 17th, 2007 --

14 A. Yes, ma'am.

15 Q. -- Board of Directors meeting minutes;
16 correct?

17 A. Yes.

18 Q. And if we can look at 16, just put on
19 the record that's the March 20th, 2007 Board of
20 Directors meeting minutes; is that correct?

21 A. No.

22 Q. I'm sorry. It is the January 16th, 2007
23 Board of Directors meeting minutes?

24 A. Correct.

25 Q. I'm going to skip back to January 16th

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1 for just one moment and I will give you a copy of
2 Exhibit 136. And I apologize, I'm going out of
3 order again numerically.

4 (GOVT. EXH. 136, Babcock Center Finance
5 Committee Meeting, dated January 16,
6 2007, was marked for identification.)

7 BY MS. NORRIS:

8 Q. Referring you to Page 2 and on that page
9 under Financial Statement Review, the second line,
10 there's a second sentence it references that you are
11 trying to get your accounts payable down.

12 A. Yes, ma'am.

13 Q. Do you know what Babcock Center was
14 doing to try to reduce their accounts payable at
15 this time?

16 A. Not that I can recall specifically.

17 Q. Okay. Under Other Matters, next to the
18 last paragraph from the bottom, it references that
19 you announced a full-time recreation/events
20 position.

21 A. Yes, ma'am.

22 Q. Do you know if that was a new hire? A
23 new employee hired?

24 A. No. It was an existing position, just
25 changed function.

1 (GOVT. EXH. 137, Babcock Center Finance
2 Committee Meeting, dated May 14, 2007,
3 was marked for identification.)

4 BY MS. NORRIS:

5 Q. Okay. I'll give you -- what was just
6 marked as Exhibit 137, and that is the finance
7 meeting minutes for May 14th, 2007; is that correct?

8 A. Yes.

9 Q. If you go to the bottom of the second
10 page, the notes reference a short-term note from
11 BB&T for June. Do you see that at the bottom?

12 A. I do.

13 Q. And do you remember receiving about a \$1
14 million loan from BB&T in June of 2007?

15 A. Yes.

16 Q. The next -- the next to last sentence
17 says: This amount will allow for payroll taxes to
18 become current; is that correct?

19 A. Yes.

20 Q. Do you remember if that money was used
21 to pay payroll taxes?

22 A. I do not know.

23 MS. NORRIS: Okay. I'll give you what
24 is marked as Government's 20.

25 (GOVT. EXH. 20, Babcock Center Board of

1 Director's Meeting, dated May 15, 2007,
2 Bates Stamp Numbers BAB000589 -
3 BAB000592, was marked for
4 identification.)

5 BY MS. NORRIS:

6 Q. And these are the Board of Directors
7 meeting minutes for that same month; is that
8 correct?

9 A. Yes, ma'am.

10 Q. So I'm going to refer you to Page 3 of
11 that document. There it references the \$1 million
12 loan from BB&T again; is that correct?

13 A. Yes, ma'am.

14 Q. It does not mention using that loan to
15 pay payroll taxes; is that correct?

16 A. I haven't read it yet.

17 Q. I'll give you a second to look at it.

18 A. Thank you. (Reading.) You are correct.

19 Q. Do you know if the Board knew about the
20 payroll tax liabilities at this time?

21 A. I do not remember.

22 Q. Okay. If I submit the Babcock Center
23 was still having -- or still late paying and
24 depositing payroll taxes in 2008, would you
25 anticipate that they knew about the problem in May

1 of 2007?

2 A. I don't remember.

3 (GOVT. EXH. 138, Babcock Center Finance
4 Committee Meeting, dated June 18, 2007,
5 was marked for identification.)

6 BY MS. NORRIS:

7 Q. Okay. I show you the last -- sorry,
8 next to last finance committee meeting, it's Exhibit
9 138. This is June of 2007; correct?

10 A. Yes, ma'am.

11 Q. I'll refer you to Page 2 of that
12 document.

13 A. (Reading.)

14 Q. The second paragraph under Financial
15 Statement Review there's a discussion of referring
16 Ms. Hartsell to a company that -- sorry, referring
17 Ms. Tyler to a company that outsources payroll; is
18 that correct?

19 A. That is correct.

20 Q. Was Babcock Center considering
21 outsourcing payroll at this time?

22 A. I don't remember.

23 Q. Do you remember Babcock Center ever
24 considering outsourcing payroll?

25 A. Yes.

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1 Q. You just don't remember when that was?

2 A. That's correct.

3 Q. Do you know why Babcock Center was
4 considering outsourcing payroll at one point?

5 A. To identify the synergies, if it would
6 be cheaper.

7 Q. Were late filing of -- or late
8 depositing, sorry, of payroll taxes any
9 consideration in any decision to outsource payroll?

10 A. I don't remember.

11 MS. NORRIS: I'll show you Exhibit 21.
12 (GOVT. EXH. 21, Babcock Center Board of
13 Director's Meeting, dated June 19, 2007,
14 Bates Stamp Numbers BAB000593 -
15 BAB000596, was marked for
16 identification.)

17 BY MS. NORRIS:

18 Q. These are the Board of Directors minutes
19 for June 2007; is that correct?

20 A. Yes, ma'am.

21 Q. Okay. On this document I'm going to
22 refer you to Page 3, and there it discussed
23 reconsideration being given to hiring a deputy
24 executive director.

25 A. Where am I looking? I apologize.

1 Q. On Finance Committee -- sorry, the third
2 paragraph in the Finance Committee.

3 A. (Reading.) Yes, ma'am.

4 Q. Were you considering hiring a deputy
5 executive director at that time?

6 A. The Board wanted me to hire an executive
7 director but we didn't have the money.

8 MS. NORRIS: Let me show you Exhibit 24.
9 (GOVT. EXH. 24, Babcock Center Board of
10 Director's Meeting, dated September 24,
11 2007, Bates Stamp Numbers BAB000604 -
12 BAB000606, was marked for
13 identification.)

14 BY MS. NORRIS:

15 Q. This is the Board minutes for September
16 24th, 2007; is that correct?

17 A. Correct.

18 Q. And I'll reference you to the bottom of
19 the executive director's report on Page 1.

20 A. Yes, ma'am.

21 Q. And there it lists a Ms. Deaton was
22 hired as head of marketing?

23 A. That's correct.

24 Q. Do you remember at the time that
25 Ms. Deaton was hired did Babcock Center have the

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1 funds to hire a new employee?

2 A. To the best of my knowledge, her salary
3 was not out of the Babcock Center.

4 Q. Do you know who would have paid her
5 salary?

6 A. Babcock Center Foundation.

7 Q. And how was it determined which salaries
8 Babcock Center Foundation paid?

9 A. With the Board of Directors and the
10 executive director, which would be me. We discussed
11 what we needed to do to operate the foundation.

12 Q. Okay. Did you ever go to the Babcock --

13 A. I can correct this.

14 Q. Sure.

15 A. I apologize. The foundation director
16 had left, if I recall. That's the second sentence,
17 in the absence of a Foundation Director we need to
18 do upcoming. So she assumed those duties and
19 responsibilities. Fifty percent was paid by the
20 Babcock Center, 50 percent was paid by the
21 foundation.

22 Q. Okay. Was there ever discussion of how
23 the Babcock Center could afford to do this at the
24 time they weren't meeting payroll taxes?

25 A. We needed somebody to run the Babcock

1 Center Foundation, which is what she did.

2 Q. At any point did you ever go to the
3 Babcock Center Foundation and say, look, we're not
4 able to meet our payroll tax liabilities, can you
5 help us fund employees, can you help us fund
6 programs so that we're able to meet those payroll
7 tax liabilities?

8 A. We went to the Babcock Center Foundation
9 and brought half -- borrowed half a million dollars.
10 That's the time we went to the foundation and it was
11 to pay all kinds of bills.

12 Q. So you never specifically went to the
13 Babcock Center and asked them to fund any sort of
14 personnel or programs so that you could meet your
15 payroll tax liabilities?

16 A. Not that I can recall.

17 Q. Do you remember the Babcock Center
18 Foundation having any knowledge that the Babcock
19 Center owed payroll taxes?

20 A. There are some members on the Babcock
21 Center Foundation that are also on the Babcock Board
22 of Directors.

23 Q. And those people would have known?

24 A. Should have known.

25 MS. NORRIS: Okay. I'll show you

1 Exhibit 26.

2 (GOVT. EXH. 26, Babcock Center Board of
3 Director's Meeting, dated November 26,
4 2007, Bates Stamp Numbers BAB000610 -
5 BAB000612, was marked for
6 identification.)

7 BY MS. NORRIS:

8 Q. And I'm going to reference by the
9 Presentation by Derrick, Stubbs & Stith. The second
10 paragraph of that document there it states that the:
11 Discussion held on penalties paid to the IRS.
12 Derrick, Stubbs & Stith will attempt to work with
13 the IRS to get some of these penalties back.
14 Dr. Johnson and Ms. Tyler have discussed this
15 situation and have developed a strategy to prevent
16 recurrence; is that correct?

17 A. That's correct.

18 Q. I'm going to look at a couple of things
19 in this paragraph. To your knowledge, did the Board
20 know about the tax penalties prior to this
21 discussion?

22 A. I don't remember.

23 Q. Okay. Do you know what -- well,
24 Derrick, Stubbs & Stith was the accounting firm;
25 correct?

1 A. Yes, ma'am.

2 Q. Do you know what work they were going to
3 do to attempt to get some of the penalties back from
4 the IRS?

5 A. I don't remember.

6 Q. There it says Dr. Johnson and Ms. Tyler
7 have discussed the situation and have dropped a
8 strategy to prevent recurrence; correct?

9 A. That is correct.

10 Q. So your strategy would have been to
11 prevent recurrence would have been created by at
12 least November of 2007; correct?

13 A. One strategy would have been at least.

14 Q. Do you know what that strategy was?

15 A. I don't remember.

16 Q. Do you remember what sorts of things
17 your strategies entailed? Was it cost cutting?

18 A. I just --

19 Q. Oversight of payroll personnel?

20 A. I truly can't remember. It's been five
21 years -- almost five years.

22 Q. Do you remember if there was any
23 discussion at this meeting of the fact that the
24 Babcock Center didn't have the funds to pay the
25 payroll taxes at this time?

1 A. Would you repeat the question?

2 Q. Do you remember if there was any
3 discussion at this meeting to the fact that the
4 Babcock Center didn't have the funds to pay the
5 payroll taxes?

6 A. I don't remember.

7 Q. Do you ever remember any conversations
8 where anyone alleged that the personnel within the
9 payroll department or within the finance department
10 weren't properly upholding their duties of paying
11 the payroll taxes?

12 A. I don't remember.

13 Q. Was any of the payroll or finance staff
14 replaced due to any tax issues? Do you remember
15 were any employees let go or any employees
16 reprimanded?

17 A. During this time?

18 Q. During this time.

19 A. Not that I can recall.

20 MS. NORRIS: I'll show you Exhibit 29.

21 (GOVT. EXH. 29, Babcock Center Board of
22 Director's Meeting, dated February 28,
23 2008, was marked for identification.)

24 BY MS. NORRIS:

25 Q. These are the Board minutes for February

1 28th, 2008; is that correct?

2 A. Yes, ma'am.

3 Q. Going to direct you to Page 2 under the
4 President and CEO's Report. In the first item it
5 states that Dr. Johnson announced that Christy
6 Harmon has been hired as the marketing coordinator;
7 is that correct?

8 A. That is correct.

9 Q. Do you know if Ms. Harmon was paid by
10 the Babcock Center or the foundation?

11 A. I believe she's paid by the foundation.

12 Q. By the foundation. 100 percent of her
13 salary?

14 A. I believe that is accurate.

15 (GOVT. EXH. 139, Babcock Center Finance
16 Committee Meeting, dated April 28, 2008,
17 was marked for identification.)

18 BY MS. NORRIS:

19 Q. I'll show you Exhibit 30 -- sorry, show
20 you Exhibit 139. This is the last finance committee
21 notes that we'll look at. It is the finance
22 committee meeting for April 28, 2008; is that
23 correct?

24 A. Yes, ma'am.

25 Q. I'll ask you to turn to Page 3 of that

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1 document. There it shows that \$65,000 is owed to
2 AT&T; is that correct?

3 A. Yes.

4 Q. It was a plan put in place to pay this
5 amount over a three-month period?

6 A. That is correct.

7 Q. Do you remember if that payment plan was
8 completed?

9 A. I'm not sure, but I believe it was.

10 Q. Do you know why the Babcock Center
11 decided to catch up on its balance owed to AT&T
12 rather than the payroll taxes?

13 A. I don't know exactly. I don't remember
14 exactly why.

15 Q. Do you know who would have been involved
16 in that discussion?

17 A. Linda Tyler and myself.

18 MS. NORRIS: Okay. All right. I just
19 have two more regular Board meeting notes for you.

20 (GOVT. EXH. 33, Babcock Center Board of
21 Director's Meeting, dated June 23, 2008,
22 was marked for identification.)

23 MS. NORRIS: While I'm in here I'll grab

24 36.

25 BY MS. NORRIS:

1 Q. All right. I'll show you Exhibit 33.
2 These are the Board of Directors' meeting minutes
3 from June 23rd, 2008; is that correct?

4 A. Yes, ma'am.

5 Q. Okay. I am going to ask you to turn to
6 Page 3, please, and under the Finance Committee
7 notes here it discusses that DDSN is not going to
8 pay providers prospectively anymore and instead will
9 pay twice a month; is that correct?

10 A. Yes, ma'am.

11 Q. How did that payment change affect
12 Babcock Center?

13 A. Well, it reduced our cash flow by 50
14 percent that we were expecting every month.

15 Q. Did it actually reduce it or just reduce
16 the timing?

17 A. It reduced --

18 Q. Or change the timing?

19 A. For that particular period of time it
20 reduced it.

21 Q. So there was not an actual reduction in
22 amount overall received, it was just a timing issue?

23 A. That's correct.

24 Q. And there again it references a BB&T
25 loan of \$1 million. Do you remember what that loan

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1 was used to repay?

2 A. I described earlier this afternoon that
3 in June the Department of Disabilities and Special
4 Needs, because they paid us prospectively, they
5 can't pay us in June. So we didn't have enough
6 money to meet payroll or any other bills. That's
7 why we had to borrow the money.

8 Q. So you're guessing that that went to
9 payroll, that full million dollars?

10 A. I can't say it was the full million
11 dollars, but it was to help offset expenses that we
12 had to pay during June.

13 Q. Okay. And the last is 36, Board of
14 Directors meeting for -- 33 -- I thought I marked
15 it. Apparently -- here's my sticker, sorry about
16 that.

17 (GOVT. EXH. 36, Babcock Center Board of
18 Director's Meeting, dated September 22,
19 2008, was marked for identification.)

20 BY MS. NORRIS:

21 Q. Is the Board of Directors meeting for
22 September of 2008?

23 A. September 22, 2008, correct.

24 Q. Okay. And I ask you to look at Page 2,
25 third paragraph down. There it discusses both the

1 deputy executive director and a senior director of
2 administration were hired; is that correct?

3 A. That is correct.

4 Q. I remember you stated earlier you didn't
5 hire a deputy executive director, that was back in
6 2007, because you didn't have the funds to do so.

7 A. That's correct.

8 Q. Okay. So by September of 2008 when you
9 did hire one, is that because you believed you had
10 the funds at that time to do so?

11 A. I know that the Board of Directors
12 directed me to hire the position at that time.

13 Q. Okay.

14 A. I can't recite whether we had the funds
15 to do it or not.

16 Q. Okay. And do you remember why the Board
17 of Directors directed you to hire? Or did they give
18 you any reason to hire two additional employees at a
19 time when they were still failing to meet payroll --
20 or payroll taxes, I'm sorry?

21 A. No.

22 MS. NORRIS: I'm going to show you
23 Government's Exhibit 135 and we are done with the
24 Board meeting minutes.

25 (GOVT. EXH. 135, Handwritten Document

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1 Entitled, Taxes Payment March 2009, was
2 marked for identification.)

3 BY MS. NORRIS:

4 Q. Do you recognize this document?

5 A. No.

6 Q. Do you recognize the handwriting?

7 A. No, I do not.

8 MS. NORRIS: Okay. I have just a few
9 more exhibits and I think we can do this ahead of
10 time, so we'll take another quick break and I'll get
11 that ready.

12 (A recess transpired.)

13 (GOVT. EXH. 39, BB&T Babcock Center
14 Operating Account Statement, dated
15 January 31, 2007, Bates Stamp Numbers
16 003141 - 003155, was marked for
17 identification.)

18 BY MS. NORRIS:

19 Q. I'm going to real quickly go through
20 these with you, and you looked at Exhibit Number 39.
21 Appears to be a copy of Babcock Center's accounts at
22 BB&T for the period January 31st, 2007; is that
23 correct?

24 A. Yes, ma'am.

25 Q. And do you know if you had signature

1 authority on this account?

2 A. I believe I did.

3 Q. Do you know what this account was used
4 for?

5 A. No.

6 Q. This is the account number for records
7 ending 2667. I'll have you look at the back page of
8 the document and it has daily balance summary where
9 it shows the balance of the account for each day.
10 Does the balance of this account help you remember
11 at all what this account is used for?

12 A. No.

13 Q. I can't remember if I asked you. Do you
14 know if the Babcock Center had more than one
15 checking account?

16 A. I believe it does, but I'm not sure.

17 Q. Okay. Judging by the amount of the
18 balance for this account, do you know -- would this
19 likely have been the account that Babcock Center
20 used for operating expenses?

21 A. More than likely but, again, I don't
22 know for sure. I never saw bank statements.

23 Q. Okay. Who would have seen the bank
24 statements?

25 A. The director of finance.

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1 Q. And was it ever explained to you when
2 payroll taxes were due?

3 A. No.

4 Q. Okay. Do you know -- do you have any
5 idea how it would have been possible for the Babcock
6 Center to not have the funds to pay the payroll
7 taxes given the daily balance shown in this report?

8 A. I will say this. I'm not a finance
9 person, my degrees aren't in finance. But what I do
10 know is we have reserve accounts and I know there
11 are reserve accounts to which we cannot touch the
12 funds. Whether or not this includes some reserve
13 accounts, I have no idea.

14 Q. Okay. Do you know if the Babcock Center
15 has maintained the bank statements for those return
16 accounts?

17 A. I said return. I think they're called
18 restricted accounts.

19 Q. Restricted accounts?

20 A. I don't know where -- you know, because
21 I'm not the finance person I can't tell you which
22 account that money is in, whether it's one or not.
23 I simply don't know.

24 MS. NORRIS: I just, for the record,
25 would ask for all of the records from all of the

1 bank accounts the Babcock Center has if it's more
2 than one.

3 (This page contains information to be
4 supplied by counsel and/or the deponent.)

5 MS. NORRIS: Then I will save these for
6 tomorrow so that was another good break. I'm going
7 to show you Government Exhibit 76.

8 (GOVT. EXH. 76, 2009 Fourth Tax Quarter,
9 Bates Stamp Numbers BAB000568 -
10 BAB000577, was marked for
11 identification.)

12 BY MS. NORRIS:

13 Q. Have you seen this document before?
14 I'll give you a second to look over it.

15 A. (Reading.) I don't know if I saw this
16 document or not. I don't know what it is.

17 Q. I told you that this document -- well,
18 do you know who would have created this document?

19 A. No.

20 Q. Would it surprise you to learn the
21 Babcock Center received federal tax deposit
22 penalties at least up until the fourth quarter and
23 that's the fourth tax quarter for 2009?

24 A. I know that we were not paying our taxes
25 on time. And your question is?

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1 Q. Does it surprise you to know that that
2 continued through at least the end of 2009?

3 MR. SULLIVAN: I'll object to the form
4 of the question.

5 THE WITNESS: Yeah, I don't understand
6 your question.

7 BY MS. NORRIS:

8 Q. Did you know that the Babcock Center was
9 still receiving Federal tax deposit penalties
10 through the fourth quarter of 2009?

11 A. I noticed our penalties, because we sent
12 money and I wanted it to go directly to the taxes.
13 It did not go directly to the taxes so we were still
14 being penalized for that.

15 Q. Did you do any sort of analysis to
16 determine that the money -- sorry, strike that.

17 Can you explain what you mean by your
18 statement that the money was supposed to be paid to
19 the taxes and was not paid to the taxes?

20 A. Based on the letters that I read to you
21 earlier that I had sent included money that was sent
22 to pay for our taxes that were due, but they were
23 applied to pay for penalties and interest.

24 Q. Okay. And those were documents --
25 you're referencing Exhibits 12 and 13?

1 A. I have no idea.

2 Q. Okay. The letters that we spoke about
3 earlier -- let's pull those out really quickly.
4 They're right here, Exhibits 12 and 13, I'll show
5 you those. And those documents, Exhibit 12
6 references period June 30th, 2007; is that correct?

7 A. Yes, ma'am.

8 Q. And the Exhibit 13 references September
9 30th, 2007; is that correct?

10 A. That is correct.

11 Q. Have you seen anything to indicate that
12 those taxes were applied to any quarters other than
13 those two referenced quarters?

14 A. I don't remember.

15 Q. Okay. So what is the basis for your
16 belief that the payments were misapplied?

17 A. Discussions with my attorney.

18 Q. And how would that affect the fact that
19 your payments were not timely paid in 2009 for the
20 2009 tax quarters?

21 MR. SULLIVAN: Object to the form of the
22 question.

23 THE WITNESS: I don't understand the
24 question.

25 BY MS. NORRIS:

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1 Q. Were you aware that the Babcock Center
2 was not paying the payroll taxes timely in 2009?

3 A. I don't -- the dates are all -- at this
4 point of time in the day I'm all confused with the
5 dates.

6 Q. Okay. I'm just asking because when I
7 asked you that earlier you referenced these two
8 documents and I was just curious how the letters,
9 Exhibits 12 and 13, would affect Babcock's ability
10 to pay in 2009.

11 A. I don't remember.

12 MS. NORRIS: I'm going to show you
13 Exhibit 111.

14 (GOVT. EXH. 111, Attachment I, Provider
15 CPA Findings Fiscal Year 2006, Bates
16 Stamp Numbers BAB001061, was marked for
17 identification.)

18 BY MS. NORRIS:

19 Q. I'll give you a second to look over that
20 document. Do you remember?

21 A. The whole document?

22 Q. Do you remember what that document was?
23 Or is, I'm sorry.

24 A. The Department of Disabilities and
25 Special Needs -- I should answer yes.

1 Q. What is the document?

2 A. The Department of Disabilities and
3 Special Needs asks all providers of services to get
4 independent audits on an annual basis. They then
5 take the findings of all those audits across the
6 State and submit these reports to all providers.

7 Q. Okay.

8 A. Without identifying any specific
9 provider.

10 Q. So that information could have been
11 about Babcock Center, or it could have been about
12 any other providers?

13 A. Anybody.

14 Q. Okay. Since we skipped several of those
15 exhibits I planned on asking about, I am actually
16 through all of the exhibits I think I have for you.
17 I'd like to take about five minutes and review my
18 notes and see if I have any more questions, if you
19 don't mind.

20 A. Yes, ma'am.

21 MS. NORRIS: If we do that, I'll get you
22 out of here. Off the record.

23 (A recess transpired.)

24 BY MS. NORRIS:

25 Q. Just a couple of follow-up questions.

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1 First I'll ask for the records for any documents
2 that you may have related to any bonuses that were
3 made in 2007 or 2008.

4 A. Okay.

5 Q. And I will say -- well, do you know if
6 any bonuses were ever paid that were over, let's
7 say, \$200?

8 A. Yes.

9 Q. Okay. So I will limit that because I
10 know yesterday we discussed that there were some
11 small bonuses that were paid sometimes to housing
12 managers, I believe?

13 A. Yes.

14 Q. Is that correct? So I'll limit it to
15 anything over \$200 to weed out those small bonuses.

16 A. Okay.

17 Q. If you have any documentation regarding
18 those. And, again, I'll limit that to the 2007/2008
19 calendar years or bonuses for any fiscal years that
20 include those calendar years if that makes sense.

21 A. Okay.

22 (This page contains information to be
23 supplied by counsel and/or the deponent.)

24 BY MS. NORRIS:

25 Q. Now, at the time during or after the

1 production of Babcock Center did you ever consider
2 yourself to be overstaffed, either with
3 administrative employees or other employees?

4 A. No.

5 MS. NORRIS: No? I'm going to show you
6 Exhibit 23.

7 (GOVT. EXH. 23, On-Line Article from The
8 Augusta Chronicle, dated April 12, 2004,
9 was marked for identification.)

10 BY MS. NORRIS:

11 Q. This appears to be an on-line or
12 printout of an on-line newspaper; is that correct?

13 A. Yes, it does.

14 Q. Have you heard of The Augusta Chronicle
15 before?

16 A. No.

17 Q. Looking at the third paragraph there --

18 A. Could I read?

19 Q. Sure.

20 A. Thank you. (Reading.) Yes, ma'am.

21 Q. I'm actually going to clarify. I think
22 I marked that exhibit as 122?

23 A. Actually 23.

24 Q. I'm sorry. That should be 121.

25 MR. SULLIVAN: Can I look at that real

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1 quick?

2 MS. NORRIS: Sure.

3 MR. SULLIVAN: 121. (Reading.) Okay.
4 (GOVT. EXH. 121, On-Line Article from
5 The Augusta Chronicle, dated April 12,
6 2004, was re-marked for identification.)

7 BY MS. NORRIS:

8 Q. It's dated April 12th, 2004; correct?

9 A. Yes.

10 Q. And the first sentence talks about how
11 the Babcock Center plans to scale back its
12 operations.

13 A. Yes.

14 Q. Two paragraphs down it says that: The
15 move comes off state and federal reviews of Babcock
16 homes uncovered problems ranging from financial
17 mismanagement to theft. Do you see that?

18 A. Yes, ma'am.

19 Q. Do you know what financial mismanagement
20 they're referencing there?

21 A. I don't know what specifically they
22 might be referencing, but I know in our audit that I
23 described earlier it discussed issues with how we
24 tracked and accounted for consumer funds.

25 Q. Do you know if any of those statements

1 or federal audits addressed any tax issues?

2 A. To my knowledge, they do not.

3 Q. Okay. If they do address tax issues, I
4 would just ask you to produce those.

5 A. Certainly.

6 MS. NORRIS: If possible.

7 (This page contains information to be
8 supplied by counsel and/or the deponent.)

9 BY MS. NORRIS:

10 Q. Just a couple of questions about other
11 people that the Babcock Center has listed as
12 witnesses in this case. Who is Chuck Norman? What
13 is his position?

14 A. He's the senior director of
15 administration.

16 Q. And, to your knowledge, would he have
17 information concerning the tax issues?

18 A. Yes.

19 Q. How about Bill Danielson?

20 A. Treasurer -- past treasurer of our Board
21 of Directors. He's no longer on the Board.

22 Q. And do you remember having any
23 discussions with him regarding any tax issues?

24 A. Yes.

25 Q. How about Don Simmons?

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1 A. Short-term employer -- employee. He was
2 the senior director of administration prior to
3 Mr. Norman.

4 Q. Do you remember what time period?

5 A. Not sure.

6 Q. So would he have had knowledge about the
7 tax issues also?

8 A. Yes.

9 Q. Anyone else, other than Ms. Tyler who
10 we've already talked about, who you believe would
11 have information or that you remember having
12 conversations with about the tax issues?

13 A. Can you repeat the question?

14 Q. Are there any other individuals that you
15 remember having conversations with about the tax
16 information -- or the tax issues in 2007 and 2008 or
17 that --

18 A. The Board.

19 Q. Okay. Any individuals that aren't on
20 the Board?

21 A. (Indicating.)

22 Q. Other than Mr. Sullivan?

23 A. Not that I can recall.

24 Q. Just a quick question, you mentioned at
25 the beginning of the deposition you had your

1 deposition taken before. Was that in a matter
2 related to the Babcock Center?

3 A. I've had my deposition taken several
4 times.

5 Q. Were any of those times in cases that
6 related to the Babcock Center?

7 A. Yes.

8 Q. Okay. Were any of them in cases that
9 related to any financial issues at the Babcock
10 Center?

11 A. No.

12 MS. NORRIS: I don't have any other
13 questions for you. Thank you so much for coming
14 today.

15 MR. SULLIVAN: Nothing for me.

16 (The witness, after having been advised
17 of her right to read and sign this transcript, does
18 not waive that right.)

19 (The deposition was concluded at 5:07
20 p.m.)

21

22

23

24

25

1 SIGNATURE OF DEPONENT

2 DEPONENT: DR. JUDITH JOHNSON
3 DEPOSITION DATE: September 18, 2012
4 REPORTER: LORI S. MORTGE
5 CASE CAPTION: BABCOCK CENTER, INC. vs. USA

6 (Please return both Signature of Deponent pages)

7 I, the undersigned, DR. JUDITH JOHNSON, do
8 hereby certify that I have read the foregoing
9 deposition and find it to be a true and accurate
10 transcription of my testimony, with the following
11 corrections, if any:

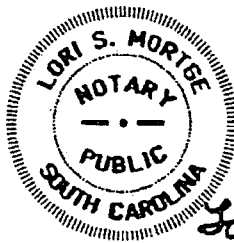
12 PAGE	13 LINE	14 CHANGE	15 REASON

1 CERTIFICATE OF REPORTER

2 I, Lori S. Mortge, Certified Court
3 Reporter and Notary Public for the State of South
4 Carolina at Large, do hereby certify that the
5 foregoing transcript is a true, accurate, and
6 complete record.

7 I further certify that I am neither
8 related to nor counsel for any party to the cause
9 pending or interested in the events thereof.

10 Witness my hand, I have hereunto affixed
11 my official seal this 29th day of September, 2012 at
12 West Columbia, Lexington County, South Carolina.



20 *Lori S. Mortge, CCR*

21 Lori S. Mortge
22 Certified Court
23 Reporter, CCR
24 My Commission expires
25 December 13, 2016

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

BABCOCK CENTER, INC.,

Plaintiff,

vs. C/A NO. 3:11-cv-01721-CMC

UNITED STATES OF AMERICA,

Defendant.

ORIGINAL

DEPOSITION OF: LINDA TYLER

DATE: September 17, 2012

TIME: 2:15 PM

LOCATION: 995 Morrison Drive
Charleston, SC

TAKEN BY: Counsel for the Defendant

REPORTED BY: Roxanne M. Easterwood, RPR

A. WILLIAM ROBERTS, JR., & ASSOCIATES :

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2

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13 UNITED STATES OF AMERICA:

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15 DIVISION
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17 555 4TH Street, NW, Room 6911
18 Washington, DC 20001
19 (202) 514-4963
20 amanda.r.norris@usdoj.gov

21 (INDEX AT REAR OF TRANSCRIPT)
22
23
24
25

Linda Tyler - September 17, 2012

3

1 STIPULATION

2 It is stipulated by and between Counsel
3 that this deposition is being taken in accordance
4 with the Federal Rules of Civil Procedure; that all
5 objections as to Notice of this deposition are
6 hereby waived; that all objections except as to
7 form are reserved until the time of trial; and that
8 the witness does waive reading and signing of this
9 deposition.

10 * * * * *

11 LINDA TYLER

12 being first duly sworn, testified as follows:

13 EXAMINATION

14 BY MS. NORRIS:

15 Q. I will just state for the record, my
16 name is Amanda Norris. I'm a trial attorney at the
17 Department of Justice in the tax division. Before
18 I get started, if I could have you state and spell
19 your name for the record, please?

20 A. Linda Tyler, L-I-N-D-A, T-Y-L-E-R.

21 Q. You're here with Eddie Sullivan, the
22 attorney for Babcock Center?

23 A. Yes.

24 Q. Have you ever had your deposition taken
25 before?

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Linda Tyler - September 17, 2012

4

1 A. No.

2 Q. What we're going to do is I'm going to
3 ask you a series of questions today and show you
4 some documents. All I need you to do is just
5 answer my question to the best of your ability and
6 as accurately and truthfully as possible. If you
7 need me to repeat a question or clarify a question,
8 just let me know and I'm happy to do so.

9 I need you to give me verbal answers,
10 please rather than uh-huh or huh-uh, head nod or
11 head shake, that sort of thing. I know we all do
12 it. If throughout the deposition I say is that a
13 yes or no, that's not intending to harass you. I
14 just want to let you know that we do want to have
15 the best transcript of the proceeding as possible
16 so that Mr. Sullivan and I know exactly what was
17 said here today. So that's why we do that.

18 If you need to go back to something --
19 I tend to find in these tax cases sometimes people
20 don't remember things until they see a document and
21 say, oh, yeah, that reminds me why we did this back
22 three tax quarters ago -- let me know. I'd ask you
23 to finish the question that we're on and then we
24 can go back and you can supplement any answers that
25 you have if you think of something new.

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Linda Tyler - September 17, 2012

5

1 If you need a break at any point let me
2 know. I will take one at least probably in the
3 middle of the deposition or towards the end. If
4 you need one before then, feel free to let me know.
5 We can do that. I don't want you to feel like
6 you're stuck in here. I would just ask you to
7 complete the question that we're on before we take
8 a break and not talk to anyone about your testimony
9 while you're on the break, obviously.

10 Any questions you have for me about the
11 procedure before we get started?

12 A. No.

13 Q. Is there any medication you're on or
14 any other reason, a health condition or something
15 that would make your answers today anything other
16 than accurate and truthful?

17 A. No.

18 Q. Did you review any documents in
19 preparation for today's deposition?

20 A. I did review some that Mr. Sullivan
21 had.

22 Q. Would you tell me what those were,
23 please, just generally?

24 A. 941s and maybe some documents that went
25 with the 941s.

Linda Tyler - September 17, 2012

6

1 Q. Did you speak to anyone other than Mr.
2 Sullivan about the deposition?

3 A. No.

4 Q. I'm going to show you -- just to
5 explain what I'm doing here, I actually have all of
6 the exhibits for all of the depositions, and I have
7 them numbered so that we use the same exhibit
8 numbers throughout. Because of that I probably
9 won't be going in order. We'll actually start with
10 Exhibit 114, but that's why we do that.

11 (Deposition EXH. 114, Subpoena sent to
12 Ms. Tyler, marked for identification.)

13 BY MS. NORRIS:

14 Q. I've given Mr. Sullivan a copy of
15 everything, so I will give you a copy. I'll ask
16 you to take a look at this and give you a second to
17 flip through it. This is the subpoena that your
18 received to come here today; is that correct?

19 A. Yes.

20 Q. I'll have you flip to the last page,
21 please, and give you a second to look at that.
22 That's just requested documents related to the
23 Babcock Center's tax issues and the quarters.

24 A. I don't have any.

25 Q. You don't have any personally or

Linda Tyler - September 17, 2012

7

1 professionally; is that correct?

2 A. No.

3 Q. With that, then we will go back to what
4 is the highest level of education you have
5 completed?

6 A. I have my bachelor's 's degree.

7 Q. What's that in?

8 A. Accounting.

9 Q. When did you receive that?

10 A. December 1991.

11 Q. Are you a CPA?

12 A. No.

13 Q. Since then have you completed any other
14 training in accounting or anything like that?

15 A. Just got a CPE when required.

16 Q. I'm just going to go briefly through
17 your employment history. We won't linger too long
18 in anything. Starting in '91 did you do accounting
19 work right out of your undergraduate degree?

20 A. Yes. I went to work for a CPA firm.

21 Q. What kind of work were you doing there,
22 just generally?

23 A. Audits, tax returns, bookkeeping work
24 for the clients that were assigned to me.

25 Q. What types of clients were they?

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1 A. Nonprofits, manufacturing.

2 Q. Was it a large firm, small firm? Do
3 you know how many people were there? I guess
4 that's a vague question.

5 A. It's a large local firm. Does that
6 make sense?

7 Q. Yes, that make sense. How long did you
8 work for that company?

9 A. Three years.

10 Q. So until about 94/95?

11 A. Yes.

12 Q. What was your title there?

13 A. Accountant.

14 Q. Were you working with tax preparation
15 or tax returns there?

16 A. Yes.

17 Q. What kind of tax work were you doing
18 generally?

19 A. Usually personal tax, corporate tax,
20 and I did get involved with some of payroll taxes
21 associated with some of my clients.

22 Q. Were you preparing the 941s?

23 A. Reviewing.

24 Q. Were you in charge of -- were you
25 preparing the entire payroll or just the tax aspect

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1 of it?

2 A. The bookkeeping department would do the
3 preparation and I would do the review.

4 Q. You said you left there in about '94?

5 A. That's about right.

6 Q. Where did you work after that?

7 A. Mariplast North America.

8 Q. What was your position there?

9 A. I was the CFO and the general manager.

10 Q. What does that company do?

11 A. Manufacturing.

12 Q. How long were you there?

13 A. Until March of 2001. So what's that,
14 about seven years.

15 Q. Just generally, what was your role as
16 CFO and manager there?

17 A. I did all of the accounting for the
18 company. I reported all of the information back to
19 the headquarters in Italy. I took all of the
20 orders. I shipped all of the orders. I made sure
21 all of the orders got produced properly, backed
22 properly, shipped properly.

23 Q. Were you dealing with taxes there as
24 well?

25 A. Yes.

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1 Q. Is it the corporate taxes or payroll
2 taxes also?

3 A. Payroll taxes.

4 Q. Were you preparing the payroll there?

5 A. Yes, I was.

6 Q. You were preparing the 941s there?

7 A. Yes.

8 Q. Did you sign the 941s for that company,
9 if you remember?

10 A. I don't remember.

11 Q. You said you left there in about March
12 of '01?

13 A. Uh-huh.

14 Q. Where did you go after that?

15 A. The Disabilities Board of Greenville
16 County.

17 Q. What your role with them?

18 A. I was the chief financial officer.

19 Q. What was your role there?

20 A. I was in charge of all of the finances,
21 reporting to the board, and review of all
22 information associated with the financials.

23 Q. Was that a state board, or is that a
24 private organization?

25 A. It's a quasi governmental.

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1 Q. Were you dealing with taxes there as
2 well?

3 A. Yes.

4 Q. Including payroll taxes?

5 A. I reviewed them.

6 Q. How long did you work there?

7 A. Two or three years.

8 Q. Until '03 or '04?

9 A. Something like that.

10 Q. Where did you go after that?

11 A. I worked at the Phoenix Center or the
12 Greenville County Drug and Alcohol Commission.

13 Q. What was your role there?

14 A. I was the chief financial officer.

15 Q. Were you working with taxes there?

16 A. Yes.

17 Q. Including payroll taxes?

18 A. Yes.

19 Q. How long were you there?

20 A. Two years.

21 Q. So until about 04/05 probably? Just
22 trying to get a good timeline here.

23 A. I left the Greenville Board probably in
24 '03 or '04. I worked with the Drug and Alcohol
25 Commission until May of '06, which is when I went

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1 to work for Babcock Center.

2 Q. So Babcock Center was May '06?

3 A. Uh-huh.

4 Q. And what was your title there
5 officially?

6 A. Director of finance, chief financial
7 officer. They kind of used those two
8 interchangeably.

9 Q. How did they describe your role to you
10 when you went to work for Babcock Center?

11 A. I was in charge of all finances.

12 Q. That included all tax aspects?

13 A. Yes, client funds.

14 Q. Is that similar to the type of role
15 that you had had in your previous positions?

16 A. Yes.

17 Q. When you came to work at Babcock Center
18 in May '06 did they mention any problem to you when
19 you first started working there?

20 A. It wasn't mentioned to me as far as
21 there were issues, but one of the things I had to
22 do shortly after I began was paying a very large
23 penalty for late filing.

24 Q. Why did they tell you that they
25 received that penalty?

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1 A. Because we did not have the money to
2 pay the taxes.

3 Q. But you did have the money eventually
4 to pay the penalty?

5 A. We did pay the penalty.

6 Q. When was that, approximately, from what
7 you remember? Was that sometime during the year
8 2006?

9 A. Yes. It could be as early as July. No
10 later than I would say September.

11 Q. Do you know where those funds came from
12 to pay that penalty at that time?

13 A. Out of the operating fund.

14 Q. How long did you work at Babcock
15 Center?

16 A. Three, almost four years.

17 Q. So you left into 2009?

18 A. I left February 2009, the end of
19 February.

20 Q. Why did you leave Babcock Center at
21 that time?

22 A. I got a job in Charleston.

23 Q. And you have been here since?

24 A. Yes.

25 Q. What is your current position?

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1 A. I work for Charleston County Disability
2 and Special Needs Board, and I'm the chief finance
3 officer.

4 Q. I will be deposing Dr. Johnson, so I'll
5 ask her a little more about this. But just to get
6 it started, if you can give me a brief overview of
7 what the Babcock Center does, what kind of
8 individuals that the Babcock Center is helping, its
9 history, its size, that sort of thing.

10 A. The Babcock Center is the largest board
11 in South Carolina. Every county in South Carolina
12 has a board that takes care of individuals with
13 disabilities. They are either individuals that are
14 born with intellectual or physical disabilities
15 such as spina bifida, Down's Syndrome, those type
16 of issues, or it's someone who has been involved in
17 a very serious car accident that has left them with
18 a brain injury or a head and spinal cord injury.
19 Those are the type of individuals that it serves.

20 We serve them individually. We serve
21 them in a work atmosphere. We help them find jobs
22 in the community if they're capable of working in
23 the community. We do everything we possibly can to
24 allow them to reach the most potential that they
25 can with their issues.

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1 Q. How long has the Babcock Center been in
2 existence?

3 A. I want to say it started sometime in
4 the '60s.

5 Q. About how many individuals does it work
6 with?

7 A. When I left, residentially it was 220 I
8 believe. At one point it had been as high as 140 I
9 think.

10 Q. Do you know when that was it had been
11 as high as 440?

12 A. It hadn't been too long before I came
13 because they had just finished the depopulation
14 when I came.

15 Q. That was early 2000s?

16 A. Yes.

17 Q. In the time you were there basically it
18 decreased in size from 440 to 220?

19 A. It was already at 220.

20 Q. When you got there?

21 A. They were just finishing that up.

22 Q. That was in May '06?

23 A. May '06.

24 Q. So there really wasn't a size reduction
25 in the time period that you were there?

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1 A. They had just finished it.

2 Q. And did the corresponding number of
3 employees that worked for the Babcock Center also
4 decrease just before the time period that you got
5 there?

6 A. To some degree, yes.

7 Q. Was there a 50 percent reduction?

8 A. I don't think so. I don't know the
9 exact number that were there before, but I don't
10 know that it was an exact 50 percent decrease.

11 Q. Do you know about how many people
12 worked for the Babcock Center during the time
13 period that you were there?

14 A. Roughly 650.

15 Q. Do you know how many at the highest
16 point?

17 A. I don't.

18 Q. Do you have a sort of guess?

19 A. No.

20 Q. How was the Babcock Center funded, just
21 generally?

22 A. Based on a very complex funding
23 schedule through Department of Disability and
24 Special Needs, based on individuals that are
25 served.

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1 Q. So they received the bulk of their
2 funds from the state then?

3 A. Yes.

4 Q. Do they also receive funds from the
5 federal government?

6 A. Through the state there's a match.

7 Q. How about, are there donors that also
8 contribute to the organization or --

9 A. They typically contribute to the
10 foundation.

11 Q. I'll come back to that in just one
12 second. Does the Babcock Center itself receive any
13 funding from anyone other than the state or
14 matching funds?

15 A. They receive some revenue from the
16 consumers themselves.

17 Q. Is that in the form of rents?

18 A. Uh-huh, room and board.

19 Q. We'll come back to Babcock Center
20 Foundation now. What is the foundation?

21 A. The foundation is a 501c3 that was
22 established to be able to accept donations on
23 behalf of the individuals that were supported
24 through a 501c3. So the deductions were tax
25 exempt.

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1 Q. What are those funds used for?

2 A. If a consumer has to get eyeglasses and
3 they can't afford the eyeglasses and it's not time
4 for them to get another pair under Medicaid rules,
5 then the foundation would purchase it for them.

6 With Medicaid money you cannot purchase
7 clothing because that's considered to be an expense
8 of the individual. Some individuals do not have
9 enough money to purchase clothing. So the
10 foundation would purchase clothing as well.

11 Q. Does the Babcock Center Foundation help
12 at all with any of the operating expenses of
13 Babcock Center?

14 A. I don't remember specifically there was
15 any operational thing that they assisted with
16 because it wasn't that much money available. The
17 one thing they did do every year is -- I'm assuming
18 every year. The years that I was there they did a
19 gift card for the employees at Christmas. It was
20 very small, but it was something they could do
21 because we weren't allowed to do anything for
22 employees for the holiday.

23 Q. That's because the Babcock Center, like
24 I said, called the center -- as opposed to the
25 foundation, the Babcock Center was not able to do

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1 anything; is that what you're saying?

2 A. Correct.

3 Q. Did the Babcock Center ever give funds
4 to the foundation for anything?

5 A. Not that I'm aware of.

6 Q. You said the foundation was a 501c3?

7 A. Yes.

8 Q. Was the Babcock Center a 501c3?

9 A. I think so.

10 Q. Does the Babcock Center have any sort
11 of endowment, or does it solely run based on the
12 state funds?

13 A. The Babcock Center?

14 Q. Yes.

15 A. It runs on the state funds.

16 Q. So you mentioned -- and again I'll ask
17 Dr. Johnson a few more questions about this. You
18 mentioned that just before the time period that you
19 had been there that there was about a 50 percent
20 reduction in numbers of consumers that the Babcock
21 Center could service; is that correct?

22 A. Yes.

23 Q. Can you tell me first why was that, and
24 then also just generally what that process of
25 downsizing was?

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1 A. The reasoning behind it was because it
2 was required by the state legislature. I'm not
3 sure why that was required of them. Basically
4 houses were turned over with their consumers to
5 other boards.

6 Q. How involved was the state in this
7 process? Were they determining which facilities
8 had to be turned over?

9 A. We had to report to them how many beds
10 we had every month and so on.

11 Q. This was a multi-stage process,
12 correct?

13 A. Yes.

14 Q. How many phases were there?

15 A. If I remember correctly, there were
16 three.

17 Q. Do you know when the three phases
18 started?

19 A. No, ma'am.

20 Q. You said they ended sometime before the
21 beginning of '06?

22 A. Uh-huh.

23 Q. Did you ever see any sort of more
24 comprehensive plans as to exactly what the state
25 was mandating with each phase of the process?

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1 A. I saw documentation where it described
2 which houses were given to which boards in which
3 phase.

4 Q. Was that something that the Babcock
5 Center came up with or that the state came up with,
6 if you remember?

7 A. I don't know.

8 Q. Did the Babcock Center revise its
9 budget each time to meet each of these phases of
10 the downsizing plan?

11 A. I don't know.

12 Q. Were you involved at all with the
13 budgeting process?

14 A. Once I got there, yes.

15 Q. So if you remember, when was the very
16 first time that you realized that the Babcock
17 Center had tax problems, specifically payroll tax
18 problems?

19 A. At some point the payroll manager asked
20 me was it okay for her to submit the tax.

21 Q. Who was the payroll manager?

22 A. Karen Tucker.

23 Q. When you saw payroll manager, what
24 exactly did Ms. Tucker do?

25 A. She was in charge of making sure the

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1 payroll was processed, and she was the one who
2 would call in the taxes.

3 Q. She would call in the taxes to the IRS?

4 A. Uh-huh. And then she should create all
5 of the reporting.

6 Q. Did you know why she was asking for
7 your permission to do this?

8 A. At first I didn't, so obviously I
9 asked.

10 Q. Did you ask her or did you ask someone
11 else?

12 A. I asked her.

13 Q. What did she tell you?

14 A. That a lot of times there wasn't the
15 money to pay them.

16 Q. Do you know who in the past had told
17 her not to pay them?

18 MR. SULLIVAN: Object to the form of
19 the question.

20 You may answer.

21 BY MS. NORRIS:

22 Q. Did she tell you if someone had told
23 her not to pay them in the past?

24 A. She had told me that the gentleman that
25 had my job before me had told her not to.

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1 Q. Do you know who that was?

2 A. Twan. I remember his first name was
3 Twan.

4 Q. Do you know how to spell that? Do you
5 know?

6 A. I think T-W-A-N.

7 Q. I can look for that in the documents if
8 I need it for some reason. So she asked you
9 sometime after you first got there if it was okay
10 for her to call in the taxes to the IRS. Did she
11 explain to you what had caused the problems in the
12 past?

13 A. No.

14 Q. Did you go to speak to anyone else
15 about the problem at that time?

16 A. I'm sure I asked somebody, but I don't
17 remember specifically who I talked to. I remember
18 thinking it was strange.

19 Q. Why did you think it was strange?

20 A. I had never worked at an agency before
21 that could not afford to pay the payroll tax. So
22 to me that was strange.

23 Q. Did you eventually learn why they
24 couldn't afford to pay them?

25 A. Yes, I did.

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1 Q. How did you learn that?

2 A. I went to sign off on what we could pay
3 as far as accounts payable was concerned to our
4 vendors and there wasn't enough much to pay all of
5 those bills.

6 Q. Are you speaking with respect to the
7 IRS or with respect to other vendors?

8 A. Other vendors in addition to the IRS.

9 Q. Did you speak to anyone about this
10 problem at that point?

11 A. I was talking to my supervisor at the
12 time who -- I'm trying to think of his name, Matt.
13 I don't remember Matt's last name. He was the
14 deputy director at the time. He said that, yes,
15 there were cash flow problems and that was one of
16 the things that we needed to work on.

17 Q. Did he say what caused the cash flow
18 problems?

19 A. I don't remember if he did or not. I
20 know they existed when I came.

21 Q. At the time that you came was anyone
22 else working on the tax issue or just the payroll
23 manager, Ms. Tucker?

24 A. I think just Ms. Tucker.

25 Q. Did Ms. Tucker continue to work at

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1 Babcock Center through 2008?

2 A. Yes.

3 Q. Does she still work there now, do you
4 know?

5 A. No, she does not.

6 Q. Do you know when she left?

7 A. She left after I did. So it would have
8 been after March 2009.

9 Q. So when you started investigating some
10 of these cash flow problems that we were just
11 talking about did you learn about anything that the
12 Babcock Center was doing to try and fix those
13 problems?

14 A. That became my issue. What I learned
15 was some of the root causes of the cash flow issue.

16 Q. What were those root causes?

17 A. One of the largest one was the
18 downsizing, because the way they had to turn things
19 over. When you're having to transfer employees,
20 they're no longer your employees, so you're having
21 to pay them all of their vacation leave and all of
22 the benefits they're entitled to. That wasn't
23 really accounted for as to how it was going to
24 happen when these things occurred.

25 Sometimes you had to turn over the

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1 house but not completely the staff at the same time
2 while the other board was determining whether or
3 not they wanted to hire the staff or whether you
4 were going to have RIF them. So there were extra
5 staffing involved when there weren't consumers
6 being taken care of. Just a lot of issues that
7 occurred because of the downsizing.

8 Q. Those were still going on after the
9 downsizing was completed in 2006?

10 A. Yes.

11 Q. So after you got there in 2006, I know
12 you said that the downsizing was mostly complete.
13 What downsizing related problems were remaining in
14 2006 when you got there?

15 A. Because Babcock Center was such a large
16 agency there were levels of management in place to
17 take care of an agency of that size. When it was
18 cut in half it was not very clearcut, especially
19 with the way the houses were given to the other
20 boards what needed to go when, what structure
21 needed to be changed and what managers needed to be
22 RIFed or whatever was going to happen to bring the
23 size of the agency in line with the downsize.

24 Q. So it sounds like the downsizing and
25 the transfer of the properties took place before

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1 they knew what they were going to do with all of
2 the staff involved?

3 A. I think so.

4 Q. When did they finally get all of that
5 figured out?

6 A. I can't say specifically. I don't
7 know.

8 Q. Was it sometime during your period at
9 Babcock Center or was it after you were done or
10 after you left, I'm sorry?

11 MR. SULLIVAN: Object to the form.
12 You can answer.

13 THE WITNESS: There was some change in
14 the structure some while I was there, but I don't
15 say the issues were really completely figured out
16 when I left.

17 BY MS. NORRIS:

18 Q. So what, I guess, personnel issues
19 still remained in effect at the time that you were
20 there that were causing these cash flow issues?

21 A. There was just still too many
22 employees.

23 Q. Were these people working? What were
24 they doing at that time?

25 A. They would be working at that point,

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1 yes.

2 Q. Were they working for properties that
3 had been transferred over to another board?

4 A. No, but there were levels of management
5 that still needed to be shrunk down.

6 Q. Did all of the property transfers take
7 place before your time at Babcock Center?

8 A. Yes.

9 Q. I'll go back. You mentioned that Ms.
10 Tucker was in charge of payroll. I'll go back to
11 the Babcock Center's payroll procedures and have
12 you explain those to me and what you did and what
13 Ms. Tucker did. Just to start off with, how
14 frequently were employees paid?

15 A. The 15th and the last day of the month.

16 Q. All of your payroll was prepared
17 inhouse?

18 A. Yes.

19 Q. Who did that?

20 A. Ms. Tucker, and she had an employee. I
21 believe her name was Debra Burns.

22 Q. They prepared the checks?

23 A. Yes.

24 Q. Did they use any payroll tax software
25 to do this, or did they do it manually?

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1 A. They keyed timecards and timesheets
2 into a software system, and I can't tell you the
3 name of it. It was one that Babcock Center had had
4 for a while.

5 Q. Were they in charge of the withholding
6 taxes portion of the paychecks?

7 A. Yes.

8 Q. So the taxes were withheld twice a
9 month. Was it the 15th and 30th?

10 A. The 15th and last day of the month.

11 Q. Payroll taxes were withheld?

12 A. Yes.

13 Q. What did they do with those payroll
14 taxes?

15 A. They were just in the operating
16 account.

17 Q. There was one operating account? There
18 wasn't a separate payroll account?

19 A. There was a separate payroll account
20 for the checks to sweep through and the direct
21 deposits to sweep through, but the payroll taxes
22 came out of the operating, if I remember correctly.

23 Q. So by sweep through do you mean that
24 for each pay period you would deposit the amount of
25 the payroll into that account, or what system did

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1 Babcock Center use for that account?

2 A. The payroll account was linked to the
3 operating account. When the checks in direct
4 deposit would come through the payroll account,
5 then it would sweep the money out of the checking,
6 the operating account over into the payroll
7 account.

8 Q. Other than that payroll tax sweep
9 through account there was just one general
10 operating account that was used for everything
11 else; is that correct?

12 A. Yes.

13 Q. Who was in charge of depositing payroll
14 taxes each month?

15 A. Karen Tucker.

16 Q. Was she the one that you said would
17 call in each month?

18 A. Yes.

19 Q. Do you know what training she had
20 received on the deposit requirements?

21 A. No. She was there before I came.

22 Q. What's your understanding of what the
23 deposit requirements are with respect to payroll
24 taxes?

25 A. With the size agency of Babcock Center,

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1 they are due the day after payroll. So they had to
2 be called in pretty much the day of payroll.

3 Q. So would Ms. Tucker come to you each
4 time employees were paid for permission to call
5 that in?

6 A. Yes.

7 Q. Or is that something she did
8 independently?

9 A. She and I just talked about it, about
10 how much money did we have, what could we pay, what
11 could we not pay.

12 Q. So she wouldn't have independently
13 decided not to pay the payroll taxes; is that what
14 you're saying?

15 A. No. No.

16 Q. Did you make any distinction as between
17 the amount of the payroll taxes that was the
18 portion that was withheld from the employees'
19 paycheck and the matching amount that the company
20 paid over, or was that all kept in one account?

21 A. One account.

22 Q. So there was never any discussion of
23 paying a partial amount or paying a withholding
24 amount?

25 A. I don't remember.

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1 Q. So that amount that was withheld from
2 the employees' paychecks was just used in the
3 general operating account?

4 A. Yes.

5 Q. That was used for day-to-day expenses?

6 A. Yes.

7 MR. SULLIVAN: Object to the form.

8 BY MS. NORRIS:

9 Q. Was that a yes?

10 A. Yes.

11 Q. I can rephrase that. If the amount of
12 the payroll taxes that was withheld from the
13 employees' paychecks was not immediately deposited
14 to the IRS what was it used for?

15 A. Daily operating.

16 Q. Who prepared the 941 returns for the
17 Babcock Center?

18 A. Karen Tucker.

19 Q. Did you review those returns?

20 A. Yes, I did.

21 Q. You signed those returns; is that
22 correct?

23 A. Yes, I did.

24 Q. Did anyone else review them?

25 A. No.

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1 Q. Would you ever discuss -- I'm sorry.
2 This is going back to the payroll twice a month.
3 Would you ever discuss whether or not to pay the
4 taxes with someone else or -- I'm sorry -- to
5 deposit the taxes with someone else other than Ms.
6 Tucker?

7 A. Do you mean did I -- I'm not exactly
8 sure what you're asking.

9 Q. Was anyone else involved in those
10 decisions of whether to deposit the payroll taxes
11 after payment on the 15th and 30th?

12 A. I want to say originally that we
13 discussed it or I discussed it with Matt, my
14 supervisor, and then when nothing changed where it
15 was either pay the bills or pay the taxes we paid
16 the bills.

17 Q. What bills are you referencing when you
18 say the decision between paying the bills and
19 paying the taxes?

20 A. Electricity in the homes, water in the
21 homes, food in the homes, transportation for the
22 vehicles, paying for the gas, paying for the
23 repairs, paying for the staffing, paying for any of
24 the needs that the consumers had whether it be
25 nutritional needs, incontinence needs, whatever.

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1 It was either keep the place running or pay the
2 taxes.

3 (Deposition EXH. 63, January, February,
4 March 2007 941 Quarterly Federal Tax Return, marked
5 for identification.)

6 BY MS. NORRIS:

7 Q. I'll very quickly go through the
8 returns with you just because I have a couple
9 questions on them. We'll start with Exhibit 63.
10 I'll have you take a look at this. Now it looks
11 like the Babcock Center at this point, this is the
12 first quarter for 2007; is that correct? Is that a
13 yes?

14 A. Are you talking on the IRS's calendar
15 year or the Babcock Center's fiscal year?

16 Q. I'm sorry. That's a good
17 clarification. On the IRS calendar this is the
18 first quarter?

19 A. 2007, yes.

20 Q. At that point you're paying about \$4
21 million in wages each quarter, correct?

22 A. Yes.

23 Q. So about 270,000 is withheld at that
24 point from the employees' paychecks on line 3?

25 A. For federal?

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1 Q. Yes.

2 A. Yes.

3 Q. If I could have you turn to the second
4 page here?

5 A. Uh-huh.

6 Q. Can you tell me what this sheet is?

7 A. This is a document that Karen Tucker
8 would fill out and give to me with the 941 so that
9 I could verify the wages and the -- I could
10 actually recalculate the taxes myself if I wanted
11 to verify the numbers and also what was paid and
12 what was due.

13 Q. Ms. Tucker you said prepared this; you
14 did not prepare this?

15 A. I did not.

16 (Deposition EXH. 64, April, May, June
17 2007 941 Quarterly Federal Tax Return, marked for
18 identification.)

19 BY MS. NORRIS:

20 Q. We'll go to Exhibit 64. I'll go
21 through these quickly. This is for the IRS's
22 second quarter; is that correct?

23 A. Yes.

24 Q. You did sign this return, correct?

25 A. Yes.

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1 Q. This shows no balance due on line 12;
2 is that correct?

3 A. Yes.

4 Q. So Babcock Center had paid it that
5 month or during that quarter?

6 A. It appears so, yes..

7 Q. As of the date of filing?

8 A. Yes.

9 (Deposition EXH. 65, July, August,
10 September 2007 941 Quarterly Federal Tax Return,
11 marked for identification.)

12 BY MS. NORRIS:

13 Q. If I could just have you verify
14 Exhibit 65, please. This is for IRS third quarter
15 of 2007, correct?

16 A. Yes.

17 Q. Again, you did sign this return on the
18 final page?

19 A. Yes.

20 (Deposition EXH. 66, Amended July,
21 August, September 2007 941 Quarterly Federal Tax
22 Return, marked for identification.)

23 BY MS. NORRIS:

24 Q. Exhibit 66, this is also for a third
25 quarter 2007, sorry, IRS third quarter?

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1 A. Uh-huh.

2 Q. It says correction up at the top?

3 A. Uh-huh.

4 Q. Do you know why you would have
5 corrected the 941 for this quarter?

6 A. Yes, because on the original --

7 Q. Just for the record, you're comparing
8 this to 64?

9 A. Yes, 64. Sorry. I think it's actually
10 63, no. Yes, it is 64. It appeared as though the
11 taxes had been fully paid, but they were not. I
12 don't have the summary sheet that would go with it,
13 but it states on the summary sheet that's included
14 with the correction the page shows that there were
15 three of the six payroll tax deposits made instead
16 of all of them like the original stated.

17 Q. So do you know if this correction was
18 filed with the IRS?

19 A. Yes.

20 Q. Exhibit 66, is that 66?

21 A. Yes. The correction doesn't have one.

22 (Deposition EXH. 67, October, November,
23 December 2007 941 Quarterly Federal Tax Return,
24 marked for identification.)

25 BY MS. NORRIS:

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1 Q. Okay, 67. Again, if you look at this
2 document, it does not have a signature page on it.
3 We received all of the signature pages for all of
4 the documents. But would you still have likely
5 been the reviewer and signer of the 941 at this
6 time?

7 A. Yes.

8 (Deposition EXH. 68, Amended October,
9 November, December 2007 941 Quarterly Federal Tax
10 Return, marked for identification.)

11 BY MS. NORRIS:

12 Q. And for number 68 we have another
13 correction. This return you did sign, correct?

14 A. Yes.

15 Q. Do you know if the first one, Number
16 67, was ever actually filed?

17 A. Once I signed the documents they were
18 given back to Ms. Tucker for filing. As far as I
19 know they were all filed, but I did not actually
20 mail them myself.

21 Q. This is a similar correction for the
22 fourth quarter of 2007 as the last correction we
23 just discussed?

24 A. No. This one the amount of taxes owed
25 did not change. What appears to have changed would

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1 be the gross wages.

2 (Deposition EXH. 69, January, February,
3 March 2007 941 Quarterly Federal Tax Return, marked
4 for identification.)

5 BY MS. NORRIS:

6 Q. Exhibit 69 here. Again I'll have you
7 turn to the last page of the document and confirm
8 that that is your signature?

9 A. Yes.

10 Q. That's all I needed on that one.

11 (Deposition EXH. 70, April, May, June
12 2007 941 Quarterly Federal Tax Return, marked for
13 identification.)

14 BY MS. NORRIS:

15 Q. Exhibit 70, this is the second quarter,
16 second IRS quarter of 2008. This does not appear
17 to have a signature page; is that correct?

18 A. No, but I would have signed this
19 document.

20 (Deposition EXH. 71, July, August,
21 September 2007 941 Quarterly Federal Tax Return,
22 marked for identification.)

23 BY MS. NORRIS:

24 Q. Look at Document 71. This is for IRS
25 third quarter 2008. You did not sign this

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1 document; is that correct?

2 A. I did not.

3 Q. It's signed by Don Simmons?

4 A. Yes.

5 Q. Who is Mr. Simmons?

6 A. He became my supervisor in August 2008.

7 Q. What was his title?

8 A. Senior Director of Administration.

9 Q. What was his role? What did he
10 supervise? What were his sort of day-to-day tasks
11 within Babcock Center?

12 A. He was over the financial department,
13 and I want to say that he was over like the
14 maintenance and transportation as well, but I'm not
15 -- I can't exactly remember. There was more to it
16 than just finance, but I don't remember exactly
17 what it was. Human resources as well.

18 Q. Did he take over the payroll function?
19 Do you know why he would have signed this return?

20 A. I was on maternity leave.

21 Q. He would have been reviewing the
22 returns while you were gone?

23 A. Yes.

24 Q. What periods were you gone
25 approximately?

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1 A. My child was born August 11th, which
2 was a Monday, so the Friday before. I worked until
3 August 8th, and I was out for six to eight weeks
4 following her birth.

5 (Deposition EXH. 72, Adjusted
6 Employers's Quarterly Federal Tax Return or Claim
7 for Refund, Form 941-X, marked for identification.)
8 BY MS. NORRIS:

9 Q. A couple more here. I think I have the
10 answers to this one, but I will ask you anyway. I
11 show you Exhibit 72 here. This is a 941-X.
12 Turning to the signature page of that document, you
13 did not sign that document, correct?

14 A. No.

15 Q. You were not working at Babcock Center
16 in November 2010; is that correct?

17 A. No, I was not.

18 Q. What was Chuck Norman's role at Babcock
19 Center?

20 A. He took over my position when I left.

21 Q. That would have been in 2009?

22 A. Yes.

23 Q. Did Chuck Norman have any role at the
24 Babcock Center before 2009 that you know of?

25 A. Not while I was there, no.

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1 Q. He was not employed by Babcock Center
2 in any other capacity?

3 A. Not while I was there, no.

4 Q. He would have reviewed this quarterly
5 return, correct?

6 A. Yes.

7 (Deposition EXH. 73, October, November,
8 December 2008 942 Employer's Quarterly Federal Tax
9 Return, marked for identification.)

10 BY MS. NORRIS:

11 Q. This is Exhibit 73. That is the 941
12 for the final quarter, final IRS quarter for 2008?

13 A. Correct.

14 Q. You did sign this return?

15 A. I did.

16 (Deposition EXH. 74, Amended October,
17 November, December 2008 942 Employer's Quarterly
18 Federal Tax Return, marked for identification.)

19 BY MS. NORRIS:

20 Q. Exhibit 74 appears to be another 941
21 for the final quarter of 2008; is that correct?

22 A. Yes.

23 Q. That is unsigned, but it has Mr.
24 Norman's name; is that correct?

25 A. Uh-huh.

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1 Q. So that would have been -- was Mr. Norm
2 -- strike that. This return is dated April of '09,
3 correct?

4 A. Uh-huh.

5 Q. Mr. Norman had already started working
6 at Babcock Center at that time?

7 A. Yes.

8 Q. You would not have reviewed this
9 amended return?

10 A. No, but I do know why it was amended.

11 Q. Why was that?

12 A. Right before I left -- let me back up a
13 little bit. While I was there Don Simmons had
14 changed the role of payroll from being under
15 finance to being part of HR and he transferred Ms.
16 Tucker to HR. Then when we discussed segregation
17 of duties there was a reason why they were supposed
18 to be separated. He sort of gave me payroll back,
19 but Ms. Tucker was supposed to still be on the
20 taxes.

21 So in finance we thought the taxes were
22 being paid when some of them were not, and I found
23 that out that they were not being paid right before
24 I left. So I remember telling them you guys have
25 got to amend this return.

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1 Q. That was late 2008/early 2009?

2 A. Early 2009. It would have been in
3 February, because if I had caught it before we
4 filed it by January 31st I would have not let it
5 gone out. So it had to be February 2009.

6 Q. When did that split take place when Ms.
7 Tucker was moved to HR from finance?

8 A. When I got back from maternity leave.
9 I don't remember exactly when, but October,
10 November.

11 Q. Of 2008?

12 A. Of 2008 I think.

13 Q. So between that time period and looks
14 like April of '09 that was when there was confusion
15 about who was handling the taxes?

16 A. Yes.

17 Q. That was corrected in April of 2009?

18 A. Yes, if it means the return.

19 Q. I'm sorry?

20 A. Because as far as who was paying what
21 taxes, I was gone by then. I don't know.

22 Q. So you're not sure who was paying what
23 taxes by the fourth quarter of 2008?

24 A. There was confusion at that point when
25 I told them we needed to amend the return right.

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1 before I left. I think they were still trying to
2 figure out exactly how they were going to split
3 those two things. So I'm not really sure who was
4 responsible at that point when I left.

5 Q. So the confusion, and I just want to
6 clarify here to make sure I get this right, started
7 in October or November of 2008 and lasted until the
8 time that you left in early '09; is that correct?

9 A. Yes.

10 (Deposition EXH. 76, Document BAB000568
11 through 577, marked for identification.)

12 BY MS. NORRIS:

13 Q. I'm going to show you now Exhibit 76.
14 I'll give you as second to look over this.

15 MR. SULLIVAN: We skipped 75; is that
16 right?

17 MS. NORRIS: We skipped 75. We're on
18 76.

19 BY MS. NORRIS:

20 Q. Have you seen this document before?

21 A. No, I don't think so.

22 Q. So you didn't prepare this document?

23 A. No.

24 Q. Were you aware that Babcock Center was
25 receiving tax deposit penalties as far back as

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1 2002?

2 A. No.

3 Q. Were you aware that Babcock Center
4 continued to receive tax deposit penalties up
5 through the entire time that you were there in
6 2009?

7 A. Yes.

8 Q. But you don't believe that this
9 document was prepared during the time that you were
10 working at Babcock Center?

11 A. Well, no, because, I mean, it has
12 March 15, 2010. It has information on it after it
13 let.

14 (Deposition EXH. 98, Report, W-2 Recap,
15 marked for identification.)

16 BY MS. NORRIS:

17 Q. I show you Exhibit 80. Actually,
18 sorry. We're going to skip Exhibit 80. I'll show
19 you Exhibit 98. That says that the document was
20 updated, in the top left corner, in November 2010,
21 correct?

22 A. Uh-huh.

23 Q. That's a yes?

24 A. Yes. I'm sorry.

25 Q. Thank you. Have you seen this document

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1 before?

2 A. I don't remember it if I have ever seen
3 it.

4 Q. So this was not a document you created?

5 A. No.

6 Q. You didn't create any documents like
7 this for other quarters?

8 A. No. This looks like a recap for our
9 W-2s.

10 Q. What reports, or did you generate any
11 monthly, weekly, quarterly reports during your time
12 period? And just generally what reports did you
13 create?

14 A. I created financial statements on a
15 monthly basis.

16 Q. Did anyone review those financial
17 statements?

18 A. I'm sorry?

19 Q. Who reviewed those financial
20 statements?

21 A. Dr. Johnson would review those as well
22 as the board, the finance committee of the board.

23 Q. Did you create any other reports to
24 track the financial condition of Babcock Center
25 during that time period?

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1 A. What type of reports do you mean?

2 Q. I guess I can strike that question and
3 come back.

4 (Deposition EXH. 131, Babcock Center,
5 Inc. General Ledger Report, marked for
6 identification.)

7 BY MS. NORRIS:

8 Q. I'm going to show you what's been
9 produced by the Babcock Center. And I apologize, I
10 only have a couple copies of it because it is a
11 very large document. We're on Exhibit 131.

12 MS. NORRIS: I apologize, this is not
13 in your binder, since I was just reviewing it on
14 Friday.

15 BY MS. NORRIS:

16 Q. I'll give you one copy here. It's a
17 very large document. Was this a -- it says general
18 ledger report at the top, correct?

19 A. Yes. Yes.

20 Q. Was this something that you maintained?

21 A. This was maintained within the
22 software.

23 Q. What software did Babcock Center use?

24 A. They used Blackbaud, but we switched
25 over to Blackbaud from, I think it was called

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1 Account Mate.

2 Q. M-A-I-N-T?

3 A. M-A-T-E. And from what I understand,
4 they had just converted to Account Mate when I came
5 to Babcock Center.

6 Q. When did you switch over to Blackbaud?
7 Was that during your time?

8 A. Yes. April of either 2007 or 2008.
9 Had to have been 2008.

10 Q. So until that time you were using
11 Account Mate, M-A-T-E?

12 A. Uh-huh.

13 Q. So this report, at least with respect
14 to time period up to October -- or I'm sorry, April
15 of 2008 would have been produced on Account Mate?

16 A. This looks like a Blackbaud document,
17 but I don't remember what the general ledger
18 reports look like that came out of Account Mate.

19 Q. When you switched over to Blackbaud was
20 all of the information from Account Mate switched
21 over as well?

22 A. Yes, they did pull in history.

23 Q. I'll have you turn back toward the end
24 of the document, I think after the yellow sticky
25 mark there. I have marked this document, what is

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1 Bates stamped BAB200-70-0294, and it looks like
2 there's a change in the way that the information is
3 reported at that time or that point in the ledger
4 which looks like it's around March 2008; is that
5 correct?

6 A. Yes.

7 Q. So that would have been around the time
8 that you made the switch over to Blackbaud?

9 A. It could well have been.

10 Q. From there on the page that I have
11 marked on, does that look like a Blackbaud report
12 to you -- I'm sorry, Blackbaud general ledger
13 report?

14 A. I think so.

15 Q. Who maintained this ledger?

16 A. I'm not really sure how to answer that.

17 Q. Who was authorized to input data into
18 the ledger?

19 A. Accounts payable, payroll, accounts
20 receivable, purchasing. And then Sandra
21 Ballington, who was the accounting manager, and
22 myself had authorization to make journal entries.

23 Q. Since you said Sandra Ballington was
24 the accounting manager --

25 A. Accounting manager.

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1 Q. Did she have anything to do with
2 payroll taxes?

3 A. She reconciled the bank accounts. So
4 she would get the reports from Karen Tucker that
5 would show how much had been paid for her to be
6 able to reconcile, and then she would obviously see
7 what had not been paid.

8 Q. Was this ledger ever audited or
9 reviewed to insure accuracy; and if so, by who?

10 A. We had an external audit once every
11 year starting usually in August at the end of the
12 fiscal year, which ended June 30, and it was done
13 by an independent outside auditor. For the years
14 that I was there it was Derrick, Stubbs & Stith.

15 Q. Was there a specific person that was
16 your contact at that firm or a specific accountant
17 that you worked with, or were there several people
18 that you worked with?

19 A. The partner was Craig Statler. The
20 individual that was kind of over our account was
21 Tim Monaghan. And the accountant that we dealt
22 with mostly who was on site was Amy Cain, C-A-I-N.

23 Q. Would those three people that you just
24 named: Mr. Statler, Mr. Monaghan, and Ms. Cain, be
25 the three individuals that you worked with in 2007

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1 and 2008?

2 A. Yes.

3 Q. Just to take a step back to clarify,
4 when did Babcock Center's fiscal year begin and
5 end?

6 A. The beginning was July 1st. The end
7 was June 30th.

8 Q. I'll ask you to set the ledger aside
9 for just a moment and we'll look at a couple other
10 reports and come back to that. Actually, I have
11 one more question before we move on. You don't
12 need the document for this. But I've been given a
13 general ledger listing and a general ledger report.
14 Do you know the difference between those two
15 documents?

16 A. Is one detailed and one summary? I
17 mean, without seeing them, no.

18 Q. I did not bring the second one. I
19 apologize. It was very large as well.

20 (Deposition EXH. 105, Babcock Center,
21 Inc. Schedule of Activities Years Ended June 30,
22 2007 and 2006, marked for identification.)

23 BY MS. NORRIS:

24 Q. I'll show you Exhibit 105. Have you
25 seen this document before?

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1 A. Ys.

2 Q. Was this something that you prepared?

3 A. No.

4 Q. Who prepared this?

5 A. The auditors.

6 Q. So this would have been prepared in
7 conjunction with the audit report?

8 A. Yes.

9 Q. Would this have been after the tax year
10 ending June 30, 2007 most likely?

11 A. Well, the first page is comparing
12 fiscal year 2006, which is July 1, '05 through
13 June 30, '06, to fiscal year '07, which would be
14 July 1, '06 through June 30, '07.

15 Q. The second page is?

16 A. Comparing fiscal year '07 to fiscal
17 year '08 and giving variances between those years.

18 Q. Just briefly, a couple questions on the
19 first page. It looks line DDSN. That's the --
20 well, what does DDSN stand for?

21 A. Department of Disability and Special
22 Needs.

23 Q. Those were the funds that you received
24 from the state. Looks like \$32 million in 2007 and
25 \$31 million in 2006; is that correct?

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1 A. Uh-huh.

2 Q. So your total revenues for 2006 and
3 2007 were \$32,963,750 in 2007 and \$32,559,557 in
4 2006; is that correct?

5 A. Yes.

6 Q. So your revenues were slightly higher
7 in fiscal year 2007 than fiscal year 2006; is that
8 correct?

9 A. Yes.

10 Q. Similarly, looking at the next section
11 of this page here, it looks like your salaries went
12 down by about \$3 million in 2007; is that correct?

13 A. I'm sorry, ask me that question again.

14 Q. Looking at the first page, about
15 halfway down the page there is an amount of total
16 salary expense there, and looks like \$17.5 million
17 for 2007 and 20.2 million for 2006, correct?

18 A. Yes.

19 Q. So there was about a \$3 million salary
20 decrease between 2006 and 2007; is that correct?

21 A. Not 3 million, 2.6.

22 Q. \$2.6 million, I'm sorry. Would that
23 have been due to the downsizing most likely?

24 A. Yes, because in 2006 we were still
25 paying the payouts for the employees that had left.

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1 Q. Just a couple questions on a couple
2 items towards the bottom there. There is an
3 expense for consulting services. It's about 27,
4 almost \$28,000 for 2007 and about \$3000 for 2006.
5 What do consulting services entail?

6 A. Specifically for Babcock Center, I
7 don't remember.

8 Q. Looking at the next line, do you
9 remember -- the next line item is professional
10 services. Do you remember what that would have
11 entailed?

12 A. Professional services I think were if
13 we had to pay psychologists, doctors, pharmacies,
14 any type of therapies, psychiatrists, speech
15 therapist, things like that, if I remember
16 correctly.

17 Q. Turning to the following page, which is
18 comparing fiscal year 2007 and fiscal year 2008, it
19 looks like in fiscal year 2007 Babcock received
20 about \$32.1 million from DDSN; is that correct?

21 A. Yes.

22 Q. In 2008 received about \$27.5 million?

23 A. Yes.

24 Q. Do you know what that reduction was due
25 to?

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1 A. They started cutting our budgets, the
2 amount of funding that they were sending to us and
3 cutting our services. Well, let me rephrase that.
4 They cut the funding that they gave us to provide
5 the same services.

6 Q. So you were providing services for the
7 same number of individuals in 2007 and 2008?

8 A. Yes.

9 Q. Was that due to statewide cuts or was
10 that part of the downsizing plan or due to
11 something else?

12 A. This was part of the economy when the
13 economy was going south. This is due to state
14 funds.

15 Q. This is not something anticipated by
16 the reduction in size of Babcock Center; that was
17 mandated by the state?

18 A. No. No. No.

19 Q. So looking at total revenues, it looks
20 like total revenues decreased from fiscal year 2007
21 from almost \$33 million down to about
22 \$28-and-a-half million in 2008; is that correct?

23 A. Yes.

24 Q. It looks like your salaries were about
25 the same for those years at about \$17 million,

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1 correct?

2 A. Yes. Some of this is a little bit
3 skewed because -- I'm trying to remember what
4 years. Whenever there is an increase, a COLA
5 increase to state employees, it's also sent to us.
6 So salaries can increase without employee numbers
7 changing. It would also increase revenues to cover
8 that raise and the additional health insurance that
9 we would have to pay and state retirement as well.
10 Sometimes it's hard to look at these numbers
11 without knowing some of the details that goes
12 behind it.

13 Q. You're saying whenever the state
14 employees received cost of living increase, Babcock
15 Center employees --

16 A. We were forced to.

17 Q. And DDSN mandates that the money that
18 they give you for that cost of living increase go
19 toward employee salaries?

20 A. Yes.

21 Q. Are you saying that that's what may
22 have happened?

23 A. 2006 and 2007 I'm pretty sure there was
24 a three percent raise.

25 Q. Looks like, going back to page 1, it

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1 looks like the salaries actually went down in 2007.
2 So you're saying that that was a cost of living
3 increase but fewer employees?

4 A. It was. The 2006 still contains what
5 we were having to pay out, vacation and other
6 benefits to employees that were being RIFed because
7 of downsizing. So it's fairly skewed to look at
8 some of this.

9 Q. Was that problem of having to pay out
10 vacation and other similar expenses to employees
11 that had been RIFed, was that problem solved by tax
12 year 2007?

13 A. That portion was complete. Everybody
14 who was going to be paid out and RIFed was done at
15 that point.

16 Q. By that point you mean June 30, 2007?

17 A. I think it was done by June 30, 2006.
18 I'm not exactly sure. But there was also a change
19 in the way DDSN mandated service coordination so
20 that we actually had to terminate a good many --
21 well, service coordinators had to be terminated.
22 That was with another agency that was kind of with
23 ours, but it still affected Babcock Center a little
24 bit because of the people that were responsible for
25 taking care of the individuals now had service

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1 coordinators. There were fewer of them, so they
2 could not give as much information to Babcock
3 Center to help these people because they had so
4 many more case loads.

5 Q. That was in fiscal year 2006 or 2007?

6 A. I think that was in 2007.

7 Q. I'm sorry, I just want to clarify. You
8 said most of the additional payment and benefits
9 that had to be paid out to the RIF employees, that
10 was completed in the tax year ending June 30, 2006?

11 A. I think so, yes.

12 Q. Earlier we talked about some of the
13 employees that were kept around after the reduction
14 in services to consumers and that -- I'm sorry, let
15 me rephrase that.

16 Earlier we talked about the fact that
17 there were some employees that stuck around after
18 reduction at Babcock Center while the center worked
19 out what would be done with these managerial level
20 employees. Was that all completed in fiscal year
21 ending June 30, 2006 as well, or did that continue
22 on into fiscal year 2007?

23 A. That would probably have continued on
24 because it's -- with this type of organization it
25 is not cut and dry as to what you need and what you

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1 don't because even though you have individuals that
2 you're familiar with, their needs change, their
3 behaviors change. They may need to transfer houses
4 because people who got along perfectly then all of
5 a sudden are not getting along.

6 Sometimes it's hard to figure out
7 exactly what you do need managerially and what you
8 don't need when you're dealing with these type of
9 individuals.

10 Q. The reduction plan, the three phase
11 plan that the Babcock Center came up with with the
12 state, that involves reduction in size of consumers
13 that you were servicing, not in reduction of size
14 of employees; is that correct.

15 A. Yes, it was reduction in size of
16 employees. But determining exactly what the needs
17 were with the new number of employees was a little
18 more difficult to determine because of the type of
19 population we serve.

20 Q. So the plans themselves are you saying
21 didn't list specifically which employees would be
22 let go at which times?

23 A. I don't know specifically. As far as
24 the houses, the people who were in the houses,
25 obviously they would have to address those. As far

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1 as levels of managerial, I don't know that it was
2 specifically named.

3 (Deposition EXH. 106, Babcock Center,
4 Inc. Consolidated Statements of Cash Flows Years
5 Ended June 30, 2007 and 2006, marked for
6 identification.)

7 BY MS. NORRIS:

8 Q. I show you Exhibit 106. Have you seen
9 this document before?

10 A. This would have been from the audit.

11 Q. So this would have also been prepared
12 by the external accountants?

13 A. Yes.

14 Q. This shows, if you look about
15 two-thirds of the way down the document, a decrease
16 in cash for tax year ending June 30, 2007; is that
17 correct?

18 A. Yes.

19 Q. And can you explain why that was?

20 A. Why there was a decrease in cash for
21 just specifically 2007?

22 Q. Can you explain what this document was
23 used for within the Babcock Center? Was there any
24 -- I'm sorry, strike that.

25 (Deposition EXH. 108, Babcock Center,

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1 Inc. Accounts Payable Summary Schedule, marked for
2 identification.)

3 BY MS. NORRIS:

4 Q. I'll show you Exhibit 108. Did you
5 create this document?

6 A. I don't know if I created this document
7 or not.

8 Q. Do you remember seeing this document
9 before?

10 A. I remember some of the items on this
11 document.

12 Q. Which items do you remember? Can you
13 just explain this document to me from what you
14 remember?

15 A. The auditors are reconciling what is on
16 the detail for accounts payable to what's on the
17 trial balance.

18 Q. So this is a document that you think
19 the auditors produced?

20 A. No, we did, meaning Babcock Center.
21 Now, whether I produced it or whether one of the
22 other individuals working on the audit I don't
23 know, but I do remember some of the items that are
24 on here.

25 Q. Can you walk through which items you

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1 remember?

2 A. Reclass due to foundation.

3 Q. What was that?

4 A. The foundation had loaned Babcock
5 Center \$500,000 to meet payroll at one point.

6 Q. This would have been prior to
7 June 2007?

8 A. Yes.

9 Q. Was that paid back to the foundation?

10 A. Some of it was. And then once the cuts
11 started coming from the state it was putting
12 Babcock Center in such a bad cash flow situation
13 again that the foundation, I think they forgave
14 some of it. I don't remember how much.

15 Q. So that \$500,000 was used to meet
16 payroll?

17 A. Yes.

18 Q. And not to meet payroll taxes, correct?

19 A. Payroll.

20 Q. Did the foundation loan the Babcock
21 Center money, more than this \$500,000 on any other
22 occasion other than that's shown here on this
23 statement?

24 A. I don't know. The \$500,000 that was
25 loaned to Babcock Center to make payroll actually

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1 occurred before I was there. I just remember them
2 explaining to me what had happened and that we were
3 making payments back to them or trying to.

4 Q. So do you remember when approximately
5 this loan was forgiven?

6 MR. SULLIVAN: Object to the form.

7 You may answer.

8 THE WITNESS: I don't remember when it
9 was, and I know it was not for the full \$500,000.

10 BY MS. NORRIS:

11 Q. Do you remember how much you were
12 paying and how frequently you were paying?

13 A. Frequency, not very often. The amount
14 I don't remember.

15 Q. Other than this \$500,000, am I correct
16 that you don't remember any other time that the
17 Babcock Center had borrowed funds from the Babcock
18 Foundation; is that correct?

19 A. I don't remember any other time.

20 Q. Was this document -- looking at
21 Exhibit 108, this document is dated June 30, 2007,
22 correct?

23 A. Uh-huh. Yes.

24 Q. Do you know if there was a similar
25 document created for the period ending -- the tax

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1 year ending June 30, 2008?

2 A. I would assume so because this is
3 reconciling what's the difference between what's on
4 the January ledger -- what comes out of the
5 accounting software as the amount due for accounts
6 payable to what's on the trial balance.

7 Q. So this was a document that's generally
8 generated as part of the yearly audit?

9 A. Yes.

10 (Deposition EXH. 110, Babcock Center,
11 Inc. Cash Flow Projection, marked for
12 identification.)

13 BY MS. NORRIS:

14 Q. I'll show you Exhibit 10. Can you
15 explain this document for me, please? Or first --
16 actually, strike that.

17 Have you seen this document before?

18 A. Yes.

19 Q. Did you produce this document?

20 MR. SULLIVAN: Object to the form of
21 the question.

22 BY MS. NORRIS:

23 Q. Do you remember if you produced this
24 document?

25 A. I did not.

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1 Q. This document is dated April 2006;
2 correct?

3 A. Yes.

4 Q. Do you remember why this document would
5 have been produced?

6 A. At some point DDSN required a CPA firm
7 to come in and create this document for Babcock to
8 be able to try to get a handle on their cash flow.
9 The idea was good. Being able to apply it not so
10 good.

11 Q. So this was produced by an accounting
12 firm you believe?

13 A. The template.

14 Q. So the accounting firm produced the
15 template and it -- was Babcock Center then supposed
16 to create this cash flow projections going forward?

17 A. Yes.

18 Q. Who was responsible for that?

19 A. At first the Babcock person who was
20 there before me, and then when I came they showed
21 it to me and told me that they wanted me to use it.
22 But it could not be -- I could not figure out a way
23 to do it until after the fact because there was no
24 way of determining when specific moneys were coming
25 in. We knew when DDSN was coming in. Other than

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1 that it was really kind of a guess.

2 Q. Which money are you referencing that
3 you didn't know when it would come in?

4 A. When the consumers would pay their room
5 and board. Some paid on time, some didn't. So you
6 might get \$3000 this one day. The same day the
7 next month you might get \$100. There was no
8 consistency to when things came to be able to try
9 to apply this.

10 Q. Within yearly budgeting did Babcock
11 Center allow for this variance when the rents were
12 paid each month?

13 A. We budgeted for the amount that was to
14 be paid each month.

15 Q. So some months that full amount didn't
16 come in?

17 A. For instance, if you had an individual
18 who something happened with their health and they
19 went into the hospital, obviously they're not
20 capable of signing their check to pay their rent.
21 Whenever they got out of the hospital or if they
22 had gone on vacation or whatever, you would get the
23 money at a different time. With the amount of
24 people that we were serving those type of things
25 happened.

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1 Q. So this was a consistent problem, or
2 was this a consistent problem, or was this isolated
3 to a certain time period?

4 A. That's things that happened all the
5 time. But based on this template it was very hard
6 to project because the cash flow was so tight that
7 if you missed on what you were estimating that you
8 were going to get in because you could see this
9 projected two months out beyond the month it was
10 created, then, I mean, how can you guess what
11 payroll is going to be because of overtime? How
12 can you guess exactly what's going to come in on
13 what day? How can you guess what the electricity
14 bill is going to be?

15 I mean, you can look at history, but
16 that doesn't necessarily tell you exactly what
17 things were going to be. This document was looking
18 for exact amounts to be able to produce.

19 Q. Am I understanding you correct that
20 some of the issue that you're referencing that
21 caused cash flow problem were rent payments from
22 the consumers; is that correct?

23 A. Not necessarily cash flow problems, but
24 trying to utilize this document. It wasn't exact.
25 There wasn't an exact science to it because there

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1 were so many unpredictable items in it.

2 Q. The unpredictable items you're saying
3 that made it difficult to manage cash flow were
4 rent payments and --

5 A. That was for the sheet.

6 Q. Was there some other method the Babcock
7 Center used to manage cash flow or to anticipate
8 cash flow?

9 A. It was so tight that basically we were
10 looking at how much money came in today and what
11 bills can we pay today.

12 Q. So that day-to-day payments -- sorry,
13 the day-to-day determination of which bills should
14 be paid was due to -- sorry, I'll rephrase the
15 question.

16

17 MR. SULLIVAN: Are we getting to a good
18 place to break?

19 MS. NORRIS: Sure.

20 (A brief recess was taken.)

21 MS. NORRIS: Back on the record.

22 (Deposition EXH. 78, Babcock Center,
23 Inc. Cash Flow Projection, marked for
24 identification.)

25 (Deposition EXH. 79, Babcock Center,

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1 Inc. Cash Flow Statement, marked for
2 identification.)

3 BY MS. NORRIS:

4 Q. I'm going to show you Exhibits 78 and
5 79 together. I'll give you a second to look at
6 those. Do you recognize these documents?

7 A. Yes.

8 Q. You referenced earlier that the
9 accounting firm had tried to give you a template
10 and you were supposed to -- they wanted you to
11 implement that template; is that correct?

12 A. Yes.

13 Q. And this was mandated by DDSN?

14 A. DDSN had required Babcock Center to
15 bring in the accounting firm to help with cash
16 flow.

17 Q. Are these documents related to your
18 attempt to make these cash flow statements?

19 A. This one, which is Exhibit 78, no.
20 This was done before I was there, and so was the
21 accountants coming in and creating this and
22 explaining how all of this worked.

23 Q. So this would have been created --
24 Exhibit 78 would have been created by someone else?

25 A. Yes.

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1 Q. And Exhibit 79, was this a document
2 that you created?

3 A. I don't know. This was what was being
4 used to track cash. When I first went to work at
5 Babcock Center there was an accounting manager
6 there besides Sandra Ballington. Suzy Hertzog I
7 think her name was. I don't know if she created
8 this or if I did as far as put these numbers in it.
9 The template was already there.

10 Q. Did Babcock Center during the 2007 and
11 2008 calendar years, were they ever able to create
12 any sort of cash flow projection or cash flow
13 statements that would accurately predict cash flow?

14 A. No.

15 Q. Again, could you just briefly explain
16 why that was?

17 A. DDSN had sent us -- had given us the
18 cuts. They also changed the way they were paying
19 us. I'm not exactly sure exactly when each one of
20 the cuts hit. I know in one of the years they even
21 hit mid -- they usually came either at the
22 beginning of the fiscal year, middle of the fiscal
23 year. There was one fiscal year when they came in
24 the middle of one of those two, so it was in March.
25 It just kept changing.

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1 And they changed the way they paid us.
2 They used to pay us one month prospectively, and
3 then they changed it to where we were going to get
4 two payments with one payment right at the very
5 beginning or right before the beginning of the
6 month, another payment right at the middle, which
7 made it a little more difficult because typically
8 the payments that we were receiving from DDSN
9 covered the payroll, at least the amount that we
10 owed employees.

11 So it made it harder because we didn't
12 have that extra chunk right at the beginning of the
13 month to try to pay some of our vendors. So we
14 were getting off schedule again with vendors.

15 Q. So were the payments that you received
16 from DDSN, this is also what would have covered
17 payroll taxes?

18 A. Yes.

19 Q. Do you remember when that change took
20 effect? Actually, I may have a document that says
21 that, so we can come back to that.

22 A. I don't remember.

23 (Deposition EXH. 95, Babcock Center,
24 Inc. Balance Sheet as of 1/31/07, marked for
25 identification.)

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1 BY MS. NORRIS:

2 Q. I show you Exhibit 95. Is this a
3 document that you created?

4 A. I think so, yes.

5 Q. Did you create these sheets monthly?

6 A. A balance sheet variance, yes.

7 Q. What were they used for?

8 A. We were determining where money was
9 coming from and where money was going.

10 Q. Were these given to the auditors each
11 year?

12 A. They were included in the minutes, and
13 the auditors would review the minutes, yes.

14 Q. Minutes of the board meeting?

15 A. Yes.

16 Q. Were these the financial statements
17 that you created you referenced earlier?

18 A. A portion of them, yes.

19 Q. Were there other financial statements
20 that you created?

21 A. Income tax statements, trend reports.

22 Q. Trend reports?

23 A. Yes.

24 Q. I'm assuming you did not keep any of
25 these documents when you left Babcock?

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1 A. No. They were the property of Babcock
2 Center.

3 Q. If you look at 2007, the majority of
4 these say draft in the upper right corner. Would
5 finals have been produced of these documents or
6 final versions?

7 A. I don't know why they're marked draft.
8 The only one that would have been marked draft that
9 went to the board was July, maybe -- let me
10 rephrase that. It would be June, because we
11 weren't able to close the month off at a certain
12 period during the month to be able to produce the
13 financial statements because it was the last month
14 of the fiscal year, so we had to hold it open to
15 get all of the payables that we possibly could into
16 for purposes of audit.

17 So typically June would say draft and
18 then July might say draft depending on how far we
19 were into the auditing process to be able to say,
20 yes, our numbers are complete for the fiscal year
21 to be able to roll them over to the next one.

22 Q. So these were likely final version?

23 A. Unless these were where we were
24 reviewing with Dr. Johnson to see if there was
25 anything that we had missed before we produced the

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1 final. I don't know.

2 Q. So Dr. Johnson did review those?

3 A. Yes.

4 Q. Did anyone else review them?

5 A. She and I would review them. Sometimes
6 Sandra Ballington was in with us when we reviewed
7 them.

8 (Deposition EXH. 96, Babcock Center,
9 Inc. Balance Sheet as of 1/31/08, marked for
10 identification.)

11 BY MR. NORRIS:

12 Q. I'll quickly give you the next
13 document, which is 96, and just have you -- did you
14 create this document -- these documents as well?

15 A. You know, this might have come out of
16 the software.

17 Q. That would be Blackbaud?

18 A. This Exhibit 95. No, I don't think so.
19 I think we went to Blackbaud --

20 Q. This might have come out of the --

21 A. I'm not sure. I'm not positive where
22 it came from. No, I -- these look like mine.

23 Q. We talked a lot about the outside
24 accountants that audited Babcock Center. Did they
25 perform an audit each year?

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1 A. Yes.

2 Q. So they would have performed an audit
3 in the tax years ending June 30, 2007; June 30,
4 2008; and June 30, 2009?

5 A. Yes.

6 Q. Did they create a report each year?

7 A. Yes.

8 Q. I'm assuming you do not have copies of
9 those reports?

10 A. No, I do not. These were definitely
11 coming out of Blackbaud. You can see the
12 difference between this and these.

13 Q. That's Exhibit 96 starting with looks
14 like May of that year that they were created with
15 Blackbaud?

16 A. Yes. Wait a minute. I'll look at
17 April. March, March is when they started coming.

18 (Deposition EXH. 111, Provider CPA
19 Findings Fiscal Year 2006 Administrative Findings,
20 marked for identification.)

21 BY MS. NORRIS:

22 Q. I'll show you Exhibit 111. Have you
23 seen this document before?

24 A. Yes.

25 Q. Is this an example of the CPA audit

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1 findings that was produced on a yearly basis?

2 A. This is the audit findings for all of
3 the boards, not just Babcock Center. This was
4 produced by DDSN. They took out any type of
5 references to which board it was so that you
6 wouldn't know which board had received this type of
7 issue, the finding, but they wanted to make people
8 aware of what type of findings were being noted.

9 Q. So is this a public report?

10 A. I don't know. I know all of the
11 finance directors and all the executive directors
12 to all the boards got them.

13 Q. This was not a document that was
14 produced by the accounting firm?

15 A. No. If Babcock Center had had
16 findings, they would have produced whatever the
17 findings were for Babcock Center which would have
18 been included in the audit, and then DDSN took all
19 of the audits of all of the agencies and combined
20 them and took out reference to which board it was
21 just to make everybody aware these are the things
22 you're finding. So if you haven't been caught
23 doing this yet but you're doing it, you need to
24 change, just making people aware of what they
25 should be doing and shouldn't be doing.

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1 Q. This is not an independent audit that
2 was performed by DDSN, they were taking information
3 from the --

4 A. Audit reports of all of the boards,
5 yes.

6 Q. This says fiscal year 2006. Do you
7 know if this was the period ending June 30, 2006,
8 then?

9 A. Yes.

10 Q. I'll have you turn to Bates stamp
11 number BAB 1075. Now, this document would have
12 been produced sometime after June 30, 2006,
13 correct?

14 A. Yes.

15 Q. Do you remember when approximately
16 these audit reports were completed? Were they
17 usually completed by the end of the calendar year?

18 A. Audit reports are due to DDSN no later
19 than September 30th following the end of the fiscal
20 year. So this we would usually get sometime
21 between December and February.

22 Q. Of the following year?

23 A. Yes.

24 Q. The following calendar year?

25 A. Fiscal year. I know it's confusing.

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1 Q. So you would have received this
2 document sometime before February 2007?

3 A. Yes, I think so.

4 Q. I'll have you look at number 7. It
5 says: The personnel with payroll duties should be
6 properly trained in payroll tax rules and
7 regulations; is that correct?

8 A. That's what it says, yes.

9 Q. Did you or anyone taking part in any of
10 the payroll functions at Babcock Center, was there
11 any additional training on payroll tax rules and
12 regulations that took place after this audit
13 report?

14 A. Additional training, not that I'm aware
15 of.

16 Q. Its also says, if you look down to the
17 third sentence: Review and reconciliation
18 procedures were not adequate to assure that payroll
19 tax reporting was correct or that proper amounts
20 were remitted to tax authorities timely. Did I
21 read that correctly?

22 A. Yes.

23 Q. Were there any steps that were taken
24 after this audit to comply with this statement in
25 the audit?

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1 A. Did this come from Babcock Center's
2 audit?

3 Q. Do you know if this came from Babcock
4 Center's audit?

5 A. I don't remember, but with this being a
6 combination of all of the boards' audit findings
7 this could have been any of the 39 board, all
8 different information.

9 Q. This was not -- I'm sorry. Who else --
10 what other boards would have had information
11 contained in this document?

12 A. Every board in the county or every
13 county in the state has a board in one form or
14 another. Every board has to have an audit every
15 year. All of the audits are sent to DDSN. DDSN
16 then goes in and gets all of the findings out of
17 the audits, puts them all together and neutralizes
18 them so you can't tell who it's for, which board
19 got that finding.

20 So this may or may not have been for
21 Babcock Center. It may not have been in their
22 audit. I don't specifically remember. This could
23 have been any of the boards.

24 Q. I will move on then. Now, you
25 mentioned a loan that Babcock Center received from

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1 the foundation prior to your time of about
2 \$500,000. Other than this loan did Babcock Center
3 take out any additional loans in the 2007 and
4 2008 calendar years to help other financial
5 problems?

6 A. I think there was a line of credit, if
7 I remember correctly. I think it might have been
8 maxed.

9 Q. What was the line of credit used for?

10 A. If we needed money to cover payroll,
11 because if our payroll fell right before we were
12 going to get a check from DDSN we may not have the
13 money to pay it. If we -- anything that we had to
14 pay.

15 Q. Was the line of credit ever used to pay
16 payroll taxes?

17 A. I do not remember.

18 Q. Did you ever guarantee or cosign loans
19 on behalf of Babcock Center in your position?

20 A. Not that I recall. The only thing I
21 might had to have signed with personal information
22 would be for an agency credit card.

23 Q. So someone else would have signed any
24 documentation regarding a loan received for the
25 Babcock Center?

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1 A. Yeah. Dr. Johnson was the only one who
2 was allowed to enter into contracts.

3 Q. Who had signature authority in the
4 Babcock Center's checking account?

5 A. Dr. Johnson and myself.

6 Q. So you or Dr. Johnson would have signed
7 all payments of any bills, payroll, any check that
8 was signed in the account?

9 A. We both would have signed.

10 Q. Was it a two signature checking
11 account?

12 A. Uh-huh.

13 MS. NORRIS: I will note for the
14 record, Mr. Sullivan did produce to me additional
15 copies of the finance committee notes this morning.
16 I thank you for that.

17 BY MS. NORRIS:

18 Q. I'll ask you a few questions about the
19 board, and then we will get through these. What
20 was the board's role in the financial affairs of
21 Babcock Center, or how involved were they in those
22 financial affairs?

23 A. The finance committee, we reviewed the
24 financial statements with them on a monthly basis
25 and then we did a report to the board. They were

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1 advised if we had to purchase vehicles, if we had
2 to increase the line of credit, or anything like
3 that they would be a part.

4 Q. So was the finance committee then aware
5 of the payroll tax issues that Babcock Center had?

6 MR. SULLIVAN: Object to the form of
7 the question.

8 You may answer.

9 BY MS. NORRIS:

10 Q. Was the finance committee aware of any
11 payroll tax issues?

12 A. Initially I don't think so because when
13 I came and I saw the payroll tax issues and that
14 this had been an issue I thought they knew. I had
15 no idea they did not. So I didn't really bring it
16 up to the finance committee because this had been
17 ongoing. I was unaware that they were not aware.

18 Q. When, if you know, did the finance
19 committee become aware, if they ever became aware
20 at all?

21 A. I was working diligently to get the
22 payroll taxes paid in addition to paying penalties
23 and interest. I'm trying to remember what fiscal
24 year it was. It might have been '08, '07. I can't
25 remember exactly. There were two or three payrolls

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1 where we could not pay the taxes, and then I had a
2 plan in place to get them caught up by the end of
3 the fiscal year, but that's when DDSN changed the
4 way we were being paid, which threw our cash flow
5 into a spin again. That's when it came out that
6 there were payroll tax issues and that they did not
7 know.

8 Q. What was your plan to get the payroll
9 taxes caught up?

10 A. I was being very careful with the way
11 the money was spent, things that I had control
12 over. I worked with our purchasing agent very
13 closely to monitor what we were purchasing, exactly
14 how many we were purchasing, and whom we were
15 purchasing it from. We had made a huge effort to
16 reduce costs to get discounts from vendors,
17 anything we could do to lower our costs so that we
18 would alleviate some of this and be able to apply
19 more money toward the taxes.

20 So there was a point in time we were
21 paying them in a timely planner. And then when
22 they changed the way we were paid, DDSN changed the
23 way we were paid, it threw issues in again. Then
24 we kept getting cuts from DDSN that also caused
25 issues, because the cost of food was still rising,

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1 the cost of gas was still rising, but our money was
2 decreasing.

3 Q. Do you remember when you tried to
4 implement this plan?

5 A. I want to say it was by the end of 2008
6 as best I can recall. I'm not exactly sure. It's
7 been a while. I would have had everything caught
8 up by the end of June if they had not changed the
9 way we were paid.

10 Q. By the end of June 2008 or 2009?

11 A. 2008 I think.

12 Q. Do you remember if you did anything
13 under 2007 tax year, if you worked with vendors,
14 reduced any of your payments, any of the activities
15 that you just mentioned?

16 A. We were always doing it.

17 Q. So the plan that you talked about
18 implementing, how was that different from what had
19 been done in the past?

20 A. For instance, when somebody would order
21 office supplies the purchasing individual and I
22 would review it and say, okay, give them half. We
23 know they do need office supplies, but give them
24 half and make them do with what they have on ways
25 that we could cut back.

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1 Q. Was this cutback specifically to help
2 pay for the taxes or was it to pay for taxes and
3 all of the operating expense?

4 A. To improve cash flow overall, to get
5 everything caught up. That was the main goal, to
6 get everything caught up. We could not cut back on
7 services. We were required to provide the
8 services. But anything else that we could cut back
9 on we were working with.

10 Q. So what were items that would not be
11 included in services that were items you could cut
12 back on? You mentioned office supplies. Was there
13 anything else?

14 A. Like chemicals to clean the houses.
15 Instead of allowing the individuals to go out
16 shopping and buying Clorox and the name brand
17 Windex we had an agreement in place with
18 Southeastern Paper to provide certain chemicals.
19 They produced the same result but at a much cheaper
20 rate. We had installed things on the wall that you
21 could dispense from, dispensers, so that we could
22 try to control the amount of product that was going
23 to each one of the houses. We had Southeastern
24 Paper actually go out and train each one of the
25 houses on how to use these products so that we

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1 didn't overuse them so that we could try to reduce
2 costs.

3 Q. Can you think of any other measures
4 that you did in an attempt to reduce costs?

5 A. I want to say they were -- I wasn't
6 involved in every one of them because there were
7 other people trying to work on controlling costs as
8 well. They were working with the company that we
9 utilized to purchase gas to get a reduction. We
10 got like a six percent -- six cent decrease on the
11 cost of gas per gallon that we had to purchase
12 because, obviously, we had to transport the
13 individuals to their jobs, to the workshops, to the
14 doctors, whatever they had to do. We were working
15 in whatever way we could find to cut costs.

16 Q. But the board was not aware of these
17 cost-cutting measures, or they just were not aware
18 that they were --

19 A. They were aware that we were working to
20 cut costs.

21 Q. They just weren't aware that taxes were
22 due?

23 A. That one of the issues was payroll tax.

24 Q. You think they became aware sometime in
25 2008?

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1 A. I think. Sorry, my years kind of run
2 together.

3 Q. Understandable. Once the board did
4 learn of the payroll tax issues how did they learn
5 of it? Did you tell them, do you remember?

6 A. I can't remember if it came up in an
7 audit or if we actually had signed an agreement
8 with Derrick, Stubbs & Stith to help us try to
9 reduce some of the penalties and interest, because
10 trying to pay those on top of trying to catch up
11 the taxes was keeping us behind as well.

12 Q. What was your understanding of how the
13 accounting firm could go about reducing the
14 penalties?

15 A. I don't know.

16 Q. Do you know who on the board first
17 learned of the tax issues?

18 A. The finance committee.

19 Q. Did you speak to Bill Danielson?

20 A. He was on the committee, uh-huh.

21 Q. Was he the chair of the committee at
22 the time?

23 A. I think so, yes.

24 Q. Do you remember talking to him about
25 the tax issue?

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1 A. We talked with the whole finance
2 committee about the tax issues.

3 Q. Once the board learned about it or once
4 the finance committee learned about it what was
5 their recommendation? What did they try to do
6 about the tax issues, if anything?

7 A. At that point we were, if I remember
8 correctly, pretty close to being caught up if not
9 caught up. So, obviously, there was a make sure
10 you pay the payroll taxes, which was always a goal,
11 but if you can't, if there is still continuing cash
12 flow let us know so that we can try to figure out
13 what else needs to be done.

14 Q. Were you aware -- or when did you
15 become aware that Babcock Center was receiving
16 penalties on behalf of any late paid or unpaid
17 payroll taxes?

18 A. When I first went to work there. I had
19 a huge payment I had to make.

20 Q. Did the board know about the penalties
21 as well or just the late payment of the taxes, if
22 you know?

23 A. I don't know. I know I talked to Dr.
24 Johnson about it, but I don't know about the board
25 specifically.

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1 (Deposition EXH. 16, Babcock Center
2 Board of Directors Meeting 1/16/07, marked for
3 identification.)

4 (Deposition EXH. 132, Babcock Center
5 Finance Committee Meeting 1/16/07, marked for
6 identification.)

7 BY MS. NORRIS:

8 Q. I'll show you Exhibit 16. Take a
9 second to review that. I will also show you
10 Exhibit 132. Actually, I'll hold off on 132 and
11 ask you about those in summary. So looking at 16,
12 is this the board of director minutes of 2007?

13 A. It appears so.

14 Q. Turning to the last page of this
15 document, it references that phase 3 of the
16 downsizing will have a negative impact on the
17 budget; is that correct?

18 A. Uh-huh.

19 Q. But the following paragraph, the first
20 sentence says: Cash flow looks good at this time;
21 is that correct?

22 A. That's what it says.

23 Q. You were present at this board meeting,
24 correct?

25 A. Yes.

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1 Q. You were on the finance committee?

2 A. I reported to the finance committee.

3 Q. Do you know why it would have said cash
4 flow looks good at this time? Would this have been
5 information that you would have reported to the
6 finance committee, or did someone else give the
7 finance committee a report?

8 A. I reported the information to the
9 finance committee, but I would not -- I did not
10 necessarily say these words. This is a summary of
11 what took place in an hour to an hour-and-a-half
12 meeting, and the only thing I can think of that
13 anybody would say cash flow looked good at this
14 time is because we had received the money from DDSN
15 for the renovations and the purchase of the
16 building that we had purchased.

17 Q. You purchased a new building in or
18 around January of 2007?

19 A. I don't remember when we purchased the
20 building. DDSN gave them the funds to purchase.

21 Q. To purchase the building specifically?

22 A. Yes, and then the funds for the
23 renovation of the building.

24 Q. Do you remember, did a specific person
25 give the finance committee a report each month?

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1 A. Myself. You mean to the board or in
2 the finance committee?

3 Q. To the board. The information that
4 would have been referenced in Exhibit 16, would
5 that have come from?

6 A. I gave the information to the finance
7 committee. I don't remember if I actually gave it
8 to the board of Babcock Center.

9 Q. But you did attend the board meetings,
10 correct?

11 A. Yes, I did.

12 (Deposition EXH. 18, Babcock Center
13 Board of Directors Meeting 3/20/07, marked for
14 identification.)

15 (Deposition EXH. 19, Babcock Center
16 Board of Directors Meeting 4/17/07, marked for
17 identification.)

18 BY MS. NORRIS:

19 Q. I'll give you Exhibit 18 and 19.
20 Turning to the last page of 18, second paragraph,
21 it says: Ms. Tyler updated the board on cash flow.
22 She relayed we are tightening our belts now in
23 preparation for the month of June.

24 Why would you have specifically been
25 tightening your belts for the month of June?

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1 A. Because we would have had a payroll on
2 June 30th and we would not have gotten the money
3 for that payroll until the beginning of July.

4 Q. I show you Exhibit 19. It mentions
5 down under the finance committee, it says: You
6 continue to watch expenses closely in preparation
7 for the month of June. But there is no reference to
8 any tax problems in this; is that correct?

9 A. No.

10 Q. Do you know -- this is dated April 17,
11 2007. Do you think this would have been before the
12 board knew about any tax problems?

13 A. Yes.

14 (Deposition EXH. 20, Babcock Center
15 Board of Directors Meeting 5/15/07, marked for
16 identification.)

17 BY MS. NORRIS:

18 Q. Exhibit 20, who took minutes at these
19 board meetings?

20 A. Charlotte Wright.

21 Q. Turning to the second page of this
22 document, it talks about a house manager's report
23 card and that 18 house managers received a bonus.
24 Four of the house managers received a bonus for
25 three months. Do you know how much that bonus

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1 would have been?

2 A. I don't remember exactly. Either \$100
3 or \$200.

4 Q. It was a relatively small amount?

5 A. Yes.

6 Q. Were any other bonuses given to Babcock
7 Center employees in 2007 or 2008 that you remember?

8 A. No. And the way this is worded, they
9 had to meet goals, one of which was keeping their
10 house in line with their budget before they would
11 earn this, keeping their overtime intact. This was
12 an incentive to try to control costs.

13 Q. Going down to the finance committee
14 section of the report, it references a \$1 million
15 loan from BB&T until they received the funds from
16 DDSN in July, correct?

17 A. Yes.

18 Q. Do you know what that loan was used
19 for?

20 A. We had to make the payroll and pay all
21 of our operating expenses from -- because at this
22 point in time DDSN was paying us in July, we'd
23 receive two checks August, one check for September,
24 September, one check for October and so on. When
25 it got to June there was no money. We got it at

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1 the end of May and that was it. We still had two
2 payrolls and all of our vendor expenses to pay and
3 we were still back in arrears.

4 Q. Turning to the next page, it notes that
5 there was a significant improvement to financials
6 between the 2006 and 2007 fiscal years. Do you
7 know what the board would have been referencing
8 there?

9 A. Without seeing the financials, no.

10 (Deposition EXH. 21, Babcock Center
11 Board of Directors Meeting 5/15/07, marked for
12 identification.)

13 BY MS. NORRIS:

14 Q. I'm going to show you Exhibit 21. If
15 you can turn to page 3, please, it talks about
16 considering hiring a deputy executive director. Do
17 you know who would make those determinations?

18 A. Where is this?

19 Q. Sorry. Under the finance committee. I
20 guess I can ask a more general question. Who
21 generally made the determinations of whether or not
22 to hire additional employees?

23 A. Dr. Johnson.

24 (Deposition EXH. 22, Babcock Center
25 Board of Directors Meeting 7/21/07, marked for

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1 Q. You were on the finance committee?

2 A. I reported to the finance committee.

3 Q. Do you know why it would have said cash
4 flow looks good at this time? Would this have been
5 information that you would have reported to the
6 finance committee, or did someone else give the
7 finance committee a report?

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9 finance committee, but I would not -- I did not
10 necessarily say these words. This is a summary of
11 what took place in an hour to an hour-and-a-half
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18 around January of 2007?

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20 building. DDSN gave them the funds to purchase.

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23 renovation of the building.

24 Q. Do you remember, did a specific person
25 give the finance committee a report each month?

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1 A. Myself. You mean to the board or in
2 the finance committee?

3 Q. To the board. The information that
4 would have been referenced in Exhibit 16, would
5 that have come from?

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7 committee. I don't remember if I actually gave it
8 to the board of Babcock Center.

9 Q. But you did attend the board meetings,
10 correct?

11 A. Yes, I did.

12 (Deposition EXH. 18, Babcock Center
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23 preparation for the month of June.

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25 tightening your belts for the month of June?

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1 A. Because we would have had a payroll on
2 June 30th and we would not have gotten the money
3 for that payroll until the beginning of July.

4 Q. I show you Exhibit 19. It mentions
5 down under the finance committee, it says: You
6 continue to watch expenses closely in preparation
7 for the month of June. But there is no reference to
8 any tax problems in this; is that correct?

9 A. No.

10 Q. Do you know -- this is dated April 17,
11 2007. Do you think this would have been before the
12 board knew about any tax problems?

13 A. Yes.

14 (Deposition EXH. 20, Babcock Center
15 Board of Directors Meeting 5/15/07, marked for
16 identification.)

17 BY MS. NORRIS:

18 Q. Exhibit 20, who took minutes at these
19 board meetings?

20 A. Charlotte Wright.

21 Q. Turning to the second page of this
22 document, it talks about a house manager's report
23 card and that 18 house managers received a bonus.
24 Four of the house managers received a bonus for
25 three months. Do you know how much that bonus

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5 A. Yes.

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7 Center employees in 2007 or 2008 that you remember?

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9 had to meet goals, one of which was keeping their
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14 section of the report, it references a \$1 million
15 loan from BB&T until they received the funds from
16 DDSN in July, correct?

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23 receive two checks August, one check for September,
24 September, one check for October and so on. When
25 it got to June there was no money. We got it at

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1 the end of May and that was it. We still had two
2 payrolls and all of our vendor expenses to pay and
3 we were still back in arrears.

4 Q. Turning to the next page, it notes that
5 there was a significant improvement to financials
6 between the 2006 and 2007 fiscal years. Do you
7 know what the board would have been referencing
8 there?

9 A. Without seeing the financials, no.
10 (Deposition EXH. 21, Babcock Center
11 Board of Directors Meeting 5/15/07, marked for
12 identification.)

13 BY MS. NORRIS:

14 Q. I'm going to show you Exhibit 21. If
15 you can turn to page 3, please, it talks about
16 considering hiring a deputy executive director. Do
17 you know who would make those determinations?

18 A. Where is this?

19 Q. Sorry. Under the finance committee. I
20 guess I can ask a more general question. Who
21 generally made the determinations of whether or not
22 to hire additional employees?

23 A. Dr. Johnson.

24 (Deposition EXH. 22, Babcock Center
25 Board of Directors Meeting 7/21/07, marked for

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1 identification.)

2 BY MS. NORRIS:

3 Q. I'll give you Exhibit 22. On the
4 second page of this it lists the finance committee
5 for 2007 and 2008. Are these the individuals that
6 you referenced earlier that would have heard about
7 the tax issues once the board became aware of them?

8 A. Yes.

9 Q. The following page references the
10 fiscal year 2007 and 2008 budget. Were you
11 involved in the creation of that budget?

12 A. To some extent, yes.

13 Q. What was your role in determining the
14 budget?

15 A. I reviewed what the individual who
16 actually put together the budget had done, and I
17 also assisted him with the HUD portions of the
18 budget.

19 Q. Do you know if there was any specific
20 mention of -- within the fiscal year 2007 and 2008
21 budget if there were any specific provisions that
22 allowed payroll taxes to be met?

23 A. They were included as part of the
24 budget.

25 (Deposition EXH. 25, Babcock Center

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1 Board of Directors Meeting 10/22/07, marked for
2 identification.)

3 Q. Skip forward a few months here, since
4 we're getting short on time, to Exhibit 25. This
5 discusses the move to Blackbaud in the following
6 year; is that correct?

7 A. Yes.

8 Q. It also mentions a grant sufficient to
9 purchase the software?

10 A. Yes.

11 Q. Do you know if that grant was approved?

12 A. Yes.

13 Q. So DDSN did pay for the purchase of the
14 Blackbaud software?

15 A. Yes.

16 (Deposition EXH. 26, Babcock Center
17 Board of Directors Meeting 11/26/07, marked for
18 identification.)

19 BY MS. NORRIS:

20 Q. I show you Exhibit 26. And about a
21 third of the way down -- sorry, two-thirds of the
22 way down it mentions the penalties paid to the IRS.
23 Do you remember this board meeting when Derrick,
24 Stubbs & Stith made a presentation to the Babcock
25 Center board?

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1 A. Uh-huh. This is when we signed an
2 agreement with them.

3 Q. Do you remember, would this have been
4 the first time that the board heard of the tax
5 penalties incurred by Babcock Center?

6 A. While I was there I think. I don't
7 know. I don't know what they knew before I came
8 and the issue was already there.

9 MS. NORRIS: Off the record.

10 (A brief recess was taken.)

11 MS. NORRIS: Back on the record.

12 BY MS. NORRIS:

13 Q. We were looking at Exhibit 26. We were
14 looking at the presentation by Derrick, Stubbs &
15 Stith that's about two-thirds of the way down on
16 the page. The last sentence of the second
17 paragraph under the heading it says: Dr. Johnson
18 and Ms. Tyler have discussed this situation and
19 have developed a strategy to prevent recurrence.

20 What was the strategy that you
21 developed at this time?

22 A. I had sat down with Dr. Johnson and
23 shown her what I had and what I was attempting to
24 do.

25 Q. Can you elaborate on what you meant by

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1 what you had?

2 A. On documents that showed these were the
3 taxes paid, these were the taxes still outstanding,
4 this is what needed to be done by the end of the
5 fiscal year what we were trying to accomplish.

6 Q. So you showed these documents to Ms.
7 Johnson or Dr. Johnson?

8 A. Uh-huh. It was the summary from the
9 941s I think.

10 Q. Do you remember developing any strategy
11 to prevent recurrence?

12 A. Well, we had already gotten on a
13 situation where we were able to pay, so the
14 strategy was that we're not going to let payroll
15 taxes not get paid again. We're going to -- if
16 there's any issues, we're going to get together and
17 discuss it and figure out what to do, if it's take
18 out a loan or whatever.

19 Q. So this strategy you're telling me was
20 to help Babcock Center have the cash flow to pay
21 the taxes?

22 A. To make sure they were paid, yes.

23 Q. Were there any procedural actions that
24 were taking place to make sure that they got paid
25 on time?

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1 A. Not procedural.

2 Q. There was nothing changed with the pay
3 -- the payroll department produced the payroll tax
4 return or procedures for how they deposited the
5 payroll taxes. Were there any changes made to
6 that? That's what I mean by procedural.

7 A. No, because the issue was not whether
8 they could produce reports or call in taxes. The
9 issue was cash, having the cash to pay them.

10 Q. So up until this point, which is
11 November 26, 2007, was your payroll tax person
12 Ms. --

13 A. Tucker.

14 Q. Was she coming to you every two weeks
15 approximately when payroll was due and saying do we
16 or do we not have the funds to make this deposit?

17 A. In the first of the fiscal year it
18 would be kind of like that because the way the
19 fiscal year is set up the first six months is very
20 hard cash wise. The second six months it gets a
21 little easier. I don't know if it's because of the
22 number of holidays that are in that particular six
23 months and overtime is associated with holidays or
24 what, but the first six months we would kind of
25 discuss it, especially the first quarter. Then if

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1 everything was going okay I would be like when
2 they're due pay them.

3 Q. So any time that they weren't paid you
4 would have discussed that?

5 A. Yes.

6 Q. Ahead of time?

7 A. Yes, if I knew about it.

8 Q. Would there have been occasions when
9 you didn't know that the payroll taxes weren't
10 being paid?

11 A. When the confusion started as to who
12 was responsible for them.

13 Q. That was in late 2008?

14 A. Yes.

15 (Deposition EXH. 33, Babcock Center
16 Board of Directors Meeting 6/23/08, marked for
17 identification.)

18 BY MS. NORRIS:

19 Q. I refer you to Exhibit 33, please. And
20 let's turn to page 3. This is the board of
21 directors meeting report for June 23, 2008,
22 correct?

23 A. I'm sorry. Ask me that again.

24 Q. Just for the record, this is the board
25 of directors meeting report for June 2008?

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1 A. Yes.

2 Q. We're on page 3. About two-thirds of
3 the way down it says: SC DDSN will no longer pay
4 providers prospectively.

5 Is this the change that you were
6 mentioning in the way that DDSN paid Babcock
7 Center?

8 A. Yes.

9 Q. So this was first mentioned at the
10 board June 23, 2008?

11 A. Yes.

12 Q. Do you remember when this change took
13 effect?

14 A. It was already in effect.

15 Q. This is in effect at the time of this
16 meeting?

17 A. Yes.

18 Q. Do you remember when that change took
19 place?

20 A. May or June, end of May/beginning of
21 June. It happened very quickly.

22 Q. It references another \$1 million from
23 BB&T, correct?

24 A. Yes.

25 Q. Do you remember what that loan was used

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1 for?

2 A. To get through the month of June.

3 Q. So that would have gone to payroll
4 operating expenses, those sort of things?

5 A. Yes.

6 (Deposition EXH. 132, Babcock Center
7 Finance Committee Meeting Minutes, marked for
8 identification.)

9 BY MS. NORRIS:

10 Q. In the interests of time, I'll skip
11 through a few more of these. Now I will give you
12 all of these finance committee. I'll clip them
13 together. And this is 132 we're on. Do you
14 recognize these documents?

15 A. Minutes for the January 2007 meeting.

16 Q. Quickly flipping through them, that's
17 for 2007 and 2008, correct? I guess we can go
18 through them. I have a couple of questions about
19 them. I'll ask you to turn to May of '07. Looking
20 at this, there is -- sorry, strike that. We
21 answered that in the other notes.

22 If you could go then to March of '08,
23 and this -- the bottom of the second page of the
24 March 2008 statement it references building issues
25 with AT&T?

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1 A. Uh-huh.

2 Q. Do you remember what those issues were?

3 A. I remember going through the bills.

4 Q. What did Babcock Center contract with
5 AT&T for?

6 A. AT&T, if I remember correctly, was on
7 state contract. So we didn't actually have to
8 contract with them, but it was for telephone
9 services. And I can't remember exactly what the
10 issue was. They were charging us an incorrect
11 amount and there were other charges that we were
12 not responsible to be responsible for.

13 Q. In looking at the following page, it
14 again mentions that the accounting firm was
15 authorized by the board to attempt to get the IRS
16 to reimburse the fines levied against you. Do you
17 remember, at this time was there any additional
18 discussion of what to do about the payroll taxes
19 situation other than getting rid of the fines?

20 A. I don't think so. I think it was just
21 an update as to where we were with that.

22 Q. Turning to April of 2008. AT&T is
23 referenced again on page 3 of the April 2008
24 finance committee meeting, and there it says it was
25 noted that \$6500 was owed to AT&T. Do you see that

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1 on the second sentence?

2 A. Yes.

3 Q. Were those overdue bills to AT&T, or
4 why was there a \$6500 balance, if you remember?

5 A. The bills where there were issues we
6 did not pay.

7 Q. It says that there was a plan to pay
8 this amount over a three month period? Is that a
9 yes?

10 A. Yes.

11 Q. Thank you. Do you remember if that was
12 paid over a three month period?

13 A. I think they were.

14 Q. You can put those aside for a moment.
15 Do you remember any other vendors or creditors
16 other than the IRS that had outstanding bills
17 during the 2007/2008 tax years?

18 A. I don't remember the specific vendors,
19 but there were a lot of vendors that we did pay
20 late.

21 Q. Those did get paid eventually?

22 A. Eventually.

23 Q. Do you remember what types of vendors
24 those were?

25 A. It might be like exterminators. I

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1 don't remember specifically exactly. I just know
2 we had to keep in mind the health and safety and
3 the welfare of the consumers.

4 Q. When you were making a determination of
5 who to pay with limited funds, do you remember
6 specific creditors that were prioritized or not
7 prioritized?

8 A. Not specific names. I know there were
9 some creditors that would work with us and some
10 that you had to pay or they were going to
11 discontinue serving you.

12 Q. Did any creditors discontinue serving
13 you that you remember?

14 A. I want to say there were a couple that
15 we had to find someone else to do their services.
16 I don't remember who they were, though.

17 Q. Do you remember when you did make tax
18 deposits why you made them at that time if it
19 wasn't necessarily the date that the check deposits
20 were due? For example, if a payment was made other
21 than the day the tax deposits were due, why would
22 they have been paid on that date? Did you have a
23 system in place for how you would catch up on
24 payments if you were behind?

25 A. We were trying to pay whatever we could

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1 when we could, but we would -- like if we owed one
2 specific payroll, we would pay that specific
3 payroll whenever we had money to do it.

4 Q. I have a few questions. I'm going to
5 bring you back to the general ledger and just ask
6 you a couple quick questions about some pages in
7 this. Again, I'm going to reference -- we're
8 looking at Exhibit 131. Turn to page BAB
9 2007000294, the one with the tab on it. I believe
10 you said earlier that the report began to look
11 different at this point because you moved to a new
12 system, specifically Blackbaud; is that correct?

13 A. I think so, yes.

14 Q. If you look about halfway down that
15 page, there was a transfer out at the end of the
16 month. There's an entry that states: Transfer
17 out, and it's about \$1.3 million followed by
18 another transfer out of \$35,000. In looking
19 through this report, about once a month there are
20 additional entries into the ledger that say
21 transfer out of about-a million plus dollars. Do
22 you remember why these transfers were paid and
23 where those funds went? Looks like those transfers
24 were generally around the 30th or 31st of the
25 month.

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1 A. Uh-huh.

2 Q. Do you remember what this item would
3 have indicated?

4 A. I do not remember what the item is. In
5 looking at it with it being going from the cash
6 management, it might have been transferring from
7 one module on the software to another like
8 transferring payments against receivables.

9 Q. Do you know, what was Three Core
10 Technology?

11 A. That was the company that we purchased
12 our gas through.

13 Q. Southeaster Paper was who you purchased
14 your cleaning supplies from?

15 A. Among other things.

16 Q. There are several entries for \$10,000
17 or more to business card. Do you know what that --

18 A. Credit card.

19 Q. It was a credit card account?

20 A. Yes.

21 Q. On page 326 it references health
22 insurance checking account. Did Babcock Center
23 have an additional checking account that it used
24 for health insurance?

25 A. At one point Babcock Center was

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1 self-insured for health insurance, and I think it
2 had a separate account for that, but then we left
3 that and actually got into a health plan.

4 Q. Did you help at all with the
5 preparation of Babcock Center's form 990 tax
6 returns?

7 A. No.

8 Q. Did you review those?

9 A. Yes.

10 Q. Did you review those for all of the
11 years that you were at Babcock Center?

12 A. I think I did, yes.

13 (Deposition EXH. 8, 2006 Form 990,
14 marked for identification.)

15 BY MS. NORRIS:

16 Q. I'll show you Exhibit 8. If you would
17 turn to, looks like it says page 9. You didn't
18 actually sign this return, but you reviewed this
19 return; is that correct?

20 A. Yes.

21 Q. Would anyone else have reviewed the
22 return?

23 A. I don't remember if Dr. Johnson did or
24 not.

25 Q. Looking at that exhibit on the page

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1 after your signature page, it lists the highest
2 paid contractors. Do you know if those contractors
3 were paid during the 2006 tax year?

4 A. Yes. Accent Contracting and NAA
5 Advent, those had to do with the building that DDSN
6 gave them the grant for.

7 Q. So that was money specifically from
8 DDSN for that building; is that correct?

9 A. Yes.

10 (Deposition EXH. 9, 2007 Form 990,
11 marked for identification.)

12 BY MS. NORRIS:

13 Q. I'll give you Exhibit 9 just to
14 reverify that this is the correct tax return for
15 2007 and have you take a look at that and tell me
16 if you reviewed this document?

17 A. Yes, I would have.

18 Q. That's also your signature on page 9,
19 is that correct, your electronic signature?

20 A. Yes.

21 MS. NORRIS: I think that's all the
22 documents I need to get through. If you don't mind
23 if I take a five-minute break to look through my
24 notes to see if that's all I have for you.

25 (A brief recess was taken.)

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1 MS. NORRIS: Back on the record.

2 BY MS. NORRIS:

3 Q. You mentioned that Babcock Center sold
4 properties due to the downsizing plan, that there
5 were certain properties that were designated to be
6 sold in each phase of the plan; is that correct?

7 A. There were some, yes.

8 Q. Do you know of any additional
9 properties that the Babcock Center sold to meet
10 operating expenses or to pay any sort of creditors?

11 A. No. I can't remember if any of those
12 properties sold while I was there, but if they had
13 sold the money would have gone back to DDSN because
14 DDSN gave them the money to purchase it in the
15 first place.

16 Q. Did you have an internal email system
17 at the time you were at Babcock Center?

18 A. Yes.

19 Q. Do you remember if any emails were sent
20 about the tax situation?

21 A. I don't remember.

22 MS. NORRIS: I think that is all that I
23 have at this time.

24 MR. SULLIVAN: No questions.

25 (The deposition was concluded at 5:31 PM.)

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CERTIFICATE OF REPORTER

I, Roxanne M. Easterwood, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript, pages 1 through 118, is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 17th day of September 2012 at Charleston, Charleston County, South Carolina.



Roxanne M. Easterwood

Roxanne M. Easterwood, RPR
My Commission expires
February 1, 2015

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**354 S.C. 129
580 S.E.2d 109**

**Patricia L. HARRISON, as Guardian ad Litem for her Ward,
James Lennon McLean, Jr., Petitioner,**

v.

**Joseph J. BEVILACQUA, Jaime E. Condom, Betty R. Guerry and
South Carolina Department of Mental Health, Respondents.**

No. 25631.

Supreme Court of South Carolina.

Heard September 19, 2002.

Decided April 28, 2003.

[354 S.C. 131]

Arthur K. Aiken, of Hammer, Hammer, Carrigg & Potterfield; and
Rebecca M. Monroy, of Collins and Lacy, P.C., both of Columbia, for
Petitioner.

Andrew F. Lindemann and William H. Davidson, II, of
Davidson, Morrison, & Lindemann, P.A., of Columbia; for
Respondents.

Justice WALLER:

Petitioner Patricia Harrison, guardian ad litem for James
Lennon McLean, Jr. (McLean), sued respondent South Carolina
Department of Mental Health (the Department) for

[354 S.C. 132]

professional negligence.¹ The jury found in favor of petitioner but
awarded damages in the amount of only \$1.00. Petitioner appealed,
and in an unpublished decision, the Court of Appeals affirmed.

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Harrison v. Bevilacqua, Op. No.2000 UP 441 (S.C. Ct.App. filed June 13, 2000). We granted the petition for a writ of certiorari to review the Court of Appeals' decision, and we now affirm.

FACTS

McLean is a diagnosed schizophrenic. He was involuntarily committed to Crafts-Farrow State Hospital (run by the Department) in 1982. He remained in the Department's continuous care until his discharge on March 6, 1995. While in the hospital, McLean resided in a locked ward. He had a very small room, but it was locked during the day. McLean had lobby privileges, but he declined yard privileges.

One day while in the hospital lobby, McLean saw some representatives from an organization called Protection and Advocacy for the Handicapped. He told them he wanted to be discharged so they became involved in his case. In 1994, after being contacted by Protection and Advocacy, petitioner was appointed guardian ad litem for McLean. In March 1994, all parties agreed at a probate court hearing that McLean could be released from the Department's care pending a home study. Eventually, McLean did go home where he has 24hour, one-on-one care.

While in the hospital, McLean's estate paid for his care. At the time of the probate court hearing in 1994, McLean's assets, both cash and real estate, were valued at over \$1 million.

At trial, petitioner attempted to prove that the Department had been negligent because McLean: (1) had been confined in the hospital too long; (2) should not have resided in a locked ward; and (3) had been improperly medicated. In her complaint, which was filed on June 1, 1995, petitioner alleged that the Department should have discharged McLean as early as October 1983. Other allegations included that the Department

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failed to follow its own Level of Care reports which, at various times, recommended McLean's transfer to an open ward or a community facility or his home.

There was conflicting expert testimony on the allegations of negligence. Regarding damages, petitioner presented undisputed evidence of how much McLean paid the Department for his care.² McLean did not testify, and there was no evidence admitted regarding mental anguish or pain and suffering. The jury found in favor of petitioner but only awarded \$1.00 in damages. The trial court denied petitioner's motions for a new trial nisi additur, JNOV, or new trial absolute. On appeal, the Court of Appeals affirmed.

ISSUES

1. Should the Court adopt the continuous treatment rule or the doctrine of continuing tort to determine that Mc-Lean's causes of action accrued when his treatment ended on March 6, 1995, his discharge date?
2. Did the Court of Appeals err in affirming the trial court's application of S.C.Code Ann. § 15-3-40, the tolling statute for disability?
3. Did the Court of Appeals err in affirming the denial of petitioner's motion for a new trial absolute based upon the \$1.00 verdict?

1. CONTINUOUS TREATMENT/CONTINUING TORT RULE

Petitioner asserts that McLean's claims are of a continuous character given the continuing treatment he received over a 13-year period. She therefore argues that this Court should adopt the continuous treatment rule, or the doctrine of continuing tort, to find McLean's causes of action accrued at the termination of his treatment by the Department, i.e., the date of discharge, March 6, 1995.

[354 S.C. 134]

Prior to trial, the Department moved for summary judgment on the basis of the statute of limitations. The Department argued that petitioner's allegations began in October 1983 yet the complaint was not filed until 1995, and therefore the action was time-barred.

Petitioner contended that because this was a "continuous tort," or pursuant to the "continuous treatment rule," the statute did not begin to run until McLean was discharged. Alternatively, petitioner argued the tolling statute for disability, S.C.Code Ann. § 15-3-40 (Supp. 2001), would allow her to "go back at least five years from the date of filing ... in pursuing this claim." The trial court decided § 15-3-40 would apply; it therefore ruled petitioner could not present any evidence of negligence which occurred more than five years prior to the filing of the complaint. As a result, the only evidence of negligence presented at trial was related to events after June 1, 1990.

Petitioner's suit for negligence against the Department arises under the South Carolina Tort Claims Act; the applicable statute of limitations reads as follows in pertinent part: "Except as provided for in Section 15-3-40, any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered...." S.C.Code Ann. § 15-78-110 (Supp.2001). The statute, however, is tolled if the plaintiff is under a disability. See § 15-3-40. Section 15-3-40 provides:

If a person entitled to bring an action ... under Chapter 78 of this title ... is at the time the cause of action accrued either:

- (1) within the age of eighteen years; or
- (2) insane;

the 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:

- (a) more than five years by any such disability, except infancy; nor

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- (b) in any case longer than one year after the disability ceases.

§ 15-3-40 (emphasis added).

Neither the trial court nor the Court of Appeals stated exactly when petitioner's claims accrued. Petitioner argues that the proper date is March 6, 1995, when McLean's treatment by the Department ended. The Court of Appeals, however, declined to adopt the continuous treatment rule, or the continuing tort doctrine, stating that the power to adopt them "lies within the exclusive domain of our supreme court or legislature." *Harrison, supra*. The Court of Appeals upheld the trial court's application of section 15-3-40 and its decision "limiting [petitioner's] claims to the five years preceding the filing of her complaint." *Id.*

In *Preer v. Mims*, 323 S.C. 516, 476 S.E.2d 472 (1996), this Court recognized that the continuous treatment rule had been adopted "by a significant number of courts around the country." *Id.* at 519, 476 S.E.2d at 473. The rule can be summarized as follows:

The so-called "continuous treatment" rule as generally formulated is that if the treatment by the doctor is a continuing course and the patient's illness, injury or condition is of such a nature as to impose on the doctor a duty of continuing treatment and care, the statute does not commence running until treatment by the doctor for the particular disease or condition involved has terminated—unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery, actual or constructive.

Id. (quoting David W. Louisell & Harold Williams, Medical Malpractice, § 13.02[3] (1996)); see also *Anderson v. Short*, 323 S.C. 522, 524-25, 476 S.E.2d 475, 476-77 (1996).

In both *Preer* and *Anderson*, the Court stressed that if the continuous treatment rule were adopted as the law in South Carolina, it would contain the discovery exception, as outlined above. Because in both those cases the discovery exception would have precluded the plaintiffs' claims, and thus they would not have benefited from the adoption of the continuous treatment rule, the Court expressly declined to adopt the rule. *Id.*

[354 S.C. 136]

The Department argues McLean likewise would not benefit from the rule because he should have discovered the alleged negligence. However, we agree with petitioner that it is not reasonable to expect McLean a diagnosed, institutionalized schizophrenic who has been adjudged to be incompetent—to have been able to discover negligent psychiatric treatment. Therefore, we are faced with the issue of whether to adopt the continuous treatment rule.

"There are a number of policy considerations behind the 'continuous treatment' rule;"³ however, most often, application of the rule is justified by reasoning that, without such a rule, a plaintiff would be required to bring suit against his or her physician before treatment is even terminated. See, e.g., Tullock v. Eck, 311 Ark. 564, 845 S.W.2d 517, 519 (1993) (noting "the most often stated rationale" for the rule is that "the patient should not be required to interrupt the treatment to bring suit against the physician because a statute of limitations is about to run."); Cooper v. Kaplan, 78 N.Y.2d 1103, 578 N.Y.S.2d 124, 585 N.E.2d 373, 374 (1991) ("The premise underlying the doctrine is that a plaintiff should not have to interrupt ongoing treatment to bring a lawsuit, because the doctor not only is in a position to identify and correct the malpractice, but also is best placed to do so."). Yet this justification would be undermined by the discovery exception to the rule, which would be part of the rule were we inclined to adopt it. See *Preer, supra*; *Anderson, supra*. Surely, a patient could only interrupt treatment if she had (or should have) discovered the negligence.

As for other reasons for the rule, the Court of Appeals for the Fourth Circuit has stated that the "continuous treatment doctrine is based on a patient's right to place trust and confidence in his physician." Otto v. Nat'l Inst. of Health, 815 F.2d 985, 988 (4th Cir.1987); accord Haberle v. Buchwald, 480 N.W.2d 351, 355 (Minn.Ct.App.1992) (the rule is based on the policy "the patient must repose reliance upon his physician in the completion of the course of curative treatment, a relationship of trust which inhibits the patient's ability to discover acts of omission or commission constituting

malpractice."). Additionally,

[354 S.C. 137]

"[a] 'practical reason' for this termination of treatment rule is that 'actionable treatment does not ordinarily consist of a single act or, even if it does, it is most difficult to determine the precise time of its occurrence.'" *Haberle*, 480 N.W.2d at 354-55. Finally, basic tort principles of fairness and deterrence also provide justifications for the rule. See Melanie Fitzgerald, Comment, *The Continuous Treatment Rule: Ameliorating the Harsh Result of the Statute of Limitations in Medical Malpractice Cases*, 52 S.C. L.Rev. 955, 966-67 (2001).

The primary argument against adoption of the continuous treatment rule is that it offends the clear policy set by the Legislature in its adoption of statutes of limitations and statutes of repose. See *id.* at 965-66 (primarily discussing statutes of limitations). Indeed, respondents maintain that adoption of the rule would be "entirely inconsistent" with the sixyear statute of repose for medical malpractice actions. See S.C.Code Ann. § 15-3-545 (Supp.2001).

Section 15-3-545(A) provides that:

In any action ... to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider ... acting within the scope of his profession must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from date of occurrence, or as tolled by this section.

(Emphasis added). In *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993), we discussed this section and stated the following:

Subsection (D) of 15-3-545 provides a limited tolling provision, applicable only to minors. Inclusion of the phrase "or as tolled by this section" in subsection (A) clearly indicates that the

only tolling of § 15-3-545(A) intended by the legislature is that contained in subsection (D).

Moreover, this Court has recognized that the six-year repose provision in § 15-3-545 "constitutes an outer limit beyond which a medical malpractice claim is barred, regardless

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of whether it has or should have been discovered." Hoffman v. Powell, 298 S.C. 338, 339, 380 S.E.2d 821, 821 (1989).

Id. at 403, 438 S.E.2d at 243 (emphasis in original). We further noted that "a statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body." *Id.* at 404, 438 S.E.2d at 243 (emphasis added, citations omitted).

After careful consideration, it is our opinion the continuous treatment rule should not be judicially adopted. See *id.* (statute of repose is an absolute time limit not tolled for any reason). We note the instant case implicates not only the general medical malpractice six-year repose statute, but also the repose portion of the disability tolling statute, section 15-3-40, which provides for an extension of the statute of limitations by five years when the plaintiff is insane. Hence, under the peculiar facts of this case, application of the continuous treatment rule would infringe upon two areas which the Legislature has spoken on regarding absolute limitations: (1) medical malpractice; and (2) delay of commencement of action due to disability.

Put simply, we find judicial adoption of the continuous treatment rule would run afoul of the absolute limitations policy the Legislature has clearly set via the statutes discussed above. See Hecht v. First Nat. Bank & Trust Co. 208 Kan. 84, 490 P.2d 649, 656 (1971) (describing other states' adoption of the continuous treatment rule as "a judicial effort to soften the harshness of the statutory accrual rule" and refusing to judicially legislate in this area). Certainly, this is an area where the Legislature can create statutory

law if it so chooses.⁴

[354 S.C. 139]

Citing Georgia law, petitioner also argues the Court should adopt the continuing tort doctrine. We disagree.

Under Georgia law, the doctrine of continuing tort:

applies "where any negligent or tortious act is of a continuing nature and produces injury in varying degrees over a period of time." ... Under this theory, the statute of limitation does not begin to run "until such time as the continued tortious act producing injury is eliminated."

Mears v. Gulfstream Aerospace Corp., 225 Ga.App. 636, 484 S.E.2d 659, 664 (1997) (citations omitted). However, the Georgia Court of Appeals has stated that the "continuing tort" theory is inapplicable to actions for medical malpractice "since it would nullify the intent of the General Assembly that, after five years, no medical malpractice action could be brought, even when a disability attaches to toll the running of the statute because the statute of repose abolishes any action five years after the negligent or wrongful act or omission." Charter Peachford Behavioral Health Sys. v. Kohout, 233 Ga.App. 452, 504 S.E.2d 514, 521 (1998). Thus, for the same reasons we reject adoption of the continuous treatment rule, Georgia has rejected application of its own continuous tort theory to medical malpractice claims. Accordingly, we find petitioner's argument on the continuing tort doctrine unavailing.

2. APPLICATION OF SECTION 15-3-40

Petitioner argues that the trial court erred in applying section 15-3-40, the disability tolling statute, to bar McLean's claims related to events before June 1, 1990. Specifically, petitioner contends that the causes of action did not accrue until March 6, 1995, the date of McLean's release from the hospital.

Because we decline to adopt the continuous treatment rule,

there is no merit to petitioner's argument that the date of accrual is March 6, 1995. Furthermore, respondents correctly point out that it was petitioner's own "alternative" argument to the trial court to apply section 15-3-40. Therefore, petitioner cannot now complain the trial court erred when it took her own suggestion. *Cf. Ex parte McMillan*, 319

[354 S.C. 140]

S.C. 331, 461 S.E.2d 43 (1995) (party cannot acquiesce to issue at trial and then complain on appeal).⁵

3. NEW TRIAL ABSOLUTE

The jury returned a verdict in petitioner's favor but awarded only \$1.00 damages. Petitioner contends this is grossly inadequate in light of the \$129,885.00 McLean paid to the Department from June 1, 1990 to December 1, 1994. Petitioner argues that because she presented this uncontested evidence of damages, the trial court erred in failing to grant the new trial absolute motion based on inadequate damages. We disagree.

"If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute." *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993) (emphasis in the original). The jury's determination of damages, however, is entitled to substantial deference. See, e.g., *Pelican Bldg. Ctrs. of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993). "The decision to grant a new trial is left to the sound discretion of the trial court and ordinarily will not be disturbed on appeal." *Rush v. Blanchard*, 310 S.C. 375, 380, 426 S.E.2d 802, 805 (1993).

[354 S.C. 141]

The Court of Appeals decided there was "no way to determine the basis for the jury's decision in this case as no special interrogatories were prepared" and three different theories of negligence were

presented. Specifically, the Court of Appeals stated as follows:

It is conceivable that the jury believed the Department properly cared for McLean and released him at the appropriate time, but that he should have been placed in an open ward. Under such a verdict, the jury could have reasonably valued McLean's actual damages at \$1.00 because the evidence does not prove that the relative freedom of the open ward was of much value to him.

Alternatively, the Court of Appeals noted that because Mc-Lean requires constant care, the jury could have determined that "McLean received good value for" the \$129,885.00 he paid the Department.

We agree with the Court of Appeals' analysis on this issue and find the amount of the verdict is not grossly inadequate. Accordingly, the Court of Appeals correctly affirmed the trial court's denial of a new trial absolute. *O'Neal v. Bowles, supra; Pelican Bldg. Ctrs. of Horry Georgetown, Inc. v. Dutton, supra.*⁶

CONCLUSION

We decline to adopt the continuous treatment rule or the doctrine of continuing tort. For the reasons stated above, the Court of Appeals' decision is

AFFIRMED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

Notes:

1. Petitioner sued the individual respondents for various causes of action all of which were disposed in their favor on a directed verdict motion. She did not appeal the directed verdict.

2. As will be further discussed below, petitioner was restricted in the presentation of evidence. Therefore, the amount of damages presented to the jury represented expenses from June 1, 1990, through December 1, 1994. According to petitioner, this amount is \$129,885.00.

3. David W. Louisell & Harold Williams, *Medical Malpractice*, § 13.02[3] (2002) (footnote omitted).

4. For example, Texas' medical malpractice statute of limitations expressly provides the last date of treatment as the triggering date if the treatment is the subject of the claim. See Texas Rev. Civ. Stat. Ann. art. 4590i § 10.01. ("Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed....") (emphasis added).

5. We note the Court of Appeals addressed this issue and concluded the trial court correctly limited petitioner's claims to five years preceding the filing of the complaint. The Court of Appeals held the express language of section 15-3-40 "reflects a clear legislative intent to set a five year limit for the commencement of tort actions against the state by a plaintiff who is laboring under a disability other than infancy." *Harrison, supra* (emphasis added). We disagree with the Court of Appeals' interpretation of section 15-3-40. The express language of the statute allows the time for commencement of an action to be "extended" by a maximum of five years. Thus, an insane plaintiff would apparently have seven years from discovery to bring a negligence action under the Tort Claims Act. See §§ 15-78-110, 15-3-40; see also *Fricks v. Lewis*, 26 S.C. 237, 1 S.E. 884 (1887). We note, however, if the action is one for medical malpractice, there is also the six-year statute of repose. See § 15-3-545. Consequently, it is unclear how this statute would interact with the seven years allowed by sections 15-78-110 and 15-3-40. In any event, because these questions have not been raised by the parties, they need not be resolved for disposition in the instant case.

6. We affirm petitioner's remaining issue pursuant to Rule 220(b)(1), SCACR and the following authority: *Otis Elevator, Inc. v. Hardin Const. Co. Group, Inc.*, 316 S.C. 292, 450 S.E.2d 41 (1994) (absent a showing of prejudice, an appellate court will not reverse for an alleged error in the exclusion of evidence).

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Edward Mims, by and through his legal
guardian, Margaret Mims,

Plaintiff,)

v.)

Babcock Center, Inc., Judy Johnson,
South Carolina Department of
Disabilities and Special Needs,
Kathi Lacy, and Stanley Butkus,

Defendants.)

IN THE COURT OF COMMON PLEAS

Civil Action No. 07-CP-40-3365

RESPONSE IN OPPOSITION TO
PLAINTIFF'S RULE 59(e) MOTION

(DEFENDANTS SOUTH CAROLINA
DEPARTMENT OF DISABILITIES AND
SPECIAL NEEDS, KATHI LACY AND
STANLEY BUTKUS)

The DDSN Defendants (South Carolina Department of Disabilities and Special Needs, Kathi Lacy and Stanley Butkus) submit the following response in opposition to Plaintiff's motion to alter, amend, etc., filed pursuant to Rule 59(e), SRCP. For the reasons set forth herein, the DDSN Defendants respectfully submit that Plaintiff's motion should be denied.

1. Plaintiff first complains that his Motion for Summary Judgment was not heard or decided. Motion at 1-2. However, and as discussed by the parties and the Court at the June 4, hearing, only the Defendants' summary judgment motions had been scheduled for hearing that day. The Defendants' motions were filed by the Defendants in April 2013. Following a status conference with Judge Manning on May 8, 2013, a notice was issued by Judge Manning on that same day, setting the Defendants' Motions for Summary Judgment to be heard on June 4, 2013.

Plaintiff, on May 24, 2013, ten days before the previously-scheduled hearing on Defendants' summary judgment motions, and on the Friday before the three-day Memorial Day weekend, filed his own summary judgment motion, accompanied by a foot-high stack of attachments totaling about 2,300 pages. On the next working day, May 28, Defendants' counsel

wrote Chief Administrative Judge Manning, requesting confirmation that only the previously scheduled motions, i.e., the Defendants' motions, would be heard on June 4. Exhibit 1, attached. Judge Manning's law clerk sent an e-mail the next day, noting that "Judge Manning has stated the Motions will be scheduled normally, and only those currently scheduled will be heard on June 4th. As [for] the other recently filed Motions, Judge Manning has stated if they needed to be heard after the 4th but before trial, he will set up a status conference." Exhibit 2, attached.

At the hearing, Plaintiff's counsel once again sought to have her motion added to those scheduled to be heard, and once again that request was denied, this time by Judge Cooper. Defendants' summary judgment motions were heard, and the parties were to submit proposed Orders with regard to Defendants' motions. See Form 4 Order dated June 5, 2013 ("MUA-Proposed Orders due within 28 days from P and D attorney"). Obviously, the parties were directed to file proposed Orders only on the motions that had actually been heard, that is, the Defendants' summary judgment motions.¹

All this aside, and as discussed in Point 6 below, the granting of summary judgment to the Defendants rendered it unnecessary for the Court to address Plaintiff's summary judgment motion.

2. Plaintiff's Point 1 (the "relation back" doctrine).

Plaintiff's first numbered point appears to argue that the filing of the original Complaint on May 29, 2007 was an event to which the subsequently-filed Amended Complaint related back. Motion at 3-4. However, Plaintiff does not in any way describe those claims that might

¹ Despite the manifestly clear statements from both Judge Manning and Judge Cooper that Plaintiff's motion was not being heard on June 4, Plaintiff's present motion still asserts that Judge Cooper's Order June 5 Form 4 Order asked for proposed orders from both sides "on their respective motions for summary judgment." Motion at 1. As shown above, however, there can be no question that only the summary judgment motions of the Defendants were heard and taken under advisement. It is difficult to see how Plaintiff's counsel can possibly claim to have thought otherwise.

have been preserved from the statute of limitations as a result of the application of the "relation back" doctrine. Plaintiff leaves it to the Court and the Defendants to guess which claims might be assisted by the "relation back" doctrine.

Rule 7(b)(1), SCRCP, provides that motions "shall state with particularity the grounds therefor, and shall set forth the relief or order sought. *See, e.g., Lucey v. Meyer*, 401 S.C. 122, 131-132, 736 S.E.2d 274, 279 (Ct. App. 2012)("By requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly"). This part of Plaintiff's motion does not provide the requisite notice regarding the claims that are alleged to have related back to the filing of the original Complaint. It does not provide enough information for the Court or the Defendants to "comprehend the basis of the motion" or to ascertain the relief sought. As a result, this claim by Plaintiff should be rejected for lack of specificity.

3. Plaintiff's Points 2 and 3 (Tolling and adjudication of incompetence)

Plaintiff's arguments concerning tolling and adjudication of incompetence are largely unchanged from his arguments made in his June 28, 2013 Response in Opposition to Defendants' Motions for Summary Judgment at 3-4 and 30-31. Those arguments were rejected in the Order granting summary judgment for the DDSN Defendants at pp. 25-28. Plaintiff makes only one new argument, alleging that public policy militates against ending the tolling period when a guardian is appointed. Motion at 4-5. However, Plaintiff's arguments on that point are completely speculative, and are insufficient to override the policy reasons underlying the Court's holding on this point at pp. 26-27.

4. Plaintiff's Point 4 (Reliance on facts that predate the statute of limitations).

Plaintiff's fourth point, Motion at 6, is that this Court "erred in not ruling that Plaintiff is

entitled to rely upon facts that predate the statute of limitations period in proving his case." This argument is devoid of specifics as to which parts of the Order contain this alleged error. For that reason alone, this claim should be rejected pursuant to Rule 7(h)(1).

In addition, this point does not specify which "facts that predate the statute of limitations" Plaintiff wished to rely on. This additional lack of specificity provides another reason why this issue is without merit and should be disregarded.

5. Plaintiff's Point 5 ("false or misleading information" in parts of the Order).

Under this point, Plaintiff apparently faults the Order for not considering "many, many injuries as documented in the Chronology beginning at Mims 2083." Motion at 6. However, as set forth at pp. 8-9 of the Order, Plaintiff's Response in Opposition discussed only three instances of physical injury. Plaintiff's present motion does not add any specific reference to any other physical injury for which he claims damages.

Rule 56(e) 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.) Plaintiff's vague and conclusory references to "many, many injuries" and to a 14-page "chronology" created by counsel do not meet this requirement that a party opposing summary judgment must set forth "specific facts" that show a genuine issue for trial. This is an example of Plaintiff's practice which was described in the Order as follows:

Plaintiff sets forth a lengthy version of the facts on the one hand, coupled with a general discussion of legal principles on the other hand, but Plaintiff completely fails to connect the two. Plaintiff's response simply does not set forth how the alleged acts or failure to act of the DDSN Defendants amounted to actionable torts that proximately caused injury to Plaintiff.

Order at 21. As a result, Plaintiff's argument under this point fails for lack of specificity under both Rule 7(b)(1) and Rule 56(e).²

6. Plaintiff's Point 6 (alleged lack of due process in not considering Plaintiff's Motion for Summary Judgment)

In his sixth point, Plaintiff argues that he was denied due process because his motion for summary judgment, filed after the Defendants' motions had already been set for a hearing, was not considered. Because it was filed so close to the hearing date, Plaintiff's motion was not set for a hearing at the same time as Defendants' motions. However, Plaintiff was given the opportunity to file a brief in opposition to Defendants' motions for summary judgment. Such a memorandum was indeed served by Plaintiff's counsel on June 28, 20013, several weeks after the June 4 hearing. In that memorandum, Plaintiff had the option of spelling out every reason why Defendants' motions should be denied. The memorandum was 34 pages long, but consisted primarily of factual and legal assertions that were non-specific or not logically connected, as noted earlier.

If Plaintiff had been able to defeat Defendants' motions for summary judgment, the next step in this case would have been the scheduling of Plaintiff's own motion for summary judgment. However, Plaintiff did not defeat Defendants' summary judgment motions, so cannot be heard to complain that his own motion was not actually reached. Any argument that was raised in support of Plaintiff's own motion could have been specifically raised in opposition to Defendants' motions; in many instances, such arguments were indeed raised, although without any particular specificity.

² Instead of providing specific facts with which to oppose Defendants' summary judgment motions, Plaintiff has frequently sought to incorporate other documents by reference. *See, e.g.*, Motion at 1, 2. However, those cross references are devoid of details, so they do not meet Rule 56(e)'s requirement of a showing of "specific facts." *See, e.g., Barge v. Anheuser-Busch, Inc.*, 87 F.3d 256, 260 (8th Cir.1996) (a court "is not required to speculate on which portion of the record the nonmoving party relies, nor is it obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim").

7. Plaintiff's Point 7 ("new evidence").

In Plaintiff's seventh point, it is contended that a federal case involving co-defendant Babcock Center's tax liability contains "new evidence" that the Court should consider. The claimed "new evidence" is that between 2004 and 2006, DDSN ordered Babcock to reduce its population by 50%. Motion at 7-8. However, this evidence is not new at all: when Plaintiff's counsel took the deposition of Defendant Butkus in 2009, he testified that

in the fall of '04, . . . I met with the [Babcock] Board and said we have to reduce by 50 percent. We have to go from 634 beds to 317 beds in 18 months, and that's what we did.

6/10/09 Deposition of Stan Butkus at 87, lines 8-13 (Exhibit 3, attached). This event was mentioned in the 2013 Order of Judge Currie cited by Plaintiff, but the fact of the 2004-2006 reduction was clearly known to Plaintiff's counsel long before 2013, and no later than the 2009 Butkus deposition. As a result, the alleged "new evidence" was not in fact new, and provides no reason for the Court to reconsider its prior Order.

8. Plaintiff's Point 8 (personal involvement of Defendants).

In Plaintiff's eighth point, Motion at 8-22, it is claimed that the Order was in error in holding "that the individual defendants did not have sufficient personal involvement to make them liable under Mims' § 1983 and negligent supervision causes of action." Motion at 8. As shown below, Plaintiff's argument under this point adds nothing relevant or material to his arguments made in his original opposition to these Defendants' Motion for Summary Judgment.

The Order held that Plaintiff's June 28, 2013 response to Defendants' motion for summary judgment referenced only the following three instances of physical injury:

1. An occasion on August 13, 2000, when Plaintiff was residing at the Clusters facility and was beaten by Carl Anthony, an employee of Babcock Center. Pl. Mem. 5-6.
2. An occasion on July 27, 2004, when Plaintiff was residing at the Kensington facility and was found to have a number of ant bites. Pl. Mem. 6.

3. An occasion on May 27, 2005, when Plaintiff was residing at the Kensington facility and was found with an unexplained penis injury which was not regarded by the treating physician as indicative of abuse or neglect. Pl. Mem. 7.

Order at 8-9 (footnote omitted). The Order then discussed in detail the applicable law for supervisory liability under Section 1983, the failure of Plaintiff even to allege the elements of supervisory liability, and the similar failure of Plaintiff to point to anything in the record showing facts necessary to satisfy the necessary legal elements for such liability. *Id.* at 8-15.

With regard to these three incidents, Plaintiff's motion does not specifically identify any portion of this Court's Order that is in error. In fourteen pages of argument on this issue, Plaintiff cites only a few general references to the Order (Motion at 8, 12, 13, 20), and never cites a specific page of the Order that references the DDSN Defendants. Instead, rather than framing his arguments in terms of specific points of alleged error in the Order, Plaintiff simply reiterates his previously-made vague and logically-unconnected arguments as if the Order had never been issued. No reason for reconsideration of the Order has been shown.³

9. Plaintiff's Point 9 (supervisory negligence).

In Plaintiff's Point 10, Motion at 22-27, it is claimed that there was evidence to support Plaintiff's claim for supervisory negligence. Motion at 22. The argument on this point is largely indistinguishable from the argument of the previous point. As with Plaintiff's Point 8, a series of general facts is recited, but with no specific or logical connection between those claimed facts and any action or inaction of the DDSN Defendants that involved the specific injuries complained of. Nor is any part of the Order specifically cited.

³ The motion also contains several references to alleged "obstruction" by Defendant Butkus of a weekend visit on June 10, 2005. *See, e.g.*, Motion at 25. However, as the Order held (p. 15, n.8), Plaintiff has never shown how he was damaged by the short delay that occurred in connection with that weekend home visit.

10. Plaintiff's Point 10 (proximate cause)

In Plaintiff's Point 10, Motion at 27-28, Plaintiff argues the same points that were argued at p. 18 of his opposition to the Defendants' summary judgment motions. These points were addressed at p. 14 of the Order, and Plaintiff has offered no new reason why those conclusions by the Court should be overturned. Instead, Plaintiff continues to claim that a 2001 judicial commitment of Plaintiff was "fraudulently obtained," although the only basis for this statement was refuted at p. 14 of the Order, citing the recantation by the guardian ad litem of her affidavit and the deposition testimony of both the GAL and Mrs. Mims that they were both unaware of any false information having been provided to the Probate Court by DDSN or its employees. Plaintiff does not even address that deposition testimony. In any event, there is nothing in this point that warrants reconsideration.

The DDSN Defendants would also note that Plaintiff's "but for" causation theory, stated on p. 27 of the motion, would not establish liability of Defendant Butkus for several reasons. Plaintiff argues that "but for" the 2001 judicial commitment, none of Plaintiff's injuries would have occurred. First, this Court has held that Plaintiff has cited no evidence to show that the injuries discussed in the Order were sufficiently foreseeable so as to have made any DDSN official to have liable therefor. Second, the 2001 judicial commitment was obtained by the consent of all concerned, and Plaintiff's mother and GAL 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) notwithstanding statements to that effect in their respective affidavits. Flynn Deposition, 9/2/09, pp. 50-65 and p. 52, lines 16-18; Mims Deposition, , 6/23/09, p. 84, lines 15-21. Thirdly, there has been no showing of negligence of Defendant Butkus in connection with the 2001 judicial commitment. Finally, the existence of the 2001 Consent Order is in itself an intervening event that affects any alleged liability of the

DDSN Defendants, and no one representing the Plaintiff ever sought to have it re-examined until after all of the events now complained of had occurred.

11. Plaintiff's Point 11 (negligent supervision)

Plaintiff's Point 11, pp. 28-29, contains more discussion of negligent supervision. Again, however, this point, like others, consists only of general legal statements and conclusory factual allegations, with no attempt to make a connection to any of the incidents cited by Plaintiff in opposition to Defendants' Motion for Summary Judgment. Nor is there any reference to any part of the Order in which error was allegedly committed. For all of these reasons, this point presents no reason for a change in the Order.

12. Plaintiff's Point 12 (negligent supervision)

Plaintiff's Point 12, pp. 29-32, contains still more discussion of negligent supervision. Plaintiff argues that this Court erred "in its determination that Mims has failed to cite specific evidence to support his claim for negligent supervision." Motion at 29. However, the Motion itself is non-specific. It cites several pages from the exhibits that were attached to Plaintiff's own Motion for Summary Judgment, but offers no explanation as to how those citations establish liability on the part of the Defendants. As a result, this point also presents no ground for reconsideration of the Order.

13. Plaintiff's Point 13 (contentions related to the Tort Claims Act).

Plaintiff's Point 13, Motion at 33-34, argues that the Tort Claims Act does not bar this action. Plaintiff's first argument, which concerns tolling of the statute of limitations, has been addressed above. Plaintiff's remaining argument with regard to the DDSN Defendants is limited to a single paragraph containing a thrice-repeated conclusory statement that Plaintiff has provided "material evidence" to show that the individual Defendants acted outside the scope of their official duties. Motion at 34, citing S.C. Code Ann. § 15-78-70(b). However, there is no

attempt to connect these three entirely conclusory statements to anything whatsoever in the record. Nor is there any attempt to make a specific showing as to how any such facts would constitute actions outside the scope of official duties.

The Order held that Plaintiff's efforts to assert state tort claims against the individual DDSN Defendants were conclusory. Order at 19, n. 12. The present motion does nothing to improve upon that conclusory showing.

14. Plaintiff's Point 7 (ADA claim)

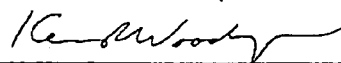
In its fourteenth and final point, Plaintiff's motion again reflects a misunderstanding of the nature of the showing that must be made by a party opposing summary judgment. Instead of providing "specific facts showing that there is a genuine issue for trial" SCRCF Rule 56(e), Plaintiff merely makes references to four allegations in his own Amended Complaint. Motion at 35. In other words, Plaintiff attempts to do the very thing that Rule 56(e) prohibits, that is, "rest[ing] upon the mere allegations . . . of his pleading. . . ." In addition to not setting forth any specific allegations, Plaintiff's motion also does not address the holdings made in the Order with regard to the ADA claims. As a result, Plaintiff's ADA contentions are devoid of any reason that would warrant reconsideration of the Order in this regard.

CONCLUSION

For the foregoing reasons, the DDSN Defendants respectfully submit that Plaintiff's Rule 59(e) motion should be denied in its entirety.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: 
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ATTORNEYS FOR DEFENDANTS THE SOUTH
CAROLINA DEPARTMENT OF DISABILITIES
AND SPECIAL NEEDS, KATHI LACY AND
STANLEY BUTKUS

Columbia, South Carolina

March 24, 2014.

Exhibit 1

DAVIDSON & LINDEMANN, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

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James M. Davis, Jr.[†]
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Of Counsel
Kenneth P. Woodington

*Also Admitted In North Carolina
†Certified Mediator

May 28, 2013

VIA US MAIL AND EMAIL cmanningj@sccourts.org

The Honorable L. Casey Manning
Circuit Court Judge, Fifth Judicial Circuit
Post Office Box 192
Columbia, South Carolina 29202

RE: Edward Mims, by and through his legal guardian, Margaret Mims v. Babcock Center, Inc.,
Judy Johnson, the South Carolina Department of Disabilities and Special Needs, Kathi Lacy
and Stanley Butkus
Civil Action Number: 07-CP-40-3365
Claim Number: 44654
Date of Incident: 1/04/99?
Our File Number: 104.7785

Dear Judge Manning:

You will recall that on May 8, counsel for the parties were present at a status conference in your chambers concerning the above case. The two groups of Defendants have filed motions for summary judgment on April 12 (DDSN Defendants) and April 23 (Babcock Defendants). As a result of the May 8 status conference, you set those two motions to be heard on June 4 by Judge Cooper.

Plaintiff's counsel had not previously suggested that she might be filing a motion for summary judgment on behalf of the Plaintiff. However, this past Friday afternoon, May 24, she served counsel for the Defendants with a motion for summary judgment of her own. The motion was accompanied by a stack of exhibits nearly a foot high and totaling almost 2,300 pages. I was out of the office when that motion arrived, and it came at the start of the three-day Memorial Day weekend.

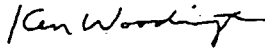
The Honorable L. Casey Manning
May 28, 2013
Page Two

I am writing to ask for confirmation that Plaintiff's motion will not be heard by Judge Cooper on June 4. The scheduled hearing was not one on "all pending motions," but was limited specifically to the two motions that the Defendants had already filed. Those motions are based primarily on legal issues, particularly the statute of limitations, and if they are granted in whole or even in part, the burden on the Court and on the parties to address Plaintiff's motion and the 2,300 pages accompanying it would be greatly reduced, if not eliminated. I would therefore ask that if it becomes necessary for Plaintiff's motion to be heard at all, such hearing be set for a later date after resolution of the Defendants' motions. This request is made not only because of the possibility that Plaintiff's motion will not need to be considered at all, but also because that motion is so voluminous that it would be difficult for defense counsel to prepare an adequate response in the short time between now and the previously-scheduled June 4 hearing. Counsel for the Babcock Defendants also joins in this request.

I appreciate any consideration you can give to this request.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Kenneth P. Woodington

KPW:nmb

cc: VIA US MAIL AND EMAIL

Patricia L. Harrison, Esquire (Plh.cola@att.net)

Christian Stegmaier, Esquire (cstegmaier@collinsandlacy.com)

Peter D. Protopapas, Esquire (pdp@rplegalgroup.com)

Mr. Paul Gunter (gunterp@rcgov.us)

Exhibit 2

From: Manning, L. Casey Law Clerk (Adam Ribock) <CManningLC@sccourts.org>
Sent: Wednesday, May 29, 2013 3:49 PM
To: Kenneth P. Woodington; 'Patricia L Harrison'
Cc: cstegmaier@collinsandlacy.com; gunterp@rcgov.us
Subject: RE: Mims v. Babcock 07-CP-40-3365

Judge Manning has stated the Motions will be scheduled normally, and only those currently scheduled will be heard on June 4th. As the other recently filed Motions, Judge Manning has stated if they needed to be heard after the 4th but before trial, he will set up a status conference. Thank you.

Adam Ribock
Low Clerk to The Honorable L. Casey Manning
Fifth Judicial Circuit
Richland County Judicial Center
1701 Main Street, Room 214
Columbia, SC 29201
Office: (803) 576-1774
Fax: (803) 576-1744

From: Kenneth P. Woodington [<mailto:kwoodington@DML-LAW.com>]
Sent: Tuesday, May 28, 2013 4:48 PM
To: 'Patricia L Harrison'; Manning, L. Casey Law Clerk (Adam Ribock)
Cc: cstegmaier@collinsandlacy.com; gunterp@rcgov.us
Subject: RE: Mims v. Babcock 07-CP-40-3365

Patricia, my secretary sent this, but her e-mail indicates that it went to you and all other counsel. Apologies if for some reason it did not. I only objected to Plaintiff's motion being heard, for the reasons stated in the letter.

From: Patricia L Harrison [<mailto:plh.cola@att.net>]
Sent: Tuesday, May 28, 2013 4:45 PM
To: cmanninglc@sccourts.org
Cc: Kenneth P. Woodington; cstegmaier@collinsandlacy.com; gunterp@rcgov.us
Subject: Re: Mims v. Babcock 07-CP-40-3365

I was out of the office last week, but I have not seen a letter from Ken Woodington objecting to next week's hearing on their motion to dismiss, which his office scheduled several weeks ago. I would very much appreciate being provided with copies of all communications with the court when they occur. I have been preparing for next week's hearing on Defendant's motion for summary judgment, which we agreed in chambers would be heard in May. We received a notice indicating that Mims' case is on the Roster for June 17 and I believe it is #2 on that Roster.

If the hearing is not going to go forward on June 4 and/or if we are not going to be #2 on the docket for June 17, please so advise. It is very difficult for Mrs. Mims to find someone to keep Edward and those arrangements must be made ahead of time. I realize that date certain trials are rarely scheduled, but it would seem that providing a day certain in this case would be a reasonable accommodation of Edward's

disability. Also, some of DDSN's witnesses may now be out of state and I expect that the agency would join in a request for a day certain.

Thank you for your consideration of this request.

Patricia L. Harrison

(to be followed with letter sent via mail)

From: Jo Boyd

Sent: Tuesday, May 28, 2013 3:33 PM

To: cmanninglc@sccourts.org

Cc: Patricia Harrison ; kwoodington@DMI-LAW.com ; cstegmaier@collinsandlacy.com ; gunterp@rcgov.us

Subject: Mims v. Babcock 07-CP-40-3365

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Exhibit 3

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF RICHLAND

3
4 EDWARD MIMS, BY AND THROUGH
5 HIS LEGAL GUARDIAN,
6 MARGARET MIMS,

Plaintiff,

Case No.: 07-CP-40-03365

7 vs

8 BABCOCK CENTER, JUDY JOHNSON,
9 SCDDSN, KATHI LACY,
10 STANLEY BUTKUS,

Defendants.

11 D E P O S I T I O N

12 WITNESS: STAN BUTKUS

13 DATE: Wednesday, June 10, 2009

14 TIME: 10:04 a.m.

15 LOCATION: Law Office of Patricia Harrison
16 611 Holly Street
17 Columbia, South Carolina

18 TAKEN BY: Attorneys for the Plaintiff

19 REPORTED BY: GINA M. SMITH
20 Certified Shorthand Reporter
21 Registered Professional Reporter

22
23
24 Gina M. Smith, CSR, RPR
25 117 Harmon Creek Court
Lexington, SC 29072
803-359-5705

Mims 1336

1 APPEARANCES:

2 ATTORNEYS FOR PLAINTIFF

3 EDWARD MIMS, BY AND THROUGH HIS LEGAL
GUARDIAN, MARGARET MIMS:

4 LAW OFFICE OF PATRICIA HARRISON

5 BY: PATRICIA HARRISON, ESQ.

6 611 Holly Street
Columbia, SC 29205

7 ATTORNEYS FOR DEFENDANT

8 BABCOCK CENTER AND JUDY JOHNSON:

9 COLLINS & LACY

10 BY: CHRISTIAN STEGMAIER, ESQ.

11 1330 Lady Street, Sixth Floor

12 P.O. Box 12487
Columbia, SC 29211

13 ATTORNEYS FOR DEFENDANT

14 SCDDSN, KATHI LACY AND STANLEY BUTKUS:

15 DAVIDSON & LINDEMANN, P.A.

16 BY: KENNETH P. WOODINGTON, ESQ.

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18 P.O. Box 8568
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19 ALSO PRESENT:

20 TANA G. VANDERBILT

21 (INDEX AT REAR OF TRANSCRIPT)

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1 Clusters to management, DDSN management, and then
2 working towards its closure.

3 I will tell you, because we may get to it
4 in a moment anyways, is that we continued to track
5 data. We did reviews of the program's periodic
6 indicators that Kathi Lacy oversaw, how they were
7 doing in different program areas.

8 And in the fall of '04, the trend line
9 still was not good for the agency as a whole on
10 quality. So what I did was I met with the Board
11 and said we have to reduce by 50 percent. We have
12 to go from 634 beds to 317 beds in 18 months, and
13 that's what we did. And so --

14 Q. So you did actually reduce by 50 percent?

15 A. Yeah, that's right.

16 Q. And you met that mark?

17 A. Yes.

18 Q. Would it surprise you to know that
19 Dr. Johnson testified in Federal Court that that
20 mark was not met and in fact you -- your agency was
21 giving her additional new people?

22 A. At the time I left the agency, the only
23 people that she got or the agency got was when
24 there were some vacancies. We didn't have -- if
25 you went back and looked at, for example, the 500

1 CERTIFICATE OF REPORTER

2 I, Gina M. Smith, Registered Professional
3 Reporter and Notary Public for the State of South
Carolina at Large, do hereby certify:

4 That the foregoing deposition was taken
5 before me on the date and at the time and location
6 stated on page 1 of this transcript; that the
7 deponent was duly sworn to testify to the truth,
8 the whole truth and nothing but the truth; that the
9 testimony of the deponent and all objections made
10 at the time of the examination were recorded
stenographically by me and were thereafter
transcribed; that the foregoing deposition as typed
is a true, accurate and complete record of the
testimony of the deponent and of all objections
made at the time of the examination to the best of
my ability.

11 I further certify that I am neither related
12 to nor counsel for any party to the cause pending
or interested in the events thereof.

13 Witness my hand, I have hereunto affixed my
14 official seal this 24th day of June, 2009, at
Columbia, Richland County, South Carolina.

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16
17
18 Gina M. Smith
19 Gina M. Smith
20 RPR, CSR, Notary Public,
21 State of South Carolina
22 at Large.
23 My Commission expires
24 July 23, 2013.
25