

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY

G. Thomas Cooper, Circuit Court Judge

Case No. 2007-CP-40 3365

Appellate Case No. 2014-001373

Op. No. 5539

S.C. Ct. App. filed February 21, 2018

Rehearing denied April 13, 2018

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

v.

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

Appellate Case No. 2018-000867

Return in Opposition to Petition for *Certiorari*

I.

Introduction

This case was filed more than a decade ago, yet it returns to this Court for a second round without Mims ever having his day in court. Defendants delayed trial on the merits so long that Mims died before having the opportunity to present his case to a jury. Section 1983 claims were brought not only for violation of Mims' rights, but in his important role as private attorney general to protect the rights of others who have suffered, and continue to suffer as a result of actions by these Defendants. *Newman v. Piggie Park*, 390 U.S. 400, 402 (1968) ("When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority.")

Although the case presents a novel question, the decision of the Court of Appeals is not in conflict with any decision of Appellate Courts in this state and both the initial decision of the Court of Appeals, that court's substituted published decision and the decision to deny reconsideration were unanimous. The decision regarding the tolling of the statute of limitations is in keeping with this Court's earlier decision in *Harrison v. Beveliqua*, 354 S.C. 129, fn. 5 (2003) and other orders of this Court. The Court should deny Respondents' petition for *certiorari* and remand this case for a prompt trial.

II.

Plaintiff's Counter-statement of the Case

Petitioners' statement of the case contains erroneous facts and misleading interpretations of those facts. Almost immediately after Mims' mother voluntarily placed her son at the Babcock Center during her temporary illness, he began suffering from "unexplained injuries" which continued until he was removed by court order from the Babcock Center. In counter to Petitioner's statement of facts in the Petition, Mims refers to his statement of facts contained in Supplemental Volume 1 (Mims' motion for partial summary judgment filed on May 29, 2013), which is incorporated by reference.

This case was initially filed in 2007, but that complaint was not served. *Mims v. Babcock Center*, 399 S.C. 341 (2012). After the complaint was filed in the circuit court, DDSN and Babcock Center made allegations that Mims' caregiver had abused or neglected him, making his mother fearful of retaliation, because she relied upon the support of this caregiver while she worked in order to keep her son at home. *Id.* R. 3275, paragraphs 50, 52, 53. After those allegations against the caregiver were unfounded and Mims was no longer at risk of losing this support, he filed an amended complaint on May 7, 2008.

¹ The record contains extensive documentation of the culture of retaliation at DDSN and the Babcock Center in the form of affidavits of a state senator (R. 3197), families (R. 3409, 3411, 3453-3454) and a registered nurse (R. 3458), as well as newspaper articles (R. 279, 1506, 1854, 3119, 3132).

This Court ruled in 2012 that the amended complaint was timely filed and remanded Mims case for trial. *Mims v. Babcock Center*, 399 S.C. 341 (2012). But, the circuit court again dismissed his lawsuit and Mims filed an appeal in the Court of Appeals. Mims settled his claims against the Babcock Center while his lawsuit was on appeal to the Court of Appeals and he died while that appeal was pending. But, there is no evidence in the record to support Petitioner's claim that Mims' death was not related to the injuries described in the amended complaint. His death occurred after the record was closed and whether or not those injuries contributed to his demise is an issue to be resolved at trial.

The Court of Appeals reversed the award of summary judgment and remanded Mims' case for trial on November 8, 2017. *Estate of Mims v. S.C. Dep't of Disabilities & Special Needs*, 2017 S.C. App. LEXIS 455 (S.C. Ct. App. 2017).

After DDSN, Stanley Butkus and Kathi Lacy filed a motion to reconsider, South Carolina Protection & Advocacy, Inc. and the National Academy of Elder Law Attorneys filed an amicus brief requesting publication of the Court of Appeals' decision. The Court of Appeals withdrew its prior opinion and issued a reported decision again remanding Mims' case for trial on February 21, 2018. *Estate of Mims v. S.C. Dep't of Disabilities & Special Needs*, 422 S.C. 388 (S.C. Ct. App. 2018). When that Court denied Petitioners' second motion to reconsider,

Petitioners filed a Petition for *Certiorari*. This return is filed in opposition to that petition.

III. Counter-statement of arguments.

- 1. The Court of Appeals correctly followed the majority rule, holding that that the appointment of a guardian does not end the tolling period which was established by the South Carolina General Assembly in S.C. Code of Laws 15-3-40(2).**
- 2. The Court of Appeals correctly followed all procedural rules in it ruling that Mim's claims were preserved.**
- 3. Mims properly pled and argued material facts and his claims are supported by legal theories which support his claims for violation of Section 1983 and negligence, gross negligence and negligent supervision.**
- 4. Whether this Court's controlling ruling in *Madison v. Babcock Center* supports the lower court's ruling as to the remaining Defendant's liability.**

IV. ARGUMENTS

- 1. The Court of Appeals correctly followed the majority rule, holding that that the appointment of a guardian does not end the tolling period which was established by the South Carolina General Assembly in S.C. Code of Laws 15-3-40(2).**

In adopting the majority view that the appointment of a guardian does not end the tolling period established by the General Assembly in S.C. Code Ann. 15-3-40, the Court of Appeals ruled at 397:

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

It is a well established rule of statutory construction that the court should ascertain and effectuate the intent of the legislature whenever possible. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). The "clear and unambiguous" purpose of the state tolling statute was to extend by five years the statute of limitations for persons under a mental disability, and for up to nineteen years for a minor child.

Instead, Petitioners argue that this court should adopt the minority view, i.e. that appointment of a guardian extinguishes the ward's disability. Petitioners rely upon a decision by a single federal district court judge in New Hampshire, who did not refer that issue to the state's Supreme Court before ruling against the majority view. In *Stewart v. Robinson*. 115 F.Supp. 2d 188, 194-195 (D.N.H. 2000), the New Hampshire federal district court judge interpreted that state's guardianship statute in favor of the minority view.²

² The second case cited by Petitioners, *Sims v. Amisub of South Carolina*, 408 S.C. 202, 2017, 758 S.E.2d 187, 195 (Ct. App. 2014) deals with a different statute, S.C. Code 15-3-545, which is applicable only to medical malpractice claims not at issue in this case. The issue raised in *Sims* was whether the appointment of a conservator (as opposed to a guardian) ends the tolling period.

Stewart appears to have been cited only once outside of South Carolina, on other grounds, by another federal district court judge in New Hampshire, in *Jones v. McKenzie*, 2011 U.S. Dist. LEXIS 145319 (N.H.D.C. 2011). It has not been cited as authority by that State's Supreme Court. By virtue of it being the minority rule, it is not a better reasoned analysis. The majority rule is consistent with this court's interpretation of the tolling statute. *Harrison v. Bevilacqua*, 354 S.C. 129, f.n. 5 (2003) (distinguishing the tolling statute from the medical malpractice statute of repose at S.C. Code § 15-3-545).

Unlike South Carolina's tolling statute, the New Hampshire statute extends the statute of limitations indefinitely for two years "after such disability is removed." New Hampshire RSA 508:8. Also, what Petitioners fail to mention is that the decision in *Stewart* appears to apply only to guardians of the estate, not to guardians of the person, as is the issue in *Mims*' case. South Carolina uses a different terminology, referring to what New Hampshire calls "guardians of the estate" as "conservators." The New Hampshire statute obligates only the "guardian of an estate" (conservator in S.C. terminology) to "...prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of the

This Court recognized in *Sims* that it is the pejorative of the legislature, not the courts, to address any inequities resulting from the tolling statute. 414 S.C. 109 (2015). ("Because of our disposition, we need not reach the issue of the effect, if any, of the appointment of a conservator on the matter of tolling a statute of limitations." Id. at fn. 7) (Emphasis added.)

estate's assets..."³ Id. at 195 (citing RSA 464-A:26). In New Hampshire, guardians of the *person*, like Mims' mother, do not have that obligation and their duties are defined by a different section in the New Hampshire Code at 464-A:26.

By contrast, like the parent of a minor child, a guardian (of the person) in South Carolina may, but is not obligated to "institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform his duty." Like parents of a minor, in South Carolina, a guardian has no statutory duty to initiate actions against third parties - as guardians of the estate are obligated to do in New Hampshire. S. C. Code 62-5-312(4).

Under Petitioner's reasoning, only orphans for whom no legal guardian has been appointed could benefit from the extension of the statute of limitations for more than one year under S.C. Code 15-3-40, because a parent could bring a lawsuit on behalf of the minor child.

Even more illogical is the fact that under Petitioners' reasoning, a mentally incapacitated plaintiff would have less time to file a complaint than S.C. Code 15-3-530 and 535 provide for a non-disabled person. Petitioners make the illogical argument to this Court that the statute of limitations ends one year after the

³ The New Hampshire statute provides that: "It is the duty of the guardian of the estate to protect and preserve it, to retain, sell and invest it as hereinafter provided, to prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of the estate's assets..." RSA 464.

appointment of a guardian - regardless of whether the statute of limitations for a non-disabled person would have run.

Petitioner's argument also ignores the discovery rule, which allows even a non-disabled plaintiff a three year period to file a lawsuit (two for claims against the state) pursuant to S.C. Code 15-3-535, which requires actions to "be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." *Doe v. Bishop of Charleston*, 407 S.C. 128, 139 (2014). A person with profound intellectual disabilities is clearly not capable, "by the exercise of reasonable diligence" to know he has a cause of action.

Petitioners argue that the guardian must file a lawsuit within one year of appointment, not even the three years provided without regard to the tolling statute. That is an absurd result. The clear intent of the General Assembly was to give a person unable to protect his own rights due to mental disability additional time to file a lawsuit. The result Petitioners propose should be rejected by this Court. The General Assembly knows how to limit the tolling period, as it did in enacting the six year statute of repose for medical malpractice actions in section 15-3-545, but it did not impose any such limitation when a guardian is appointed, or even when a conservator is appointed.

No court of which counsel is aware has found that appointment of a guardian of the person ends the disability for purposes of the tolling statute. The Court should affirm the adoption of the majority rule in its order denying certiorari.

2. The Court of Appeals correctly followed all procedural rules in it ruling that Mim's claims were preserved.

Defendants assertion that “the Court of Appeals took upon itself to relieve the estate in this case from compliance with virtually all procedural rules” ignores Respondent’s briefs filed in that court and extensive responses to Defendants’ motion for summary judgment, which include the six volumes Mims presented in opposition to that motion, and arguments made at the summary judgment hearing. Petition at 8. R. 1198 to 3457 (six volumes presented to the trial court before the summary judgment hearing). The Court of Appeals correctly ruled that Mims “appealed the sections of the order where the circuit court limited the scope of Mims' lawsuit, and he has consistently alleged and argued his theory of the case—from his pleadings to his arguments at summary judgment, and now on appeal.” Order at 400.4

Mims refers the Court to the Estate’s Return Opposing Petitioners’ (then Respondents’) Second Petition for Rehearing, pages 6 through 11.

⁴ Mims refers the Court to the Estate’s Return Opposing Petitioners’ (then Respondents’) Second Petition for Rehearing, pages 6 through 11.

In addition to recognizing the arguments and extensive evidence Mims presented to the lower courts in opposition to summary judgment, in a footnote at fn. 8, the Court noted that “Even if we were to find the issue was not preserved, we would still address it,” citing *Caughman*. 247 S.C. at 109, 146 S.E.2d at 95 (holding it is the duty of the court to protect the interests of those under legal disability, and therefore, the court will take notice of any error prejudicial to them even though not raised appropriately); *Ramage v. Ramage*, 283 S.C. 239, 244, 322 S.E.2d 22, 25 (Ct. App. 1984) (choosing to address inadequately appealed issues when the arguments were reasonably clear from the brief and the issues were ruled upon by the circuit court).”

As Judge Alex Sanders eloquently expressed in *McCall v. Finley*, 294 S.C. 1, 4 (1987):

Appellate courts recognize -- or at least they should recognize -- an overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter. E.g., *Cox v. Cox*, 290 S.C. 245, 349 S.E. (2d) 92 (Ct. App. 1986) (appellant has the burden of showing that an error was prejudicial).

Applying that “unstated rule,” because the Court of Appeals correctly found that Mims presented evidence of material facts to support his claims, Mims prevailed whether or not the rules were relaxed. Petitioners here have failed to show how they were harmed by the Court of Appeals’ inclusion of that footnote, which reminds us all of how important the right of persons suffering a disability to have

their day in court and to present their case to a jury really is - a right denied to Mims for now over a decade.

Petitioners fail to cite any authority that says the party benefitting from an issue preservation ruling, alive at the time of the alleged procedural error, must be alive when the appellate court finally issues a ruling. Petitioners' arguments that Mims' death obliterates his arguments and objections made to the trial judge, and his presentation of extensive evidence to that court in opposition to summary judgments are not supported by any authority.

Petitioners' argument ignores S.C. Code 15-3-50 which clearly requires that the disability must exist "when his right of action accrued." To require that the disability continue during the course of an appeal, here an appeal drug out by deep pocketed defendants, would defeat the intent of the legislature.

What Mims has requested, now for a decade is a "fair trial consistent with all applicable rules of procedure and evidence." Petitioners' Brief at 11. It has been Petitioners who have denied that right - so long that Mims died in the process - but his claims survive for the benefit of his estate. In particular, his Section 1983 claims survive in part because of his important status as a private attorney general. *Newman*, 390 U.S. 402.

The lower court correctly held that the circuit court erred in evaluating the sufficiency of Mims' pleadings at summary judgment, specifically finding that

“Mims sufficiently pled his causes of action for negligent supervision, negligence, and gross negligence” and that Defendants may be held liable under the supervisory liability standard set forth in *Shaw v. Stroud*, 13 F3d. 791, 799 (4th Cir. 1994). Mims’ amended complaint clearly set forth claims for supervisory negligence, negligence and gross negligence in paragraphs 80 and 81. R. 87-88. Throughout the amended complaint and this litigation, Mims has asserted that Lacy and Butkus had actual and constructive knowledge of the harms suffered at Clusters and Kensington and that Mims' involuntary confinement at those facilities posed a "pervasive and unreasonable risk" of constitutional injury because they knew or should have known of the ongoing substandard care and neglect, including beatings, insect infestations, and sexual assaults.

At both lower courts, Mims preserved his claims that the responses of Lacy and Butkus to the knowledge of the systemic abuse was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices"; and he presented material facts supporting his claims that there was an "affirmative causal link" between the Lacy's and Butkus's inaction and specified injuries, including unlawful confinement. R. 2640-2647, [redacted]. Those defendants knew that the Babcock Center was not in compliance with federal standards and that multiple investigations had found that the problems identified had not been corrected, and, even after a drastic reduction in bed capacity due to the Center’s failure to protect

residents from abuse and neglect, those two officials attempted to thwart Mims' mother's attempts to remove him from an unsafe facility. R. 2640-2647. Mims demonstrated that Lacy and Butkus had a duty to protect him, they violated that duty (and still argue that it does not exist) and that he suffered from multiple personal injuries over a period of years due to their violations of his rights.

It is ironic and mostly sad that it is the agency and its former officials charged with protecting the rights of persons with intellectual disabilities (and paid handsomely to do so) who challenge here the courts' duty to guard zealously the rights of parties under legal disability. See, e.g., Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 69 (1999).

The record demonstrates that Mims complied with all procedural rules and this Court should deny *certiorari*.

3. Mims properly pled and argued material facts and his claims are supported by legal theories which support his claims for violation of Section 1983 and negligence, gross negligence and negligent supervision.

A. Strict liability. The Court did not base its opinion on a standard of strict liability or *res ipsa loquitur*, but it properly applied the supervisory liability rule established in *Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994) to Mims' claims for violation of Section 1983 and *Madison v. Babcock Center*, 371 S.C. 123 (1994) for negligence related claims.

On pages 11 and 12, Petitioners continue their fantastical argument that

Mims never appealed the trial court's decision that his claims and that his arguments were limited to just three "incidents" which occurred in 2000, 2004 and 2005. Petitioner's argument again ignores evidence and Mims' arguments that are set forth in his amended complaint, and throughout his initial brief to the Court of Appeals, regarding ongoing and systemic personal injuries and violations of his civil rights. Mims' Initial Brief at 25-4 (Section 1983) and 40-47 (negligent supervision, negligence and gross negligence).

Petitioners' arguments contained at page 14 of their petition for *cert.* simply repeat the arguments they made unsuccessfully to this Court in *Madison v. Babcock Center*, 371 S.C. 123 (2006). In *Madison*, this Court ruled that DDSN owes a common law duty to its clients and that statutory immunity exceptions are not applicable to claims of negligent supervision, negligence, conscious indifference and gross negligence. *Id.*

This Court instructed DDSN that its arguments in *Madison* were "unpersuasive because Department owes a common law duty of care directly to Appellant," so why are they continuing to litigate this issue? Petitioners arguments are likewise unpersuasive here and their petition for *cert.* should be denied. *Id.* at 141. This Court clearly informed DDSN in its 2006 ruling that the fact that services were being provided by the Babcock Center, or "the fact a third party may have committed a criminal act in harming Appellant does not affect the existence

of Department's duty.” Id. See *Greenville Memorial Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990), where this Court held the city liable for a patron's personal injuries resulting from the criminal acts of another despite the city's claim of immunity under § 15-78-60(20). The *Madison* Court clearly ruled that DDSN may be found liable based on negligence where, as here, the negligence creates a foreseeable risk of injury to the plaintiff and that DDSN “remains under a duty to provide reasonable care and treatment to its clients,” a duty DDSN continues to ignore. 371 S.C. at 141. Specifically, this Court ruled that DDSN’s duties include 1) adequately supervising the provision of services by another entity as well as 2) its own conduct in relation to *prior notice of inappropriate care* of its clients by such entity. Id. (Emphasis added.) Thus, DDSN should recognize that it is liable for breach of its common law duty when its action (or lack thereof), as in this case, “creates a foreseeable risk of and causes injury.” Id.

B. Section 1983 claims. Petitioners’ arguments regarding lack of knowledge of Butkus and Lacy on pages 14-21 ignore not only the ruling in *Madison*, but also the fact that Mims sued those DDSN officials in both their individual and official capacities, thus both the agency and those officials are subject to Appellant’s Section 1983 claims. Petitioner’s Second Request for Reconsideration in Court (SRR) of Appeals at 6. As the United States Supreme Court recently held in *Lewis v. Clarke*:

In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself. *Will v. Michigan Dept. of State Police*, 491 U. S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989); *Dugan v. Rank*, 372 U. S. 609, 611, 620-622, 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963). This is why, when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation. *Hafer*, 502 U. S., at 25, 112 S. Ct. 358, 116 L. Ed. 2d 301. The real party in interest is the government entity, not the named official. ... "Personal-capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under color of state law." *Hafer*, 502 U. S., at 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (emphasis added)... "[O]fficers sued in their personal capacity come to court as individuals," *Hafer*, 502 U. S., at 27, 112 S. Ct. 358, 116 L. Ed. 2d 301, and the real party in interest is the individual, not the sovereign.

137 S. Ct. 1285, 1292 (2017).

At page 18 of the Petition, Petitioners argue that the Court of Appeals erroneously "adopted a new theory of liability" of unconstitutional confinement. This argument ignores not only Paragraph 63 in the § 1983 Cause of Action, which realleges "Each and every allegation above..as if set forth below," but also Mims' constitutional claims of violation of his liberty, equal protection and freedom from unreasonable seizure claims in paragraph 66.

Rather than having no resemblance to claims of unlawful confinement, the amended complaint repeatedly describes allegations and claims supporting his constitutional claims. SRR at 4. In paragraph 34, Mims complained that during the "first years of his involuntary confinement" he was forced to live at Clusters, which CMS and SC DHEC found to be in violation of health and safety standards.

Mims also provided extensive evidence of the horrific violations which resulted in abuse and neglect of residents living at Clusters. Record at 1264.

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

Petitioners argue that the confinement was not caused by Lacy and Butkus, but by DDSN or the probate court. (See discussion above re official capacity claims.) Attempting to deflect responsibility to the probate court, Respondents ignore the facts in the record showing that Butkus, and only Butkus could determine his placement...and that he made a conscious decision to place and keep Mims in facilities he and Lacy personally knew to be unsafe. R. 2567. (It would be a consensus, but I make decisions on placement in the code. The executive of the Agency’s responsible for making placement decisions”) and 2608-2610.

Even if the involuntary commitment had been “lawful,” which it was not, Mims provided material facts (including the affidavit of the GAL at R. 2038) showing that the commitment was fraudulently obtained and that Butkus, Lacy and the Department had a continuing duty to provide safe conditions of confinement once Mims was involuntarily committed, which they totally failed to do.

Paragraph 14 clearly states that Lacy and Butkus “were aware of the

systemic abuse, neglect and exploitation of clients” in Babcock Center, where Butkus had placed him. In his deposition, Butkus described Lacy’s duties, which included tracking abuse and neglect in DDSN facilities and responsibilities for quality assurance. R. 2623-2624. Lacy personally participated in the probate court proceedings where DDSN filed formal “objections,” attempting to prevent Mims’ mother from being appointed as his guardian - which would have prevented Mims from bringing this lawsuit. R. 2689-2694. (“Dr. Kathi Lacy, Associate State Director-Policy, SCDDSN, was also present and presented a recording of events since the June 12, 2005 meeting (Tab I)...Testimony was taken from several individuals including Dr. Lacy and the Petitioner.”) The record contains extensive evidence showing that Lacy and Butkus were not just supervisors who failed to protect Mims and others from unsafe conditions through neglect, but that they both personally participated in decisions related to his care and confinement.

Respondents’ argument that Plaintiffs have never suggested that DDSN is subject to liability under Section 1983 ignores the allegations in the amended complaint and the multiple references to violations by DDSN contained in Plaintiff’s initial Court of Appeals brief at pages 30 to 38. Issue 3 in that brief states that “defendants” violated his civil and constitutional rights” and the First Cause of Action for violation of Section 1983 clearly refers to DDSN as one of the defendants. On page 26 of that brief, Plaintiff argues that “Much suffering occurred

as a result of this fraudulent and illegal action by DDSN.” Plaintiff argued that it was DDSN experts who determined that he required one-on-one supervision, and the “penis injury” clearly documented that Mims was not provided that level of supervision, as no one could explain how he somehow came to have a gaping oozing laceration on his penis that required multiple stitches to close and that no one could explain how this injury occurred. Id.

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

Plaintiff’s amended complaint and brief clearly allege both official and individual liability claims under Section 1983. The Court may wish to inquire, however, as to whether a conflict of interest exists in state taxpayer dollars being spent to defend Butkus and Lacy against Plaintiff’s individual capacity claims.⁵

⁵ Rule 1.13 of the South Carolina Rules of Professional Conduct provides that “...in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances.” That Rule advises of the obligation to balance “maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.” Lacy retired in 2014 and she is no longer an employee of DDSN, although she may or may not be performing work for DDSN under contract. Butkus resigned as Director of DDSN under pressure in 2009, soon after a critical audit conducted by the Legislative Audit Council reported that the agency failed to protect the health and welfare of its clients and spent tens of millions of dollars allocated by the General Assembly for services for

C. **Negligent supervision, negligence and gross negligence claims.** As to Mims' claims for negligent supervision, negligence and gross negligence, the Court of Appeals correctly recognized that Mims properly alleged in his amended complaint that Petitioners committed these torts "when they failed to provide proper supervision to protect Mims from assault, battery, sexual assault, and injury; failed to properly monitor Mims' condition and treatment needs after initiating involuntary commitment proceedings for him; failed to discharge Mims to the care of his mother; and obstructed the attempts of Mims' mother to establish the guardianship." *Estate of Mims*, 422 S.C. at 403.

All that was necessary to survive summary judgment was for Mims to present just a scintilla of evidence to support these claims and the Court of Appeals correctly held that Mims met that burden.¹¹ See *Hancock* 381 S.C. at 330, 673 S.E.2d at 803 (2009) ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."). Mims far exceeded that bar in the six volumes of documentation that he presented to the trial court. R. 1198-3458.

Petitioners' arguments as to strict liability and *res ipsa loquitur* are red herrings that should not distract this Court's attention from the Court of Appeals'

other purposes.

ruling as to the appropriate standard for negligent supervision in a Section 1983 case: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices"; and (3) that there was an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff. *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994).

The lower court correctly held that proximate cause is an issue to be resolved by the fact finder, and that it may be resolved by direct or circumstantial evidence. Court of Appeals Order at 403, citing *Madison*, 371 S.C. at 147, 638 S.E.2d at 662-63. As this Court recognized in *Madison*, the court's sole function regarding the issue of proximate cause at summary judgment is "to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." *Id.* As this Court has ruled: "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)). Thus, when the evidence supports more than one reasonable inference, it is an issue best resolved by the jury. *Id.* In most cases, as this Court has ruled, "gross negligence is

a factually controlled concept whose determination best rests with the jury." Id. at 332, 566 S.E.2d at 545. The Court of Appeals was correct in concluding that the issue of whether DDSN acted in a grossly negligent manner is a factual issue for a jury to determine whether the agency breached its duty and met the applicable standard of care.

4. Whether the Court of Appeals erred because Defendants have no "supervisory connection" with the Babcock Center.

Petitioners' argument that Defendants have no "supervisory connection" with the Babcock Center is clearly contradicted by sworn testimony of defendant Stanley Butkus, where he testified:

So for you to say to me that did I think that I didn't have any responsibility for Babcock is way off from what the actual facts are.

R. 2646. Throughout his deposition, Butkus testified about his oversight role over the Babcock Center and decision to close Clusters years after he knew of the abuse in those facilities.

As discussed above, Petitioners have blatantly disregarded this Court's ruling in *Madison*, in a case where that plaintiff, like Mims, alleged that she was sexually assaulted in a facility operated by Babcock Center under a contract with DDSN.

Unlike the plaintiff in *Young v. SCDDSN*, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007), Mims has alleged not just a single wrongdoing by a service

coordinator, which occurred unbeknownst to DDSN or its officials, but systemic abuse, neglect and ongoing injuries of which the Defendants were repeatedly informed through federal, state and independent investigations. Unlike Young, who lived in his own home with his mother, Mims was involuntarily committed to the custody of DDSN based on a proceeding initiated by DDSN.

As in *Doe v. Kidd*, DDSN has consciously disregarded rulings of the courts and its statutory and common law obligations to persons in its care. 656 Fed. Appx. 643, 650 (4th 2016). (“In fact, the district court determined that the defendants did not comply with this Court's order - or the Medicaid Act - until August 2013, a full two and a half years after *Doe II* was decided.”)⁶

This Court ruled in 2011 that DDSN violated the criteria for determining eligibility for services by imposing an age eighteen onset requirement. *Doe v. South Carolina Department of Health and Human Services*, 398 S.C. 62 (2011).

Yet, the South Carolina Legislative Audit Council reported in 2014 that:

DDSN’s eligibility directive is inconsistent with an S.C. Supreme Court ruling...On December 28, 2011, the S.C. Supreme Court held that, when taken together, lack of additional criteria in the state’s Medicaid waiver application, the broad definition of ID in S.C. Code §44-20-30(12) and use of an onset cutoff age of 22 in a regulation promulgated by the agency indicate that the proper legal standard for ID includes an onset cutoff age of 22, not 18...

⁶ In *Doe v. Kidd II*, the Fourth Circuit ruled in 2011 that “We therefore hold that, as a matter of law, Defendants have violated the Medicaid Act through their ongoing refusal to finance residential habilitation services at an acceptable CTH I placement of her choice,” yet DDSN continued to refuse to provide the required services for more than two more years. 419 Fed. Appx. 411, 418 (4th Cir. 2011).

In the current directive (last updated in October 2013), the standard for eligibility for a determination of ID remains an onset age of 18. In addition, the CAT applied the age 18 standard as recently as August 2013. While the case cited above was specific to a Medicaid waiver, the effect of the general age of onset directive is that all applicants who do not meet the age 18 cutoff will be denied eligibility for DDSN services. The applicant would never get to the point of examination for waiver eligibility.

In its opinion, the Supreme Court majority noted that DDSN's commission has the authority to promulgate regulations that define ID in the context of waiver services, but it has not.⁷

This case represents another one where these Defendants have prolonged litigation, ignoring prior rulings of this Court, such as the ruling in Madison holding that DDSN has a common law duty and can be held liable for negligent supervision for injuries to Babcock Center residents.

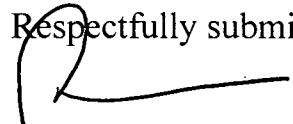
V. **Conclusion**

As has been often repeated: "Justice delayed is justice denied." *Coffey v.*

⁷ This Court may take judicial notice of the 2014 follow up audit of the audit the South Carolina Legislative Audit Council issued in 2008 which is found at http://lac.sc.gov/LAC_Reports/2014/Documents/DDSN.pdf.

PSLJ, Inc. (In re PSLJ, Inc.), 1990 U.S. App. LEXIS 26338 (4th Cir. 1990). Mims waited a decade for his day in court, which was denied him by Petitioner's deep pocketed and protracted litigation. This Court should deny Petitioners' Petition for *Certiorari* for the reasons set forth above, giving the sole beneficiary of his estate, his aging mother, that opportunity to tell her son's story to a jury during her lifetime. Respondent prays also that this Court will take into consideration that Mims brought this lawsuit not only for himself, but like Rosa Parks, Anne Newman, the courageous plaintiffs in Clarendon County and other civil rights pioneers, as a private attorney general. *Newman*, 390 U.S. at 402 and 342 U.S. 350 (1952).

Respectfully submitted,



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June 11, 2018

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JUN 15 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA COURT OF APPEALS

Case No. 2014-001373

Civil Action No. 2007-CP-40-3365

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2018-000867

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

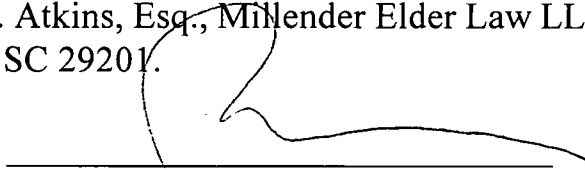
v.

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

CERTIFICATE OF SERVICE

The **Return to the Petition in Opposition for Writ of Certiorari** was sent First Class United States Mail to Petitioner's Counsel Kenneth P. Woodington, Esq., Davidson, Wren & Plyler, P.O. Box 8568, Columbia, SC 29202-8568; and to Amici Counsel Kathleen Warthen, Esq., Protection & Advocacy for People with Disabilities, 3710 Landmark Dr., Suite 208, Columbia, SC 29204, and Franchelle C. Millender, Esq. & Andrew J. Atkins, Esq., Millender Elder Law LLC, 1441 Main St., Suite 725, Columbia, SC 29201.

June 11, 2018



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