

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. 2018-000867

Op. No. 5539
(S.C. Ct. App. filed February 21, 2018)

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

v.

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

REPLY TO RETURN TO PETITION FOR CERTIORARI

Petitioners DDSN, Butkus and Lacy submit the following Reply to
Petitioner’s Return to Petition for Certiorari. Although claiming a right to go to a
jury on a number of unnamed injuries, Respondent, the Mims Estate, specifically
mentions only one such injury, and even then only in passing. Petitioners’ response
to the issues mentioned in the Return are set forth below.

1. Statutes of limitation.

Petitioners reiterate that the better-reasoned cases hold that the appointment of a guardian terminated the disability period. Respondent misstates the effect of Petitioners' contentions, asserting that "Petitioners make the illogical argument to this Court that the statute of limitations ends one year after the appointment of a guardian - regardless of whether the statute of limitations for a non-disabled person would have run." Return at 7-8. In fact, however, Petitioner's contention was that "the minimum time period for filing suit would be the original limitation period plus one year." Petition at 7 (emphasis added). The scenario imagined by Respondent's counsel does not exist.

2. Relaxation of procedural rules.

As noted in the Petition, the Court of Appeals held in effect that certain claims of injury could go to a jury even though those claims and injuries were (a) not specifically pled, (b) not mentioned in opposition to summary judgment, (c) not argued on appeal, and (d) in most instances, abandoned on appeal. The result reached by the Court of Appeals effectively discarded all of the procedural rules that exist for the protection of the rights of the opposite party, in this case the defendant Petitioners. There was no good reason for such a dispensation, because the court's relaxation of the rules did not even benefit a disabled person, the

original plaintiff being deceased' leaving only the estate which seeks only monetary relief.

Relaxation of the rules was also uncalled for when the plaintiff was represented at all times by counsel. If permitted to stand, the decision of the Court of Appeals will encourage lax practice on the part of attorneys directly responsible for the representation of disabled persons (or as in this case, the estates of disabled persons, which have no special need for such protection), while denying procedural safeguards to defendants who are litigating in opposition to disabled persons.

Respondent argued that Petitioner "ignores Respondent's briefs filed in [the Court of Appeals] and extensive responses to Defendants' motion for summary judgment. . . ." Return at 9. However, the circuit court held that the trial court filings by Plaintiff did "not pertain to any of the legal contentions and standards by Defendants in support of their motions for summary judgment." R. I, 38 n. 3. And as for Plaintiff's briefs in the Court of Appeals, Defendants invite this Court to review the Statement of Issues on Appeal in the Brief of Appellant (p. 1). That Statement of Issues is plainly devoid of any challenge to the circuit court's decision to limit the issues to the only three incidents for which Plaintiff actually made an argument in the circuit court. Nor did the body of that brief in any way challenge the trial court's decision to so limit the incidents subject to review. The Court of Appeals blindsided the Defendants by considering issues for which

Plaintiff had presented no challenge or argument in the circuit court or on appeal, and offered nothing other than conclusory statements on p. 9-10 of its second opinion, App. 9-10, in support of its decision. Apparently recognizing that Plaintiff had not in fact even come close to preserving the issue, the Court of Appeals augmented its conclusory holding with its decision to relax procedural rules. App. 9, n. 8. This Court should grant certiorari and reverse the decision of the Court of Appeals on this point in order to maintain a fair set of ground rules for both sides in litigation, especially when the rights of disabled persons are not in fact capable of being affected by the outcome of the lawsuit.

3. Failure to plead or prove facts.

The Petition for Certiorari analyzes the incidents actually alleged in the Amended Complaint individually and in detail. Petition at 4-5, 12, 19-23. In response, the Return continues the estate's practice of speaking only in the broadest of generalities, arguing only that the "evidence" can be found in other filings by the estate and offering no specific argument in the Return to show that evidence was actually provided to the circuit court. Return at 14 (mentioning only unspecified "ongoing and systemic violations of his civil rights"). In fact, the utter inability of the estate to provide evidentiary support for its claims is most dramatically illustrated by the 25-page Return's mention of only one specific injury, the minor penis injury whose cause was unknown and which the examining

physician did not believe to have been indicative of abuse or neglect. Return at 19. Defendants have never argued that that issue, even though lacking in merit, was not preserved.

4. Official capacity claims.

Another groundless claim asserted by the estate was also never raised on appeal and accordingly was never addressed by the Court of Appeals. That is the claim that DDSN and the individual Defendants in their official capacities could be held liable for damages under 42 U.S.C. § 1983. Return at 18-19. However, the circuit court held that it was uncontested that the other Defendant, i.e., DDSN itself, was not subject to the Section 1983 claim:

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

R. I, 37. The estate’s current and belated position to the contrary is manifestly without merit because:

- a. The circuit court was correct on the merits of this claim. *Will v. Michigan State Police*, 491 U.S. 58, 71 (1989) holds that “a suit . . . ‘against [a state agency] . . . is no different from a suit against the State itself. . . .]N]either a State nor its officials acting in their official capacities are ‘persons’ under § 1983.” *Will* is universally recognized as holding that “neither a state agency nor its officials acting in their official capacities are ‘persons’ amenable to suit under § 1983.”

Manning v. S.C. Dep't of Highway & Pub. Transp., 914 F.2d 44, 48 (4th Cir. 1990). This is a fundamental precept of Section 1983 law.¹

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

The fact that the estate would belatedly seek to raise such a spurious argument is indicative of the estate's practice of pressing claims that are both procedurally barred and substantively without merit.²

5. The Court of Appeals' new "confinement" theory.

As pointed out in the Petition, the Amended Complaint contains no allegation that Butkus or Lacy were in any way responsible for Mims'

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

² In another specious argument, Plaintiff complains about alleged delay on the part of the Defendants, Return at 1, but this action was not filed until 2007, seven years after the first complained-of event, and even then the original Complaint was never served. The Defendants were served only in 2008, eight years after the first complained-of event. If the original Complaint had been served at the time it was filed, final judgment in the circuit court would probably have occurred in 2008 or 2009. The fact that this did not happen is attributable solely to Plaintiff's counsel.

confinement. Petition at 19. The Petition then reviewed the Amended Complaint in detail, pointing out that there was no allegation in it that Butkus or Lacy were responsible for Mims' "confinement." *Id.* at 19-21. The Return does not and cannot show otherwise.

The Petition, p. 18, also noted that the Amended Complaint did not allege, and Plaintiff did not prove, any of the three elements of a § 1983 claim set forth in *Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994).³ The Return utterly fails to show the "affirmative causal link" between the supervisor's conduct and the alleged injury, as required by *Shaw*. This failure is shown very clearly by the Return's citation only to R. X, 2640-47 as showing an "affirmative causal link." Return at 12. Those pages, which are from the deposition of Defendant Butkus, mention general concerns about Babcock, but do not even refer to Mims, much less to how some

³ Those elements, of which there are three, are as follows:

1. Actual or constructive knowledge on behalf of the supervisor that the subordinate's conduct was a "pervasive and unreasonable risk" of injury to citizens like the plaintiff;
2. Deliberate indifference or implied authorization of the conduct by the supervisor; and
3. An "affirmative causal link" between the supervisor's inaction and the constitutional injury suffered by the plaintiff.

13 F.3d at 799 (citations omitted).

In *Ashcroft v. Iqbal*, 556 U.S. 662, (2009) the Supreme Court noted that because masters do not answer for the torts of their servants in § 1983 cases, "the term 'supervisory liability' is a misnomer." *Id.* at 677. Indeed, the dissent in *Iqbal* opined that "[I]est there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating [] supervisory liability entirely." *Id.* at 693 (Souter, J., dissenting).

act by the Defendants “affirmatively caused” injury to Mims.⁴ Such a non-showing cannot possibly serve to defeat summary judgment in favor of the Defendants. To hold otherwise in the absence of an actual logical connection would be to impose strict liability or *res ipsa loquitor* liability, as Defendants have previously pointed out.

The Return does not cite anything in the Amended Complaint that specifically alleges involvement by Butkus or Lacy in connection with the “confinement,” which was the result of an uncontested Probate Court order. The reason the Return does not cite anything in the Amended Complaint is that there is nothing in it that can be cited. They are not mentioned by name in this regard. The theory of unlawful “confinement” as part of the Section 1983 was created entirely by the Court of Appeals, representing yet another instance of a violation by that court of the procedural rights of the Defendants.

6. State law claims against DDSN.

Finally, the Petition noted that the estate’s only state law claim is in the Fourth Cause of Action, entitled “Negligent Supervision.” R. I, 86. The Court of

⁴ The same pages of the record are cited on the following page (p. 13) of the Return as showing that Butkus and Lacy “attempted to thwart” efforts by Mims’ mother to have him discharged from Babcock. As with so many other assertions by Plaintiff, however, this one also has zero support in the cited pages. The Court of Appeals may have assumed, contrary to the absence of documentation in the record, that Plaintiff’s counsel actually had some factual basis for the barrage of generalized allegations made in Plaintiff’s filings. Such an assumption cannot withstand close scrutiny, as the Petition for Certiorari and the present Reply have demonstrated.

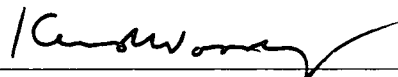
Appeals concluded, without offering a rationale, that “we find Mims sufficiently pled his causes [sic] of action for negligent supervision, negligence, and gross negligence.” App. 12, n. 10. However, and as the Circuit Court noted, R. I, 50-51, only supervisory negligence was actually pled, and even as to that claim, the Amended Complaint contained only conclusory allegations that lacked the irreducible element of the naming of a specific person who was negligently not supervised. *Bank of New York v. Sumter County*, 387 S.C. 147, 156, 691 S.E.2d 473, 478 (2010)(emphasis added). Once again, the Return contains nothing to overcome these deficiencies.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson, Wren & Plyler, P.A., attorneys for the Petitioners, does hereby certify that service of the **Reply to Return to Petition for Certiorari** in the above referenced action was made upon all counsel of record by placing a copy in the United States Mail, first class postage prepaid, at the

below listed addresses clearly indicated on said envelopes this the 5th day of July,
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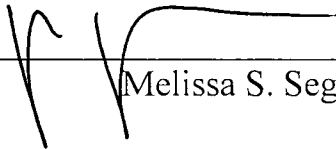
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