The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
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N O T I C E

In the Matter of Angela Deese Marshall

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on March 22, 2018, beginning at 4:00 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

February 20, 2018

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.

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N O T I C E

In the Matter of Frank Barnwell McMaster

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on March 22, 2018, beginning at 3:00 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

February 20, 2018

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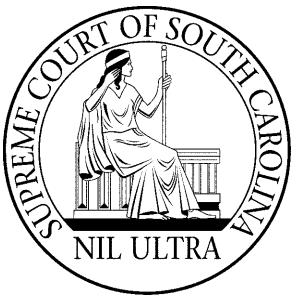

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 8
February 21, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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The Supreme Court of South Carolina

Re: Reinstatement of Electronic Filing Pilot Program in Richland County

Appellate Case No. 2015-002439

ORDER

On November 14, 2017, the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas was expanded to include Richland County. However, E-Filing was suspended in Richland County by Order dated November 16, 2017, due to unforeseen technical issues that made E-Filing problematic for attorneys and court personnel. Based on the substantial work performed by South Carolina Judicial Department and Richland County staff, the technical issues that adversely affected E-Filing have been remedied.

Accordingly, pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the E-Filing of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, shall be reinstated in Richland County effective March 8, 2018. Effective March 8, 2018, all filings in all common pleas cases commenced or pending in Richland County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Aiken	Allendale	Anderson	Bamberg
Barnwell	Beaufort	Cherokee	Clarendon
Colleton	Edgefield	Georgetown	Greenville
Greenwood	Hampton	Horry	Jasper
Kershaw	Laurens	Lee	Lexington
McCormick	Newberry	Oconee	Pickens
Saluda	Spartanburg	Sumter	Williamsburg
York—Effective February 27, 2018		**Richland—Reinstated March 8, 2018**	

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available on the E-Filing Portal page at http://www.sccourts.org/efiling/ to determine whether any

specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal page.

s/Donald W. Beatty
Donald W. Beatty
Chief Justice of South Carolina

Columbia, South Carolina
February 16, 2018

The Supreme Court of South Carolina

Re: Mandatory Summary Court Judge Mentoring Program

Appellate Case No. 2018-000030

ORDER

By Order dated August 13, 2013, the Supreme Court adopted a pilot program for mentoring to assist newly appointed summary court judges in their progression to the bench. Based on the success of the pilot program, this Court has determined it is appropriate to establish a permanent mandatory summary court judge mentoring program to be administered by South Carolina Court Administration.

Accordingly, the South Carolina Appellate Court Rules are hereby amended to add Rule 512, which is set forth in the attachment to this Order. Rule 512 shall be effective March 1, 2018.

This Order does not affect summary court judges who are currently subject to the South Carolina Summary Court Judges Pilot Mentoring Program. Instead, those judges must comply with the requirements of the South Carolina Summary Court Judges Pilot Mentoring Program.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
February 21, 2018

RULE 512
MANDATORY SUMMARY COURT JUDGE MENTORING PROGRAM

(a) Mentoring Program. Following a successful summary court judge mentoring pilot program, this rule has been promulgated by the Supreme Court of South Carolina to establish the Mandatory Summary Court Judge Mentoring Program. The program shall be administered by South Carolina Court Administration.

(b) Completion Required. All persons who complete the Magistrate and Municipal Judge Orientation Program following the effective date of this Rule will be required to participate in and complete the Mandatory Summary Court Judge Mentoring Program.

(c) Assignment of Mentor. South Carolina Court Administration shall assign a mentor judge to all summary court judges who complete the Magistrate and Municipal Judge Orientation Program and notify the summary court judge of the assignment. The summary court judge shall schedule an Initial Meeting with the mentor judge within thirty days of receipt of the letter notifying the summary court judge of the assignment. The mentor and summary court judge must complete an Individualized Mentoring Plan and submit a copy to Court Administration for review within thirty days of the Initial Meeting.

(d) Purpose of Program. The goal of the program is to provide summary court judges with the tools that will enable them to continually improve and enhance their ability to perform their judicial functions with appropriate levels of professionalism, in an ethical and fair manner, maintaining the dignity and respect which should accompany the office they hold. The three elements for summary court judges participating in the program, and which must be included in all Individualized Mentoring Plans, are:

(1) Before the hearing: prepare yourself for your role in the judicial process.

(2) In the courtroom: conduct yourself at a high ethical standard.

(3) Engage in ongoing learning and development in the area of ethics and professionalism.

(e) Uniform Mentoring Plan; Forms. South Carolina Court Administration shall prepare a Uniform Mentoring Plan and other forms to be approved by the Supreme Court.

(f) Certification of Completion; Failure to Complete; Evaluation.

(1) The summary court judge shall complete the program within one year of submission of the Individualized Mentoring Plan. Upon completion, the summary court judge shall file a Certificate of Completion with South Carolina Court Administration.

(2) If the summary court judge has not completed all requirements of the mentoring program within the required time frame or is otherwise unable to obtain a certificate from the mentor judge, the summary court judge shall provide a detailed response to South Carolina Court Administration explaining the reasons, including hardship reasons, for noncompliance. South Carolina Court Administration, in its discretion, may grant such additional time as it deems appropriate to file a Certificate of Completion.

(3) A willful failure to complete the program in a timely manner shall be a ground for discipline under Rule 7 of the Rules for Judicial Disciplinary Enforcement contained in Rule 502, SCACR, and may subject the summary court judge to sanctions under that rule. If the summary court judge fails to complete the program, South Carolina Court Administration may refer the matter to the Office of Disciplinary Counsel.

(4) If requested by South Carolina Court Administration, the summary court judge and mentor shall complete an evaluation of the mentoring experience following the filing of a Certificate of Completion.

The Supreme Court of South Carolina

Re: Mandatory Summary Court Judge Mentoring Program

Appellate Case No. 2018-000030

ORDER

This Court has adopted Rule 512 of the South Carolina Appellate Court Rules to establish a permanent mandatory summary court judge mentoring program to be administered by South Carolina Court Administration. Attached to this Order are the following documents:

Uniform Mentoring Plan
Individualized Mentoring Plan
Certificate of Completion

These documents are hereby approved for use with Rule 512, effective March 1, 2018.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
February 21, 2018

The Supreme Court of South Carolina

MANDATORY SUMMARY COURT JUDGE MENTORING PROGRAM

UNIFORM MENTORING PLAN

INTRODUCTION

Pursuant to Rule 512 of the South Carolina Appellate Court Rules establishing the Mandatory Summary Court Judge Mentoring Program, the Supreme Court has set out three objectives for the mentoring plan. These objectives are intended to be a guide to the development of the relationship between the mentor and the new summary court judge and should be addressed on an on-going basis over the course of the mentorship period.

The relationship between the mentor and new summary court judge is not a check-list of items to be covered and then ended. It is intended to be the beginning of a long-term professional relationship that enhances the new summary court judge's ability to perform his or her duties in a responsible and professional manner. The goal of the program is to provide new summary court judges with the tools that will enable them to continually improve and enhance their ability to perform their judicial functions with appropriate levels of professionalism, in an ethical and fair manner, maintaining the dignity and respect which should accompany the office they hold.

OBJECTIVES

The three elements set out by the Supreme Court are as follows:

Objective A
Before the hearing: prepare yourself for your role in the judicial process.

Objective B
In the courtroom: conduct yourself at a high ethical standard.

Objective C
Engage in ongoing learning and development in the area of ethics and professionalism.

Each objective is to be met through a series of action steps over the course of the mentorship year. Suggested action steps are included in this model plan; however, the mentor and new judge should work out a plan that best suits their schedules and workloads. The mentor and new judge must schedule an Initial Meeting within thirty days of being notified of the assignment of a mentor. The mentor and new judge must complete an Individualized Mentoring Plan, which must be submitted to South Carolina Court Administration (Court Administration) for review **within thirty days** of the Initial Meeting.

PLEASE NOTE

1. **All three elements must be included in your Individualized Mentoring Plan.**

2. **In order to complete the Mandatory Summary Court Judge Mentoring Program, all three elements in your Individualized Mentoring Plan must be met.**

SUGGESTED ACTION STEPS

It is important that you establish a clear understanding as to the expectations of both the mentor and the new summary court judge.

Establishing clear expectations is critical to the success of the mentoring relationship. The mentor and the new judge should meet in person as soon as possible and develop a plan to address completing all the objectives of the program. The goal is a clear plan of action for the course of the next year.

Things to consider include:

1. Schedule the Initial Meeting, which may be at the office of the mentor or the new judge, or casually for lunch;

2. Determine the frequency of "formal" contact, the best methods of communication, to include in-person meetings, telephone conversations, e-mails, or a combination of the three.

Objective A
Before the hearing: prepare yourself for your role in the judicial process.

The new judge should be aware of how his or her preparedness and professionalism affects the behavior and attitudes of lawyers, officers, and *pro se* litigants who appear in his or her court.

Things to consider as you set out the steps for meeting this objective include:

1. Periodic discussions on the following: the importance of wearing a robe when conducting court and recording all proceedings;

2. Discuss with the new judge the importance of maintaining control of the courtroom as well as methods for doing so; and

3. Ensure that the new judge gains an understanding of the importance of staying current with recent legislative and case law changes, as well as how to locate this information through the websites of the Judicial Department and the South Carolina Legislature.

Objective B
In the courtroom: conduct yourself at a high ethical standard.

The importance of developing professional standards and exercising civility in the courtroom cannot be overstated. Helping the new judge to understand the expectations placed on the judge by the Judicial Canons is critical to meeting this objective. Discuss the challenges that the new judge may encounter in upholding the requirements of the Canons. The mentor should observe the new judge in his or her courtroom initially and then again after at least three months. Additionally, the new judge shall observe the mentor holding court on at least one occasion. The mentor should stress the need to review the Advisory Opinions and Ethics Updates, which will provide guidance concerning the interpretation and practical application of the Judicial Canons.

Things to consider as you set out the steps for meeting this objective include:

1. Periodic discussions on the following: the role of the judge in the legal system; the judge's responsibility in adhering to the Judicial Canons; and the practical challenges in meeting those responsibilities;

2. Review the concept of judicial restraint; and

3. Ensure that the new judge gains an understanding of the local legal community's expectations of professionalism and behavior, including the importance of being on time for court and working all hours assigned.

Objective C
Engage in ongoing learning and development in the area of ethics and professionalism.

Common complaints against judges include allegations of bias, mishandling of court funds, and poor supervision of staff. The mentor should stress the importance of compliance with the Chief Justice's Financial Accounting Order, avoiding inappropriate *ex parte* communications, and supervising court staff to ensure compliance with the Judicial Canons.

Things to consider as you set out the steps for meeting this objective include:

1. Review the Financial Accounting Order and disciplinary opinions in which judges have mishandled court funds;

2. Review the provisions of the Judicial Canons that apply to court staff; and

3. Discuss the prohibition against *ex parte* communications as well as methods for avoiding inappropriate communications, including the appearance of impropriety.

PROGRAM REQUIREMENTS

The suggested action steps are offered as a guideline for the development of your Individualized Mentoring Plan. Each mentor and new judge should work out arrangements that best suit their specific professional relationship and work schedule. Given the relationship, other action steps may be more suitable than those suggested above.

The mentor and new judge must complete the Individualized Mentoring Plan and submit a copy to Court Administration for review within thirty days of the Initial Meeting. Periodically throughout the year, the plan should be reviewed and updated to ensure that it is still meeting the objectives of the program and the individual goals as set out by the mentor and new judge. Upon completion of the mentoring experience, a Certificate of Completion, signed by the mentor and new judge, must be submitted to Court Administration.

CONCLUSION

The mentor's relationship with the new judge has the potential to be one of the most influential relationships of the new judge's professional career. It is the goal of the program and the hope of the Supreme Court that the development of strong professional relationships will ensure the successful transition of the new summary court judge as he or she becomes a valuable member of the profession. The Court also hopes the relationships created through this program will help new judges achieve personal and professional success, support the continued civility of the profession, and ensure that judges hold themselves to, and comply with, the highest standards of the profession.

The Supreme Court of South Carolina

MANDATORY SUMMARY COURT JUDGE MENTORING PROGRAM

INDIVIDUALIZED MENTORING PLAN

Summary Court Judge: _____ S.C. Bar Number: _____

Mentoring Judge: _____ S.C. Bar Number: _____

The above-named new summary court judge and mentoring judge met on _____, 20__, and set out the following plan to comply with the three (3) elements of the Mandatory Summary Court Judge Mentoring Program as prescribed by the Supreme Court of South Carolina. ***Pursuant to Rule 512 of the South Carolina Appellate Court Rules establishing the program, the Individualized Mentoring Plan shall be submitted to South Carolina Court Administration for review within thirty days of the Initial Meeting between the mentor and new judge.***

OBJECTIVE 1: ***Before the hearing: prepare yourself for your role in the judicial process.***

To meet this objective, we have agreed to:

OBJECTIVE 2: ***In the courtroom, conduct yourself at a high ethical standard.***

To meet this objective, we have agreed to:

Objective 3: ***Engage in ongoing learning and development in the area of ethics and professionalism.***

To meet this objective, we have agreed to:

_____ _____

DATE **SIGNATURE OF MENTORING JUDGE**

_____ _____

DATE **SIGNATURE OF NEW SUMMARY COURT JUDGE**

The Supreme Court of South Carolina

MANDATORY SUMMARY COURT JUDGE MENTORING PROGRAM

CERTIFICATE OF COMPLETION

We hereby certify that Summary Court Judge _____:

_____Has completed all requirements of the Mandatory Summary Court Judge Mentoring Program as set forth in the Individualized Mentoring Plan submitted to South Carolina Court Administration on the _____ day of _____, 20____.

_____Has **not** completed all requirements of the Mandatory Summary Court Judge Mentoring Program as set forth in the Individualized Mentoring Plan submitted to South Carolina Court Administration on the above date. Pursuant to Rule 512 of the South Carolina Appellate Court Rules establishing this program, I am attaching a detailed response explaining the specific reasons why the requirements were not completed.

_____ _____

DATE **SIGNATURE OF MENTORING JUDGE**

_____ _____

DATE **SIGNATURE OF NEW SUMMARY COURT JUDGE**

_____ I am willing to volunteer in the future as a mentor.

_____ I am not willing to volunteer in the future as a mentor.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Benjamin Gecy, Appellant,

v.

South Carolina Bank & Trust, Jaime Hamner and Deborah Hamner, Respondents.

Appellate Case No. 2014-002712

Appeal From Beaufort County
Marvin H. Dukes, III, Circuit Court Judge

Opinion No. Op. 5538
Heard June 8, 2017 – Filed February 21, 2018

AFFIRMED

Robert V. Mathison, Jr., of Mathison & Mathison, of Hilton Head Island, for Appellant.

James John Wegmann, of Weidner, Wegmann & Harper, LLC, of Beaufort, for Respondents Jamie Hamner and Deborah Hamner; and Thomas A. Holloway, of Harvey & Battey, PA, of Beaufort, for Respondent South Carolina Bank & Trust.

MCDONALD, J.: Benjamin Gecy appeals the circuit court's grant of summary judgment in favor of South Carolina Bank & Trust (Bank), Jaime Hamner, and

Deborah Hamner (collectively, the Hamners), arguing summary judgment was improper because material questions of fact exist as to whether Bank intentionally interfered with the contracts between the Hamners and Gecy, whether the Hamners breached their contracts with Gecy, and whether Bank and the Hamners made negligent misrepresentations. Gecy further asserts the circuit court erred in declining to continue the summary judgment hearing so Gecy could compel discovery responses and take additional depositions. We affirm.

Facts and Procedural History

This case arises from a failed real estate and construction transaction between Gecy and the Hamners. In February 2010, the Hamners contracted to purchase 10 Meredith Lane, a parcel on a private road in Beaufort County, from Gecy for $150,000. Additionally, the Hamners contracted for Gecy to build them a house on the property for $156,900. Gecy referred the Hamners to Bank for financing. Later in February 2010, Bank informed Gecy that in order to approve the Hamners' financing application, all property owners on Meredith Lane needed to sign a road maintenance agreement (RMA).

According to Gecy, RMAs are generally only required for Veterans Affairs (VA) loans. Gecy contends Bank's own internal policies did not require the RMA; thus, under Gecy's theory, Bank misrepresented that the signed RMA was a requirement for approval of the Hamners' non-VA construction loan. Bank explained that the VA does not have a construction loan program, so the plan was for the Hamners' loan to begin as a conventional construction loan and roll over into a VA loan once construction was completed. Because the VA requires an RMA for its loans, Bank's policy in such situations is to require the RMA before closing on a construction loan when "the permanent loan would require it."

Closing on the transaction was originally scheduled for March 5, 2010, but when the closing did not occur, an automatic thirty-day extension took effect. On April 5—the date the extension expired—Gecy notified Bank that all necessary landowners had either signed or agreed to sign the RMA. However, neither Gecy nor the Hamners ever presented Bank with an RMA signed by all property owners. On April 9, 2010, the Hamners' attorney informed the closing attorney that the contracts were null and void because the Hamners were denied financing based, in part, on Gecy's failure to provide the signed RMA by April 5. Gecy then sued

Bank for tortious interference with contract and unfair trade practices, alleging Bank "directed or otherwise motivated" the Hamners away from their contracts with him. Separately, Gecy sued the Hamners for breach of contract. Finally, Gecy sued both Bank and the Hamners for civil conspiracy and negligent misrepresentation.
In March 2012, Bank moved for summary judgment—which the Hamners later joined—based in part on an affidavit from Diana Chalmers (Diana). Diana's affidavit stated she owned property on Meredith Lane and never signed the RMA, despite Gecy's repeated requests.

In July 2012, Gecy filed for bankruptcy, and the case was stayed until the bankruptcy discharge in November 2013. In February 2014, Gecy filed a pro se motion to compel discovery responses and a motion to continue the summary judgment hearing. In the motion for a continuance, Gecy asserted Diana's recent deposition testimony contradicted certain statements in her affidavit. Consequently, Gecy requested time to depose two additional witnesses: Diana's husband, Ed Chalmers, and "newly discovered witness" Robert Walters.[1]

The court denied Gecy's motion for a continuance and following a hearing, granted summary judgment in favor of Bank and the Hamners. At the subsequent hearing on his motion to reconsider, Gecy—now represented by counsel—argued his misrepresentation claim against Bank was valid, citing § 552 of the Restatement (Second) of Torts (1977). Gecy further argued the continuance should have been granted because he had actively prosecuted the case at all times, except during the bankruptcy stay. In response, Bank argued § 552 was inapplicable, and *Kerr v. Branch Banking & Trust*, 408 S.C. 328, 759 S.E.2d 724 (2014), was dispositive.

In September 2014, the court denied Gecy's motion to reconsider but amended its previous order. The court found *Kerr* controlled and was a "complete bar" to

[1] According to Gecy, Walters participated in an unrelated transaction with Bank in December 2012; the Walters transaction involved a piece of property on Hester Lane, another private road. Gecy asserts no RMA was filed at the time of the Walters closing and, although a RMA was later filed, it was not signed by all neighboring landowners.

Gecy's claims against Bank. Specifically, the court cited *Kerr* for the proposition that Gecy could not maintain an action against Bank because he was not a party to the Hamners' financing application.[2] Thereafter, Gecy appealed the grant of summary judgment, but only with respect to the causes of action for intentional interference with contract, breach of contract, and negligent misrepresentation.

Standard of Review

"In reviewing an order for summary judgment, the appellate court applies the same standard which governs the trial court under Rule 56 of the South Carolina Rules of Civil Procedure." *M & M Grp., Inc. v. Holmes*, 379 S.C. 468, 473, 666 S.E.2d 262, 264 (Ct. App. 2008). "Summary judgment is appropriate 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.'" *Id.* (quoting Rule 56(c), SCRCP). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below." *Id.* (quoting *Willis v. Wu*, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004)). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *Id.* (quoting *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006)). "[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." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Law and Analysis

A. Gecy's Claims Against Bank

1. Negligent Misrepresentation

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[2] The amended order also removed a statute of frauds analysis set forth in the original summary judgment order.

> In a claim for the tort of negligent misrepresentation where the damage alleged is a pecuniary loss, the essential elements include: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation.

Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 473, 581 S.E.2d 496, 504 (Ct. App. 2003).

Gecy primarily argues that § 552 of the Restatement (Second) of Torts validates his negligent misrepresentation cause of action—and *Kerr* is inapplicable—because Gecy was a Bank customer with open lines of credit. We disagree.

Kerr involved a company (Skywaves) that used BB&T to fund its capital needs pursuant to a factoring agreement. 408 S.C. at 329–30, 759 S.E.2d at 725. As Skywaves' business grew, it chose to enter a new and expanded factoring agreement with BB&T. *Id.* at 330–31, 759 S.E.2d at 725. Several months after entering the new agreement, a BB&T employee made a presentation to the appellants—who were already affiliated with Skywaves—and assured them BB&T would honor the new agreement. *Id.* at 331, 759 S.E.2d at 725. Based on these representations, the appellants invested in Skywaves. *Id.* A year later, BB&T ceased funding Skywaves, arguing Skywaves had defaulted under the terms of the new agreement. *Id.* Skywaves eventually sought bankruptcy protection and the appellants lost their investments. *Id.* The appellants, in their capacities as investors and Skywaves employees, sued BB&T for negligent misrepresentation, fraudulent inducement, negligence, and violation of the Unfair Trade Practices Act. *Id.* at 331, 759 S.E.2d at 725–26. The negligent misrepresentation claim was based upon the BB&T employee's presentation. *Id.* at 332, 759 S.E.2d at 726. The circuit court granted summary judgment to BB&T, and the appellants appealed the

court's findings as to the causes of action for negligence, negligent misrepresentation, and fraudulent inducement. *Id.*

Our supreme court noted the appellants were essentially trying to sue BB&T for breaching a contract between BB&T and its customer, Skywaves. *Id.* at 332–33, 759 S.E.2d at 726. Rejecting this claim, the supreme court held there was "no basis in the law for a finding that BB&T owed any duty to [a]ppellants, as non-customer investors, sufficient to support their claims." *Id.* at 333, 759 S.E.2d at 726. The court acknowledged that banks owe a limited duty of care to their customers, but explained this duty does not extend to non-customers when "the non-customers' claims are premised on disputed contractual obligations between a bank and its customer, but the non-customer is not an intended third-party beneficiary to that contract." *Id.* at 333, 759 S.E.2d at 726–27.

Likewise, *Kerr* bars Gecy's negligent misrepresentation claim against Bank. Assuming Gecy's allegations concerning the non-existence of both a VA loan and an RMA policy are true for the purposes of summary judgment, Gecy still holds a position similar to that of the investors in *Kerr*—he is attempting to proceed with a cause of action that, at its core, concerns a financing application between Bank and its customers, the Hamners. In this context, Bank owed no duty of care to Gecy—a non-customer for purposes of the Hamners' contract—when evaluating the Hamners' financing application. Thus, only the Hamners could properly pursue Bank for any irregularities or misrepresentations. *See Redwend*, 354 S.C. at 473, 581 S.E.2d at 504 (requiring as an element of a negligent misrepresentation claim that "the defendant owed a duty of care to see that he communicated truthful information to the plaintiff").

Further, we disagree with Gecy that § 552 applies to these facts. Section 552 provides in pertinent part:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails

> to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Restatement (Second) of Torts § 552 (1977).

Most of South Carolina's jurisprudence concerning § 552 was summarized in *First Federal Savings Bank v. Knauss*, 296 S.C. 136, 140, 370 S.E.2d 906, 908 (Ct. App. 1988):

> The concept of negligent misrepresentation as described in the Restatement (Second) of Torts is not new to South Carolina. This court recognized the existence of a duty to exercise due care in giving information when the defendant had a pecuniary interest in the transaction. *Winburn v. Insurance Company of North America*, 287 S.C. 435, 339 S.E.2d 142 (Ct. App. 1985). The South Carolina Supreme Court has recognized consultants may be liable in negligence to non-contracting parties who have reasonably relied upon their reports in taking action. *South Carolina State Ports Authority v. Booz–Allen & Hamilton Inc.*, 289 S.C. 373, 346 S.E.2d 324 (1986).

The most recent case cited by Gecy to support his § 552 argument is *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, in which our supreme court adopted

§ 552's standard of liability as to an accountant's duty to exercise reasonable care or competence in obtaining or communicating information. 327 S.C. 238, 241 n.3, 489 S.E.2d 470, 471 n.3 (1997). The court stated, "To establish liability under Restatement § 552, the party seeking to recover for a negligent misrepresentation must show he justifiably relied on the information communicated by the accountant." *Id.* at 241, 489 S.E.2d at 472.

Thus far, South Carolina has applied § 552 to non-contracting third-parties only in the accounting and consulting contexts. *See also Johnson v. Robert E. Lee Acad., Inc.*, 401 S.C. 500, 506 n.6, 737 S.E.2d 512, 515 n.6 (Ct. App. 2012) (noting South Carolina has recognized an accountant may have a duty to a third party under a negligent misrepresentation cause of action based on § 552); *Booz–Allen*, 289 S.C. at 376–77, 346 S.E.2d at 326 (stating when a consulting firm is hired by an entity to critique that entity's competitors for marketing purposes, the consulting firm has a duty to exercise due care and accurately report factual data about the competitors). Applying § 552 in such professional situations comports with § 552's intent to prevent the supplying of "false information for the *guidance of others in their business transactions*." (emphasis added). Conversely, such language neither envisions nor applies to transactions like the Hamner contract, for which Bank provided information about its own financing requirements to a third party in a real estate transaction. Therefore, § 552 is inapplicable, and the circuit court's grant of summary judgment as to negligent misrepresentation was proper.[3]

2. Tortious Interference with Contractual Relations

[3] We question whether Gecy's § 552 argument is preserved as Gecy appeared pro se at the summary judgment hearing and did not mention § 552. Gecy's counsel raised § 552 for the first time at the hearing on Gecy's motion to reconsider. *See e.g.*, *Bank of New York v. Sumter County*, 387 S.C. 147, 159, 691 S.E.2d 473, 479 (2010) ("It is axiomatic that an issue cannot be raised for the first time in a post-trial motion."). Moreover, even if § 552 were arguable here, Gecy has failed to set forth evidence that Bank provided "false information for the guidance" of anyone in this transaction. Gecy seems to suggest that Bank's requirement of an RMA signed by all property owners on the private road was "false" because an RMA should not be required for financing of the type sought by the Hamners. See *infra*, section A.2. We reject this contention.

Gecy contends that through discovery, he learned the Hamners did not apply for a VA loan; thus, he argues Bank's statements that it required a signed RMA were false. Gecy further asserts Bank refused to provide him with any guidelines or policies confirming Bank's RMA requirement. Finally, Gecy argues the information he discovered about Bank's separate transaction with Walters demonstrates the falsity of Bank's assertions about any RMA requirement.

"To establish a cause of action for tortious interference with contractual relations, a plaintiff must show: 1) the existence of a contract; 2) knowledge of the contract; 3) intentional procurement of its breach; 4) the absence of justification; and 5) resulting damages." *Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 480, 642 S.E.2d 726, 731 (2007). "[A]n action for tortious interference protects the property rights of the parties to a contract against unlawful interference by third parties." *Dutch Fork Dev. Grp. II, LLC v. SEL Properties, LLC*, 406 S.C. 596, 604, 753 S.E.2d 840, 844 (2012) (quoting *Threlkeld v. Christoph*, 280 S.C. 225, 227, 312 S.E.2d 14, 15 (Ct. App. 1984)).

Unlike Gecy's negligent misrepresentation claim, his cause of action for intentional interference with contractual relations does not require a duty analysis. Nevertheless, we hold summary judgment was proper because, in the light most favorable to Gecy, the evidence here established that Bank required a signed RMA for the Hamners to obtain financing. Bank was within its rights to set its own lending policies, and it informed Gecy clearly about the need for an RMA, even extending the closing date to obtain this compliance. Bank was not required to provide a written policy to verify its own underwriting requirement. It is undisputed that Gecy (and the Hamners) failed to obtain an RMA signed by all necessary landowners before the expiration date of the closing extension. Thus, Gecy has failed to show an issue of material fact demonstrating that *Bank* intentionally procured any breach of the contracts without justification. *See Eldeco*, 372 S.C. at 480, 642 S.E.2d at 731 (listing the elements of a tortious interference with contractual relations cause of action). Evidence about the Walters transaction— an unrelated transaction that occurred at a different location—does not give rise to the necessary "mere scintilla" or even an inference that Bank intentionally procured the breach of the Hamners' contracts with Gecy.

B. Gecy's Claims Against the Hamners

1. Breach of Contract

Gecy contends the Hamners' failure to perform pursuant to their contracts was not excused by Gecy's failure to comply with Bank's RMA requirement. Gecy asserts the Hamners refused to consider other financing options that had no RMA requirement and "disappeared for all intents and purposes" during the period immediately before the April 5, 2010 deadline so the closing could not occur as scheduled.

"In an action for breach of contract, the burden is on the plaintiff to prove the contract, its breach, and the damages caused by such breach." *Allegro, Inc. v. Scully*, 418 S.C. 24, 34, 791 S.E.2d 140, 145 (2016). "A condition precedent is an act which must occur before performance by the other party is due." *Alexander's Land Co. v. M & M & K Corp.*, 390 S.C. 582, 596, 703 S.E.2d 207, 214 (2010) (citation omitted). "If a contract contains a condition precedent, that condition must either occur or it must be excused before a party's duty to perform arises." *McGill v. Moore*, 381 S.C. 179, 187, 672 S.E.2d 571, 575 (2009).

We find the circuit court properly granted summary judgment on the breach of contract cause of action. Both the real estate contract and the construction contract had checked boxes under the "Method of Payment" headings indicating the contracts were "Subject to Financing." Both contracts also contained language stating, "Buyer's obligation under this agreement is contingent on Buyer obtaining said loan." Thus, financing was a condition precedent to the Hamners' performance of the contracts. *See M & M Grp.*, 379 S.C. at 477, 666 S.E.2d at 266 (stating "use of the language 'is contingent upon' is unequivocal and patently indicates the parties' respective obligations to buy and sell . . . are contingent on [the buyer's] ability to secure financing"). We agree with the circuit court that the "uncontroverted testimony" shows Bank did not offer the Hamners financing. Accordingly, the contractual provisions excused the Hamners' lack of performance.[4] *See id.* at 478, 666 S.E.2d at 267 ("The failure of one to perform

[4] Notably, when asked during his deposition about how the Hamners breached the contracts if the contracts were contingent upon financing, Gecy merely repeated his allegations that Bank made false statements about its RMA requirement. When asked again how the Hamners were responsible for Bank's actions, Gecy added,

under a contract because of his inability to obtain financing from a third party on whom he relied to furnish the money will not excuse performance, in the absence of a contract provision in that regard." (quoting *Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 209, 452 S.E.2d 622, 624 (Ct. App. 1994))).

As to Gecy's allegation that the Hamners hindered the contracts by their conduct, we note there were provisions in the contracts stating the Hamners had a duty to "provide all documents or information requested by the lending company in a prompt and timely manner" and a duty to "take any action that is needed or requested by Lender to process the loan application." Gecy admitted Jaime Hamner actively participated in attempting to obtain signatures for the RMA. There simply was no breach, nor any evidence to support the allegation that the Hamners "hindered" the contracts by their conduct.

2. Negligent Misrepresentation

Gecy asserts Jaime Hamner made false representations about the type of loan for which he applied, falsely indicated his willingness to close the transaction, and then "disappear[ed] during the critical period leading up to the scheduled closing on April 5, 2010."

"A claim for negligent misrepresentation may be made when the misrepresented facts induced the plaintiff to enter a contract or business transaction." *Armstrong v. Collins*, 366 S.C. 204, 220, 621 S.E.2d 368, 376 (Ct. App. 2005). "There is no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence." *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010) (quoting *AMA Mgmt. Corp. v. Strasburger*, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992)).

Gecy presented no evidence that the Hamners were anything but ready, willing, and able to perform pursuant to the contracts and close the transactions on either the original closing date, March 5, 2010, or the extended closing date, April 5, 2010. As noted above, Gecy admitted Jaime Hamner actively participated in

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"That's a good question. Maybe Mr. Hamner might not be responsible here. Maybe it's the bank. Maybe Mr. Hamner's got a cause of action against the bank."

attempting to obtain signatures for the RMA. It was only after Gecy failed to provide Bank with the signed RMA—and Bank thus declined to extend financing—that the Hamners told Gecy they no longer intended to complete the transactions. The contracts, contingent upon such financing, permitted the Hamners to do just that, and Gecy has failed to produce evidence of a negligently made false statement on which to predicate damages.

Further, even if Gecy could provide evidence of a false statement by the Hamners, his cause of action against them still fails as he did not justifiably rely upon any such misstatement. While it is true that "issues of reliance are ordinarily resolved by the finder of fact, 'there can be no reasonable reliance on a misstatement if the plaintiff knows the truth of the matter.'" *McLaughlin v. Williams*, 379 S.C. 451, 457–58, 665 S.E.2d 667, 671 (Ct. App. 2008) (quoting *Gruber v. Santee Frozen Foods, Inc.*, 309 S.C. 13, 20, 419 S.E.2d 795, 800 (Ct. App. 1992)).

C. Denial of Continuance and Motion to Compel

Gecy contends the grant of summary judgment should be "reversed as unfounded or premature" because the court denied his requests to depose two additional witnesses and denied by implication his motion to compel additional discovery.

We agree with the circuit court that Gecy's additional depositions and further discovery would not have "contribute[d] to the resolution of issues in the case." First, Ed Chalmers's deposition would have been relevant only to Gecy's breach of contract claim against the Hamners because Gecy sought to depose Ed to find out if he and Diana had agreed by email to sign the RMA. If they had, Gecy argues he could have made out "a prima facie case that everybody on that road had approved," and the Hamners could have proceeded with the closing. However, even if the Chalmers had *agreed* to sign the RMA, it would make no difference because no signed RMA was submitted before the expiration of the closing date extension. Without the RMA signed by all property owners on Meredith Lane, Bank declined to give the Hamners financing, and their non-performance was excused. Gecy admitted that the deposition would not establish Bank ever provided the financing.

Second, Robert Walters's deposition was unnecessary because he had no connection to this transaction. Walters participated in an unrelated transaction

with Bank in 2012 that involved an unrelated road maintenance agreement; his deposition would have provided no evidence that Bank owed a duty to Gecy or that Bank intentionally inferred with the Gecy-Hamner transaction.

Significantly, the motions for summary judgment were heard nearly two years after the filing of Gecy's verified complaint. All parties had a full and fair opportunity to develop the record. For these reasons, and because the additional depositions would not have changed the analysis of the merits of the summary judgment motions, the circuit court did not abuse its discretion by denying Gecy's motion for a continuance. *See M & M Grp.*, 379 S.C. at 474–75, 666 S.E.2d at 265 ("The grant or denial of a continuance lies with the sound discretion of the trial court and such ruling will not be reversed absent a clear showing of abuse of discretion.").

Conclusion

For the foregoing reasons, the circuit court's decision is

AFFIRMED.

GEATHERS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

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

Appellate Case No. 2014-001373

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

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

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Patricia Logan Harrison, of Columbia, for Appellant.

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

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

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

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

I.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV.

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

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

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

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

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

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

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

V.

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

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

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

VI.

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

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GEATHERS and MCDONALD, JJ., concur.