

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

The Honorable Diane Schaefer Goodstein, Circuit Court Judge

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Case No. 2008-CP-18-2286

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A.M. Kelly Grove,

Petitioner,

v.

South Carolina Department of Health  
and Environmental Control, BabyNet,  
Debra M. McCoy, in both her official  
and individual capacities, and Office of  
South Carolina First Steps to School  
Readiness,

Respondents.

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**PETITION FOR WRIT OF CERTIORARI**

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**SC Court of Appeals**

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Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioner A.M. Kelly Grove hereby petitions this Court to issue a writ of certiorari to review the opinion of the Court of Appeals captioned *A.M. Kelly Grove v. S.C. Dept. of Health and Environmental Control*, Op. No. 2013-UP-322 (S.C. Ct. App. filed July 17, 2013). This Court should grant the petition and reverse the Court of Appeals' decision, which is in conflict with prior decisions of this Court and of the United States Supreme Court, and thereby reinstate the jury verdict below.

**CERTIFICATE OF COUNSEL**

Counsel for Petitioner certifies that a petition for rehearing and rehearing *en banc* was made and finally ruled on by the Court of Appeals on September 27, 2013.

**QUESTIONS PRESENTED**

1. Whether a defamation plaintiff's evidence of lack of good faith, actual malice, improper scope and improper occasion supports a jury verdict over a defense of qualified privilege, irrespective of whether the evidence establishes publication to an improper party.
2. Whether questions concerning the existence or abuse of a qualified privilege asserted in defense of a defamation action are questions for the jury so long as material evidence against such privilege is in the trial record.
3. Whether evidence that Respondents' actions foreclosed Petitioner's employment opportunities in her chosen profession by disclosing allegations of serious character defects supports a claim under 42 U.S.C. § 1983 for violation of a liberty interest.

## STATEMENT OF THE CASE

The Court of Appeals and trial court have annulled the verdict of a Dorchester County jury, which was awarded to Petitioner Kelly Grove on her defamation claim after a week-long trial. The Panel's Opinion does not justify this extraordinary result with a single line of prose. The Opinion and the trial court decision which it affirms simply ignore the primary evidence Ms. Grove presented at trial. Both focus instead on an alternative ground for the verdict which Ms. Grove was not required to establish to defeat Respondent McCoy's qualified privilege defense.

The Panel's decision conflicts directly with this Court's own precedents regarding the factual issues to be determined by a jury in cases of qualified privilege. *See Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 485, 514 S.E.2d 126, 134 (1999). It also misapprehends this Court's rulings dictating a standard of review deferential to a jury's factual determinations. *See Shealy v. Doe*, 470 S.C. 194, 634 S.E.2d 45 (2006); *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997). It also conflicts with federal Supreme Court precedent regarding cases brought under 42 U.S.C. § 1983 for deprivation of a liberty interest. *See Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). Such conflicts provide more than ample grounds for this Court to exercise its discretion to grant a writ of certiorari.

Grove, a pediatric physical therapist's assistant, provided physical therapy services for children in the state's BabyNet system until March 2008, at which time Defendant Debra McCoy terminated her rights to treat patients in the BabyNet system. In two letters, one dated March 11, 2008 and a second dated April 23, 2008, McCoy published a number of false and defamatory statements regarding Grove. These letters

were addressed to Ms. Grove's employer, to Medicaid (the primary alternative payor for her services), and to the Department of Labor, Licensing and Regulation which governs her licensure. At the trial of this matter, McCoy's primary defense was not the truth of her statements or their actionability, but that they were made pursuant to the qualified privilege for defamatory statements under South Carolina law.

Grove refuted the qualified immunity defense with evidence that McCoy acted without good faith, with evidence that McCoy's statements were not limited in scope or sent on a proper occasion, and with evidence of McCoy's actual malice. Each of these grounds is *independently* sufficient to defeat the qualified privilege defense. Grove defeated McCoy's motion for a directed verdict based on such evidence. During the defense case, Grove also elicited testimony showing that the defamatory statement was published to a parent, and thus to an improper party, another sufficient ground to defeat any claim of privilege.

The Court of Appeals followed the erroneous path set by the trial court and considered only the latter issue, concerning evidence of publication to an improper party, in determining that the verdict should not stand. The Panel thus overlooked many issues presented by McCoy's assertion of a qualified privilege. The Panel plainly failed to consider the record evidence of McCoy's lack of good faith, failure to limit the statements to a proper scope or to a proper occasion, and actual malice.

The Court of Appeals' narrow review directly conflicts with this Court's decision in *Swinton Creek*, which is the first authority the Panel cites. As recognized in *Swinton Creek*, the question of whether a qualified privilege has been abused presents a variety of factual issues for the jury. In that case, this Court expressly enumerates as examples of

jury issues the very issues in dispute here: whether the defendant acted in good faith, whether the scope of the statement was properly limited, and whether the statement was sent only to proper parties. The Panel and the trial court erroneously overlooked the first two issues and considered the latter ground as the only question within the jury's province regarding abuse of a qualified privilege.

Neither the Panel nor the trial court ever analyzed the primary issues or evidence regarding the qualified privilege defense in order to decide those issues as a matter of law—except when the trial court decided in Ms. Grove's favor after reviewing the evidence on the defendant's motion for directed verdict. These issues and the record evidence supporting them simply have been overlooked since the jury rendered its verdict. Instead, the trial court seized on a secondary, alternative issue unnecessary for the jury's decision, and the Court of Appeals has followed suit.

The Panel and trial court also misapprehended the applicable evidentiary standard and failed to draw reasonable inferences in the light most favorable to Grove. This Court's precedent forbids any court from disturbing a jury's factual findings unless the record discloses no material evidence which could support them in the mind of a reasonable juror. The court reviewing the jury's determination must view the evidence and the inferences that can be drawn therefrom in the light most favorable to Grove, whether that court is the trial court on a motion for judgment notwithstanding the verdict or the Court of Appeals reviewing the trial court's order granting such motion. The record is replete with evidence to support the jury's rejection of the qualified privilege defense for a number of independent reasons addressed herein. Viewed through the proper lens, the record evidence also supports the jury's determination even on the single,

insufficient issue the reviewing courts have centered on—publication to an improper party.

Lastly, the Court of Appeals again followed the trial court and failed to review the record evidence and draw reasonable inferences in favor of Grove on her due process claim under 42 U.S.C. § 1983. The Panel's Opinion appears to recognize that the government action implicates Grove's liberty interest in practicing her profession and property interests in specific work she was doing at the time of the government action foreclosing such opportunities and specific work. The Panel cites applicable cases but does not apply the holdings to the case at hand, at least not with the proper review of the record evidence.

#### **SUMMARY OF GROUNDS FOR CERTIORARI**

Under Rule 242(b)(3), SCACR, certiorari is appropriate when a decision of the Court of Appeals is in conflict with prior decisions of this Court. As demonstrated below, Grove presented substantial material evidence at trial permitting the jury to infer McCoy's lack of good faith and actual malice, that is, reckless disregard of Grove's rights, as well as improper scope of publication and publication on an improper occasion. Although Grove has raised this issue in depth, both in post-trial motion papers (R. pp. 536-44, 585-643) and before the Panel, neither has given it any consideration. The failure to consider such evidence directly conflicts with this Court's holding in *Swinton Creek*, rendering certiorari appropriate. Furthermore, the Panel's construction of this Court's *Hanahan* and *Shealy* opinions is in direct conflict with the holdings of those two cases, making the ruling an appropriate subject for certiorari.

Likewise, under Rule 242(b)(5), SCACR, certiorari is appropriate where the Court of Appeals' decision conflicts with a decision of the United States Supreme Court in a case involving a federal question. In dismissing Grove's 42 U.S.C. § 1983 claim for deprivation of a liberty interest, the trial court and the Panel misapply the law as set forth by *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972), as further articulated in the "stigma-plus" test set forth by the Fourth Circuit in *Jackson v. Long*, 102 F.3d 733, 730 (4th Cir. 1996) and *Ridpath v. Board of Governors of Marshall Univ.*, 447 F.3d 292, 308 (4th Cir. 2006). This direct conflict makes the Panel's ruling an appropriate one for certiorari.

### ARGUMENT

**I. Evidence of lack of good faith, actual malice, improper scope and improper occasion supports a jury verdict over a defense of qualified privilege without regard to whether statements were published to improper parties.**

The key substantive legal questions before the trial court and the Court of Appeals on Grove's defamation claim were (1) whether McCoy established a qualified privilege from Grove's defamation action and (2) whether McCoy abused such privilege. As the primary opinion the Panel relied on makes clear, "the question whether the privilege has been abused is one for the jury." *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 485, 514 S.E.2d 126, 134 (1999). In that opinion, this Court offered an exemplary but non-exhaustive list of factual issues that should be left in the hands of a jury: (a) "whether the defendants acted in good faith in making the statement;" (b) "whether the scope of the statement was properly limited;" and (c) "whether the statement was sent only to the proper parties." *Id.* The Court of Appeals' decision erroneously takes each of

these very factual inquiries, and others, away from the jury. Even worse, it does so after considering only the last one.

The Court of Appeals overlooked extensive evidence of record supporting the jury's determination to reject the qualified privilege defense, including (i) testimony of witnesses that McCoy had a bias against Ms. Grove (R. p. 163, line 23-p. 165, line 5; R. p. 188, line 23-p. 189, line 4; R. p. 218, lines 5-10; R. p. 218, line 18-p. 219, line 1; p. 312, lines 23-24; R. p. 339, line 24-p. 340, line 6); (ii) admission by McCoy that certain of her statements were not accurate and that she in fact knew before she published them that they were not accurate (*e.g.*, R. p. 269, line 22-p. 272, line 4; R. p. 281, lines 5-9; p. 805); (iii) patent contradictions between McCoy's testimony and her libelous statements (*e.g.*, R. p. 264, lines 18-20; R. p. 313, lines 4-9; *cf.* R. pp. 806, 815-16); and (iv) direct conflicts in the testimony of McCoy and Ms. Grove regarding the issues addressed in McCoy's letters.

Grove presented this overlooked evidence primarily to advance three arguments, *any one* of which would defeat the qualified privilege defense: lack of good faith, a statement exceeding the scope of any privilege, and actual malice. Should this Court determine that Grove presented sufficient evidence to create a factual issue for the jury on *any one* of these issues, reversal of the trial court's JNOV order and reinstatement of the jury's verdict is warranted.

Grove sets forth the extensive evidence, including copious citations to the record, of McCoy's lack of good faith at pages 21 through 30 of her Final Brief to the Court of Appeals. Perhaps the most egregious instance is the completely false, innuendo-laden accusation in McCoy's letter to Grove's licensing board that Grove was involved in a

“potentially violent domestic dispute” with the parent of one of her patients and that she was therefore “very concerned for the well-being of other children and families Ms. Grove might come into contact with in the future.” (R. p. 815-16.) In fact, the uncontested evidence at trial was that McCoy had no idea what was going on and that Grove was trying to calm the father down because of his anger at the BabyNet program and at McCoy—and specifically *not* at Grove. (R. p. 272, lines 5-17; R. p. 274, lines 6-14; R. p. 284, line 18-p. 286, line 5; R. p. 301, lines 14-25; R. p. 327, line 9-p. 328, line 20.) Such accusation shows an improper bias on McCoy’s part against Grove, and the jury so found.

Grove also presented evidence of McCoy’s bias against Grove as a physical therapist’s *assistant*, as opposed to a physical therapist. Grove, a licensed physical therapist assistant, was in fact the only physical therapist’s *assistant* providing services for BabyNet in South Carolina. (R. p. 312, lines 23-24.) The evidence of bias includes not only Grove’s testimony that McCoy terminated her because McCoy believed she was unqualified to see BabyNet children as a physical therapist’s assistant despite the governing law and evidence to the contrary, (R. p. 163, line 23-p. 165, line 5; R. p. 188, line 23-p. 189, line 4; R. p. 218, lines 5-10; R. p. 218, line 18-p. 219, line 1), but also the corroborating testimony of a third-party parent to whom McCoy spoke about Grove confirming that bias (R. p. 339, line 24-p. 340, line 6).

Also glaringly in support of the verdict is McCoy’s admission that in her letter describing alleged complaints, her investigation, and violations of procedure as the basis for her action against Grove, she included a complaint regarding whether Grove was

adequately supervised which she knew to be false! (R. p. 269, line 22-p. 272, line 4; R. p. 281, lines 5-9; R. p. 805.)

Further, though perhaps not a surprise in light of the evidence above, McCoy admitted she never investigated the complaints against Grove despite her assurances in the defamatory letters that she had done so. That failure violated her duties as the Procedural Safeguards Officer as well as BabyNet policies and procedures. (R. p. 276, lines 7-13; p. 289, line 13-p. 290, line 1; p. 305, line 10-p. 306, line 17; pp. 813-14.)

McCoy's defamatory letters themselves, when compared with the actual evidence in the case, provide additional evidence of bias and lack of good faith:

- McCoy knowingly made false statements in her letters that she concluded Grove *violated* certain policies and procedures following *investigation* (R. p. 805 (“investigation of these complaints began in March 2006”) p. 814 (“BabyNet Program staff began investigating these complaints”); p. 806 (terminating Grove from BabyNet “[a]s a result of . . . [Grove’s] failure to comply with BabyNet policy and procedures and contract recommendations”). In fact, McCoy admitted in trial testimony that she had not made any such conclusions (R. p. 264, line 12-p. 265, line 7 (McCoy did *not* conclude Grove failed to “maintain professional relationships and boundaries with families served” ); p. 274, lines 4-25 (same); p. 313, lines 4-9 (McCoy stating that the decision to write the letter was “solely made [] on the fact that we had received these numerous complaints” without any investigation); *accord* p. 815 (letter stating that decision to terminate Grove made “[d]ue to the long history of complaints,” not any resulting investigation)).

- Grove gave and Defendants corroborated evidence showing that had McCoy investigated, as she claimed to have done, she would have found that Grove did not and could not have ordered expensive and inappropriate equipment on her own initiative (R. p. 197, line 1-p. 198, line 23; R. p. 319, lines 7-10 (McCoy admitting that a doctor's prescription is required for assistive technology equipment); R. p. 437, line 23-p. 440, line 14 (parent Kelly Hogan admitting same upon impeachment); R. p. 457, line 3-p. 458, line 4); R. p. 805, 814-15 (McCoy allegations)).
- Grove gave uncontradicted evidence that she submitted all her regular progress reports to her employer as required (R. p. 465, line 7-p. 466, line 15; R. p. 805, 814-15 (McCoy allegations)).
- Grove gave and Defendants corroborated evidence that a child's "natural environment" includes anywhere a child without disabilities might go, despite McCoy's contention in her letters that Grove took children to play facilities that were not part of the "natural environment" (R. p. 647 (BabyNet policy defining natural environments as "[s]ettings that are natural or normal for the child's age peers who have no disabilities"); R. p. 180, line 3-p. 182, line 7 (Grove testifying to same); R. p. 222, line 12-p. 223, line 4 (Grove testifying to same and that other therapists used similar facilities); R. p. 229, line 24-p. 230, line 18; R. p. 242, lines 12-24 (Grove's employers testifying to same); R. p. 266, line 13-p. 269, line 12 (McCoy admitting same); pp. 805, 814-15 (McCoy allegations)).

From this evidence, as set forth more fully in Grove's Final Brief to the Court of Appeals, the jury could reasonably infer that McCoy had an improper bias against Grove.

It could also reasonably infer that McCoy acted on that bias by lying about whether she had investigated Grove's actions and about her findings that Grove had violated certain policies and procedures in order to support her false and defamatory statements to Grove's employer and licensing authority. This evidence of a lack of good faith is, *by itself*, sufficient to defeat McCoy's qualified privilege defense.

The same evidence meets the common-law standard for actual malice set forth by this Court, that "the defendant's statement was motivated by ill will with the intent to injure the plaintiff, or that the statement was made with such recklessness as to show a conscious indifference toward or disregard of the plaintiff's rights." *Eubanks v. Smith*, 292 S.C. 57, 63, 354 S.E.2d 898, 902 (1987). By showing such actual malice, Grove overcomes the qualified privilege defense—without regard to whether any improper publication took place or any of the other elements of qualified privilege were met. *Id.*

The Panel and trial court also overlooked evidence demonstrating that the Defendant's statements exceeded the proper scope and proper occasion of any applicable privilege. McCoy's defamatory allegation regarding the alleged incident with the father was based on events Defendant admitted she did not investigate and claimed she did not consider in her decision to terminate Ms. Grove as an approved provider. (R. p. 274, lines 19-25; p. 275, lines 7-13; p. 276, lines 7-13; p. 289, line 13-p. 290, line 1; p. 305, line 10-p. 306, line 17; pp. 813-14.) This begs the question whether a description of the incident was necessary or whether it exceeded the scope of any applicable privilege. As to proper occasion, the March 11 letter accomplished any necessary reporting purpose to Grove's employer, Medicaid, and LLR; McCoy had no need to send a second letter for the same purported reporting purpose on April 23. It was this second letter that labeled

Ms. Grove a danger to children and families based on an incident of which Defendant admitted she did not know the facts. Thus, even if the first letter is somehow conditionally privileged, the second plainly exceeds the scope of any such privilege.

**II. The Panel's Opinion misapprehends the applicable evidentiary standard for judgment notwithstanding the verdict and improperly takes from the jury questions concerning qualified privilege in a defamation action.**

The Panel's application of the JNOV standard to the facts of this case is incomplete, one-sided, and ignores significant evidence in the record. Such a review plainly conflicts with this Court's duty to draw all inferences in the light most favorable to Ms. Grove and to preserve a jury's verdict if there is any evidence to sustain the implicit factual findings. *Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006) ("When reviewing a motion for directed verdict or JNOV, an appellate court must employ the same standard as the trial court"); *Burns v. Universal Health Servs., Inc.*, 361 S.C. 221, 231-32, 603 S.E.2d 605, 611 (Ct. App. 2004) (reciting standard of review deferential to jury verdict).

The Panel's string citation, with minimal comment, to cases addressing the evidentiary standard takes this Court's own holdings out of context. The Opinion cites *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997), for the proposition that "verdicts may not be permitted to rest upon surmise, conjecture, or speculation." As the *Hanahan* court recognized, this is a "corollary" of another rule: "when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court." *Id.* at 149, 485 S.E.2d at 908. The same opinion also holds that "[t]he issue *must* be submitted to a jury whenever there is material evidence tending to establish

the issue in the mind of a reasonable juror.” *Id.* These three statements are not contradictory; rather, they inform each other and together describe one standard.

But what constitutes “material evidence”? The Opinion offers as its answer a citation to *Shealy v. Doe*, 470 S.C. 194, 204, 634 S.E.2d 45, 50 (2006), which it cites for the proposition that to warrant the finding of a fact, circumstantial evidence must “lead to the conclusion with reasonable certainty and must have sufficient probative value to constitute the basis for legal inference, not for mere speculation.” Again, this statement of the legal rule is one-sided. The *Shealy* opinion goes on to provide that if circumstantial evidence allows a factfinder to reasonably infer the truth of a proposition, it permits a “legal inference” and necessarily creates a factual question for jury determination. Grove has met this burden.

*A. The evidence at trial supported a jury finding that McCoy published her defamatory statement to the mother of a child Grove treated.*

The issue to which both the trial court and the Panel appear to have devoted their sole attention is whether Grove presented sufficient evidence to support a jury finding that McCoy published her defamatory March 11, 2008 letter to Kelly Hogan, the parent of a child Grove treated. This is the only issue addressed in the Panel’s Opinion. It is the only issue about which McCoy has made any contention regarding surmise or conjecture, which in turn appears to be the basis of the Panel’s decision to affirm the trial court’s grant of JNOV on the defamation claim. McCoy has never disputed that such a publication would extend beyond the bounds of publication to a “proper party” as required to maintain the qualified privilege. Thus, the sole question on this element is whether Grove presented sufficient evidence to support a reasonable jury inference that McCoy sent the March 11, 2008 letter to Hogan. *Shealy*, 470 S.C. at 204-05, 634 S.E.2d

at 50-51. It is *necessary but not sufficient* for McCoy to prevail on this point to establish her qualified privilege.

Grove presents a detailed analysis on pages 18-21 of her Final Brief of why the only reasonable conclusion from the evidence at trial is that Hogan got her copy of the March 11, 2008 letter from McCoy. Seminal points include that Hogan had been in contact with McCoy for some time before (R. p. 285, lines 12-24; R. p. 295, line 11-p. 297, line 6; R. p. 299, line 20-p. 300, line 7); that Hogan had just complained to McCoy about Grove (R. p. 272, lines 5-13); that Hogan's complaint prompted McCoy's decision against Grove (R. p. 323, lines 21-25); that Hogan regarded this letter as a response to her complaint to McCoy (R. p. 822-24; R. p. 449, lines 1-4; R. p. 450, lines 4-15); and that there is no evidence of any communication between Hogan and any other person who received the letter except LLR, to whom Hogan herself sent a copy of the letter (R. p. 446, line 21-p. 449, line 4). During the trial itself, the court expressly agreed with Grove that the evidence created a question for the jury as to publication beyond the scope of any privilege. (R. p. 478, lines 21-23). McCoy's briefs in this case do nothing to contradict Grove's argument on this point and put forth no argument for any alternative inference.

The trial court and the Opinion apparently conclude that any publication by McCoy to Hogan "rest[s] upon surmise, conjecture, or speculation." *Hanahan*, 326 S.C. at 149, 485 S.E.2d at 908. A full review of the evidence, however, shows that Grove has presented circumstantial evidence from which the jury may reasonably infer the truth of the proposition that McCoy did in fact publish the letter to Hogan. *Id.* To hold otherwise, as the trial court and the Opinion do, would be to prevent juries from making

any inferences at all—effectively destroying the concept of circumstantial evidence altogether.

*B. The evidence at trial supported a jury finding that McCoy did not establish a qualified privilege or that she abused any such privilege.*

As discussed in Part I, *supra*, the assertion of a qualified privilege defense to a claim of defamation raises factual questions as to good faith, scope of the privilege and the statements, and as to actual malice. McCoy bore the burden of establishing a proper exercise of any claimed privilege. Some authorities support treating these questions as elements of the defendant's affirmative defense of qualified privilege:

To make the defense of privilege complete \* \* \* good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion and publication in a proper manner and to proper parties only, must appear. The absence of any one or more of these constituent elements will, as a general rule, prevent the party from relying upon the privilege. All of these questions are, however, questions of fact for the jury to determine according to circumstances of each case.

*Duckworth v. First Nat. Bank*, 254 S.C. 563, 573, 176 S.E.2d 297, 302 (1970). Other cases suggest these factual inquiries are part of determining whether a privilege, once established, has been abused. See *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 485, 514 S.E.2d 126, 134 (1999). The key point is that the defense of qualified privilege presents these factual issues for the jury's consideration.

The Opinion does not suggest that the Panel considered the evidence on these issues recounted in Part I, *supra*. To the extent the Court reviewed such evidence, it plainly did not draw all reasonable inferences in favor of Grove or the jury's verdict. Accordingly, any review was not pursuant to the applicable legal standard, which also constitutes reversible error in direct conflict with the law of South Carolina. *Wright*, 372 S.C. at 18, 640 S.E.2d at 495; *Burns*, 361 S.C. at 231-32, 603 S.E.2d at 611.

**III. State action disclosing allegations of serious character defects which forecloses employment opportunities supports a claim under 42 U.S.C. § 1983 for violation of a liberty interest.**

The trial court granted a directed verdict for Defendants on Grove's § 1983 claim for deprivation of a constitutionally protected due process liberty interest, as recognized in *Board of Regents v. Roth*, 408 U.S. 564 (1972). The Opinion correctly cites to *Sloan v. South Carolina Board of Physical Therapy Examiners*, 370 S.C. 452, 483, 6363 S.E.2d 598, 614-15 (2006), for the proposition that a person has a liberty interest in the right to follow a chosen profession free from unreasonable government interference—in Grove's case, physical therapy, which was in fact the very profession at issue in *Sloan*. It purports to apply—again correctly—the Fourth Circuit's "stigma-plus" test for violation of a liberty interest, as set forth in *Jackson v. Long*, 102 F.3d 733, 730 (4th Cir. 1996) and *Ridpath v. Board of Governors of Marshall Univ.*, 447 F.3d 292, 308 (4th Cir. 2006). A proper analysis of the facts of this case under the stigma-plus test, however—which the Opinion makes no effort to undertake—reveals that Grove did set forth facts sufficient to survive directed verdict and take this claim to the jury.

The Opinion appears to affirm the directed verdict on three heads: (1) that the state action did not "foreclose [Grove's] freedom to take advantage of other employment opportunities," *Jackson*, 102 F.3d at 730; (2) that the communications at issue did not imply the existence of "serious character defects such as dishonesty or immorality," but only alleged "incompetence," *Ridpath*, 447 F.3d at 308; and (3) that the charge of a serious character defect was not "publicly disclosed," *id.* at 312. Grove presented sufficient material evidence to allow a reasonable juror to find for her on each of these issues, rendering directed verdict improper.

First, McCoy's state action prevented Grove from being employed in practicing her chosen profession. BabyNet is a practical monopoly for pediatric physical therapists like Grove, (*see* R. p. 254, line 22-p. 256, line 3; R. pp. 808-811), and Grove's practice is limited to this area because of both health conditions and long experience in the field, (R. p. 148, line 10-p. 151, line 7; R. p. 193, line 1-p. 194, line 9). By banning Grove from performing BabyNet services without any investigation, notice, or opportunity for Grove to be heard on the matter, McCoy foreclosed Grove's ability to work in South Carolina as a pediatric physical therapist's assistant. Moreover, even without this evidence, the Court should presume that the state action barring Grove from providing therapy to BabyNet patients based on stigmatizing accusations will "foreclose other government employment opportunities" and prejudice Grove's private employment prospects as well. *See McNeill v. Butz*, 480 F.2d 314, 320 (4<sup>th</sup> Cir. 1973) (holding that court may surmise that the government's stigmatizing action will prejudice plaintiff's future employment opportunities).

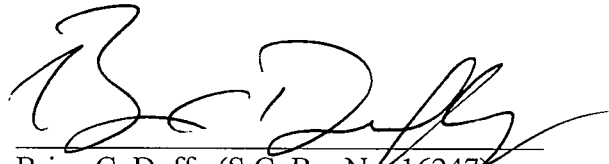
Second, the allegations in McCoy's two letters went far beyond incompetence. As noted *supra*, the letters alleged that Grove was dangerous to children and families. (R. p. 815-16.) They also alleged dishonesty, immorality, and fraud, including fraudulent overbilling, ordering expensive or inappropriate equipment, and diagnosis outside the scope of Grove's license (each of which allegations was proved false by uncontested evidence at trial). (R. p. 805, 814.) This evidence is sufficient for a reasonable juror to conclude that McCoy's statements accused Grove of "serious character defects such as dishonesty or immorality." *Ridpath*, 447 F.3d at 308.

Third, the Opinion misinterprets the meaning of *Ridpath's* requirement that the serious character defect at issue be "publicly disclosed." The purpose of requiring a "public" disclosure is to demonstrate the effect of the state action on the plaintiff's opportunities to obtain alternate employment in her chosen profession. *See id.* at 311 (liberty interest infringed by action that serves to exclude from one's occupation). The requirement makes good sense in cases where an employment action is at issue, such as the firing of a teacher or coach at a state educational institution. It is less directly applicable to cases such as this one, where the state action is regulatory and monopolistic, rather than simply being the action of one government employer in a market which includes many potential such employers. In any event, the relevant "public" is not the public at large, but that segment of the public which has the ability to affect Grove's employment opportunities. *Accord McNeill*, 480 F.2d at 317-18, 320 (finding a liberty interest violation where only "publication" in evidence was permanent disqualification placed in plaintiff's government file).

McCoy's false statements accusing Grove of serious character defects were made to exactly those persons and institutions which can control her ability to work as a pediatric physical therapist: BabyNet, Medicaid, LLR, and her own employer—not to mention the evidence, described in detail above, that the parent of a child Grove treated also received McCoy's letter. To hold otherwise would be to ignore the substantial wrong done to Grove by McCoy's state action and leave her without a remedy, contrary to the purpose of the Due Process Clause and 42 U.S.C. § 1983.

CONCLUSION

For the reasons stated, Petitioner respectfully prays this Court to grant her Petition for Writ of Certiorari to the Court of Appeals.



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*Attorneys for Petitioner*

October 24, 2013  
Charleston, South Carolina

# DUFFY & YOUNG LLC

96 BROAD STREET, CHARLESTON SC 29401

telephone 843-720-2044 facsimile 843-720-2047

ATTORNEYS AT LAW

October 24, 2013

***VIA FED-EX OVERNIGHT MAIL***

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1205 Pendleton Street  
Columbia, SC 29201

RE: A.M. Kelly Grove v. South Carolina Department of Health and Environmental Control, et al.  
Civil Aciton No.: 2008-CP-18-2286  
Appeals Court Case Tracking No.: 2011195626

Dear Ms. Kitchings:

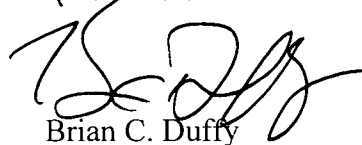
Enclosed for filing please find two copies of our Petition for Writ of Certiorari in the above-referenced matter, as well as two copies of a Proof of Service serving same on Respondents.

I would appreciate it if you would please return one stamped copy of each document to us in the envelope provided.

Should you have any questions or concerns, please do not hesitate to contact me.

With best regards, I remain,

Very truly yours,



Brian C. Duffy

Enclosures

cc: James A. Stuckey, Esq. (via courier)  
Alissa R. Collins, Esq. (via courier)

**RECEIVED**

OCT 25 2013

**SC Court of Appeals**

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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

The Honorable Diane Schaefer Goodstein, Circuit Court Judge

---

Case No. 2008-CP-18-2286

---

A.M. Kelly Grove,

Appellant,

v.

South Carolina Department of Health  
and Environmental Control, BabyNet,  
Debra M. McCoy, in both her official  
and individual capacities, and Office of  
South Carolina First Steps to School  
Readiness,

Respondents.

---

**PROOF OF SERVICE**

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I, Brian C. Duffy, of Duffy & Young, LLC, certify that I have served the **PETITION FOR WRIT OF CERTIORARI** on Respondents by delivering a copy to James A. Stuckey, Esq., at his office located at Stuckey Law Offices, LLC, 123 Meeting Street, Charleston, South Carolina 29401.

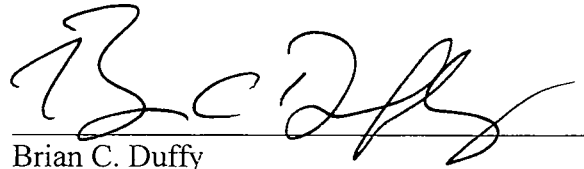
*[signature on following page]*

**RECEIVED**

OCT 25 2013

**SC Court of Appeals**

This 24<sup>th</sup> day of October, 2013 at Charleston, South Carolina.

A handwritten signature in black ink, appearing to read 'B C Duffy', written over a horizontal line.

Brian C. Duffy  
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