THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

FINAL BRIEF OF APPELLANT

Brian C. Duffy
J. Rutledge Young, III
Seth W. Whitaker
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044 (phone)
(843) 720-2047 (fax)
Attorneys for Appellant

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STATEMENT OF THE CASE

On September 24, 2010, a Dorchester County jury found for Appellant Kelly Grove on her defamation claim against Respondent Debra McCoy and awarded her $250,000 in actual damages. McCoy's primary defense to the defamation claim was qualified privilege. During the trial, the court acknowledged that Grove had presented sufficient evidence for the jury to infer an unprivileged publication of the defamatory material.

On June 28, 2011, the trial court granted McCoy's motion for judgment notwithstanding the verdict and entered judgment for McCoy. Despite the court's holding during trial that the evidence was sufficient, in its JNOV order the court held that the evidence was insufficient to support the very same inference. The trial court's order also failed to consider that Grove had presented evidence of actual malice and ill will which would independently permit the jury to find against McCoy on the qualified privilege defense.

Grove, a pediatric physical therapist's assistant, brought this action for defamation and violation of her constitutional rights to due process under 42 U.S.C. § 1983 on September 10, 2008. Grove's claims arise from false and unsubstantiated allegations

made against her by Respondents which induced them improperly to terminate her ability to practice pediatric physical therapy, as well as the publication of the false allegations to third parties.

On the eve of trial, at a hearing on September 17, 2010, the court reversed its own prior ruling and granted summary judgment from the bench on Appellant's § 1983 property interest claim. The remaining claims were tried on September 20-24, 2010. Upon the close of Appellant's case-in-chief, the court granted Respondents' motion for a directed verdict on the § 1983 liberty interest claim such that only the defamation claim remained, against only Respondent McCoy. Should this Court affirm the judgment notwithstanding the verdict, Grove requests that the case be remanded for a jury to resolve the § 1983 claims.

After the jury issued its verdict on September 24, 2010, Defendant timely moved for judgment notwithstanding the verdict or for a new trial on October 2, 2010. The parties briefed and argued the post-trial motions at a hearing held on December 10, 2010. On June 28, 2011, the trial court entered its JNOV order, which order was revised on July 12, 2011.

On July 15, 2011, Appellant timely served notice of appeal from the court's grant of JNOV in favor of Respondent McCoy, as well as the court's grant of a directed verdict on the § 1983 liberty interest claim and of summary judgment on the § 1983 property interest claim.

STATEMENT OF FACTS

Appellant Kelly Grove is a licensed physical therapist's assistant who specializes in physical therapy for young children with developmental disabilities, a field in which

she has worked for 28 years. (R. p. 200, lines 14-19). Grove grew up as a physical therapy patient through her pre-teens because of a bilateral hip disformation she was born with, and always wanted to work as a pediatric physical therapist. (R. p. 148, line 10-p. 149, line 6; R. p. 193, lines 1-6). She began working as an assistant to a physical therapist, and once programs became available to train physical therapist's assistants in the 1980s, Grove graduated from such a program and became a licensed physical therapist's assistant or "PTA." (R. p. 149, line 7-p. 151, line 7). Grove has difficulty, especially as she has gotten older, with lifting, carrying, and otherwise moving larger people, and is thus physically limited to working with small children. (R. p. 193, line 1-p. 194, line 9).

In South Carolina, nearly all physical therapy services for children aged 0 to 3 are provided under the auspices of Respondent BabyNet. (R. p. 254, line 22-p. 256, line 3; R. pp. 808-811). BabyNet, which is not income-based but strives to serve all South Carolina children who need therapy services, provides "early intervention" which coordinates a child's service plan, provides information to parents regarding providers, and serves as a payor of last resort for services and equipment when other sources, such as Medicaid, do not pay. (R. p. 154, lines 12-16; R. p. 167, line 23-p. 168, line 4; R. p. 252, line 22-p.253, line 3). All BabyNet services are provided in the child's "natural environment," which includes everyday routines, activities and places for similar children and families without disabilities, rather than in a clinical setting. (R. p. 647; R. p. 812; R. p. 180, lines 3-13; R. p. 222, line 12-p. 223, line 4; R. p. 229, line 24-p. 230, line 18; R. p. 242, lines 12-24; R. p. 266, line 13-p. 269, line 12).

BabyNet's own data show that it serves virtually all children in South Carolina in need of its services. (R. p. 254, line 22-p. 256, line 3; R. pp. 808-811). BabyNet is thus a monopolist and a de facto regulator of such services in South Carolina. A new parent of a child with a developmental delay, unlikely to know anything about pediatric physical therapy and concerned about his or her child's developmental problems, when offered a choice of providers by a BabyNet early interventionist, has no reason to choose a therapist for whose services BabyNet will not act as a payor of last resort over one for whom BabyNet will pay. (R. p. 249, line 1-p. 250, line 6).

Since March of 2006, Grove has been an independent contractor therapist for Charleston Children's Therapy Center ("CCTC"), a private entity which provides physical, occupational, and speech therapy services for children. (R. p. 226, lines 3-16). CCTC is in turn under contract to Defendant BabyNet to provide therapy services to BabyNet children in the greater Charleston area. (R. p. 226, line 20-p. 227, line 7). Most of CCTC's clients, including almost all children in the 0-to-3 age group (excepting a few who fail to qualify because their development is not sufficiently delayed but still seek therapy) come through BabyNet. (R. p. 153, lines 15-18; R. p. 227, lines 4-7; R. p. 228, lines 13-23). CCTC had never received any complaints about Grove's therapy services until learning from McCoy that BabyNet was terminating Grove's ability to see BabyNet patients. (R. p. 807; R. p. 233, lines 2-10; R. p. 234, lines 17-24).

Ms. Grove has earned an excellent reputation as a therapist with her employers, her supervisors, and the parents of her patients. (R. p. 241, lines 3-6; R. p. 245, lines 7-9; R. p. 248, lines 4-10; R. p. 324, line 22-p. 325, line 1; R. p. 325, line 21-p. 326, line 21). Grove's supervising physical therapist, Heather Maharrey, testified that Grove "was the

one I'd want seeing my child if I had a child that needed therapy" because of her wealth of experience and the good job she did, and had "100% trust" in her. (R. p. 325, line 21-p. 326, line 21; R. p. 334, lines 10-19).

Respondent BabyNet is a coalition of state government agencies which, at the time of the relevant acts in this case, was led by Respondent South Carolina Department of Health and Environmental Control ("DHEC"), of which Respondent McCoy was an employee. While this case was pending lead responsibility was transferred to Respondent Office of South Carolina First Steps to School Readiness ("First Steps"), which now employs McCoy in the same role.

Debra McCoy has worn many hats with respect to BabyNet, including Provider Relations Coordinator and Procedural Safeguards Officer. (R. p. 251, line 25-p. 252, line 3; R. p. 289, lines 13-17). One of McCoy's jobs is to ensure that a complaint process is in place, that the process is properly followed, and that complaints are investigated and resolved. (R. p. 257, lines 12-21; R. p. 289, line 18-p. 290, line 1). McCoy has failed to establish a standard process for investigating those complaints. (R. p. 258, line 11-p. 259, line 10; R. p. 260, lines 17-22; R. p. 261, line 1-p. 262, line 6; R. p. 282, lines 10-18; R. p. 321, line 22-p. 322, line 19). Furthermore, McCoy has a bias against physical therapist's assistants providing therapy services for BabyNet. (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; R. p. 339, line 24-p. 340, line 6).

McCoy received three e-mail complaints from supervisors in the BabyNet system and two from parents regarding Grove over a two-year period, but failed to investigate them herself, save on one point. (R. p. 275, line 14-p. 276, line 13; R. p. 277, lines 10-

17; R. p. 318, lines 10-22) (testifying as to various failures to investigate). The one investigation she did conduct, regarding supervision of Grove by a licensed physical therapist as required by statute, showed that Grove was properly supervised. (R. p. 269, line 22-p. 272, line 4).

McCoy testified that, to some extent, she relied on investigations she presumed were done by field personnel. (R. p. 269, lines 17-21; R. p. 278, line 5-p. 279, line 3; R. p. 282, lines 19-23). But the evidence at trial showed plainly that those personnel also failed to perform any investigation and simply passed complaints up the BabyNet hierarchy until they reached McCoy, presuming that McCoy would be the one investigating. Geri Connors, the regional "systems manager" in charge of relations between the state office and the regional providers, testified that she handled complaints she could not resolve in a simple fashion locally by sending them to McCoy to deal with them further, and expected that McCoy would communicate directly with the complaining party to investigate. (R. p. 416, line 16-p. 420, line 11; R. p. 428, lines 1-20). Likewise, Robert Crosby, a BabyNet early interventionist, testified that he did not investigate a complaint he got from a parent, but simply sent the complaint he received to his supervisor, Brenda Merrill, who relayed it to McCoy. (R. p. 406, lines 3-22).

One of the complaints was from Kelly Hogan, the parent of a BabyNet child who had received physical therapy from Grove. The complaint was dated February 26, 2008, but McCoy received it on March 4, 2008. (R. p. 272, lines 5-13; R. pp 822-824). This complaint, which McCoy admits she never investigated, nonetheless directly prompted McCoy's action against Grove. (R. p. 276, lines 7-13; R. p. 277, line 8).

The Hogan[1] family's child entered BabyNet in 2007 when he was already more than two years old, soon after the family moved to South Carolina from Massachusetts. (R. p. 431, lines 19-22; R. p. 446, lines 2-11). After a few therapy sessions with the child, Grove believed that he needed orthotics, specifically leg braces, to help with walking. (R. p. 167, lines 1-12; R. p. 170, line 17-p. 171, line 1). Grove's supervising physical therapist agreed, and the child's regular doctor prescribed the braces based on their joint written recommendation. (R. p. 169, lines 10-19; R. p. 331, lines 20-25; R. p. 437, line 23-p. 440, line 12). The braces were ordered and a request was put in to BabyNet for payment in July 2007, but the request languished in the BabyNet system for nearly three months without action. (R. p. 425, line 10-p. 427, line 8; R. p. 428, line 21-p. 430, line 2; R. p. 458, line 21-p. 464, line 4).

As the child neared age 3 when he would age out of BabyNet, the family and Grove became concerned that he had not received the braces yet. (R. p. 171, lines 21-24; R. p. 174, line 25-p. 175, line 7). When contacted by Grove about the delay, Geri Connors, the BabyNet official ultimately responsible, had no sense of urgency regarding the request and said that she would handle it "when I get around to it." (R. p. 169, line 16-p. 170, line 5; R. p. 174, line 18-p. 175, line 7; R. p. 175, line 15-p. 176, line 7; R. p. 463, line 20-p.464, line 4). Connors acknowledged at trial that Grove's complaint regarding the delay in ordering the braces and resulting frustration was legitimate. (R. p. 425, line 10-p. 427, line 8; R. p. 428, line 21-p. 430, line 2; R. p. 462, lines 5-16).

[1] Kelly Hogan's husband was born Brian Nutting, but now goes by the name Hogan. (R. p. 442, lines 8-14). Sometimes the family or the child are given the surname "Nutting-Hogan" or "Hogan-Nutting." Herein the family will be referred to simply as "Hogan."

In October 2007, McCoy met with Grove, Grove's supervising therapist, and Grove's employers, and all agreed that BabyNet should supply the braces even though the child had already aged out of BabyNet. (R. p. 166, lines 9-23; R. p. 172, lines 9-14; R. p. 231, line 10-p. 232, line 18; R. p. 243, lines 16-24). McCoy acknowledged that BabyNet had failed to act in a timely manner to provide the braces. (R. p. 295, lines 15-17). The child's therapy with Grove was complete by this time, and no complaints about the therapy Grove provided for the child were raised. (R. p. 173, lines 22-24; R. p. 272, lines 5-17).

Although BabyNet had taken action to resolve the matter, in the face of the father's irate complaints to BabyNet regarding the delay in getting the braces and threats of legal action (R. p. 172, lines 15-17; R. p. 186, line 7-p. 187, line 9; R. p. 199, lines 3-9; R. p. 430, lines 3-24), McCoy, Connors, and other BabyNet personnel, along with Grove and her supervising physical therapist, met with the Hogan family at their home in January 2008 (R. p. 186, lines 7-19; R. p. 285, lines 12-24). The father was so angry that day that Grove had to calm him down before the meeting could begin. (R. p. 467, line 18-p. 468, line 4). McCoy was sick that day, and Mr. Hogan was particularly concerned that his children might get sick if she came to the house—to the point that he wanted to cancel the meeting until Grove interceded. (R. p. 467, line 12-p. 468, line 14; R. p. 469, line 23-p. 470, line 13). At no point before or during the January 2008 meeting did the family make <u>any</u> complaints about the therapy services Grove had provided. (R. p. 272, lines 5-17; R. p. 274, lines 6-14; R. p. 327, line 9-p. 328, line 20). In fact, when BabyNet offered to provide the child with additional therapy sessions to help him get used to the

braces, McCoy offered the family more therapy sessions with Grove, and the family was willing to accept. (R. p. 187, lines 19-23; R. p. 188, lines 16-18).

In the meantime, Grove had hired the father, Brian Hogan, a contractor, to build a fence and perform other renovation work on her house at a time when Grove thought her treatment of the Hogan's child was over. (R. p. 220, line 18-p. 221, line 11; R. p. 435, lines 13-17). Well after Grove's treatment of the child was in fact complete, Grove asked Mr. Hogan that he fix problems related to shoddy work and materials.[2] (R. p. 446, lines 2-15). Four months after the Hogan child was discharged from BabyNet, (R. p. 188, lines 2-9; R. p. 220, lines 10-17), on February 20, 2008, Grove's attorney sent Mr. Hogan a letter formally requesting that he repair the defects, (R. p. 443, line 12-p. 444, line 19). At trial, Mrs. Hogan admitted that she had never made any complaint, oral or written, regarding Grove's therapy for her son—which had ended more than four months before—until just after receiving the letter from Grove's attorney about the construction defects. (R. p. 445, line 11-p. 446, line 1). After receiving the complaint about the construction work, Mrs. Hogan then prepared and sent her complaint regarding Grove to McCoy. (R. p. 822-824). The complaint included documentation about the construction issues which, had McCoy reviewed it, would have made Hogan's bias and motive clear. (R. p. 274, lines 19-25). McCoy testified, however, that she did not consider the material related to the construction issues in reaching her decision, and that she never concluded that Grove violated any professional boundaries or codes of conduct in hiring the father. (R. p. 274, lines 19-25; R. p. 275, lines 7-13).

[2] Grove eventually obtained a judgment against Mr. Hogan regarding the construction defects. (R. p. 441, lines 9-20).

Nevertheless, based solely on "where there's smoke, there's fire" logic that simply because she had received five written complaints, something must be wrong, McCoy decided to take action directly against Grove to expel her from the BabyNet program. (R. p. 277, lines 8-16; R. p. 313, lines 4-9; R. p. 314, lines 6-8; R. p. 320, lines 19-24; R. p. 321, lines 10-21). McCoy never gave Grove a chance to respond to the complaints before making her decision. (R. p. 161, lines 6-15; R. p. 224, lines 21-25). Although McCoy met with Grove's employers on March 6, 2008 before announcing her decision, she had already made the decision before that meeting. (R. p. 323, lines 21-25). McCoy wrote and published two defamatory letters related to these issues, dated March 11, 2008 and April 23, 2008.

In the March 11 letter, addressed to CCTC and copied on its face to the regional BabyNet manager, DHEC counsel, Medicaid, and the Department of Labor, Licensing, and Regulation ("LLR"), McCoy listed twelve separate complaints against Grove. (R. p. 805). McCoy made no effort to exclude complaints she failed to investigate or knew to be untrue. (R. p. 281, lines 5-11; R. p. 283, lines 5-16). The letter claimed that each complaint had been individually investigated: "The investigation of these complaints began in March 2006. . . . BabyNet Central Office has followed up with your agency and/or Kelly on each occasion after receiving the complaints." (R. pp. 805-806). The letter required that CCTC "no-longer allow Kelly Grove to serve BabyNet Children and that no other BabyNet children are assigned to her for PT services," because of "the numerous complaints filed against Ms. Grove and her failure to comply with BabyNet policy and procedures and contract recommendations." (R. p. 806) (emphasis added). Nothing in the letter states or implies that any of the complaints were disproved. The

letter gives the clear impression that the complaints had been investigated, found to be true, and were the "failure[s] to comply with BabyNet policy" that led to Grove's dismissal from BabyNet. Id.

The evidence presented at trial showed that several of the allegations in the letter were false, and that McCoy knew or could easily have determined that they were false:

- McCoy alleged that Grove was not properly supervised by a physical therapist as required by the statute governing physical therapists's assistants. (R. pp. 805-806). This is the only complaint McCoy bothered to investigate, and by her own admission, the investigation produced no evidence that Grove was not properly supervised. (R. p. 270, line 21-p. 272, line 4). Grove's supervising physical therapist at the time, Heather Maharrey, testified regarding her supervision of Grove and about McCoy's conversation with her on the subject. (R. pp. 817-818; R. p. 329, line 24-p. 330, line 9; R. p. 332, lines 1-20).
- McCoy alleged that Grove asked families to go to play gyms such as Tumble Bugs or House of Bounce for therapy and required parents to pay for these services, when BabyNet calls for services to be provided in the natural environment at no cost to parents. (R. pp. 805-806; see also R. p. 813). The evidence at trial actually showed that under BabyNet policy, "natural environment" can include places outside the home where young children without developmental delays often go, such as the play gyms, and that Grove did not require the families to pay for the cost of such facilities but met the cost herself out a special memorial fund she had established for the purpose. (R. p. 179, line 18-p. 181, line 12; R. p. 266, line 13-p. 269, line 12; R. p. 812). Grove also had

valid therapeutic reasons for using the play gyms for therapy, because they provide both equipment not available in the home and a large, air-conditioned indoor space for the children to run around in. (R. p. 181, line 13-p. 182, line 7). McCoy claimed that she called Grove in January 2007 to discuss this issue, but Grove denied ever receiving such a call, presenting a clear issue of credibility for jury determination. (R. p. 806; R. p. 176, lines 8-14).

- McCoy alleged that Grove failed to maintain "professional relationships and boundaries with families served." (R. p. 805; see also R. p. 814). With respect to Grove's hiring Brian Hogan to work as a contractor on her house, however, McCoy specifically testified that she did not conclude that this was a violation of any professional code of conduct, and that she did not even consider the materials related to the construction problems in reaching her decision. (R. p. 264, line 16-p. 265, line 7; R. p. 274, lines 19-25; R. p. 275, lines 7-13).

At trial, Mrs. Hogan admitted receiving a copy of the March 11 letter, forwarding it as an attachment to a complaint she made to LLR regarding Grove, and discussing the issues raised in it with her child's teachers. (R. p. 446, line 21-p. 449, line 19; R. p. 451, lines 1-8). She did not get the letter from Grove. (R. p. 450, lines 4-6). At the time, she was not in contact with any of the addressees of the letter; she was, however, in recent contact with McCoy as a result of the March 4 complaint. (R. pp. 822-824; R. p. 442, lines 13-16; R. p. 285, lines 12-24; R. p. 299, line 15-p. 300, line 7).

The April 23 letter is addressed to Grove's licensing authority, the Board of Physical Therapy Examiners. It opens: "This is to advise you of complaints I have received and investigated regarding [Kelly Grove]." (R. p. 813) (emphasis added). It

then lists twelve complaints substantially similar to those in the March 11 letter. In the April 23 letter, McCoy claims that "[a]s part of the investigation, I spoke directly with the families and BabyNet staff filing the complaints." (R. p. 814). Again, McCoy testified at trial that in fact she did not do anything to follow up on the complaints except the supervision complaint, which (as noted above) she found no evidence to support. (R. p. 269, line 22-p. 272, line 4; R. p. 275, line 14-p. 276, line 13; R. p. 277, lines 10-17; R. p. 318, lines 10-22).

The April 23 letter twists the facts known to McCoy regarding the Hogan family beyond recognition. McCoy states that "[t]he initial complaint from the family was that the child had not received the services that he was entitled to." (R. p. 814). As McCoy acknowledged at trial, the "services" the child did not receive were the braces; the Hogan family made no complaints regarding the services that Grove provided until much later. (R. p. 274, lines 6-14; R. p. 284, lines 11-17; R. p. 327, line 9-p. 328, line 20). McCoy then says she met with the family, Grove, and other involved persons "[i]n an attempt to get the child's services." (R. pp. 814-815). McCoy goes on to describe the January 2008 meeting, when in fact BabyNet had already decided to provide the child's braces in October 2007, and set up the January 2008 meeting in an effort to smooth things over with the irate father. Id.

McCoy's efforts to smear Grove then took a more personal turn. McCoy states that:

> When the BabyNet staff arrived for the meeting, some staff observed someone angrily interacting with the child's father outside. We were encouraged to remain in our car because it appeared as if a potentially violent domestic dispute was occurring. Staff then realized it was Ms. Grove who was fighting with the father.

(R. p. 815). At trial, McCoy admitted that she had no idea what was taking place, and was too far away to see or hear. The uncontroverted evidence at trial actually showed that Grove was trying defend BabyNet's actions and to calm the father down before the meeting began. (R. p. 467, line 7-p. 468, line 14).

McCoy also asserted in the letter that BabyNet providers were prohibited from entering into personal services contracts with clients. (R. p. 815). In fact, as McCoy admitted, no such policy exists; BabyNet providers are not permitted to solicit for other businesses or causes which they may be involved with, but there is no prohibition in BabyNet's rules against arms-length transactions such as the one Grove entered for construction. (R. p. 651; R. p. 265, line 8-p. 266, line 12). Furthermore, the evidence also showed that Grove entered the arrangement at a time when she thought her treatment of the Hogan child was done, and did not make any complaints about the work until her therapy for the child actually was complete. (R. p. 435, lines 13-17; R. p. 446, lines 2-15).

The April 23 letter concludes with the following passage:

> The BabyNet Program is very concerned about the well-being of other children and families Ms. Grove might come into contact with in the future. We therefore ask that you investigate Ms. Grove's conduct to determine whether it is consistent with licensing standards.

(R. p. 816). This passage goes beyond any failure to comply with policy to imply that Grove represented an actual threat to the safety of children and families to the extent that McCoy believed that LLR needed to act against Grove to protect them, an allegation McCoy never made elsewhere or testified to.

At trial, McCoy failed to produce any evidence resulting from any investigation on her part supporting the truth of the allegations against Grove. Evidence was limited to the e-mails reporting the complaints to her, and was admitted for the limited purpose of

showing that a complaint had been made. (R. pp. 819-821; R. p. 291, line 12-p. 292, line 25; R. p. 298, lines 2-21; R. p. 302, line 12-p. 304, line 10). Grove, on the other hand, presented evidence that a number of the allegations were false. In addition to the evidence regarding proper supervision, attendance at and payment for play gyms, and maintenance of professional boundaries described supra, as well as the bias and motive of the Hogan complaints, Grove established that the following other allegations—none of which McCoy investigated—were also false:

- McCoy alleged in both letters that Grove ordered expensive and inappropriate equipment for children. (R. p. 805; R. p. 814). In fact, as McCoy was well aware, Grove lacks authority to order equipment; her supervising physical therapist had to agree with her recommendation and a licensed physician had to prescribe the equipment before it could be ordered. (R. p. 197, line 1-p. 198, line 23; R. p. 319, lines 7-10; R. p. 437, line 23-p. 440, line 14; R. p. 457, line 3-p. 458, line 4).
- At trial, McCoy produced for the first time evidence about an improperly ordered bath chair from an early interventionist, Jennifer Horres, who came into the affected child's case after the fact. (R. p. 805; R. p. 814; R. p. 409, line 25-p. 410, line 23). Horres did not have any personal knowledge of how the chair was ordered. (R. p. 413, line 24-p. 414, line 25). Grove, the only witness actually involved in the child's case at the time the chair was ordered, testified that bath chairs are occupational therapy equipment and that the occupational therapist ordered it. Grove had no involvement with ordering the bath chair. (R. p. 458, lines 5-20).

- McCoy alleged in both letters that Grove discharged children from BabyNet because of scheduling conflicts. (R. p. 805; R. p. 814). Grove denied ever discharging a child from BabyNet because of a scheduling conflict. (R. p. 184, line 15-p. 185, line 3). Furthermore, Grove's supervising therapist was required to sign off on any discharge. (R. p. 332, line 24-p. 334, line 23).
- McCoy made two contradictory allegations in both letters: first, that Grove did not work with the children during therapy but talked to the parents instead, and second, that Grove failed to educate the parents about how to incorporate therapy into their daily routines. (R. p. 805; R. p. 813). As Grove testified, she strives to do both as appropriate, but when she talks to the parents during therapy sessions it is about the child. (R. p. 183, line 20-p. 184, line 14; R. p. 195, lines 4-15).

Based on the evidence, the jury returned a verdict for Grove on the defamation claim against McCoy and awarded her $250,000 in actual damages. (R. pp. 37-38).

STANDARD OF REVIEW

In ruling on a motion for directed verdict or judgment notwithstanding the verdict, a trial judge may not disturb the jury's factual findings unless the record discloses no evidence which reasonably supports them. Rule 50(a)-(b), SCRCP; Burns v. Universal Health Svcs., Inc., 361 S.C. 221, 231-32, 603 S.E.2d 605, 611 (Ct. App. 2004). The trial judge must view the evidence and the inferences that can be drawn therefrom in the light most favorable to the nonmoving party. Id. at 232, 603 S.E.2d at 611. The judge's concern is solely with the existence of evidence, not its weight. Id. An appellate court applies the same standard to a JNOV motion as that applied by the trial court. Wright v. Craft, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006). The jury's verdict must be

upheld if there is any evidence to sustain its implicit factual findings. Id. Because a motion for JNOV is simply a renewal of a directed verdict motion, a motion for directed verdict is subject to the same standards as a motion for JNOV. Glover v. N.C. Mut. Life Ins. Co., 295 S.C. 251, 256, 368 S.E.2d 68, 72 (Ct. App. 1988).

In reviewing a ruling on a motion for summary judgment, the appellate court likewise applies the same standard as the trial court. Shirley's Iron Works, Inc. v. City of Union, 387 S.C. 389, 396, 693 S.E.2d 1, 4 (Ct. App. 2009). The evidence and all reasonable inferences must be drawn in favor of the non-moving party. Id. The non-moving party need only produce a mere scintilla of evidence to withstand a motion for summary judgment. Id. at 396, 693 S.E.2d at 4-5.

ARGUMENT

I. THE JURY PROPERLY REJECTED McCOY'S CONTENTION THAT HER ACTIONS WERE PROTECTED BY A QUALIFIED PRIVILEGE.

The jury properly rejected the defense of qualified privilege based on the evidence before it. In fact, the evidence supported the jury's decision on a number of grounds. To establish the affirmative defense of a qualified privilege, McCoy had to prove each of the following five elements: (1) good faith; (2) an interest to be upheld; (3) a statement limited in scope to this purpose, (4) a proper occasion, and (5) publication in a proper manner and to proper parties only. Conwell v. Spur Oil Co., 240 S.C. 170, 178, 125 S.E.2d 270, 274-75 (1962). At trial, Grove focused her challenge on three of these five elements: first, good faith, which may be defeated by a showing of actual malice; second, a statement limited in scope to the proper purpose; and, third, publication in a proper manner and to proper parties only.

In the Order vacating the jury verdict, the trial court focused solely on the issue of publication in a proper manner and to proper parties only. (R. pp. 17-18). The evidence in the record, however, raises questions of fact regarding not only publication to improper parties but also the failure to act in good faith and the improperly broad scope of the statements.

A. McCoy improperly published a defamatory statement to the mother of a child Grove treated.

Respondent McCoy asserted a qualified privilege to publish statements about Grove to her employer, certain officers and representatives of BabyNet and DHEC, Medicaid, and LLR. (R. p. 280, lines 2-11). McCoy is not privileged to publish defamatory information concerning complaints about Ms. Grove, purported investigations of the complaints, and their fanciful results to people outside of that group, and does not claim otherwise. In particular, publication of such statements to parents of former BabyNet children is not protected. But one such parent, Kelly Hogan, received McCoy's March 11, 2008 letter. How did she get it? The evidence leads to one reasonable conclusion: Respondent McCoy sent it to her.

Hogan had just sent a written complaint to McCoy about Grove, which McCoy received on March 4, 2008. (R. p. 272, lines 5-13). McCoy made the decision to revoke Grove's BabyNet rights within a day or two (R. p. 323, lines 21-25), and sent her first letter within a week of receiving the complaint from Hogan (R. pp. 805-806). McCoy had been working personally with the Hogans for months prior to the Hogan complaint regarding BabyNet's admitted failure to provide braces for their child. (R. p. 285, lines 12-24; R. p. 295, line 11-p. 297, line 6; R. p. 299, line 20-p. 300, line 7). McCoy even

met with the Hogans at their house to hear their concerns and propose a remedy for the situation. (R. p. 285, lines 12-24).

Of all the parties to whom Hogan sent her complaint, McCoy is the only one who had a copy of the March 11 letter. Hogan understood the March 11 letter as a response to her complaint demonstrating that Grove had been "disciplined for her wrongdoings," which is how Hogan characterized the letter in her subsequent complaint to LLR. (R. pp. 822-824; R. p. 449, lines 1-4; R. p. 450, lines 4-15). Only McCoy had a reason to send the March 11 letter to Hogan, having received Hogan's complaint a week before and made her decision to remove Grove from BabyNet based on that complaint. (R. p. 442, lines 13-16; R. p. 824).

There is no evidence of any relevant communication between Hogan and any other person who received McCoy's letter. We know that Hogan did not receive the letter from Grove. (R. p. 450, lines 4-6). McCoy had been Hogan's contact person at BabyNet for some time, beginning with the call to set up the meeting at the Hogan home months before. (R. p. 289, line 13-p. 290, line 1; R. p. 295, line 11-p. 297, line 6; R. p. 299, line 20-p. 300, line 7). Hogan had no reason to communicate with Ms. Grove's employer, CCTC, given that her son's treatment through CCTC had ended roughly four months earlier when he turned three years old, and there is no evidence that she did so. (R. p. 152, line 24-p. 153, line 25; R. p. 172, lines 2-6; R. p. 195, line 20-p. 196, line 5; R. p. 446, lines 2-11). Hogan also had no reason to communicate with anyone at the entirely separate Medicaid program, and there is no evidence that she ever did. The lone remaining entity copied on McCoy's letter was LLR. Hogan obviously did not get the letter from LLR—she later sent it to them. (R. p. 446, line 21-p. 449, line 4).

The unmistakable inference is that McCoy provided Hogan a copy of the March letter. In fact, the very issue of this inference arose during trial. The court replayed the audio recording of the relevant testimony outside the presence of the jury and agreed that such an inference was reasonable based on the evidence. (R. p. 471, line 7-p. 482, line 14). Immediately after listening to the testimony, the court was quite certain that the evidence created a question of fact for the jury to determine:

> I think you could argue to the jury that inference. I don't think there's any question that you're entitled to argue that.

(R. p. 478, lines 21-23) (emphasis added).

Even after further discussion concerning whether there was evidence of the letter being sent to parents other than Ms. Hogan, the court reaffirmed its conclusion:

> I do think that you covered the topic with Ms. Hogan about any additional publications. And—and it is what it is. And there's certainly—I think you can argue that inference. I think you can argue the inference. I think they can argue a different inference.
>
> . . .
>
> But I think you can argue an inference as well.

(R. p. 482, lines 6-14).

The court addressed the same issue at the close of evidence when defendant renewed her motion for directed verdict. Counsel for Grove specifically argued that the evidence permitted a reasonable inference that McCoy published the statements to Hogan. The court again came to the same conclusion: "I do believe that a—a jury issue has been generated." (R. p. 484, lines 2-13).

Viewed in any light—and especially in the light most favorable to Grove—there is not "any question" that the evidence supports a reasonable inference that McCoy provided the letter to Hogan. The jury's verdict must be upheld on JNOV if there is any

evidence to sustain its implicit factual findings. Wright, 372 S.C. at 18, 640 S.E.2d at 495. The trial court made that very ruling on a directed verdict motion just after hearing the evidence. A few days shy of nine months later, the court repudiated the jury verdict on the basis that no reasonable inference could be drawn from the evidence that McCoy provided the letter to Hogan: "Given that Plaintiff presented no evidence that it was Dr. McCoy who provided the letter to Kelly Hogan, the Court can only conclude that any inference or presumption from this incident that seeks to defeat the defense of qualified privilege by excessive publication by Defendant is based on pure speculation and conjecture." (R. pp. 17-18). The trial court erred when it overturned the jury verdict on a ruling flatly contradictory to its considered rulings during trial. If the court could repeatedly draw the inference at issue when analyzing the evidence for that specific purpose during trial, how can it be that the jury cannot draw that same inference? As the record, the court's contemporaneous rulings, and the jury's own verdict demonstrate, one can reasonably infer from the evidence that McCoy provided the letter to Hogan. In its order, the trial court failed to view the evidence and the inferences that can be drawn therefrom in the light most favorable to Grove. See Burns, 361 S.C. at 232, 603 S.E.2d at 611.

B. Grove presented ample evidence that McCoy acted with actual malice and therefore not in good faith.

The applicable common-law standard for actual malice is 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); see also (R. p. 488, lines 12-24) (charging the jury). By showing such actual

malice, Grove allowed the jury to reject the good faith element of McCoy's qualified privilege defense. Eubanks, 292 S.C. at 63, 354 S.E.2d at 902.

Grove presented three types of evidence that McCoy acted with actual malice. First, McCoy stated that she had concluded that Grove violated certain policies and procedures when in fact she had not made those conclusions. Second, McCoy represented that she had investigated complaints when she knew she had not. The evidence revealed that investigation or even simple analysis would have dispelled many of the complaints. Third, the light in which McCoy cast certain complaints, her choice to send two letters instead of one, her decision to urge a review of Grove's licensure, and other witnesses' testimony regarding McCoy's bias against Grove together also provide sufficient evidence to support a jury finding that McCoy acted with ill will.

The context of the false statements is relevant to discerning their true meaning in a defamation action. Erickson v. Jones Street Publishers, L.L.C., 368 S.C. 444, 483, 629 S.E.2d 653, 674 (2006); see also Eubanks, 292 S.C. at 62, 354 S.E.2d at 901 (making similar use of context in determining defamatory nature of statements). In this case context is very important. McCoy recounted her illusory investigations and fallacious findings to Ms. Grove's licensing agency and to the main alternative source of payment for her services. McCoy actively threatened the only livelihood Grove had known for the past twenty-eight years, and did so as the Procedural Safeguards Officer of BabyNet. Against this backdrop, McCoy's actions demonstrate actual malice.

1. McCoy stated that Grove had committed violations of policy but never concluded any violations occurred.

The letters purport to reach conclusions based on McCoy's investigations that Grove had violated BabyNet policies. When pressed at trial, McCoy tried to re-

characterize her letters as simply listing complaints, passing them along without comment: "I didn't conclude that Ms. Grove violated that. But I—what I stated in my letter is that was a complaint that was made to me." (R. p. 264, lines 18-20; accord R. p. 313, lines 4-9). The words she chose for the letters belie those she subsequently chose when defending herself at trial:

- "As a result of the numerous complaints filed against Ms. Grove and her failure to comply with BabyNet policy and procedures and contract recommendations ...." (R. p. 806) (emphasis added);

- "Ms. Grove had entered into a personal business arrangement with the family. (BabyNet providers are not permitted to enter into personal contracts with their clients for services.)," (R. p. 815); and

- "Ms. Grove has let her personal business dispute completely overshadow her responsibilities as a BabyNet service provider," (R. p. 816).

Even if McCoy had not expressly stated conclusions regarding violations of policy, her letters plainly insinuate that Grove violated BabyNet policies by listing complaints, reporting that she investigated them, and stating that she revoked Grove's rights to treat BabyNet children as a direct result. Such insinuation, where false and malicious and having plain meaning, is actionable under South Carolina defamation law. Eubanks, 292 S.C. at 62-63, 354 S.E.2d at 901. If it were not her intention to convey that message, McCoy easily could have made clear that she was passing along complaints and that she took action only because she had received the complaints, not because she had investigated and concluded Grove committed violations. Instead, with reckless disregard (at best) for Ms. Grove's rights and her future, McCoy conveyed a far different message to the authorities who determine whether Grove ever works again as a physical therapist's assistant.

At trial, McCoy testified that she neither investigated the complaint nor made the determination that Grove had violated BabyNet policy regarding maintenance of professional relationships and boundaries with BabyNet families: "I didn't conclude that Ms. Grove violated that. But I—what I stated in my letter is that was a complaint that was made to me." (R. p. 264, line 12-p. 265, line 7; R. p. 274, lines 4-25). Nonetheless, McCoy included the complaint in both letters and reached specific conclusions in the letters indicating she had made such a finding. A reasonable juror was entitled to conclude that McCoy's statements and insinuations in the letters concluding wrongdoing on Grove's part, despite McCoy's own testimony that she found no such violations, were made recklessly and with conscious indifference, and thus with actual malice. See Eubanks, 292 S.C. at 62-63, 354 S.E.2d at 901.

2. McCoy failed to investigate complaints but falsely stated she had.

As McCoy admitted, both her job description and the governing BabyNet policies and procedures called for her to investigate complaints against BabyNet service providers such as Grove. (R. p. 289, line 13-p. 290, line 1). The government officials who received McCoy's letters would expect that the Procedural Safeguards Officer ensured the proper investigations had occurred. In fact, McCoy told the recipients that she had personally investigated the complaints (all emphases supplied):

- "This is to advise you of complaints I have received and investigated . . .," (R. p. 813);
- "As part of the investigation, I spoke directly with the families and BabyNet staff filing the complaints, (R. p. 814); and
- "After speaking with [the filers], I informed Ms. Grove of the complaints and allowed Ms. Grove to respond," id.

Grove presented sufficient evidence to permit an inference of reckless disregard for Grove's rights, and thus actual malice, by showing that McCoy did not perform the investigations she claimed to have performed and was required to perform as part of her job duties and governing regulations. (R. p. 160, line 10-p. 162, line 7; R. p. 163, lines 20-22; R. p. 165, line 6-p. 166, line 8; R. p. 176, lines 8-20; see also R. p. 807; R. p. 233, lines 2-10; R. p. 315, lines 17-24 (employers writing and testifying that they were not aware of any complaints regarding Grove until informed of her BabyNet termination); R. p. 258, line 11-p. 259, line 10; R. p. 260, lines 17-22; R. p. 261, line 1-p. 262, line 6; R. p. 282, lines 10-18; R. p. 321, line 22-p. 322, line 19 (failure to perform according to requirements and procedures); R. p. 275, line 14-p. 276, line 13; R. p. 277, lines 10-17; R. p. 318, lines 10-22 (failure to investigate)). Regarding most of the complaints listed in the March 11, 2008 and April 23, 2008 letters, the evidence tended to show that McCoy simply assumed that all complaints she received were true. (R. p. 306, lines 13-17). In fact, McCoy flatly admitted to no investigation whatsoever of four of the complaints in her letters. (R. p. 276, lines 7-13; R. p. 305, line 10-p. 306 line 17) (Hogan complaints).

For the one complaint in McCoy's March 11, 2008 letter that she actually did investigate, she admits that she found no evidence to support it. The allegation is that Grove practiced as a physical therapist's assistant without ensuring proper supervision by a licensed physical therapist. (R. p. 805). McCoy admitted at trial that she had investigated this complaint and found no wrongdoing, but had nonetheless made no effort to remove it from the letter or to explain therein that she had investigated and found nothing wrong. (R. p. 269, line 22-p. 272, line 4; R. p. 281, lines 5-9).

Grove presented evidence to show that an investigation would have revealed no violation of policy regarding most of the complaints. McCoy's reckless indifference kept her from realizing, based solely on information already known to her, that some complaints were outright baseless. She would have known that other complaints were groundless had she conducted the investigation she claimed she had. Three examples stand out. First, McCoy cited a complaint that Grove ordered expensive equipment that was inappropriate for the child. (R. p. 805; R. p. 814). As the testimony revealed, and as McCoy knew well, Grove could not order equipment; all such orders required approval from a supervising physical therapist and a doctor's prescription. (R. p. 197, line 1-p. 198, line 23; R. p. 319, lines 7-10; R. p. 437, line 23-p. 440, line 14; R. p. 457, line 3-p. 458, line 4).

Second, McCoy decried Grove's "refusal to submit quarterly progress summary reports to [early interventionists]." (R. p. 805; R. p. 814). Grove actually submitted her reports to her employer, which had staff whose duty it was to submit them to the early interventionists, who are BabyNet field personnel. (R. p. 465, line 7-p. 466, line 15). No one bothered to ask if Ms. Grove had submitted the reports to CCTC as she is required to do.

Third, McCoy also criticized Grove for holding sessions at Tumble Bugs and the House of Bounce instead of in the child's "natural environment." (R. p. 805; R. p. 813). McCoy knew that these play gyms fit within the BabyNet definition of natural environment. (R. p. 647; R. p. 180, lines 3-13; R. p. 222, line 12-p. 223, line 4; R. p. 229, line 24-p. 230, line 18; R. p. 242, lines 12-24; R. p. 266, line 13-p. 269, line 12) (various witnesses, including McCoy, testifying as to meaning of "natural environment").

Furthermore, as Grove explained at trial, the play gyms were used for valid therapeutic reasons. (R. p. 181, line 13-p. 182, line 7).

Four of the other complaints are subject to a serious credibility attack. They were made by Kelly Hogan, whose bias and motive to attack Grove were clear: she sent the complaints a week after her husband received a threat from Grove's lawyer regarding the unrelated construction defects. (R. p. 445, line 4-p. 446, line 1). The timing is even more suspicious given that the complaint from Hogan came almost a year after the alleged problems with therapy for her child began, and more than four months after treatment had ended. (R. p. 446, lines 2-11). Hogan's own letter revealed as much. (R. p. 824). McCoy's letters, however, did nothing to disclose or address this credibility issue. Moreover, by her own admission and contrary to the representations in her letters, McCoy never addressed these complaints with Grove. (R. p. 278, line 23-p. 279, line 1).

McCoy, as BabyNet Procedural Safeguards Officer, thus made a number of assertions in the letters to LLR—Grove's licensing authority—and to Medicaid—the other primary payor for Grove's services—that McCoy had in fact performed investigations and that the results led to her action against Grove. The uncontroverted evidence showed that McCoy did not reach the conclusions her letters indicate she did, nor did she investigate all of the complaints as she claimed, and that she knew or could easily have determined that several of the allegations were either false or suffered serious credibility problems. These statements may reasonably be viewed, in the light most favorable to Grove, as having been made recklessly and with conscious indifference toward or disregard of her rights, and thus support a jury finding of actual malice. See Burns, 361 S.C. at 232, 603 S.E.2d at 611 (evidence to be construed in non-movant's

favor on JNOV); Eubanks, 292 S.C. at 63, 354 S.E.2d at 902 (common-law actual malice standard).

3. The evidence permits an inference of McCoy's ill will toward Grove and raises a question for the jury as to whether the statements were limited in scope to the asserted purpose.

Grove presented additional evidence at trial which tends to show ill will on McCoy's part, particularly when considered in combination with the evidence above. Four instances described at trial are of particular relevance. First, both Grove and Alisha Mizell, the parent of a child for whom Grove provided therapy, described encounters with McCoy suggesting that she did not trust or had a bias against physical therapist's assistants. Grove was the only physical therapist's assistant serving BabyNet children in South Carolina. (R. p. 312, lines 23-24). Mizell testified that McCoy volunteered to her out of the blue that she could get "a real physical therapist" for her child instead of Grove, a PTA. (R. p. 339, line 24-p. 340, line 6) (emphasis added). Grove testified that McCoy gave her the impression that she held something against her because she was a physical therapist's assistant. (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).

Second, the details of the letters themselves demonstrate McCoy's ill will in that she did not limit her statements to the purpose for which she asserted a privilege. McCoy's April 23 letter specifically requested that Grove's licensing board investigate her. McCoy did not simply pass on complaints or relay apparent BabyNet conclusions or acts; rather, McCoy directly challenged Grove's license to practice. (R. p. 288, lines 3-10; R. p. 816). Nor was the need for a second letter at all clear; the March 11 letter had

already described the allegations, the apparent conclusions regarding violations of policy, and the BabyNet action.[3]

Third, although McCoy conceded at trial that the failure to deliver braces for the Hogan family resulted from a BabyNet administrative failure and not from Grove's services (R. p. 284, lines 11-17; R. p. 295, lines 15-17), her April 23 letter suggests otherwise. In a paragraph that begins "[u]nfortunately, BabyNet received more complaints about Ms. Grove," McCoy identifies the complaints from the Hogan family. (R. p. 814). Projecting instead of accepting the blame for the braces issue, McCoy misleads the readers to believe Grove to have been responsible: "[t]he initial complaint from the family was that the child had not received services that he was entitled to." Id.

Fourth, McCoy makes a very serious and innuendo-laden, but completely baseless, accusation when she describes an angry and "potentially violent domestic dispute" involving Grove and Brian Hogan. (R. p. 815). McCoy could not hear the encounter she references and did not ask anyone involved what it was about. (R. p. 301, lines 14-25; R. p. 285, lines 4-6). Nor did McCoy mention that, as she conceded at trial, Mr. Hogan was "very upset" about the braces issue, and that his anger with BabyNet and threats of legal action were what prompted the meeting. (R. p. 284, line 18-p. 286, line 5). The jury learned at trial that Ms. Grove was trying to mollify Mr. Hogan's anger toward McCoy herself, who was coming to his home despite being sick that day and thus, in the husband's eyes, threatening the child's health. (R. p. 467, line 12-p. 468, line 14; R. p. 469, line 23-p. 470, line 13). Grove was present to try to help all parties through a

[3] The second letter thus also presents a jury question on another element of the qualified privilege: whether there remained an interest to be upheld or a proper occasion for sending it. Conwell, 240 S.C. at 178, 125 S.E.2d at 274-75.

problem BabyNet bureaucracy created and was deflecting anger directed at McCoy herself, yet McCoy portrays Grove to the licensing authority as a person who is a danger to families. In fact, McCoy expressly offers that characterization: "The BabyNet program is very concerned for the well-being of other children and families Ms. Grove might come into contact with in the future." (R. p. 816).

McCoy's portrayal of Grove stood in stark contrast to the therapist the jury came to know and who has devoted decades to helping young children in light of her own struggles as a child. (R. p. 148, line 10-p. 149, line 6; R. p. 193, lines 1-6; R. p. 200, lines 14-19). The jury received testimony and written evidence praising Grove as a therapist from Grove's employers (R. p. 241, lines 3-6; R. p. 245, lines 7-9; R. p. 248, lines 4-10), former supervising therapist (R. p. 324, line 22-p. 325, line 1; R. p. 325, line 21-p. 326, line 21; R. p. 334, lines 10-19), and a parent with an emotional tribute to Grove for therapy Grove provided her child (R. p. 336, line 21-p. 337, line 25).

From this evidence, the jury was free to infer that McCoy acted with ill will, which also supports a finding of actual malice and an absence of good faith. Eubanks, 292 S.C. at 63, 354 S.E.2d at 902.

II. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S 42 U.S.C. § 1983 CLAIMS AGAINST THE GOVERNMENTAL ENTITY DEFENDANTS BEFORE THEY COULD BE CONSIDERED BY THE JURY.

A. Plaintiff established a protected liberty interest giving rise to a claim against the Defendants under § 1983.

The trial court granted a directed verdict at the close of Grove's case-in-chief for the governmental entity Defendants on Grove's § 1983 liberty interest due process claim, finding that Grove failed to establish that the government was in a position to foreclose

employment opportunities for her. (R. p. 403, line 11-p. 404, line 14). This is an artificially narrow construction of the liberty interest and constitutes reversible error.

The constitutionally-protected liberty interest does not apply only to action taken with respect to specific employment positions. Rather, any time "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). Likewise, where government action imposes a stigma or other disability that forecloses a person's ability to take advantage of other employment opportunities, a protected liberty interest is at stake and due process is required. Board of Regents v. Roth, 408 U.S. 564, 573-74 (1972). What distinguishes a liberty interest case from a garden-variety action for defamation is the additional presence of a present government action which injures the plaintiff. For instance, in Ridpath v. Board of Governors, 447 F.2d 292, 309-10 (4th Cir. 2006), the Fourth Circuit recognized and applied the "stigma-plus" test in analyzing an alleged deprivation of a liberty interest. Under this test, to have an actionable liberty interest claim under § 1983 based on a public official's stigmatizing remarks, a plaintiff must show both impairment of future employment opportunities as a result of the remarks and a present injury "such as termination of government employment." Id. at 309 n.16 (quoting Paul v. Davis, 424 U.S. 693, 709 (1976) (emphasis added)). Such cases often arise in the employment context, but the liberty interest is broader than employment and implicates any government action which deprives a person of a substantial liberty without due process of law. See, e.g., Hogge v. Hedrick, 391 F. Supp. 91, 110 (E.D. Va. 1974) (holding that

statute regulating massage parlors which allowed denial of permit applications without due process protections violated applicant's liberty interest).

As Grove argued before the trial court, taking the facts in the light most favorable to her, she established a claim in her case-in-chief under the stigma-plus test sufficient to survive Defendants' directed verdict motion. See Rule 50(a), SCRCP. The present injury was the action McCoy took, directly against Grove, to prevent her from seeing BabyNet patients. (See R. pp. 805-806; R. pp. 813-816; R. p. 320, lines 16-24; R. p. 321, lines 10-19). The jury had sufficient evidence before it to conclude that McCoy's action was a significant present injury. 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). 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).[4] Furthermore, McCoy admitted that it was her duty to investigate complaints and ensure that due process was given, but that she did not investigate the complaints before her. (R. p. 273, line 25-p. 274, line 5; R. p. 286, line 24-p. 287, line 2; R. p. 318, lines 18-22 (failure to investigate complaints); R. p. 289, line 13-p. 290, line 1 (duty to provide due process based on parent requests); R. p. 314, lines 4-9 (made decision to terminate Plaintiff's rights based solely on number of complaints)). Nor do any of BabyNet's policies and procedures mention any process by which a provider such as Grove may request a hearing. (R. p. 263, lines 4-14).

[4] Any argument as to the competency of Plaintiff to testify regarding her health and ability to perform physical therapy on adults is waived by Defendants' failure to preserve an objection at the time of trial, and the jury is free to assign such testimony the weight it deems appropriate.

The stigmatizing remarks which affect Plaintiff's future employment opportunities are discussed in detail in Plaintiff's argument regarding defamation. See Part I, supra. This evidence was sufficient to permit a jury finding that stigmatizing remarks from a BabyNet official regarding Plaintiff would foreclose future employment opportunities for her. Fourth Circuit case law supports the proposition that allegations of dishonesty, immorality, fraud, and injury to reputation are the types of remarks that establish a violation of a liberty interest. See Ridpath, 447 F.2d at 308 (holding that communications implying "the existence of serious character defects such as honesty or immorality" give rise to liberty interests); McNeill v. Butz, 480 F.2d 314, 319-320 (4th Cir. 1973) (holding liberty interest implicated where charges "smack of deliberate fraud" and "in effect allege dishonesty"); Johnson v. Fraley, 470 F.2d 179, 181 (4th Cir. 1972) (holding plaintiff stated liberty interest violation for "irreparably damaging her professional reputation and thereby crippling her ability to earn a livelihood"). Significantly, the letters allege acts on Grove's part which amount to insurance fraud or malpractice: that she billed for a full hour of treatment but did not provide a full hour of therapy, (R. p. 805; R. p. 813; R. p. 293, line 23-p. 294, line 23); that she diagnosed children outside the scope of her license, (R. p. 814); and ordering expensive and inappropriate equipment, (R. p. 805; R. p. 814).

Plaintiff also presented more direct factual evidence of the effect of Defendants' stigmatizing remarks. Although Plaintiff may nominally remain on the payroll of CCTC, she also presented testimony that without BabyNet sanction, it is very difficult for her to attract new patients. (R. p. 190, lines 21-23; R. p. 191, lines 7-14; R. p. 249, line 1-p. 250, line 6). Because Plaintiff is paid on a per-visit basis, the loss of BabyNet patients is

a substantial impairment of her ability to practice her chosen profession. (R. p. 155, line 9-p. 160, line 9; R. p. 190, line 1-p.194, line 9; R. pp. 692-803; R. p. 804).

B. The trial court erred in granting summary judgment for the governmental entity Defendants on Plaintiff's § 1983 property interest claim.

On the eve of trial, the trial court granted the governmental entity Defendants' motion for summary judgment regarding Plaintiff's property interest due process claim, based on its finding that Plaintiff's employment was at-will. (R. p. 493, lines 7-14). This finding both reversed the court's prior order denying summary judgment on the same issue and failed to consider Plaintiff's protected property interest in the practice of her profession.

South Carolina recognizes the right of licensed individuals, such as Plaintiff, to practice physical therapy (and other professions) as a cognizable property interest. Sloan v. S.C. Board of Physical Therapy Examiners, 370 S.C. 452, 484, 636 S.E.2d 598, 615 (2006). In its May 20, 2010 order denying summary judgment, the trial court recognized that, taking the evidence in the light most favorable to Plaintiff, Defendants' acts deprived Plaintiff of the ability to practice her chosen profession. (R. p. 9; see also R. p. 495, line 23-p. 496, line 11; R. p. 497, lines 12-23) (Plaintiff's testimony that most child physical therapy services for age group she specializes in and is physically able to treat, ages 0 to 3, are provided though approved BabyNet providers). Plaintiff's evidence permits a jury inference that BabyNet can effectively prevent Plaintiff from practicing as a physical therapist's assistant for children 0 to 3. Plaintiff's relationship with a particular employer is not relevant; no matter whom she worked for, BabyNet would not have permitted her to provide services for BabyNet children. (R. pp. 6, 9; R. p. 491, line

7-p. 492, line 9; R. pp. 805-806; R. pp. 813-816; see also R. p. 499, line 7-p. 500, line 3; R. p. 320, lines 16-24; R. p. 321, lines 10-19 (McCoy testifying that she took action directly against Plaintiff to prevent her from seeing BabyNet children)).

It was the trial court's invocation of the employment-at-will doctrine in the second ruling that led it to dismiss the claim. (R. p. 493, lines 7-15). Reliance on cases which involve dismissal of at-will government employees is misplaced. In such cases, the issue presented is whether state law creates a legitimate claim of entitlement to a specific job which would give rise to a protected property interest. See, e.g., Frazier v. Weatherholtz, 909 F.2d 105, 107 (4th Cir. 1990). Plaintiff's claim more closely resembles a licensure case. Plaintiff does not claim that her right to work as an independent contractor for CCTC is constitutionally protected; rather, it is her more generalized right to practice physical therapy, independent of her personal employment situation, which is infringed by BabyNet's actions. The trial court recognized this in its May 20, 2010 Order:

> The Defendants' action, taking the facts in the light most favorable to Grove, has thus deprived Grove of her ability to practice her chosen profession explicitly protected in state law, and thus violated a protected due process right.

(R. p. 9).

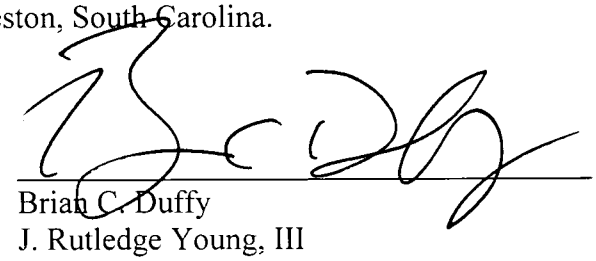
Grove also had a "legitimate claim of entitlement" giving rise to a protected property interest in continuing treatment of the existing patients she was treating at the time she was discharged from BabyNet. Roth, 408 U.S. at 576. Her case resembles Brown v. S.C. Board of Education, 301 S.C. 325, 330, 391 S.E.2d 866, 868 (1990), in which the South Carolina Supreme Court found a protected property interest in a schoolteacher's particular employment where the teacher had been certified and employer

based on a qualifying test score that was later cancelled. The Court held that the teacher was entitled to due process before losing her certification and therefore her job, and struck down a regulation making the invalidation automatic. Id. at 329-330, 391 S.E.2d at 867-68. The trial court recognized this claim in its May 20, 2010 Order, but reversed itself in the September 17, 2010 ruling. (See R. pp. 7-10).

CONCLUSION

For the foregoing reasons, Appellant Kelly Grove respectfully prays this Court to reverse the trial court's judgment notwithstanding the verdict on her defamation claim and to enter judgment in accordance with the jury's verdict. Should this Court decline to reverse the judgment notwithstanding the verdict, Appellant prays this Court to reverse the trial court's grant of summary judgment and directed verdict on her claims under 42 U.S.C. § 1983 and to remand this case for trial on such claims.

This 8th day of May, 2012 at Charleston, South Carolina.



Brian C. Duffy
J. Rutledge Young, III
Seth W. Whitaker
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044 (phone)
(843) 720-2047 (fax)
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that Appellant's Final Briefs comply with Rule 211(b), SCACR.

Brian C. Duffy
Seth W. Whitaker
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044 (phone)
(843) 720-2047 (fax)
Attorneys for Appellant

May 4, 2012

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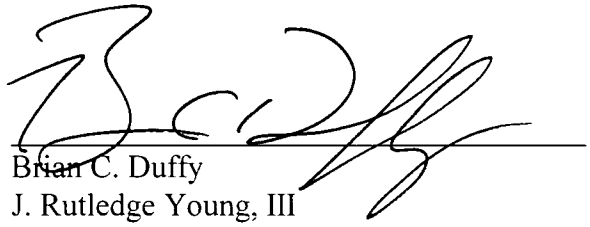
PROOF OF SERVICE

I, Brian C. Duffy, of Duffy & Young, LLC, certify that I have served the **FINAL BRIEF OF APPELLANT** 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*]

This 4th day of May, 2012 at Charleston, South Carolina.



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Seth W. Whitaker
DUFFY & YOUNG, LLC
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Charleston, South Carolina 29401
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(843) 720-2047 (fax)
Attorneys for Appellant