THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

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 RESPONDENTS

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STATEMENT OF THE CASE

Appellant Kelly Grove, a physical therapy assistant, (PTA) filed this defamation action against respondent Debra McCoy, Ph.D., on September 10, 2008, alleging four causes of action: (1) a 42 U.S.C. § 1983 action against Dr. McCoy for deprivation of "procedural due process of law" under the 14th Amendment; (2) a 42 U.S.C. § 1983 action against DHEC and BabyNet, Dr. McCoy's employers, for deprivation of "procedural due process of law" under the 14th Amendment; (3) injunctive relief against the respondents to reinstate Grove as a BabyNet provider of physical therapy services; and (4) defamation against Dr. McCoy, in her individual capacity, for defamation "with actual malice." Plaintiff prayed for both actual and punitive damages.

At all times alleged Dr. McCoy was a career employee of DHEC, and was acting in her capacities as "Acting Procedural Safeguards Officer" and "Provider Relations Coordinator, BabyNet" when, after consultation with a DHEC staff attorney, she wrote the complained of letters to appellant's employer, Charleston Children's Therapy Center ("CCTC"), and the South Carolina Board of Physical Therapy Examiners, as required by policy. The letters were written to bring to the attention of proper and required persons job performance complaints against appellant by parents and BabyNet supervisors and staff. Copies were sent to persons on a need-to-know basis.

On July 1, 2009, appellant filed an Amended Complaint, alleging the same causes of action, but expanding her defamation claim to "Defamation by all Defendants," and adding "Debra M. McCoy, in both her official and her individual capacities" and adding that "McCoy published the statements in her official capacity" or "In the alternative, McCoy published the statements in her individual capacity." Appellant added a Fifth Cause of Action: "Negligence by all Defendants" and deleted her allegation that Dr. McCoy "acted with actual malice" (Verified Complaint, R. pp. 80-

104), electing to allege instead that Dr. McCoy "acted with reckless disregard as to the truth or falsity of the statements." (Paras. 46-47, Amended Complaint; R. p. 88).

On March 26, 2010, appellant filed a Second Amended Complaint, again alleging the same five causes of action, but adding "Office of South Carolina First Steps to School Readiness" as a named defendant, alleging that BabyNet contracted with CCTC as a subordinate agency under DHEC. That pleading alined the respondents as are captioned in this appeal. Again the Fourth Cause of Action: Defamation, was against BabyNet, DHEC, and McCoy, but again, appellant did not allege that any of them acted with "actual malice", but that they acted "recklessly, wantonly, and with conscious indifference" and "with reckless disregard." (Paras. 49-50, Second Amended Complaint; R. p. 113).

Respondents pleaded a qualified general denial, applicable provisions of the Tort Claims Act, S.C. Code Ann. § 15-78-10 (1976) *et. seq.*, and the affirmative defenses of Truth and Qualified Privilege as to the defamation cause of action, and Qualified Immunity and that appellant was provided both adequate deprivation and post-deprivation relief by the S.C. Tort Claims Act, which was a bar to the procedural due process claims asserted by appellant under the 14th Amendment and 42 U.S.C. § 1983.

Respondents filed a Motion for Summary Judgment on the grounds that appellant had not identified a protected 14th Amendment interest giving rise to procedural due process rights, that they enjoyed a qualified privilege concerning any publications, and that there was no gross negligence under S.C. Code Ann. § 15-78-60(12)(1976). That motion was denied on April 9, 2012, and filed on May 20, 2010. Also, respondents' Motion to Dismiss Dr. McCoy individually or, in the alternative, to substitute DHEC in her place, under S.C. Code Ann. § 15-78-70(c)(1976) was denied.

Prior to trial appellant voluntarily dismissed and dropped her Fifth Cause of Action, Negligence.

The case came for trial before Honorable Diane S. Goodstein and a jury in the Dorchester County Court of Common Pleas on September 20-24, 2010, on the causes of action under 42 U.S.C. 1983 and defamation.

At the conclusion of appellant's case in chief she moved for a directed verdict. After extensive discussion and argument Judge Goodstein granted a directed verdict on the causes of action under 42 U.S.C. Sec. 1983, terming her action, in the terminology of Judge Walter Bristow, "an involuntary nonsuit with prejudice." (Trial Tr. 600; R. p. 394). On defendant's Motion for Involuntary Nonsuit/Directed Verdict the Court dismissed all causes of action except the defamation/libel cause of action against Dr. McCoy. In doing so, the Court stated:

> THE COURT: All right. Here's what I'm going to do, at this point, I'm going to deny the motion of involuntary non-suit, because so many of these issues are jury issues.
>
> I don't know that that's going to be my ultimate decision. I just share that with you at this point. I am not going to grant the motion for involuntary non-suit with regards to defamation as it relates to the doctor.
>
> I am concerned about it, though. And I don't mind telling you that I am very concerned about it.
>
> But I may grant - - I may change my position at the end of this case. So, I don't mind telegraphing that to you all at all. But at this point, I'm going to allow the case to go forward on the issues of defamation only, and not - - obviously not as to the State.

(Trial Tr. 622:16-623:4; R. p. 402, line 16-p. 403, line 4).

The trial went forward only on appellant's cause of action for defamation against Dr. McCoy individually.

Judge Goodstein charged the jury on "actual malice" as both being a bar to and defeating

respondent's affirmative defense of Qualified Privilege and also being a requirement to award any Punitive Damages to appellant. That identical jury charge and definition, as applicable to both qualified privilege and punitive damages, was:

> Actual malice involves a malicious intent or recklessness, willfulness, or wantonness. This means 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.

(Trial Tr. 889:18-24; R. p. 488, lines 18-24).

The jury returned a verdict for the plaintiff for actual damages only. On its Verdict Form the jury stated, "We, the Jury, unanimously find for the Plaintiff in the amount of Two Hundred Fifty Thousand dollars actual damages." The Verdict Form also listed, "We, the Jury, unanimously find for the Plaintiff in the amount of _____ dollars punitive damages." The jury left that amount blank and did not award any punitive damages.

Respondent Dr. McCoy duly moved for both a new trial, new trial nisi, and for judgment NOV. On June 23, 2011, Judge Goodstein granted respondent's Motion for Judgment Notwithstanding the Verdict on the grounds that communications between employees of an organization are qualifiedly privileged if made in good faith and in the usual course of business, set aside the jury verdict, and entered judgment for respondent Dr. McCoy.

On July 15, 2011, appellant timely served her notice of appeal and this appeal followed.

STATEMENT OF FACTS

BabyNet is a coalition of South Carolina state government agencies that coordinates health care services for children from birth to age three with developmental disabilities. (Trial Tr. 298:10-

299:12; R. p. 227, line 10-p. 228, line 12). Charleston Children's Therapy Center (CCTC) is a company that employs independent contractors to provide therapies to children and it has a contract with BabyNet to provide physical therapy services. (Trial Tr. 297:20-24; R. p. 226, lines 20-24). CCTC, like any of the other providers, is not guaranteed a certain number of BabyNet patients. (Trial Tr. 320:15-17; R. p. 235, lines 15-17). Appellant Kelly Grove is a licensed physical therapy assistant. (Trial Tr. 233:17-19; R. p. 200, lines 17-19). She works as an at-will subcontractor employee of CCTC and is assigned work on an as-needed basis and paid by the job. (Trial Tr. 324:12-25; R. p. 236, lines 12-25; Trial Tr. 352:11-22; R. p. 247, lines 11-22).

Respondent Debra M. McCoy, Ph.D, started working for BabyNet in 2004, and at all times alleged was the official responsible for BabyNet provider relations and discipline of BabyNet providers in South Carolina, her positions and titles being "Acting Procedural Safeguards Officer" and "Provider Relations Coordinator, BabyNet." (Trial Tr. 368:22 - 369:3; R. p. 251, line 22- p. 252, line 3).

There are multiple payment methods available to cover the costs of the therapy services to eligible children, including payment by the parents, payment by private insurance, payment by Medicaid, payment by BabyNet, and payment by charities such as Carolina's Children's Charity. (Trial Tr. 233:20-234:17; R. p. 200, line 20-p. 201, line 17; Trial Tr. 657:4-9; R. p. 411, lines 4-9). Some of the physical therapy patients of Kelly Grove and CCTC had their physical therapy expenses either covered by BabyNet or Medicaid, or they paid their fees themselves or with private insurance coverage. (Trial Tr. 188:10-17; R. p. 190, lines 10-17).

On March 11, 2008, due to complaints made by parents and BabyNet supervisors and staff against appellant Kelly Grove, and after consulting with a DHEC staff attorney (Trial Tr. 473:18 -

474:1; R. p. 307, line 18-p. 308, line 1), Dr. McCoy wrote a letter to CCTC, appellant's employer, listing twelve complaints against appellant Grove (Plaintiff's Trial Exhibit No. 6 ; R. pp. 805-806), in which she stated:

> As a result of the numerous complaints filed against Ms. Grove and her failure to comply with BabyNet policy and procedures and contract recommendations, effective 3/12/2008, we are asking your company to no-longer allow Kelly Grove to serve BabyNet Children and that no other BabyNet children are assigned to her for PT services. Additionally, we are bound by our contract with Medicaid to report this to Medicaid. We are also required to report this behavior to the Department of Labor Licensing and Regulation.

The letter was signed "Debra M. McCoy, Acting Procedural Safeguards Officer." (Plaintiff's Trial Exhibit No. 6; R. pp. 805-806). Copies of that March, 2008, letter were sent to Geri Connors, BabyNet System Manager; Nancy Roberts, attorney for DHEC, Division of Health Services; Medicaid; Department of Labor Licensing and Regulation, which licensed CCTC and plaintiff; and File. Dr. McCoy testified that all of the persons copied were involved in the matter, had an interest in the subject matter, and a "need to know." (See Plaintiff's Trial Exhibit No. 6; R. pp. 805-806; Trial Tr. 472:24-473:7; R. p. 306, line 24-p. 307, line 7; Trial Tr. 474:22-475:2; R. p. 308, line 22-p. 309, line 2; Trial Tr. 476:8-20 ; R. p. 310, lines 8-20).

The letter did not limit or infringe on appellant's license to practice her profession as a physical therapy assistant for other entities or individuals, nor did it ask CCTC not to assign non-BabyNet patients to appellant. (Plaintiff's Trial Exhibit No. 6; R. pp. 805-806). In fact, Kelly Grove got jobs with two other companies, Heritage Homes, and Functional Pathways, neither of which was limited by BabyNet's decision to no longer allow her to see BabyNet children. (Trial Tr. 243:23-246:10; R. p. 203, line 23-p. 206, line 10). And BabyNet patients with CCTC were actually given the option to keep Kelly Grove as a PTA with the understanding that if they chose to do so, BabyNet

would not cover the cost. (Trial Tr. 345:6-13 ; R. p. 244, lines 6-13). Appellant didn't lose any of these patients, as all but one decided to keep her and have another source pay for services rendered. (Trial Tr. 345:14-18; R. p. 244, lines 14-18).

Part of appellant's argument is that she lost income as a result of DHEC's decision to no longer allow her to see BabyNet patients. Appellant asserts that "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." (Appellant's Initial Brief p. 3 citing Trial Tr. 191:1-192:9; R. p. 193, line 1-p. 194, line 9). At trial, appellant testified:

> Because of -- of -- of a condition that I have, it's very hard for me, especially at the age that I am - sometimes my age doesn't match up with my mind, but -- that I'm not physically able to do a lot of lifting or carrying or standing somebody or taking them in and out of wheelchairs or in and out of bed. I just physically cannot do it with the hip problems that I have.

(Trial Tr. 191:7-13; R. p. 193, lines 7-13).

However, appellant admits that "BabyNet has nothing to do with [her] physical condition." (Trial Tr. 242:19; R. p. 202, line 19). Nor is she attributing any aging process or problems to BabyNet. (Trial Tr. 243:1-3; R. p. 203, lines 1-3). The Court even noted during Grove's Motion for a Directed Verdict:

> You don't — have that in this record. You have – you don't have that nobody else will hire her. You don't have anything in this record other than, based on complaints that the state received, that they communicated those complaints to her employer and asked that her -- that her employer not use her for BabyNet patients. You -- you know, and in terms of -- she says that because she's an -- that she's 20 years older than she used to be, that she prefers not to have heavier people. You don't have any evidence that she can't act as a physical therapist assistant.

(Trial Tr. 575:18-576:5; R. p. 369, line 18-p. 370, line 5).

Melissa Nelson and Charlene Durham, co-owners of CCTC, both testified at trial. (Trial

Tr. 292:6-7; R. p. 225, lines 6-7; Trial Tr. 332:25-333:1; R. p. 239, line 25-p. 240, line 1). Charlene Durham testified that appellant was still employed by CCTC at the time of trial (Trial Tr. 326:23-24; R. p. 237, lines 23-24), that the "letter hadn't stigmatized" her as to appellant (Trial Tr. 326:25-327:2; R. p. 237, line 25-p. 238, line 2), that she did not "see anything slanderous about it," and that she did not have "any less esteem or admiration . . . for Kelly Grove." (Trial Tr. 327:3-7; R. p. 238, lines 3-7). Co-employer Melissa Nelson testified that as a result of the letter she had "no concerns about Kelly Grove at all" (Trial Tr. 347:15-18; R. p. 245, lines 15-18), and did not consider the letter "as being onerous or slanderous of Kelly Grove's reputation or professional work product." (Trial Tr. 347:22-348:16; R. p. 245, line 22-p. 246, line 16).

As stated, and as required, on April 23, 2008, Dr. McCoy wrote a similar letter to the South Carolina Board of Physical Therapy Examiners. (Plaintiff's Trial Exhibit No. 15; R. pp. 813-816). She signed that letter "Debra M. McCoy, Ph.D., LMSW, Provider Relations Coordinator, BabyNet." (See Plaintiff's Trial Exhibit No. 15; R. pp. 813-816).

Several defense witnesses testified that the complaints enumerated in Dr. McCoy's letters were complaints they had received from parents and staff about appellant. The Court admitted these letters as proof that the complaints were made, but not as to the truth of the statements. Early Interventionist Robert Crosby testified a patient's mother had complaints about Kelly Grove showing up late and about her not being there for the entire session as scheduled. (Trial Tr. 638:21-25; R. p. 405, lines 21-25).

Jennifer Horres, another Early Interventionist, testified that two other patients' mothers complained about appellant scheduling appointments and her not staying for the required full hour.

(Trial Tr. 652:14-18; R. p. 407, lines 14-18; Trial Tr. 654:19-24; R. p. 408, lines 19-24). Ms. Horres also testified about inappropriate equipment being ordered by appellant for one of her patients. (Trial Tr. 662;12-24; R. p. 412, lines 12-24).

Geri Connors, DHEC Systems Manager (Trial Tr. 680:1-2; R. p. 415, lines 1-2), testified she received "an irate telephone call from Kelly Grove, yelling and screaming" and she was stunned by her "unprofessional conduct." (Trial Tr. 694:1-8; R. p. 421, lines 1-8). She also described the "loud" and "intense" altercation between appellant and the father of one of her patient's, Brian Hogan. (Trial Tr. 696:12-698:3; R. p. 422, line 12-p. 424, line 3).

Brenda Merrill, Director of Children's Services (Trial Tr.752:6-7; R. p. 452, lines 6-7), testified as to appellant's unwillingness to follow policy and procedure and specifically stated she had to do "a lot of damage control where Ms. Grove is concerned with the paperwork." (Trial Tr. 756:5-21; R. p. 453, lines 5-21). She also testified that Kelly Grove was not providing quarterly progress reports. (Trial Tr. 758:1-11; R. p. 454, lines 1-11; Trial Tr. 762:6-15; R. p. 456, lines 6-15). Her failure to provide the reports meant that BabyNet and DHEC had no way of knowing if appellant was being properly supervised. (Trial Tr. 758:21-759:3; R. p. 454, line 21-p. 455, line 3). Their attempts to contact appellant by both phone and e-mail went unanswered. (Trial Tr. 759:5-7; R. p. 455, lines 5-7).

Finally, in addition to that testimony from BabyNet supervisors and staff, respondents presented testimony from the mother of one of Kelly Grove's patients, Kelly Hogan. Ms. Hogan testified that most of the time when appellant held therapy sessions at the House of Bounce for her child, she, Ms. Hogan, paid for the admission. (Trial Tr. 717:16-25; R. p. 432, lines 16-25).

Appellant argues that "McCoy made two contradictory allegations in both letters: first, that

Grove did not work with the children during the 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. (Appellant's Initial Brief P. 15 citing Plaintiff's Trial Exhibit No. 6, R. pp. 805-806; Plaintiff's Trial Exhibit No. 15; R. pp. 813-816). These statements are not contradictory, but rather detail two separate complaints: (1) Appellant didn't work with the children during therapy sessions but spent time talking to the mother, and (2) Appellant failed to educate the parents on how to perform therapy with their children. These complaints came from Ms. Hogan, as she explained both in her trial testimony:

> Q: And since she was the physical therapist for Riley, what kind of treatment did she render to him at the House of Bounce?
> A: I would have to say really none.
> Q: So what would Riley do?
> A: Riley would play with his sister, Meghan...and I would stand and talk with Ms. Grove.
> Q: So you and Ms. Grove would talk?
> A: Uh-huh. Yes.

(Trial Tr. 718:1-11; R. p. 433, lines 1-11).

> But, you know, pretty much for the whole time that I saw Ms. Grove with my son, she, you know, stood around and talked to me about her trips to Hawaii and visiting her daughter in Washington and her son's soccer in Aiken and, you know, just personal things. And you know, we'd talk about surfing and how she'd go to Folly Beach with her son. And just -- we really just kind of sat around and just talked for the whole time that she was there.

(Trial Tr. 733:24-734:6; R. p. 436, line 24-p. 437, line 6).

> Q: Okay. Did you ever see her -- or did she do any physical therapy exercises that you saw at the House of Bounce; that is, manipulating the legs or stretching the legs and things of that type?
> A: Maybe a few times. But there was not really any physical therapy performed. In regards to an hour's worth of treatment, she never did any of the exercises that I was taught by the Trident Sports Medicine.
> Q: Now, you say you were taught by Trident Sports Medicine; is that correct?

A: Correct.
Q: Okay. Did Kelly Grove -- as a physical therapist, did she ever teach you any exercises that you could use to -to help Ryan -- help Ryan ---
A: Riley.
Q: Riley?
A: No.

(Trial Tr. 718:12-719:3; R. p. 433, line 12-p. 434, line 3).

Appellant argues that Dr. McCoy attempted to personally "smear Grove" by including in the April 23 letter the following:

> 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 appear as if a potentially violent domestic dispute was occurring. Staff then realize it was Ms. Grove who was fighting with the father.

(Plaintiff's Trial Exhibit No. 15; R. pp. 813-816).

Appellant argues that "the uncontroverted evidence at trial actually showed that Grove was trying to defend BabyNet's actions and to calm the father down before the meeting began." (Appellant's Initial Brief p. 13). The evidence was controverted, however, when Ms. Connors clearly testified that she witnessed the altercation. "Having not met the father or Kelly or the mother, we just kind of stopped in our tracks, because we saw this altercation going on. And I assumed it was between the mom and the dad, having not met them. And later we found out it was Kelly Grove and the dad who were arguing." (Trial Tr. 696:12-17; R. p. 422, lines 12-17). She goes on to testify she was "stunned" by the interaction and described it as "very loud, very belligerent, very intense." (Trial Tr. 697:8-11; R. p. 423, lines 8-11; Trial Tr. 698:3; R. p. 424, line 3).

To the extent appellant argues that Dr. McCoy had animus against physical therapy assistants, Dr. McCoy's testimony illustrates the contrary. Dr. McCoy testified at trial that she wrote the letters in good faith, based upon facts and information received, in the interest of protecting the patient

children, and without any animosity or malice toward Kelly Grove. (Trial Tr. 481:14-22; R. p. 314, lines 14-22; Trial Tr. 484:2-7; R. p. 317, lines 2-7). More specifically, she testified that she had never heard of Kelly Grove before she received the first complaint because at the time BabyNet had over 850 providers. (Trial Tr. 483:24-484:1; R. p. 316, line 24-p. 317, line 1). "To say that I did this with some kind of maliciousness or that I was out to get her would simply have to say that I just -- out of all the providers, just put my finger on one and it happened to be Kelly Grove, and I said I was going to go after her. And that was not the case at all." (Trial Tr. 484:2-7; R. p. 317, lines 2-7). As mentioned above, the letters were written only after consultation with DHEC legal counsel and revision of several drafts. (Trial Tr. 473:18-474:1; R. p. 307, line 18-p. 308, line 1). Additionally, BabyNet had "a serious shortage of providers in this area;" it needed therapists and "[t]erminating Kelly [Grove] actually create[d] a bigger loss in the system." (Trial Tr. 480:10-18; R. p. 313, lines 10-18). Dr. McCoy's unwillingness to divulge complaints about Kelly Grove to Alicia Mizell, a patient's mother, after repeated inquiry is further evidence against appellant's contention of Dr. McCoy's ill-will or malicious intent. (Trial Tr. 478:1-15; R. p. 311, lines 1-15; Trial Tr. 526:24-527:1; R. p. 335, line 24-p. 336, line 1). On the contrary, Dr. McCoy asked Ms. Mizell to write a letter illustrating all of the good things she had to say about Kelly Grove. (Trial Tr. 529:3-5; R. p. 338, lines 3-5).

Appellant's entire defamation action rests on an inference of publication. While on the stand, Kelly Hogan indicated that she sent a complaint letter about appellant to LLR. (Trial Tr. 743:21-24; R. p. 446, lines 21-24). In the packet to LLR, Ms. Hogan included various letters, including the March, 2008, letter from Dr. McCoy to CCTC. (Trial Tr. 745:3-25; R. p. 448, lines 3-25). Appellant's counsel asked Ms. Hogan on the stand if she received the letter from Kelly Grove, to

which she responded, that she did not. (Trial Tr. 747:4-6; R. p. 450, lines 4-6). However, counsel never asked her who did send it to her. Accordingly, the Court correctly stated that Ms. Hogan never indicated how she had possession of the letter.

> Here's what we have -- and we have testimony from Ms. Hogan regarding the packet that she sent to LLR. I gather there is a complaint form and there are certain things which are attached to the complaint form. And one of the things that is attached to the complaint form -- and Mr. Duffy is absolutely correct -- is the March the 11th letter. It is unclear from her testimony, however, how she got the letter. She doesn't testify that she received the letter from the defendant. There's no question she had the -- she testified that she sends the letter -- the March the 11th letter -- to LLR. And we don't know from her testimony where it came from.

(Trial Tr. 793:1-13, R. p. 477, lines 1-13).

Appellant's entire publication argument, to overcome the defense of Qualified Privilege, rests on "the unmistakable inference that ... McCoy provided Hogan a copy of the March letter." (Appellant's Initial Brief p. 18). But Dr. McCoy's testimony at trial rebuts this, and was that she did not send the letter to anyone other than those named and copied on the letter. (Trial Tr. 472:21-23; R. p. 306, lines 21-23; Trial Tr. 476:13-17; R. p. 310, lines 13-17).

Kelly Grove admitted and testified that she knew she had a right to request a hearing from LLR (Trial Tr. 259:11-20; R. p. 215, lines 11-20) and that from March, 2008 to September, 2010, she failed to request such a hearing, even though she was represented by legal counsel shortly after her March 2008 conversation with Dr. McCoy. (Trial Tr. 259:22-260:25; R. p. 215, line 22-p. 216, line 25; Trial Tr. 255:2-256:1; R. p. 211, line 2-p. 212, line 1).

ARGUMENT

I. WHETHER THE TRIAL COURT PROPERLY RULED DURING TRIAL THAT MS. GROVE PRESENTED SUFFICIENT EVIDENCE TO DEFEAT THE DEFENSE OF QUALIFIED PRIVILEGE BUT THEN IMPROPERLY OVERRULED THE JURY'S DETERMINATION OF THAT ISSUE?

At the conclusion of appellant's trial evidence respondent Dr. McCoy moved for an involuntary nonsuit with prejudice, a involuntary dismissal, under Rule 41(b), SCRCP as to appellant's defamation cause of action. (Trial Tr. 601:14-18; R. p. 395, lines 14-18).

After argument by counsel Judge Goodstein responded:

COURT: All right. Here's what I'm going to do, at this point, I'm going to deny the motion of involuntary non-suit, because so many of these issues are jury issues.

I don't know that that's going to be my ultimate decision. I just share that with you at this point. I am not going to grant the motion for involuntary non-suit with regards to defamation as it relates to the doctor.

I am concerned about it, though. And I don't mind telling you that I am very concerned about it.

But I may grant -- I may change my position at the end of this case. So I don't mind telegraphing that to you all at all. But at this point, I'm going to allow the case to go forward on the issue of defamation only, and not – obviously not as to the State.

(Trial Tr. 622:16-623:4; R. p. 402, line 16-p. 403, line 4).

At the conclusion of respondent's evidence and defense, respondent renewed her motion and moved for a directed verdict as to the defamation cause of action. (Trial Tr. 816:19-23, R. p. 483, lines 19-23). Judge Goodstein ruled:

COURT: All right. I do believe that a – a jury issue has been generated. So many of these issues are jury issues, and I would respectfully deny the motion of the defendant and noting the exception thereto.

(Trial Tr. 817:10-13; R. p. 484, lines 10-13).

After the jury returned a verdict for the appellant the Court granted respondent ten days in which to file post-trial motions. Respondent timely moved for judgment *non obstante veredicto.* (Defendant's Amended Motion for Judgment NOV and/or a New Trial, October 2, 2010 (R. pp. 534-

535) and Defendant's Memorandum in Support, December 9, 2010 (R. pp. 545-584)). After the submittal of briefs and oral argument Judge Goodstein issued her Order on June 23, 2011, granting respondent's Motion for Judgment Notwithstanding the Verdict, setting aside the jury's verdict, and granting a verdict in favor of respondent Dr. Debra McCoy. (R. pp. 14-36).

Appellant has now asserted as one of her grounds of appeal that the Court "improperly overruled the jury's determination" of the qualified privilege defense to defamation by granting respondent judgment NOV. (Appellant's Initial Brief, Statement of Issues on Appeal No. 1).

The Court acted properly and this assignment of error is without merit because South Carolina law is firmly established that until an order is written and entered the trial judge retains discretion to change his or her mind and amend an oral ruling accordingly, and that until that time the trial court has the discretion to change its mind and amend its oral ruling.

> "There is no dispute a trial court has the discretion to change its mind and amend its oral ruling. *First Union Nat. Bank v. Hitman, Inc.*, 306 S.C. 327, 411 S.E.2d 681 (Ct.App.1991) aff'd, 308 S.C. 421, 418 S.E.2d 545 (1992). . . Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly. *First Union, supra; Case v. Case*, 243 S.C. 447, 134 S.E.2d 394 (1964). The written order is the trial judge's final order and as such constitutes the final judgment of the court."

Ford v. State Ethics Com'n, 344 S.C. 642, 545 S.E.2d 821, 823 (2001).

Additionally, "The Decree must be in writing and until such time the Judge may modify, amend or rescind such an oral Order."*Bowman v. Richland Memorial Hosp.*, 335 S.C. 88, 515 S.E.2d 259, 261 (Ct.App.1999)(Quoting *Bayne v. Bass*, 302 S.C. 208, 209-210, 394 S.E.2d 726, 727 (Ct.App.1990), quoting *Archer v. Long*, 46 S.C. 292, 24 S.E. 83 (1896)). "Because it was an oral ruling, the family court was fully within its rights to change its decision in the written order." *McComb v. Conard*, 394 S.C. 416, 426, 715 S.E.2d 662, 667 (Ct.App. 2011).

Accordingly, there was nothing "improper" about the trial judge properly overruling the jury's verdict and granting judgment notwithstanding the verdict for respondent Dr. Debra McCoy, particularly since Judge Goodstein had expressed her reservations about the case at the directed verdict stage: "I don't know that that's going to be my ultimate decision. I just share that with you at this point . . . And I don't mind telling you that I am very concerned about it . . . I may change my position at the end of this case. So I don't mind telegraphing that to you all at all."

(Trial Tr. 622:16-623:2; R. p. 402, line 16-p. 403, line 2).

II. THE TRIAL COURT WAS CORRECT IN DISMISSING APPELLANT'S ACTIONS FOR DENIAL OF PROCEDURAL DUE PROCESS OF LIBERTY AND PROPERTY INTERESTS UNDER THE FOURTEENTH AMENDMENT.

This is a counter issue framed under Rule 208(b)(2) because respondents are dissatisfied with No. 2 of the Statement of Issues on Appeal framed by appellant because appellant's submittal is too limited.

In her FIRST CAUSE OF ACTION (FOURTEENTH AMENDMENT VIOLATIONS BY MCCOY - - - 42 U.S.C. § 1983) and SECOND CAUSE OF ACTION (FOURTEENTH AMENDMENT VIOLATIONS BY DHEC, BABYNET AND FIRSTSTEPS - - - 42 U.S.C. § 1983) of her SECOND AMENDED COMPLAINT appellant alleged respondents deprived her of "rights, privileges, and immunities under the Fourteenth Amendment to the Constitution of the United States . . . in violation of her right to procedural due process of law. (Second Amended Complaint; R. pp. 105-129).

At the conclusion of appellant's case in chief, appellant moved for a directed verdict to "narrow this case down and get to the issues that there really are an issue between the parties." (Trial Tr. 547:11-24; R. p. 341, lines 11-24). Judge Goodstein pointed out that even though the

defense hadn't had an opportunity to present a defense she would label appellant's motion an "involuntary non-suit with prejudice" (in the terminology of Judge Walter Bristow) and entertain it. (Trial Tr. 548:12-25; R. p. 342, lines 12-25).

The Court and appellant's counsel then discussed appellant's Section 1983 due process claim in detail. (Trial Tr. 548-557; R. pp. 342-351) Judge Goodstein stated:

> I'm concerned, particularly when I reviewed this case, about your 1983 action. Help me. (Trial Tr. 553:21-22; R. p. 347, lines 21-22) . . . It's not a property interest. She does not have a property interest in her right to see BabyNet children. There is no property interest, remember? That's a problem. (Trial Tr. 554:22-25; R. p. 348, lines 22-25) . . .
>
> * * * *
>
> Now, here's my concern. My concern is she is not an employee; and therefore, the only connection is - - is a liberty interest, which is not reflected in the case law. Because - - because what - - in - - in all of the examples, the effectiveness has to do with the statements that are made against an employee in their discharge.
>
> What we're - - what has occurred here is that the State communicated with one of its healthcare providers, and for the reasons stated, did not want this particular individual to perform services on BabyNet.
>
> They had absolutely no effect on her employability at all. In fact, that was - - that appears to be the - - the - - the consistent testimony throughout. They didn't have an opinion about whether they continued to hire - - they didn't care if they hire - - continue to employ her or not.
>
> All they said was, 'We do not want this person. Based upon the complaints that we have received, we don't want her seeing BabyNet patients.' That's it. There's no property interest that she has . . .
>
> So I am very concerned, very concerned about your ability to proceed under 1983. . . I do not believe you're gonna be able to proceed under the liberty interest, under - - because it's not property interest. There is no property interest in her ability to continue to see BabyNet folks.

I'm concerned about that. And I need to - - that's why I wanted to go over it tonight, because I want you to have this evening to take a look at that issue and help me. (Trial Tr. 556:9-557:2; R. p. 350, line 9-p. 351, line 2; Trial Tr. 557:10-21; R. p. 351, lines 10-21).

I mean there are a lots of problems with the 1983 action . . . There's several things I think you have to show.

First of all, you have to show that there's been a violation of the liberty interest. And the violation of the liberty interest occurs when there is the stigma that is attached . . . if the State by its action is concerning the liberty interest - - remember it's the Fourteenth Amendment and due process the person is entitled to. Okay.

She's got - - she has a number of problems with that. I think the employment is one. I think that whether or not really it's a liberty interest is two. And I think that there is due process everywhere. There's due process with the procurement code if the employer chose to activate that on her behalf. There is - - there is due process through LLR. So you have some work to do this evening on your 1983 action. (Trial Tr. 561:12-562:6; R. p. 355 line 12-p. 356, line 6).

* * * *

The next morning, day four of trial, again after extensive discussion and argument, (Trial Tr. 568:1-585:18; R. p. 362, line 1-p. 379, line 18) appellant's counsel admitted, "This is a liberty interest case that has nothing to do with employment . . . There's no government employment here." (Trial Tr. 585:19-586:1; R. p. 379, line 19-p. 380, line 1). Judge Goodstein then ruled, "I'm going to grant the motion for involuntary non-suit with prejudice. It's called a 'directed verdict.' . . . I do not believe that the plaintiff has made out a case for a 1983 action." (Trial Tr. 600:21-601:2; R. p. 394, line 21-p. 395, line 2).

In her First and Second Causes of Action appellant purports to state a claim for deprivation of procedural due process under the U.S. Constitution. These claims fail as a matter of law because

the undisputed facts show that appellant lacked a property or liberty interest in her employment sufficient to trigger the procedural requirements of the Due Process Clause of the Fourteenth Amendment.

It is fundamental that "in order to claim entitlement to the protections of the due process clause - - either substantive or procedural - - a plaintiff must first show that he has a constitutionally protected 'liberty' or 'property' interest, and that he has been 'deprived' of that protected interest by some form of 'state action.'" *Stone v. University of Md. Medical System Corp.*, 855 F.2d 167, 172 (4th Cir. 1988). The allegations of the Second Amended Complaint to the effect that appellant was denied a pre-termination hearing suggest that she is asserting a "property interest" claim as opposed to a "liberty interest" claim because, whereas a pre-termination hearing is required when a property interest is at stake, *see Cleveland Board of Educ'n v. Loudermill*, 470 U.S. 532 (1985), a pre-termination hearing is not required when a liberty interest is implicated. *Campbell v. Pierce County, Ga.*, 741 F.2d 1342, 1345 (11th Cir. 1984)(because the purpose of a liberty interest hearing is "not to avert the unjustified denial of a specific benefit but to allow the aggrieved party to clear his name," the hearing is not a prerequisite to termination). In any event, whether appellant's procedural due process claims are premised on a purported property interest, liberty interest, or both, they fail as a matter of law.

A. <u>Appellant has no property interest in her employment.</u>

Even construing appellant's procedural due process claim as one based on an alleged property interest, even though her counsel apparently abandoned that before Judge Goodstein (Trial Tr. 585:19-586:1; R. p. 379, line 19-p. 380, line 1), any property interest fails because appellant was an at-will employee under state law. As the U.S. Supreme Court has made quite clear, property

interests are neither created by nor derived from the United States Constitution; rather, they are "created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Thus, the Fourteenth Amendment does not create or confer any property interests; it simply protects those interests, derived from an independent source, from deprivation by a governmental entity or official without due process. State law determines *whether* a public employee has a property interest in her employment that is protected by the Due Process Clause. *Bishop v. Wood*, 426 U.S. 341, 344-45 (1976).

A public employee's "abstract desire" for, or "unilateral expectation" of, continued employment is not sufficient to give rise to a constitutionally protected property interest. *Roth*, 408 U.S. at 577; *Pittman v. Wilson County, N.C.*, 839 F.2d 225, 227 (4th Cir. 1988). To have a protected property interest in employment, a public employee must show that she has a "legitimate claim of entitlement to continued employment arising from a state statute, local ordinance or employment contract." *Roth*, 408 U.S. at 577; *accord, Bunting v. City of Columbia*, 639 F.2d 1090, 1093 (4th Cir. 1981).

Appellant has three major foreclosing problems with trying to assert a property interest. First, she was not a state employee. She was employed as an at-will independent contractor employee by CCTC, paid for work done and services performed. (Trial Tr. 324:12-25; R. p. 236, lines 12-25; Trial Tr. 352:11-22, R. p. 247, lines 11-22). Secondly, she was not fired or terminated (Trial Tr. 326:23-24, R. p. 237, lines 23-24), and did not sustain any provable property losses as a direct and proximate result. (Trial Tr. 243:23-246:10; R. p. 203, line 23-p. 206, line 10). Thirdly, South Carolina recognizes the doctrine of employment at-will. At-will employment is generally terminable

by either party at any time, for any reason or for no reason at all. *Skipper v. S.C. Dept. of Corrections*, 370 S.C. 267, 633 S.E.2d 910 (Ct. App. 2006) (and cases therein cited). Accordingly, it would be incongruous to find appellant had any state-created liberty or property interests in her employment. Also, under South Carolina law, there is a presumption of at-will employment. *Cape v. Greenville County School District*, 618 S.E.2d 881, 883 (S.C. 2005). Furthermore, appellant's employer, CCTC, like any of the other providers, is not guaranteed a certain number of BabyNet patients. (Trial Tr. 320:15-17; R. p. 235, lines 15-17).

Since appellant was an at-will employee, she had no enforceable expectation of continued employment and had no protected property interest in that employment. Thus, because she had no protectable property interest in her employment, the Procedural Due Process Clause did not entitle her to a pre-termination hearing of any kind. *Jenkins v. Weatherholtz*, 909 F.2d 105, 107 (4th Cir. 1990).

B. <u>Appellant Had No Liberty Interest Under The Procedural Due Process Clause.</u>

A liberty interest claim arises when a public employer (but appellant was not a public employee, neither was her employer a public employer) in the course of terminating an employee, makes public false charges against her which damage her standing in the community and foreclose her freedom to take advantage of other employment opportunities in her chosen field. *Bledsoe v. City of Horn Lake, Miss.*, 449 F.3d 650, 653 (5th Cir. 2006). In order to state a claim for deprivation of a liberty interest, a plaintiff must allege facts showing that her former employer made stigmatizing charges against her in the course of terminating her employment that would likely foreclose her ability to take advantage of other employment opportunities in her chosen field, that the charges were false, and that they were made public. *Stone v. Univ. of Maryland Medical System Corp.*, 855 F.2d

167, 172 n.5 (4th Cir. 1990).

To satisfy the "made public" element of a liberty interest claim, a plaintiff may prove either that the stigmatizing charges were actually made public by her former employer in connection with her termination or that there is "a likelihood that prospective employers (*i.e.*, employers to whom [s]he will apply) or the public at large will inspect [her] file" and discover the damning charges. *Sciolino v. City of Newport News, Va.*, 480 F.3d 642, 650 (4th Cir. 2007). Significantly, "stigmatizing charges that are made only in internal communications within the governmental employer are not thereby 'made public'." *Luy v. Baltimore Police Dep't*, 326 F.Supp. 2d 682, 691 (D. Md. 2004). Similarly, charges disclosed only to the employee and thereafter disclosed to a third party either by the employee or at her request are not thereby "made public" by the employer and therefore do not trigger the requirement of a name-clearing hearing. *Bishop v. Wood*, 426 U.S. 341, 348-49 (1976); *Mills v. Leath*, 709 F.Supp. 671, 675 (D.S.C. 1988); *Luy*, 326 F.Supp. 2d at 691.

To the extent the Second Amended Complaint may be viewed to allege a liberty interest claim, the claim fails as a matter of law for several reasons. First, there is no evidence on the record that the respondents made public the allegations against appellant, only an unsubstantiated inference as to Kelly Hogan. (Trial Tr. 743:21-747:6; R. p. 446, line 21-p. 450, line 6; Trial Tr. 793:1-13; R. p. 477, lines 1-13). "[T]he failure to allege that the reasons for the dismissal were published dooms [a liberty interest] claim." *Cleveland Bd. of Educ'n v. Loudermill*, 470 U.S. 532, 547 n. 13 (1985). *See also Beckham v. Harris*, 756 F.2d 1032, 1038 (4th Cir. 1985) ("[W]here there is no public disclosure of the reasons for discharging a public employee whose job is terminable at the will of the employer, no liberty interest is implicated.")

Secondly, any purported liberty interest claim is foreclosed by the facts that the appellant was

not terminated, and the reasons stated in Dr. McCoy's letters certainly were not sufficiently stigmatizing to exclude appellant from either her present profession and job, or any future job. It is only where such "unjustified state action . . . so seriously damages the plaintiff's reputation and standing in his community as to foreclose his freedom to take advantage of other employment opportunities" that a liberty interest claim arises. *Jackson v. Long*, 102 F.3d 722, 730 (4th Cir. 1996). Thus, "[a] liberty interest is not implicated where the charges [made public in connection with termination] merely result in reduced economic return and diminished prestige, but not permanent exclusion from or protracted interruption of employment." *Manson v. Friske*, 754 F.2d 683, 693 (7th Cir. 1985); *accord, Shelton-Riek v. Story*, 75 F.Supp. 2d 480, 490 (M.D.N.C. 1999). In this case, appellant sustained no reduced economic return or diminished prestige arising from Dr. McCoy's letters, and appellant's employers Melissa Nelson and Charlene Durham, owners of CCTC, so testified.

Melissa Nelson and Charlene Durham, co-owners of CCTC, both testified at trial. (Trial Tr. 292:6-7; R. p. 225, lines 6-7; Trial Tr. 332:25-333:1; R. p. 239, line 25-p. 240, line 1). Charlene Durham testified that appellant was still employed by CCTC at the time of trial (Trial Tr. 326:23-24; R. p. 237, lines 23-24), that the "letter hadn't stigmatized" her as to appellant (Trial Tr. 326:25-327:2; R. p. 237, line 25-p. 238, line 2), that she did not "see anything slanderous about it," and that she did not have "any less esteem or admiration . . . for Kelly Grove." (Trial Tr. 327:3-7; R. p. 238, lines 3-7). Co-employer Melissa Nelson testified that as a result of the letter she had "no concerns about Kelly Grove at all" (Trial Tr. 347:15-18; R. p. 245, lines 15-18), and did not consider the letter "as being onerous or slanderous of Kelly Grove's reputation or professional work product." (Trial Tr. 347:22-348:16; R. p. 245, line 22-p. 246, line 16).

Kelly Grove admitted and testified that she knew she had a right to request a hearing from LLR (Trial Tr. 259:11-20; R. p. 215, lines 11-20) and that from March, 2008 to September, 2010, she failed to request such a hearing, even though she was represented by legal counsel shortly after her March 2008 conversation with Dr. McCoy. (Trial Tr. 259:22-260:25; R. p. 215, line 22-p. 216, line 25; Trial Tr. 255:2-256:1; R. p. 211, line 2-p. 212, line 1).

Therefore, even if appellant's Second Amended Complaint could be reasonably construed as purporting to allege a Fourteenth Amendment liberty interest violation, and appellant can clear the hurdles of not being a state employee, not having state employers, and not sustaining any monetary damages, her claim would fail as a matter of law because appellant has not alleged, nor proven, that any defamatory or stigmatizing charge made against her was "made public" by any of the respondents, and she was stigmatized thereby.

ADDITIONAL SUSTAINING GROUNDS

III. AS RESPONDENT DR. DEBRA McCOY DID NOT VIOLATE ANY CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS OF WHICH A REASONABLE PERSON WOULD HAVE KNOWN SHE IS, IN HER PERSONAL CAPACITY, ENTITLED TO THE DEFENSE OF QUALIFIED IMMUNITY AS TO THE CAUSE OF ACTION AGAINST HER UNDER 42 U.S.C. § 1983.

In her Amended Answer to Second Amended Complaint respondent Debra M. McCoy pleaded:

SEVENTH DEFENSE: QUALIFIED IMMUNITY

> 65. The actions and conduct of Debra M. McCoy, to the extent they occurred as alleged, were objectively reasonable under the circumstances of which she was aware, did not violate any clearly established constitutional or federal statutory rights of which she reasonably should have been aware, and she is entitled to QUALIFIED IMMUNITY therefor as to any actions under 42 U.S.C. § 1983.

Qualified immunity is "an immunity from suit rather than a mere defense to liability ... [and] it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806 (1985). "The 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that 'insubstantial claims' against government officials [will] be resolved prior to discovery." *Pearson v. Callahan*, 555 U.S. 223 (2009), *quoting Anderson v. Creighton*, 483 U.S. 635, 640, n. 2, 107 S.Ct. 3034 (1987). The Court has repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*).

In accord with established law, the Fourth Circuit holds that qualified immunity shields a government official from liability for civil monetary damages if the officer's "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "In determining whether the specific right allegedly violated was 'clearly established,' the proper focus is not upon the right at its most general or abstract level, but at the level of its application to the specific conduct being challenged." *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992). Moreover, "the manner in which this [clearly established] right applies to the actions of the official must also be apparent." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992).

As such, if there is a legitimate question as to whether an official's conduct constitutes a constitutional violation, the official is entitled to qualified immunity. *Wiley v. Doory*, 14 F.3d 993, 995 (4th Cir. 1994)(internal citations omitted), *cert. denied*, 516 U.S. 824 (1995). If no constitutional right was violated, there is no necessity for further inquiry concerning qualified immunity. *Pearson v. Callahan*, 555 U.S. 223 (2009).

Qualified immunity protects government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow,* 457 U.S. at 818. The doctrine exists to protect officers in the performance of their duties unless they are "plainly incompetent" or they "knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). Qualified immunity protects law enforcement officers from "bad guesses in gray areas" and ensures that they are liable only for transgressing brightlines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). Qualified immunity affords government officials greater protection than a simple defense on the merits. *Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991), citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Respondent Dr. McCoy performed a discretionary function in good faith in the performance of her assigned duties. Who would have dreamed that those actions would lead to this lawsuit? Clearly Dr. McCoy did not violate any clearly established constitutional right of which a reasonable person would have known. Accordingly, she is entitled to the defense of qualified immunity in her individual and personal capacity to appellant's action under 42 U.S.C. § 1983.

IV. APPELLANT'S PURPORTED ACTION AGAINST RESPONDENTS FOR DEPRIVATION OF PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT IS BARRED BY THE DOCTRINE OF *PARRATT v. TAYLOR,* 451 U.S. 527 (1981) AS SOUTH CAROLINA PROVIDES APPELLANT AN ADEQUATE POST DEPRIVATION REMEDY.

In her Second Amended Complaint appellant sued the respondents in two Causes of Action alleging Fourteenth Amendment violations by them "in violation of Grove's right to procedural due process of law" and the Fourteenth Amendment under 42 U.S.C. § 1983.

In their AMENDED ANSWER TO SECOND AMENDED COMPLAINT respondents pleaded:

NINTH DEFENSE: ADEQUATE POST DEPRIVATION REMEDY

67. As to plaintiff's SECOND CAUSE OF ACTION (Fourteenth Amendment Violations by DHEC, BabyNet, and FirstSteps - - 42 U.S.C. § 1983) the laws, practices, and procedures of the Courts of the State of South Carolina, specifically the South Carolina Tort Claims Act, S.C. Code § 15-78-10, *et. seq.*, provide plaintiff adequate deprivation and post deprivation relief sufficient to grant due process of law, and all process to which plaintiff might be entitled for proper relief for the alleged actions which were unamenable to prior review. Plaintiff's sole remedy is to proceed under the SCTCA in the Court of Common Pleas.

In *Parratt v. Taylor,* 451 U.S. 527 (1981) the U.S. Supreme Court held that when hobby materials of an inmate in a Nebraska prison were negligently lost and the inmate sued for deprivation of property without procedural due process in violation of the Fourteenth Amendment, when the deprivation occurred as the result of the unauthorized failure of state agents to follow established state procedure, and when Nebraska had a tort claims procedure providing a remedy to persons who suffered a tortious loss at the hands of the state, which could have fully compensated respondent for his property loss, that was sufficient to satisfy the requirements of procedural due process. In other words, even if Nebraska had deprived the inmate of his property in a constitutional sense, it had not deprived him of it without procedural due process because Nebraska's reparations remedy did all that the Fourteenth Amendment requires. This doctrine was further refined and expanded in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) and *Hudson v. Palmer*, 468 U.S. 517 (1984).

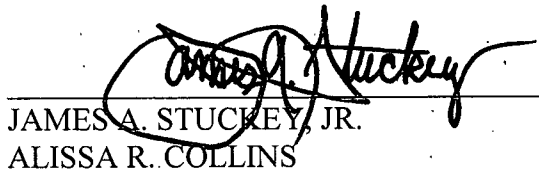
South Carolina has enacted the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et. seq.* (1976) which provides tort remedies and compensation for those sustaining injuries by any agencies of the State.

Accordingly, since South Carolina provides both a deprivation and post deprivation remedy, this satisfies any alleged deprivation of procedural due process of appellant, and she

should proceed exclusively under the South Carolina Tort Claims Act for any remedies she may seek.

CONCLUSION

For the reasons stated, based on the cited law and precedents, respondents 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, respectfully request that this Honorable Court affirm the Order of The Honorable Diane S. Goodstein and her judgment entered herein.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane Schaefer Goodstein, Circuit Court Judge

Case No. 2008-CP-18-2286

A.M. Kelly Grove,

Appellant,

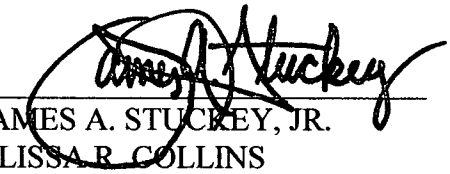
v.

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 Respondents' Final Brief complies with Rule 211(b) SCACR.



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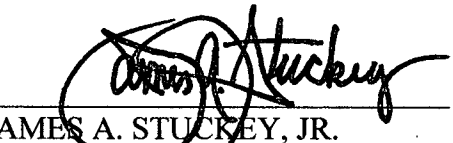
PROOF OF SERVICE

I, James A. Stuckey, of Stuckey Law Offices, LLC, certify that I have served the Respondents' Final Brief on Appellant by delivering a copy to Brian C. Duffy, Esquire, at his office located at Duffy & Young, LLC, 96 Broad St., Charleston, SC 29401 this 7th day of May, 2012.



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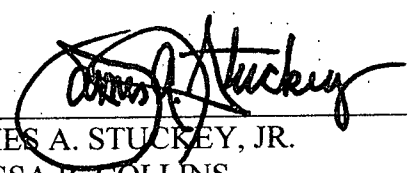

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