THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Honorable William P. Keesley, Circuit Court Judge

Case No. 2001-CP-40-03148

Health Promotion Specialists, LLC,..APPELLANT

vs.

South Carolina Board of Dentistry ....RESPONDENT

APPELLANT'S FINAL BRIEF

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ISSUES ON APPEAL

I. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT BY ASSERTING CONCLUSIONS OF LAW BASED ON FINDINGS OF MATERIAL FACTS THAT SHOULD BE LEFT TO A JURY.

   A. WHETHER THE DENTAL BOARD IS A PERSON AND IS IMMUNE FROM BEING SUED UNDER THE SOUTH CAROLINA TRADE PRACTICES ACT ARE QUESTIONS OF FACT.

   B. THE COURT ERRED IN DETERMINING, AS A MATTER OF LAW, THAT THE BOARD IS IMMUNE FROM BEING SUED.

II. THE COURT ERRED IN DETERMINING THE BOARD COULD NOT BE SUED, AS A MATTER OF LAW, UNDER THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT.

III. THE COURT ERRED IN DENYING APPELLANT'S MOTION TO AMEND THE COMPLAINT.

STATEMENT OF THE CASE

This case was originally filed in July 2001 by Appellant Health Promotion Specialists (herein HPS or Appellant) after the South Carolina Board of Dentistry (herein the Board or Respondent) adopted an "emergency" regulation on July 12, 2001 governing the practices of dental hygienists in school settings, re-imposing the requirement that the child be first examined by a dentist[1]. (R. 89; 214) That regulation had been removed in 2000 by the General Assembly. 2000 Act No. 298. (R. 139 and 179) For the emergency regulation to become effective, it required only the approval of the Board, a majority of which consists of practicing dentists who are elected by other South Carolina licensed dentists (*i.e.* the Board members are not appointed by the legislature or otherwise publicly elected). (R. 276)

HPS sought an injunction of the temporary regulation, which was denied by Order of Judge Strickland by order dated August 8, 2001. (R. 190) That order was affirmed by the Court of Appeals *solely* on the basis that HPS failed to exhaust all administrative remedies before seeking the Court's assistance. (R. 202-204)

In August, 2001, the Board published a proposed permanent regulation substantially identical to the emergency regulation (R. 335; 143), and HPS caused that proposal to be submitted to the administrative law court (ALC) for review, as was required by statute. After a public hearing to determine whether the proposed permanent regulation was a reasonable exercise of the Board's authority, the ALC judge issued a report concluding that the Board's proposed permanent regulation was unreasonable and contravened state policy to the extent it reinstated the dentist pre-examination

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[1] *e.g.* A supervising dentist had to examine the patient no more than 45 days prior to treatment by a dental hygienist in the school setting.

requirement that the legislature had eliminated in 2000. (R. 207) The Board did not submit the proposed legislation to the General Assembly.

A year later, in April of 2003, the Board filed its Motion to Dismiss in the injunction action. No discovery had taken place at the time. In September of 2003, before a hearing was scheduled on the April motion, the Federal Trade Commission (FTC) issued a complaint against the Board based on the same conduct that formed the grounds of both this action and the FTC action involving the Board. The FTC's "STATEMENT OFTHE CASE" stated only:

> 1. Respondent South Carolina Board of Dentistry ("the Board"), which consists almost entirely of practicing dentists, restrained competition in the provision of preventive dental care services by unreasonably restricting the delivery of dental cleanings, sealants and topical fluoride treatments in school settings by licensed dental hygienists. Although the South Carolina General Assembly passed legislation in 2000 eliminating a statutory requirement that a dentist examine each child before a hygienist may perform cleanings or apply sealants in school settings, the Board in 2001 re-imposed the very examination requirement that the legislature had elin1inated, and extended it to the application of topical fluoride in school settings as well. The effect of the Hoard's action was to deprive thousands of school children - particularly economically disadvantaged children - of the benefits of preventive oral health care services. The Board's anti-competitive action, undertaken by self-interested industry participants with economic interests at stake, was contrary to state policy and was not reasonably related to any countervailing efficiencies or other benefits sufficient to justify its harmful effects on competition and consumers.
> (R. 275)

This state court action was stayed after the institution of the action by the FTC, and all defendants in the present case, except the Board, were dismissed from both the federal case and this one. By Consent Order entered on November 1, 2007, this injunction case was restored to the docket in the Circuit Court and on June 10, 2010, the revised motion to dismiss was granted. (R. 4-23) Appellant's motion for reconsideration was denied by Order filed September 27, 2011. (R. 2)

STATEMENT OF THE FACTS

In 1988, the General Assembly enacted legislation aimed at increasing the availability of preventative dental care for school aged children, regardless of Medicaid eligibility. 1988 Act No. 439. (R. 210; 307) The 1988 act allowed licensed dental hygienists to provide preventative dental care in schools. The original program was not particularly effective, largely because of it required a dentist to examine each student immediately before the hygienists were able to provide services. S.C. Code §40-15-80(C)(2)(pre-2000.) It allowed the hygienists to perform certain preventative dentistry techniques "in school settings . . . under general supervision." S.C. Code Ann. Section 40-15-80(B).[2]

Prior to amendments in 2000, South Carolina statutes provided that a dental hygienist could provide cleanings and sealants in a school setting only if:

(1) a supervising dentist examined the patient no more than 45 days before the treatment;

(2) a supervising dentist provided written authorization for the procedures;

(3) the patient was not an active patient of another dentist; and

(4) the patient's parents provided written permission for the treatment.

The 2000 amendments removed all but the requirement for parental consent. (R. 139) Thus, after the 2000 amendments, the Board could not condition the care by a dental hygienist in a school setting on prior review by a dentist of the patient. (R. 341)

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[2] "'General supervision' means that a licensed dentist on the South Carolina Department of Health and Environmental Control's public health dentist has authorized the procedures to be performed but does not require that a dentist be present when the procedures are performed." Section 40-15-85(2)(2000). (R. 140)

Naturally, this amendment directly affected the dentists' (*e.g.* the Board members) economically.

In or around January 2001, appellant HPS began providing services in schools to carry out the General Assembly's intention to improve oral hygiene in school children. (R. 278) By fall of that year, HPS had established relationships with twenty-one school districts in South Carolina and had hired additional hygienists to meet the increasing demand. (R. 169) Although the new law had been in effect for some time, the Board waited until July of 2001 to enact the "emergency" legislation under the guise of clarification. (R. 152) Coincidentally, the "emergency regulation" was enacted just after the legislature went out of session and was not around to stop it, so the law would be good for the full six months allowable. The emergency regulation overlapped the beginning of the school year and thereby interrupted the flow of business for people like HPS.

One month later, HPS submitted the proposed amended law to the Administrative Law Court (ALC) for public hearing. (R. 335) In February 2002, four months after the hearing at the ALC on the permanent regulation, and one month after the 180-day period of the emergency regulation's effectiveness expired, Judge Kitrell issued a report concluding that the proposed permanent regulation was "unreasonable" in light of the 2000 amendments.(R. 207) The ALC judge's conclusion did not mention that Judge Strickland's Order of August 21, 2001 held, "the action taken by the Board is within its power and authority as conferred by statute," insofar as it created the "clarified" regulation.

In 2003, the General Assembly amended the law again to specifically set forth that the pre-examination requirement did not apply in public health settings. (R. 230-235)

The Board again attempted to supersede the legislature's action, which led to the filing of a FTC complaint against the Board that alleged the Board acted illegally in depriving children in South Carolina of preventative dental care. (R. 275) These charges against the Board arose out of deliberate and repeated acts by the Board in seeking to prevent the operation of a school-based, public health dentistry program which provides preventative health care for school-aged children. (R. 279) Ultimately, the FTC and Board entered into a Settlement Agreement and Consent Order (Order dated September 6, 2007; Docket 9311), whereby the "Board may not directly or indirectly require that a dentist conduct an examination of a patient as a condition of a dental hygienist who is working in a public health setting. . ." (R. 347 - 351)

Meanwhile, in this injunction litigation, the Board filed its motion for dismissal in April 2003 and HPS filed an amended complaint. That May, the South Carolina General Assembly enacted legislation that expressly and definitively established that while dentist examination requirements are applicable in some settings, the requirement did not apply to dental hygienists' bestowment of preventive dental hygiene services, including cleanings, sealants and topical fluoride, (R.120) when they are working in public health settings under the direction of the Department of Health and Environmental Control. S.C. Code §§40-15-80 and 40-15-85 (2000, as amended). (R. 351) Nonetheless, the Board initially maintained its position that in all settings where a dental hygienist provided services - whether public health or private practice-- a licensed dentist first had to see the patient and provide a treatment plan. Finally, on or around October 16, 2003, the Board passed resolution that affirmed it would not seek to usurp the legislation (SC. Code § 10-16-2003). (R. 92)

At the conclusion of the FTC's litigation against the Board in 2007, this case was restored to the docket and the Board renewed its motion; HPS requested leave to amend its complaint. The Court issued an opinion denying HPS' request to amend and dismissed the action, calling it an order granting summary judgment, although there was no evidence presented at the hearing to establish any findings of fact. (See transcript, generally, R. 289). The motion for reconsideration was denied in 2010 and this appeal followed. (R. 2)

ARGUMENT

I. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT BY ASSERTING CONCLUSIONS OF LAW BASED ON FINDINGS OF MATERIAL FACTS THAT SHOULD BE LEFT TO A JURY.

In ruling on summary judgment, the court sets forth several conclusions which Appellant HPS asserts are questions of material facts which should have been left to the jury, as follows:

The Board's motion, though styled as a motion for summary judgment, was really presented to the court with only the support of case law and matters appearing on the face of the pleadings. Clearly, in the June 25, 2010 order, the Court looked well beyond the allegations of the pleadings and made the findings of fact set forth in the Order, which are improper since the supposed "facts" are disputed.

"Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 376-77, 597 S.E.2d 181, 184 (Ct. App. 2004)(quoting, Murray v. Holnam, Inc., 344 S.C. 129, 138, 542 S.E.2d 743, 747 (Ct.App.2001) (citing Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing & Regulation, 337 S.C. 476, 523 S.E.2d 795 (1999)). Furthermore, in determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988).

A trial court may grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *See also*,

Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997)). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." (Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654, 656, (S.C. App. 2002). In this case, there was virtually no discovery conducted, as no depositions had been taken and virtually no documentation had been traded[3]. In fact, prior to hearing the Board's motion for summary judgment, the Court tabled HPS' pending to compel.

A. THE COURT ERRED IN RULING THAT THE DENTAL BOARD IS NOT A PERSON AND IS IMMUNE FROM BEING SUED UNDER THE SOUTH CAROLINA TRADE PRACTICES ACT.

When the Court issued its order granting summary judgment, it set forth as conclusions of law certain facts which are properly reserved for determination by the ultimate fact finder. Appellant sought reconsideration based on the error of law as to summary judgment and the Court upheld its ruling. The primary issue here is that the Court held both as a matter of law and as a fact, that the Board cannot be sued under the South Carolina Unfair Trade Practices Act because the Board is not a "person" and because the Board is immune from suit. (R. 8) In footnote 5 of the Order, the trial court found that the Board is "unquestionably" a government entity entitled to the immunities. (R. 11) Appellant would show that whether the Board can be sued and whether it is a "person" are actually material questions of fact, as more fully set forth herein, below.

The first issue is whether the Dental Board is a "person" under South Carolina law. The Enabling Act, at §40-1-20(3)(2011 amend), defines "board or commission" as being the group of individuals charged by law with the responsibility of licensing or

[3] Respondent, in the trial court and in their pleadings, asserted discovery had been plentiful. Appellant would show that while discovery had taken place in the federal court action, virtually no discovery had been processed in this case, which was stayed completely, entirely inactive as a result for years.

otherwise regulating an occupation or profession within the State. Except as otherwise designated, "board" is used in this article to reference both boards and commissions". Id. According to the American Heritage Dictionary, a "person" is an individual[4], partnership, or corporation (The American Heritage Dictionary of the English Language, Fourth Edition; Houghton Mifflin Company: 2000). Section 40-1-20(3), defines "Board" or "Commission" for purposes of the Department of Labor Licensing and Regulations (LLR) matters as "the group of *individuals* charged by law with the responsibility of licensing or otherwise regulating an occupation or profession within the State. Except as otherwise indicated, "board" is used in this article to refer to both boards and commissions." (emphasis added).

Subparagraph (8) defines a "Person" as being "an *individual,* partnership, or corporation."Id. (emphasis added). Regulation 71-400, which sets forth in South Carolina Statues the definitions applicable to the LLR, and which defines a "person" as any individual, partnership, joint venture, cooperative association, corporation, organization of employees, or the State of South Carolina or any political subdivision thereof. S.C. Code Ann. Regs. 71-400 (emphasis added). (See also, Meek v. United States, 136 F.2d 679 (6th Cir., 1943); Bowe v. Judson C. Burns, 137 F.2d 37 (3rd Cir., 1943). S.C. Code Ann. Regs. 71-1004).

Based on these facts, it could be concluded that the laws of South Carolina clearly establish that the Board of Dentistry is a "person" for the purposes of applying both the Torts Claim Act and the Unfair Trade Practices Act, so either there is a question of material fact as to the identity of the Board or the lower court misapplied the law. If, however, this Court believes the issue of the Board's identity is instead a question of law,

[4] The American Heritage Dictionary defines "individual" as being a single human considered apart from a society or community".

Appellant would show that the lower Court neither addressed that legal issue nor established *as a matter of law* that the Board is not a "person" under the UTPA. Either way, summary judgment was premature.

B. THE COURT ERRED IN DETERMINING, AS A MATTER OF LAW, THAT THE BOARD IS IMMUNE FROM BEING SUED.

The second major error was the conclusion that the Board's actions are protected by the shields of legislative and common law immunities. (R. 13) In the second amended complaint in this case, HPS alleges that the Board did not undertake a legitimate and appropriate exercise of discretion in engaging in the work of passing the emergency legislation. (R. 24-42; 36) Similar to the lower court in this case, the circuit court in Madison ruled the Department was immune from liability for negligence, relying on S.C.Code Ann. § 15-78-60(25) (2005). Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 638 S.E.2d 650 (S.C. 2006). Section 15-78-60(25) provides that a governmental entity is not liable from "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner." However, "gross negligence is ordinarily a mixed question of law and fact." Madison at 655. (internal citations omitted). On review, of Madison, the Supreme Court concluded that in most cases, gross negligence is a factually controlled concept whose determination best rests with the jury. Id. at 661. When the evidence supports but one reasonable inference, it is solely a question of law for court, but otherwise it is an issue best resolved by the jury and, in that case, the Court concluded "that the issue of whether Department acted in a grossly negligent manner is a factual issue for a jury". Id.

The Board answered Appellant's charge and argued, and the Court held, that the Tort Claims Act specifically preserves sovereign immunity for "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any chapter, provision, ordinance, resolution, rule, regulation, or written policies." (R. 11) (*citing* S. C. Code Ann. §. 15-78- 60(4)(emphases added)). The order further held that Appellant's claim was barred by a purported quasi-legislative immunity. (R. 12)[5] Specifically, the Board argued that the Court should grant judgment in its favor as to all claims seeking money damages, citing the subsections 1, 2 and 4 of S.C. Code Ann. 15-78-60, which read as follows:

> "The governmental entity is not liable for a loss resulting from: (1) legislative, judicial, or quasi-judicial action or inaction; (2) administrative action or inaction of a legislative. judicial, or quasi-judicial nature; . . . (4) adoption or enforcement or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including but not limited to, any charter. provision, ordinance. resolution, rule, regulation, or written policies; [or] . . ." S.C. Code Ann. §§ 15-78-60(1), (2) and (4).

The Board relied on the case of O'Laughlin v Windham for the proposition that the General Assembly, when enacting 15-78-20(B), intended that all other immunities previously available to government agencies under the common-law would be preserved. (R. 301) Olaughlin v. Windham, 330 S.C, 379,498 S.E.2d 689 (Ct. App. 1998). The Board repeatedly argues that it gets sovereign immunity for "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies", citing SC. Code Ann. § 15-78-60(4). The Board also

[5] The Board argued that "in this particular case, there is absolutely no question, as a matter of law that the board was acting in a quasi-legislative capacity. It issued an emergency regulation, which is within its authority to do so, is consistent with Judge Strickland's rulings and that is what they have been sued for." (R 299, Lines 19-25)

relies on the case of Williams v. Condon, which came later and held the common law prosecutorial immunity is not supplanted by the Tort Claims Act. 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). The Board argues that same must be true with respect to the common law principles of legislative and quasi-legislative immunity.

What the Court failed to recognize and apply is that "immunity under the Tort Claims Act is an affirmative defense that must be proved by the defendant at trial". Frazier v. Badger, 361 S.C. 94, 101, 603 S.E.2d 587, 590 (2004). That HPS alleges that the Board acted with an improper motive in enacting the emergency regulation speaks to the elements of its unfair trade practices claim and is not a basis for appeal today. HPS argues that whether the Board is entitled to immunity is a question of fact that the Board has to prove.

This Court, in Hawkins v. City of Greenville, stated that for each of the specific provisions set forth in S.C. Code Ann. §15-78-60, the determination of immunity from tort liability turns on the question of whether the acts in question were discretionary rather than ministerial. Hawkins v. City of Greenville, 358 SC. 280, 594 S.E.2d 557 (Ct App. 2004). The five subsections of that statute will generally shield a governmental entity from liability when it exercises discretion in the form of judicial action, legislation, or administrative regulation. But, and it is a big but, the immunity is not absolute because the entity must prove certain facts in order to be entitled to the immunity. Sovereign immunity is South Carolina is dead. (See, Wells v. City of Lynchburg, 331 S.C. 296, 302, S.E.2d 746, 749 (Ct. App. 1998) (expressly noting that the common law doctrine of sovereign immunity has been abolished in South Carolina and that all immunity issues are now resolved by reference to the Tort Claims Act)). Discretionary immunity is contingent on proof the government entity, when faced with alternatives,

actually weighed competing considerations and made a conscious choice. Further, the entity must establish, in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue. Strange v. S.C. Dept. of Hwys. & Pub. Transp., 314 S.C. 427, 429, 445 S.E.2d 439, 440 (1994). The governmental entity bears the burden of establishing discretionary immunity as an affirmative defense. Niver v. S.C. Dept. of Hwys. & Pub. Transp., 302 S.C. 461, 463, 395 S.E.2d 728, 730 (Ct.App.1990). The provisions of the Tort Claims Act that establish limitations on and exemptions to the liability of the State must be liberally construed in favor of limiting the liability of the State. Giannini v. S. Carolina Dept. of Transp., 378 S.C. 573, 591, 664 S.E.2d 450, 459 (2008)(See also, S.C. Code Ann. § 15–78–20(f) (Supp.2005)).

In this case, if the Board wanted the discretionary immunity provided under the Tort Claims Act, it was obligated to establish and prove that its members, when faced with alternatives, actually weighed competing considerations and then made a conscious choice to act. Furthermore, the Board had to show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them. Id. (see also, Sabb v. South Carolina State University, 350 S.C. 416, 567 S.E.2d 231 (2002); Steinke v. South Carolina Dept. of Labor. Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999); Summer v. Carpenter, 328 S.c. 36, 492 S.E.2d 55 (1997); Creech v. South Carolina Wildlife and Marine Resources Dept., 328 S.C. 24, 491 S.E.2d 571 (1997); Strange v. South Carolina Dept. of Highways and Public Transp., 314 S.C. 427,445 S.E.2d 439 (1994)).

Consider Steinke v. South Carolina Dept. of Labor. Licensing and Regulation, in which LLR was denied immunity under the discretionary function exception to the Tort

Claims Act in a wrongful death action that alleged the Department negligently failed to investigate the credible notices of improper modifications to a licensed device that was used to carry bungee jumpers and spectators. Steinke v. S. Carolina Dept. of Labor, Licensing & Regulation, 336 S.C. 373, 520 S.E.2d 142, (1999). In Steinke, the Department contended it was immune from suit under §15-78-60(12) because under that section, a governmental entity is not liable for a loss resulting from "licensing powers or functions, including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority except when the power or function is exercised in a grossly negligent manner." Id. at 393. The trial judge instructed the jury on this exception, but the Court determined there was "scant evidence that Department officials exercised their discretion; evidence showed that the Department received three credible notices of modifications in question, but nonetheless took no more than a cursory glance". Id. at 393-394.

As the Supreme Court has recognized, when a governmental entity seeks to establish discretionary immunity, the "standard is inherently factual.". Pike v. SCDOT, 343 S.C. 224, 540 S.E.2d 87 (2000). In Pike, the Supreme Court held that "when a governmental entity asserts the affirmative defense of discretionary immunity under the Tort Claims Act, the burden of proof is on the governmental entity and this burden is one of persuasion by a preponderance of the evidence. Accordingly, the Court of Appeals correctly analyzed this issue in terms of whether a jury issue was presented." Id. at 232. The Department of Transportation argued that if the Court required them to establish their immunity against Pike's claims by the preponderance of the evident, then "the Court will, in effect, judicially abolish the defense by allowing juries to second guess the DOT's

discretionary decisions." The Supreme Court decided that if a governmental entity merely has the burden of production, not the burden of persuasion, then agencies like the DOT "would avail itself of an affirmative defense but effectively be relieved of proving the defense. This, in our opinion, flies in the face of the well-established rule that the party pleading an affirmative defense 'has the burden of proving it'." Id. at 231. (Citing, Hoffman v. Greenville County, 242 S.C. 34, 39, 129 S.E.2d 757, 760 (1963); *accord* McCabe v. Sloan, 184 S.C. 158, 162, 191 S.E. 905, 906 (1937) ("It seems unnecessary to cite authorities in support of the postulate that when one pleads an affirmative defense, the burden is on him to prove it.")). This is not a determination that can be made on the face of HPS' Second Amended Complaint and it is not a question of law.

As counsel for HPS stated at the hearing on this motion, "[w]e don't just give governments carte blanche to run roughshod all over the rights of their citizens and hide behind the Tort Claims Act for immunity. They've got to prove that . . . their deliberations had procedural integrity. We don't sue them for getting the wrong answer, but they've got to prove that they were basically doing what government does." (R. 328, lines 2-10) The government, especially an agency whose individual members benefit fiscally from the regulations it passes, cannot do whatever it wants by way of regulation and then hide behind the Torts Claim Act; surely, that could not be the legislature's or judiciary's intent[6].

[6] The manner in which the Board members are elected (§40-15-20), that is, by other dentists, arguably establishes the Board is as a quasi-trade association whose members are elected by their peers to represent their collective interests. In fact, the Governor only has the authority to "reject" the members voted onto the Board by the other dentists. Furthermore, and interestingly enough, the sole hygienist representative is elected by the Board—of dentists. Therefore, the dental hygienist professionals don't have any vote as to who becomes a member of the Board to represent their interest.

II. THE COURT ERRED IN DETERMINING THE BOARD COULD NOT BE SUED, AS A MATTER OF LAW, UNDER THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT.

The Unfair Trade Practices Act, §39-5-10 *et seq.*, provides that

> Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another *person* of an unfair or deceptive method, act or practice declared unlawful [by the Act] may bring an action. . . to recover actual damages[7].

An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." Wogan v. Kunze, 366 S.C. 583, 606, 623 S.E.2d 107 (Ct. App. 2005)(citing, DeBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct.App.2000))." To be actionable under the South Carolina Unfair Trade Practices Act (SCUTPA), the unfair or deceptive act or practice must have an impact upon the public interest. Id. at 607(citing Haley Nursery Co. v. Forrest, 298 S.C. 520, 381 S.E.2d 906 (1989)). "An impact on the public interest may be shown if the acts or practices have the potential for repetition." Singleton v. Stokes Motors, Inc., 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004) (citing, Crary v. Djebelli, 329 S.C. 385, 387, 496 S.E.2d 21, 23 (1998)).

> The potential for repetition may be shown in either of two ways:
> (1) By showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or
> (2) By showing the company's procedures created a potential for repetition of the unfair and deceptive acts. Id.

A party bringing a private cause of action under SCUTPA must allege and prove the defendant's actions adversely affected the public interest. Daisy Outdoor Adver. Co. v. Abbott, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996); Wogan v. Kunze, 366 S.C. 583, 606-607623 S.E.2d 107 (Ct. App. 2005) (citing Haley Nursery Co. v. Forrest, 298 S.C.

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7 Sullivan and MacGregor, *Elements of Civil Causes of Action,* Fourth Edition. S.C. Bar CLE Division:2009

520, 381 S.E.2d 906 (1989)). "An impact on the public interest may be shown if the acts or practices have the potential for repetition." Singleton v. Stokes Motors, Inc., 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004) (citing Crary v. Djebelli, 329 S.C. 385, 387, 496 S.E.2d 21, 23 (1998)).

The Board argued that there is no case law in South Carolina that allows a SCUTPA claim to be asserted against a state entity because the SCUTPA requires that the unfair methods of competition or unfair deceptive acts or practices must be "in the conduct of any trade or commerce". (R. 303, line 20) The Board argues that the SCUTPA claim fails as a matter of law because HPS purportedly failed to allege any facts that would bring that claim within the specific statutory definition under §39-5-20(a) and because the Board is not a "person" as contemplated by the Act. (*see supra).* (R. 303)

Appellant would aver that if the case law does not exist in South Carolina, it is because this whole issue of whether a Board is a "person" whose actions (e.g. regulation of a profession) affects commerce, such that it falls within the coverage of SCUTPA, is a novel issue. There is established law in this State that novel issues of law do not, and should not, be decided on summary judgment because the issues need a full development of a factual record. In Doe v Batson, 338 S.C. 291, 525 S.E.2d 909, 915 (Ct. App. 1999), the court determined that "it is imperative that factual foundations are adequately explored, thereby allowing the court to enter this novel area fully informed." The Batson court relied on ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997), for the proposition that, "although all issues of novel impression do not require a trial, summary judgment is inappropriate where further inquiry into the facts is needed to clarify the application of the law." Id.

To that end, HPS brought a cause of action under a state statute in state court seeking state remedies. As to whether the Dental Board is a "person" that effects trade or commerce as defined by the Act, Appellant would show those are novel questions of fact which should not have been summarily decided. Furthermore, as dentistry constitutes "trade or commerce" under the SCUTPA, whether the regulation of that profession also constitutes an act effecting trade or commerce under the SCUTPA is also a novel questions of fact. *See*, Taylor v. Medenic, 324 S.C. 200, 217, 479 S.E.2d 35, 45 (1996) ("The provision of *all* service constitutes commerce within the meaning of the UTPA. The statute does not exclude professional services from its definition.") (emphasis in original)).

Appellant would show that when the Board passes a regulation, that endeavor constitutes an act "in the conduct of dentistry". The South Carolina legislature has expressly stated it intended that courts, when interpreting S.C. Code § 39-5-20(a), "will be guided by the interpretations given by the Federal Trade Commission and the federal courts to §5(a)(l) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)), *as from time to time amended."* S.C. Code Ann. § 39-5-20(b) (emphasis added). The pertinent part of the Federal Trade Commission Act (FTCA) states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful". Id. In other words, the action or practice falls within the ambit of an action "in the conduct of any trade or commerce" if it only, merely affects commerce.

In this case, Appellant alleged in its Second Amended Complaint that the Board promulgated anti-competitive regulations for the dental profession. As stated above, the trial court, and this court, are to be guided by FTC and by court interpretations of §

5(a)(1) of the FTC Act (15 U.S.C. § 45(a)(1), and its amendments). The FTC Act has made clear that an act or practice need only "affect" commerce to constitute conduct of any trade or commerce. Additionally, the United States Court of Appeals for the Fourth Circuit, when interpreting a former and stricter version of §5(a)(1), found that a regulatory board's promulgation of regulations constituted an act "in commerce.". It was clear enough from the allegations of the Second Amended Complaint that HPS charge the Board with conspiring with others to violate SCUTPA and/or that the Board aided and abetted others in their endeavors to so violate. (R 24) This matter should not have been dismissed on summary judgment.

This matter is so much more than purportedly moot legislation and the Dental Board. HPS suffered monetary damages and both HPS and other professions regulated by LLR are at risk to suffer continuing and future damages if the Boards, like the Dental Board here, are allowed to engage in this perpetual and repetitive actions.

III. THE COURT ERRED IN DENYING APPELLANT'S MOTION TO AMEND THE COMPLAINT.

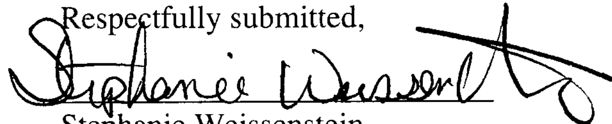
When the Court prematurely granted summary judgment, it also rejected Appellant's request to amend the complaint to allege conspiracy by the Board to violate the SCUTPA. The Court accepted the argument that the Board would be prejudiced by the amendment since the case has so long been on the docket. However, Appellant would show that because this case was stayed, for years, pending the resolution of the FTC action, this case was not active for the length of time alluded to by the Court. When the case was restored and the Board filed a new motion for summary judgment, discovery had not been conducted. Appellant is in informed and believes that, at the summary judgment stage, the Board would not have been unduly prejudiced.

"The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried and a lack of opportunity to refute it. . . This rule strongly favors amendments and the court is encouraged to freely grant leave to amend." Parker v. Spartanburg Sanitary Sewer District, 362 S.C. 276, 286, 607 S.E.2d 711, 716-717 (Ct. App. 2005); Pool v. Pool, 329 S.C. 324, 328-29, 494 S.E.2d 820, 823 (1998). Further, in the LaMotte v. Punch Line case, the South Carolina Supreme Court actually recognized a cause of action for conspiracy to violate SCUTPA. LaMotte v Punch Line of Columbia, Inc., 296 SC 66, 70, 370 SE2d 711 (1988). HPS believes it could establish facts that would prove the Board could be a co-conspirator in a conspiracy to violate the SCUTPA and that the Board may also be found to have aided and abetted others in violations of SCUTPA. As discovery has not been undertaken in this case, as the record would show, Appellant believes that it is well within the contemplation of Rule 15(a). SCRCP.

CONCLUSION

The pleadings in this case clearly set forth more than a scintilla of evidence that, when viewed in favor of HPS, who was the nonmoving party, that the Dental Board may be sued under the South Carolina Unfair Trade Practices Act and that the Board has the obligation to establish facts and evidence that it is entitled to an immunity set forth by the Tort Claims Act. Further, there is adequately pled fact that the Board's conduct in enacting these types of regulations effect commerce, and that similar conduct has been perpetrated and is likely to be perpetrated again by this Board, and others at the Department of Labor Licensing and Regulation, against other members of the public. For these reasons, and the other reasons set forth herein, summary judgment should have been denied and HPS should have been granted leave to amend the complaint.

Respectfully submitted,



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October 5, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHALD COUNTY
Honorable William P. Keesley, Circuit Court Judge

Case No. 2001-CP-40-03148

Health Promotion Specialists, LLC,
and Palmetto Dental Care, LLC,...APPELLANT

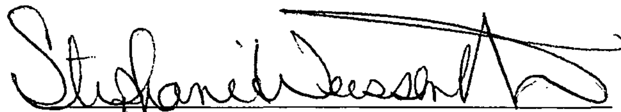
vs.

South Carolina Board of Dentistry ....RESPONDENT

CERTIFICATE OF COUNSEL

Counsel for Appellants hereby certify that the herein **Final Brief of Appellants** complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Respectfully submitted



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CERTIFICATE OF SERVICE

I, Malory L. Hogg, do hereby certify that I have this date, served one (1) copy of the **Appellants' Final Brief and Appellant's Final Reply Brief** in the above-captioned matter on the following by placing same in United States Mail, with sufficient first-class postage affixed and addressed as follows:

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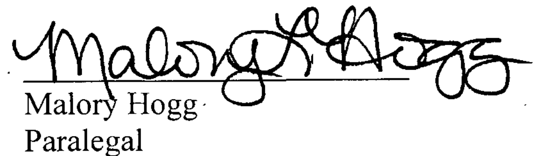

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October 5, 2012

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