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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Opinion No. 2012–UP–502 S.C. Ct. App. filed Sept. 5, 2012

Russell Charles Hurst, D.M.D. ..... *Petitioner,*

~ vs. ~

South Carolina Department of Labor, Licensing, and Regulation,
South Carolina Board of Dentistry of ..... *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

Aaron J. Kozloski, Esq.
Capitol Counsel, LLC
P.O. Box 1996, Lexington, SC 29071
803-748-1320, Fax 888-513-6021
E-mail: aaron@capitolcounsel.us
Counsel for Petitioner

Other Counsel of Record:

Patrick D. Hanks, Esq.
S.C. Dept. of Labor, Licensing & Regulation
P.O. Box 11329, Columbia, SC 29211
Phone 803-896-4477
E-mail: hanksp@llr.sc.gov
Counsel for Respondent

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AUTHORITIES

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 18, 2012.

QUESTION PRESENTED

Did the Court of appeals err in affirming the Dental Board sanctions against Dr. Hurst without applying the balancing test set forth by this Court in *Wilson v. State Board of Medical Examiners*?[1] [2]

STATEMENT OF THE CASE

Dr. Hurst petitions the Court to review the decision below on grounds that it conflicts with prior decisions of this Court: *Wilson v. State Bd. of Med. Exam'rs*, 305 S.C. 194, 406 S.E.2d 345 (1991) and *Huber v. State Bd. of Physical Therapy Exam'rs*, 316 S.C. 24, 446 S.E.2d 433 (1994)(following *Wilson*).

Dr. Hurst further asserts that a substantial constitutional issue is directly involved: Upon what standard may a South Carolina licensing board impair a duly licensed person's fundamental right to practice his or her chosen profession? Dr. Hurst asserts the standard is higher than mere substantial evidence, as articulated in *Wilson* and *Huber*.

On July 5, 2001, the South Carolina Board of Dentistry (Board) suspended Petitioner Dr. Hurst's dental license for five years after he pled guilty to three counts of committing lewd acts upon a child under 16 and one count of contributing to the delinquency of a minor. (R. 19)

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[1] 305 S.C. 194, 406 S.E.2d 345 (1991). Board must "meticulously weigh the public interest and the need for the continued services of qualified medical doctors against the countervailing concern that society be protected from professional ineptitude." 305 S.C. at 196-97, 406 S.E.2d at 346.

[2] Dr. Hurst advanced two issues below, both of which are inextricably intertwined in fact and in law. The question presented today encompasses and proposes resolution of both.

After serving his five-year suspension, the Board reinstated Dr. Hurst's license on August 21, 2006. The Board required Dr. Hurst to take and pass a licensing examination prior to reinstatement. Upon reinstatement, Dr. Hurst's license was subject to probationary terms and conditions:

> No Patients under age 21;
> No sedation of any patients;
> No use of computers in the office;
> Random patient records reviews at his expense;
> Polygraphs as directed by Dr. Gene Abel, M.D., and,
> Submission of staff surveillance forms to Dr. Abel.[3]

(R. 12) On November 30, 2010, Dr. Hurst petitioned the Dental Board to terminate or modify the conditions of probation. Dr. Hurst entered evidence into the Record that Dr. Abel pronounced him essentially cured, and in no further need of treatment or Board supervision. (R. 57, 58)

The Board heard and denied the Petition on January 14, 2011 stating, "The Board finds there is no reason at this time to alter, amend, or otherwise release Respondent from conditions placed on him by the previous order." No further explanation was offered. No reference to the evidence appears in the Order. (R. 8)

Appeal was taken to the Administrative Law Court on February 1, 2011. The Administrative Law Court (ALC) affirmed the decision of the Board without oral argument on August 9, 2011, on grounds that substantial evidence in the Record justified continued probation. (R. 2) Appeal was taken to the Court of Appeals on September 9, 2011.

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[3] Dr. Abel was selected and appointed by the Board to treat Dr. Hurst and report on his progress.

The Court of Appeals affirmed without oral argument by unpublished opinion, reasoning that nothing more than substantial evidence is required to support continued restriction of Dr. Hurst's license.[4]

Neither the decision of the ALC nor the Court of Appeals applied, nor even made passing reference to the *Wilson* balancing test for imposing professional sanctions on medical professionals. Dr. Hurst contends this is reversible error.

Dr. Hurst Petitioned the Court of Appeals for rehearing, and the Petition was denied on October 18, 2012. This Petition is made on November 19, 2012.

ARGUMENT

THE COURT OF APPEALS SHOULD HAVE REVERSED THE ADMINISTRATIVE LAW COURT WITH INSTRUCTIONS TO APPLY THE BALANCING TEST PRESCRIBED BY THIS COURT IN WILSON V. STATE BOARD OF MEDICAL EXAMINERS.

Because the Court below ruled that continued encumbrance of Dr. Hurst's license was justified by substantial evidence, and gave no consideration to the mandatory balancing test prescribed by this Court in *Wilson*, the decision should be remanded with instructions to apply *Wilson v. State Board of Medical Examiners*.

> It is therefore an essential element of the legislatively designed administrative regulatory scheme that the Board, in a disciplinary proceeding, scrupulously consider all factors relevant to continued licensure. It must, therefore, meticulously weigh the public interest and the *need for the continued services of qualified medical doctors* against the countervailing concern that society be protected from professional ineptitude.

305 S.C. at 196-97, 406 S.E.2d at 346 (emphasis in original).

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[4] The Court of Appeals relies exclusively on *Hill v. South Carolina Dept. of Health and Environmental Control*, 389 S.C. 1, 698 S.E.2d 612 (2010) for the proposition that only substantial evidence is required. However, *Hill* was not a professional discipline case.

What is apparent is that this Court distinguished professional-occupational disciplinary case from other types of regulatory proceedings by adding a balancing test to the basic requirement that sanctions must rest on substantial evidence. *See also*, *Huber v. State Bd. of Physical Therapy Exam'rs:*

> The Board must, therefore, meticulously weigh the public interest and the need for the continued services of qualified medical professionals against the countervailing concern that society be protected from professional ineptitude.

316 S.C. at 28, 446 S.E.2d 436, n.2. (extending *Wilson* beyond physician disciplinary actions).

"It cannot be doubted that a man's trade or profession is his property." *Byrne's Adminstrs. v. Stewart's Adminstrs.*, 3 S.C. Eq. (3 Des. Eq.) 466, (1812). "[T]here is no reasonable doubt that the rights of those who have been duly licensed to practice medicine or other professions are property rights of value which are entitled to protection." *Dantzler v. Callison*, 230 S.C. 75, 94 S.E.2d 177 (1956).

Throughout the proceedings in this matter, no forum before which Dr. Hurst has appeared has given countenance to the command of this Court in *Wilson*. Counsel for Dr. Hurst instructed the Dental Board on its duty to balance public protection against public need at the hearing on his petition to that Board. (R. 49-50) The Board's response: "The Board finds there is no reason at this time to alter, amend, or otherwise release Respondent from conditions placed on him by the previous order." (R. 8)

Throughout briefing to the ALC, Dr. Hurst reiterated the command of the *Wilson* and *Huber* Courts. Yet citation to *Wilson* appears nowhere in the ALC decision. The solitary ground for affirming the Board was the appearance of 10-year-old substantial

evidence in the Record, without even passing acknowledgment of the newly entered evidence of record that Dr. Hurst is rehabilitated.

The *Wilson* test was thoroughly presented to the Court of Appeals, as evidenced by the briefs accompanying this Petition. Yet discussion of, or citation to *Wilson* and *Huber* is conspicuously absent. Dr. Hurst asserts this is reversible error.

What is *most* notable about this Court's edict in *Wilson* is that the Court expressly found that there was substantial evidence supporting suspension of Dr. Wilson's license, yet reversed the decision below with stern instructions to apply the proper standard.

It is possible that the *fora* below construe *Wilson* as confined to its particular facts. Yet none below have stated so, nor even mentioned the *Wilson* decision.

The *Wilson* Court addressed two issues: (1) Whether the Board's decision was supported by substantial evidence and (2) whether the Board improperly based its sanction, in part, upon misconduct not alleged in the complaint. The Court found there was substantial evidence supporting suspension of Dr. Wilson's license, but found that the sanction was based in part on conduct not alleged in the complaint and remanded. Then, immediately after ordering remand, the Court prescribed the appropriate test that should be applied by professional-occupational licensing boards. The Court's clear and forceful instructions could hardly be construed merely as *obiter dictum*.

Reduced to its simplest form, the question Dr. Hurst implores this Court to answer for sake of clarity and certainty is whether *Wilson* established a rule of law, or whether it is rests only on its unique facts, allowing inferior *fora* to ignore its prescribed test?

Dr. Hurst asserts the opposite. Dr. Hurst reads the words of *Wilson*, "*essential*

element of the legislatively designed administrative regulatory scheme," "*scrupulously* consider all factors relevant," and "*meticulously* weigh," as affirmative commands of this Court to be given due regard.

Wilson commands an exercise of discretion, and where the record does not reflect the exercise of such discretion, the law presumes it was not exercised; and that failure to exercise discretion where required is, as a matter of law, an abuse of discretion amounting to reversible error. "A failure to exercise discretion amounts to an abuse of that discretion." *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997)(trial judge failed to consider proper factors in imposing discovery abuse sanctions). "The mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what basis that discretion was exercised." *id.* "When the [agency] is vested with discretion, but [its] ruling reveals no discretion was, in fact, exercised, an error of law has occurred." *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d 565 (1987)(remanding with instructions to trial court to exercise discretion regarding taking additional testimony).

The Board may well have had some reason for refusing to release Dr. Hurst from his conditions of probation, perhaps that public protection overtook the public's need for his services. But such reasoning is not reflected in its Order nor anywhere in the Record, and the ALC and Court of Appeals should have demanded a better explanation than, "The Board finds there is no reason at this time to alter, amend, or otherwise release Respondent from conditions placed on him by the previous order." (R. 8)

Dr. Hurst has labored under heavy burdens imposed upon his license for over a

dozen years now. "Clearly, the original sanction, if imposed after the passage of many years, becomes a harsher penalty and, moreover, impacts upon the public need for medical services . . . ." *Wilson*, 305 S.C. at 197, 406 S.E.2d at 346. Whether continuing these restrictions is unduly hash as a matter of law, or otherwise supported by substantial evidence is not the question before this Court. The question is whether indefinite imposition of sanctions of the type in this case, for this long, requires more than a two-page summary order void of any findings of fact, conclusions of law, or elucidation of reasoning.[5]

Considering the constitutional magnitude of the rights at stake for any person subject to discipline by a South Carolina licensing board, Dr. Hurst urges the Court to clarify the strength and precedential weight of its pronouncements in *Wilson* and *Huber*.

Ultimately, upon what standard may a South Carolina licensing board operating within the Executive Branch impair a duly licensed person's fundamental right to practice his or her chosen profession? Dr. Hurst's case demonstrates that South Carolina's 38 professional-occupational licensing boards, the courts that review their decisions, and the tens of thousands of doctors, dentists, nurses, and other licensed professionals facing them would benefit from this Court's clarification of *Wilson*.

CONCLUSION

This Court should declare that its instructions in *Wilson* be followed in professional disciplinary actions, and that the findings of fact and conclusions of law as

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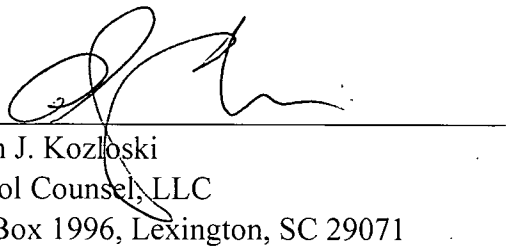
[5] The entire hearing process on Dr. Hurst's petition took only 50 minutes, which included deliberation in executive session and announcement of the decision. The two-page order was prepared and signed the same day.

applied to the *Wilson* test in such cases be adequately articulated on the record.

This Court should find as a matter of law that the decision below was erroneous in that the *Wilson* mandate does not appear to have been applied at any stage of the proceedings, and should remand with instructions to apply the *Wilson* test.

For the Petitioner:
CAPITOL COUNSEL, L.L.C.:

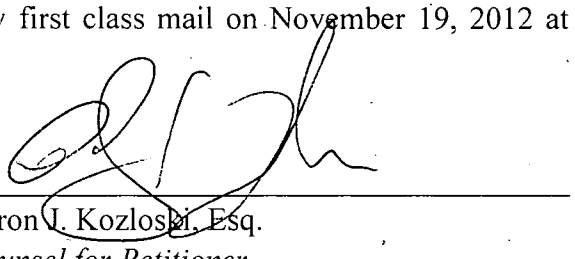


Aaron J. Kozloski
Capitol Counsel, LLC
P.O. Box 1996, Lexington, SC 29071
803-748-1320 Fax 888-513-6021
Mobile 803-465-1400
aaron@capitolcounsel.us
Counsel for the Petitioner

November 14, 2012
Lexington, South Carolina

PROOF OF SERVICE

This Petition for a Writ of Certiorari was served upon Counsel for the Respondent, Patrick D. Hanks, Esq., by first class mail on November 19, 2012 at P.O. Box 11329, Columbia, SC 29211.



Aaron J. Kozloski, Esq.
Counsel for Petitioner

November 19, 2012
Lexington, South Carolina

The Supreme Court of South Carolina

Aaron Kozloski

11/19/2012

RECEIPT #66290

Fee Type:	Case Initiation Fee
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