

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Health Promotion Specialists, LLC,

Plaintiff,

vs.

South Carolina Department of Health and Environmental Control, The South Carolina Dental Association, Dr. Richard E. Boyd, as Personal Representative of the Estate of Rocky Napier, and one or more John Does, unidentified current or former agents of South Carolina Department of Health and Environmental Control,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No.: 2019-CP-40-04567

RECEIVED

Mar 26 2025

SC Court of Appeals

ORDER GRANTING IN PART AND DENYING IN PART SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL'S MOTION TO DISMISS PURSUANT TO RULE 12(B)(6), SCRPC

This matter comes before the Court on Defendant South Carolina Department of Health and Environmental Control's ("DHEC" or the "Department") *Motion to Dismiss* all causes of action asserted against DHEC by Plaintiff Health Promotion Specialists, LLC (HPS) in its Second Amended Complaint. DHEC filed its *Motion* pursuant to Rule 12(b)(6), SCRPC, arguing that Plaintiff failed to state facts sufficient to constitute a cause of action. In furtherance of its *Motion*, DHEC submitted a Memorandum in Support. Plaintiff HPS filed a Memorandum in Opposition. The Court held a hearing on September 13, 2022, and the parties were represented at the hearing by counsel. After hearing arguments, the Court gave Plaintiff ten (10) days to provide to the Court case law supporting its position and ten (10) days after for DHEC to respond. On September 23, 2022, Plaintiff submitted a Supplemental Memorandum in Opposition to DHEC's Motion to Dismiss. In reply, DHEC filed a Supplemental Memorandum in Support on September 27, 2022. The Court considered the *Motion*, memoranda, pleadings, applicable law, and all arguments

presented at the hearing. For the reasons that follow, this Court grants Defendant DHEC's *Motion to Dismiss* in its entirety.

FACTUAL BACKGROUND

The basic facts underlying this dispute, based on the Plaintiff's pleadings,¹ arise out of HPS's provision of dental hygiene services to various public schools, some of which took place through DHEC's Public Health Dental Prevention Program (also referred to as the "Dental Program").

DHEC administers the Dental Program pursuant to Section 40-15-110 of the Dental Services Act. Providers who participate in the Dental Program must perform services "under the direction of the Department of Health and Environmental Control State Dental Coordinator," but without the requirement that a "licensed dentist be present." S.C. Code Ann. 40-15-110(A)(10).

To participate in the Dental Program and take advantage of this provision, a provider must be "employed within or contracted through" DHEC. *Id.* To fulfill this statutory requirement, DHEC enters into Memorandums of Agreement ("MOAs") with providers, which incorporate specific guidelines established by the Department. (See Paragraph 12 of Plaintiff's Second Amended Complaint.) The guidelines are modified from time to time by DHEC. The MOAs terminate after one year; but, can be renewed in writing by both parties (See, e.g., Exhibit C to Plaintiff's First Amended Complaint, pp. 4-5, ¶ III.A., reading that "[t]his MOA is renewable for four (4) additional one-year periods based on an annual review of the MDD Provider and its

¹ In accordance with Rule 10(c), SCRPC, the pleadings include copies of documents attached to the pleadings as exhibits to the pleading. Notably, the Plaintiff's Amended Complaint included copies of the Memorandum of Agreement between DHEC and HPS covering July 1, 2016 – June 30, 2017 (executed by DHEC and HPS in 2016), the Memorandum of Agreement covering July 1, 2018 – June 30, 2019 (executed by HPS in April of 2019) and a letter from DHEC to HPS dated November 22, 2019.

compliance with this MOA and the DHEC PHDPP Guidelines. To be effective, a renewal must be acknowledged in writing by both parties.”)

HPS knows and understands the process of the MOA and guidelines because HPS had been operating in the program for nearly 20 years prior to 2019. (See Paragraph 12, of Plaintiff’s Second Amended Complaint.) In August 2019, HPS was invited to and participated in the DHEC provider information conference, which it had done annually. (See Paragraph 60 of Plaintiff’s Second Amended Complaint.) In connection with the August 2019 provider conference, DHEC presented a new MOA to HPS for the 2019-2020 school year. (See Paragraph 61 of Plaintiff’s Second Amended Complaint.) However, HPS refused to sign the new MOA. (See Paragraph 63 of Plaintiff’s Second Amended Complaint). HPS admits that it refused to sign the 2019 MOA because it objected to certain provisions of the DHEC guidelines. (See Paragraph 64 of Plaintiff’s Second Amended Complaint.)

In spite of HPS’s decision to refuse to sign the MOA, HPS continued delivering its services in public schools without a contract/MOA with DHEC, in direct contradiction of S.C. Code Ann. § 40-15-110. (See Paragraph 69 of Plaintiff’s Second Amended Complaint.)²

Instead of signing the August 2019 MOA, ceasing its operations under the Dental Program, or modifying its method of delivering services (as a result of its refusal to enter into a statutorily required contract), HPS filed a lawsuit against DHEC and the South Carolina Department of Health and Human Services (“DHHS”) on August 16, 2019.

² HPS admits in its pleadings that it continued to operate in the public schools under the program through the use of mental gymnastics to “argue” that HPS was somehow operating under some prior MOA. (See Paragraph 67 of Plaintiff’s Second Amended Complaint.) Notably, HPS alleges in its Second Amended Complaint that HPS was operating under the April 2019 MOA (See Paragraph 67); but, in its Memorandum in Opposition to DHEC’s Motion to Dismiss, HPS alleged that HPS was operating under the June 3, 2016 MOA (Plaintiff’s Memorandum in Opposition, filed 11/12/22, p. 4).

The South Carolina Department of Health and Human Services was an original Defendant in the first Complaint filed by Plaintiff. While no longer a party to this civil action, the prior claims involving DHHS provides some additional background as to why this civil action was filed. The vast majority of school children served by HPS were Medicaid beneficiaries. (Paragraphs 5 and 21 of Plaintiff's First Amended Complaint.) DHEC does not control, administer, approve or make any decisions about payment for services provided through the DHEC Public Health Dental Prevention Program. (See Paragraph 6, 23 and 34 of Plaintiff's First Amended Complaint.) DHHS has exclusive administrative responsibility for Medicaid payments. (See Paragraphs 8 and 10 of Plaintiff's First Amended Complaint.) DHHS was a primary payor for the services rendered by HPS to the public school children who were Medicaid beneficiaries.

As outlined in the Plaintiff's First Amended Complaint (See Paragraph 37-44 of Plaintiff's First Amended Complaint), HPS took issue with DHHS's decision to stop paying HPS for a procedure known as atraumatic restorative treatment, or "ART." On April 5, 2019, DHHS issued a Medicaid Bulletin advising all Medicaid dental providers about changes to reimbursements relating to protective services. (See Paragraph 43 of Plaintiff's First Amended Complaint and Exhibit 1 attached to Plaintiff's First Amended Complaint).

The Plaintiff alleges in Paragraph 73 of the Second Amended Complaint that HPS had to engage in "aggressive litigation with DHHS" regarding Medicaid overpayments and also notes that that the DHHS "matters were concluded confidentiality." During the hearing on DHEC's Motion, it was noted that the settlement between DHHS and HPS (which is subject to FOIA and Plaintiff's Counsel acknowledged) was a "walk-away" settlement where both sides simply walked away. Thereafter, DHHS was dismissed from this civil action.

PROCEDURAL HISTORY

HPS initiated this civil action on August 16, 2019,³ asserting claims against two parties (South Carolina Department of Health and Human Services and South Carolina Department of Health and Environmental Control). Those claims included declaratory judgment, a request for temporary and permanent injunction, and prayer for attorney's fees under "S.C. Code Ann. § 15-77-140" (No section "15-77-140" exists in the South Carolina Code of Laws. Presumably, HPS intended to cite to section 15-77-300).

On November 22, 2019, HPS filed an Amended Complaint⁴ without filing a Motion to Amend and without leave of Court. HPS's First Amended Complaint included a claim for declaratory judgment, temporary and permanent injunction, and a prayer for attorney's fees, again under "S.C. Code Ann. § 15-77-140."

On March 17, 2021, HPS voluntarily dismissed the South Carolina Department of Health and Human Services from the civil action.

On March 28, 2022, HPS filed its Second Amended Complaint, this time with leave of Court. HPS's Second Amended Complaint added two Defendants to the civil action, eliminated claims for declaratory judgment and temporary and permanent injunction, and asserted three new tort claims against DHEC (unfair trade practices, civil conspiracy, and breach of contract accompanied by a fraudulent act), along with a statutory claim for attorneys' fees pursuant to SC Code § 15-77-300.

DHEC filed its Rule 12(b)(6) Motion on April 5, 2022, and submitted its Memorandum in Support. HPS submitted its Memorandum in Opposition (before the hearing). A hearing on the

³ The Plaintiff's initial pleading was styled as "Complaint and Petition for Emergency and Permanent Injunct [sic] Relief."

⁴ The Plaintiff's first amended pleading was styled as "Amended Complaint and Petition for Emergency and Permanent Injunctive Relief."

Defendants' Motion to Dismiss was held on September 13, 2022. The issues relating to DHEC's Motion to Dismiss have been extensively briefed, articulated and argued by the parties in this civil action.

STANDARD OF REVIEW

In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007); *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006), rehearing denied, certiorari dismissed; *FOC Lawshe Ltd. Partnership v. International Paper Co.*, 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002), rehearing denied, certiorari denied; *Brown v. Theos*, 338 S.C. 305, 526 S.E.2d 232 (Ct. App. 1999), rehearing denied, certiorari granted, affirmed 345 S.C. 626, 550 S.E.2d 304; *Burns v. Gardner*, 328 S.C. 608, 493 S.E.2d 356 (Ct. App. 1997); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995). When deciding such a motion, the question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in its behalf, the complaint states any valid claim for relief. *Plyler v. Burns*, 373 S.C. 637, 647 S.E.2d 188 (2007); *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007); *Overcash v. South Carolina Elec. & Gas Co.*, 364 S.C. 569, 614 S.E.2d 619 (2005), rehearing denied; *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995); *Benson v. United Guar. Residential Ins. of Iowa*, 315 S.C. 504, 445 S.E.2d 647 (Ct. App. 1994), rehearing denied, certiorari denied; *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987).

RULING

- I. The Plaintiff cannot sustain a Civil Conspiracy cause of action against Defendants DHEC.**
 - a. Civil Conspiracy**

Civil conspiracy requires the combination or agreement of two or more persons, to commit an unlawful act or a lawful act by unlawful means, together with the commission of an overt act in furtherance of the agreement, and with damages proximately resulting to the plaintiff. *Paradise v. Charleston Cty. Sch. Dist.*, No. 28030, 2021 S.C. LEXIS 56 (2021). The Plaintiff alleges that because of this alleged conspiracy, the Plaintiff experienced a loss.

The South Carolina Tort Claims Act expressly states that a governmental entity is not liable for a loss from administrative action or inaction. S.C. Code Ann. 15-78-60(2). A governmental entity is not liable for any adoption, enforcement, or compliance with any policy or regulation. S.C. Code Ann. 15-78-60(4). Government entities or employees are immune from a loss caused by exercises of discretion or judgment by employees in performing their duties. S.C. Code Ann. 15-78-60(5). Furthermore, a government employee who commits a tort within the scope of his official duty is protected by the SC Tort Claims Act. S.C. Code Ann. §15-78-70(a). Additionally, a government agency is not liable if an employee commits a tort when acting outside of the scope of his official duties, or if he acts to commit fraud, malice, intent to harm, or a crime involving moral turpitude. S.C. Code Ann. § 15-78-70(b).

Notably, paragraph 83 of the Plaintiff's Second Amended Complaint alleges that certain employees were acting outside of their scope of employment when committing this tort, and, at the same time, were operating inside the scope of their employment as agents of DHEC. These allegations, in the same paragraph of Plaintiff's Second Amended Complaint, are diametrically at odds with one another. Either an employee committed a tort in the scope of their official duties and would be immune from suit or the employee committed a tort outside the scope of their duties or with one of the other exceptions and is personally liable for their actions. Regardless, under either scenario, the SCTCA provides DHEC with immunity.

The United States Supreme Court case of *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S.Ct. 1344 (1991) also provides some guidance on the facts at hand. The Plaintiff's allegations, taken at face value, suggest that DHEC's regulations were implemented (or perhaps were enforced) and caused harm to Plaintiff. The United States Supreme Court stated that "virtually all regulation benefits some segments of the society and harms others; and that it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners." *City of Columbia* at 1352. In other words, there is no conspiracy for governmental entities enacting and/or enforcing regulations.

For these reasons, the Plaintiff has failed to state facts sufficient to constitute a cause of action against DHEC for civil conspiracy, and such claim fails as a matter of law.

b. Statutory Attorney's Fees

Plaintiff cannot sustain a cause of action against DHEC for statutory attorney's fees under S.C. Code Ann. § 15-77-300. To recover attorney's fees under the statute a court must find that the agency acted without substantial justification in **pressing its claim against the party**. S.C. Code Ann. § 15-77-300(A)(1) (emphasis added). HPS did not provide any evidence that DHEC pressed any claim against HPS. In fact, to the contrary, HPS filed this lawsuit and asserted claims against DHEC when HPS refused to sign the August 2019 MOA (i.e., the contract to perform the dental hygiene services in accordance with the Dental Services Act). DHEC has not pressed any claim(s) against HPS. DHEC did insist that HPS comply with the statute and execute a MOA/contract in August of 2019 so that HPS could deliver its services under the DHEC Public Health Dental Prevention Program. However, HPS refused to sign the August 2019 MOA/contract.

To the extent HPS was forced to defend itself against DHHS, HPS could have, if it would have so desired, pursued DHHS for its attorneys' fees and costs that it may claim was unwarranted

or unjust. But, HPS elected to settle its disputes/claim(s) with DHHS by executing a release with DHHS. HPS cannot sustain a cause of action for attorney's fees under this statute against DHEC for attorneys' fees it could have claimed against DHHS, and this cause of action fails as a matter of law.

CONCLUSION

HPS cannot maintain a cause of action against DHEC for Civil Conspiracy or Statutory Attorney's Fees and therefore those claims are hereby DISMISSED and DHEC's "MOTION TO DISMISS" is GRANTED IN PART for the reasons set forth herein.

Defendant DHEC's "MOTION TO DISMISS" is DENIED IN PART as it relates to Health Promotion Specialist's claims under S.C. Unfair Trade Practices Act and Breach of Contract Accompanied by a Fraudulent Act.

~ Signature page of Judge follows ~



Richland Common Pleas

Case Caption: Health Promotion Specialists Llc vs South Carolina Department Of Health And Environmental Contro , defendant, et al
Case Number: 2019CP4004567
Type: Order/Dismissal

So Ordered

Jocelyn Newman