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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM RICHLAND COUNTY  
Jocelyn Newman, Circuit Court Judge

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Appellate Case No. 2025-000592

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Health Promotion Specialists, LLC, ..... Appellants,  
v.

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, Defendants,

Of which South Carolina Department of Health  
And Environmental Control is the, .....Respondent.

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**INITIAL BRIEF OF APPELLANT**

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## **STATEMENT OF ISSUES ON APPEAL**

- I. Did the trial court err in finding that HPS cannot maintain a cause of action for civil conspiracy against DHEC because DHEC is entitled to immunity under the South Carolina Tort Claims act?
  
- II. Did the trial court err in dismissing HPS' cause of action against DHEC for violation of the South Carolina unfair trade practices act?
  
- III. Did the trial court err in dismissing HPS' cause of action against DHEC for breach of contract accompanied by fraudulent act?

## STATEMENT OF THE CASE

Appellant Health Promotion Specialists, LLC (hereafter “HPS”) initiated this action on August 16, 2019, by filing a Complaint and Petition for Emergency and Permanent Injunctive Relief against South Carolina Department of Health and Human Services (hereafter “SCDHHS”) and Respondent South Carolina Department of Health and Environmental Control (hereafter “DHEC”). Within that Complaint, HPS asserted claims against both parties for declaratory judgment, request for temporary and permanent injunctive relief, and attorney’s fees. DHEC filed an Answer on October 23, 2019.

On November 22, 2019, HPS filed an Amended Complaint seeking a declaratory judgment, temporary and permanent injunction, and attorney’s fees. On December 13, 2019, DHEC filed an answer to the Amended Complaint. HPS voluntarily dismissed SCDHHS from the civil action pursuant to the Stipulation of Dismissal filed on March 17, 2021.

On June 6, 2021, HPS moved to amend its complaint for a second time to add additional defendants<sup>1</sup> and causes of action for violation of the South Carolina Unfair Trade Practices Act, civil conspiracy, and breach of contract accompanied by a fraudulent act, which was granted pursuant to the Court’s order dated March 24, 2022. HPS subsequently filed the Second Amended Complaint on March 28, 2022. DHEC, along with the other named Defendants, filed a Motion to Dismiss pursuant to Rule 12(b)(6), SCRPC on April 5, 2022, and submitted its Memorandum in support. HPS filed its Memorandum in opposition on September 12, 2022, ahead of the hearing on the Motion to Dismiss. A hearing on Defendants’ Motions to dismiss was held on September 13, 2022, before the Honorable Joycelyn Newman. Following the hearing, and with leave of the

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<sup>1</sup> The additional defendants included 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.

Court, HPS filed a supplemental Memorandum in opposition to the Motion to Dismiss on September 23, 2022. DHEC thereafter submitted a supplemental Memorandum in support of its Motion on September 27, 2022.

On September 11, 2023, Judge Newman issued an order granting in part and denying in part DHEC's Motion to Dismiss pursuant to Rule 12(b)(6), SCRCPP. In that Order, Judge Newman dismissed HPS's causes of action for civil conspiracy and statutory attorney's fees, and upheld HPS's claims for violation of the South Carolina Unfair Trade Practices Act and breach of contract accompanied by a fraudulent act. DHEC subsequently filed a Motion to Reconsider the Court's order on September 21, 2023, and filed a Memorandum in support on December 6, 2023. HPS filed a Memorandum in opposition on December 29, 2023. On November 21, 2024, via Form 4 Order, Judge Newman granted DHEC's Motion to Reconsider. A formal order was subsequently filed on December 10, 2024, granting DHEC's Motion to Reconsider and dismissing HPS's remaining claims.

HPS filed a Motion to Reconsider the Court's order on December 20, 2024, which was subsequently denied pursuant to Form 4 Order filed February 25, 2025. HPS timely filed a Notice of Appeal on March 26, 2025. This appeal follows.

### **FACTUAL BACKGROUND**

In 1987, the General Assembly expressly authorized licensed dental hygienists to provide primary preventative care that is reversible to patients in the public health setting. S.C. Code Ann. Section 40-15-110 (10). Through significant efforts of the South Carolina Association of Dental Hygienists, in 2000, the General Assembly amended existing statutory provisions to permit licensed dental hygienists to "apply topical fluoride and . . . the application of sealants and oral prophylaxis" under specified conditions in school settings. S.C. Code Ann. Section 40-15-80(B)

(1976 as amended). “[L]icensed dental hygienists . . . within the public health system may perform other duties authorized by regulations of the State Board of Dentistry.” *Id.* at (H).

Among the programs provided to minor Medicaid beneficiaries who attend public schools in South Carolina is the Early Periodic Screening Diagnostic and Screening program, a part of the public health initiatives of the South Carolina General Assembly. The public-school dental health program permits dental hygienists, working under the general supervision of a licensed dentist, to provide oral prophylaxis to public school students who are Medicaid beneficiaries. S.C. Code Ann. § 40-15-80.

Respondent 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 contracts or Memorandums of Agreement (hereafter “MOAs”) with providers, which incorporate specific guidelines established by DHEC. (Second Amended Complaint, ¶ 12). For nearly twenty (20) years, HPS provided preventative dental care and education to tens of thousands of school-aged children throughout the state as a result of the MOAs between HPS and DHEC. (*Id.*)

In January 2018, the South Carolina Board of Dentistry ruled that “sealants and temporary fillings such as Atraumatic Restorative Therapy” fell within the statutory definition of work that dental hygienists can provide in the public school setting, because the care was “primary preventative care that is reversible” and thereafter authorized under S.C. Code Ann Section 40-15-

110(10). (Second Amended Complaint, ¶ 45). The South Carolina Dental Hygienists Association obtained a grant to train sufficient numbers of dental hygienists to provide temporary fillings as part of the public school dental preventative program for Medicaid eligible children for which HPS, and other vendors, provide dental services.

In August 2018, following the South Carolina Board of Dentistry's decision expanding the scope of preventive dental work that could be performed under the Dental Program, HPS began providing the advanced modalities as part of its preventive dental care in school settings through its 2018-2019 MOA with DHEC. (Second Amended Complaint, ¶ 52). These preventative dental services were covered by Medicaid in the cases of students who were beneficiaries of Medicaid. (*Id.*).

The decision by the Board of Dentistry was immediately condemned by private dentists and other financially interested parties, including DHEC as well as their agents, who undertook efforts to convince the Board to reverse its decision. Furthermore, DHEC, which provided initial support for the decision, reversed course after being lobbied by private dentists to do so. (Second Amended Complaint, ¶ 47). When DHEC and others were unsuccessful in obtaining the Board's cooperation to restrain the work now expanded work of dental hygienists in the school program, they took a different approach in obtaining the desired result. (*Id.* at ¶48).

In 2019, DHEC wrongfully terminated HPS from the Dental Program and communicated false information concerning HPS to multiple agencies and individuals, including SCDHHS and many of the public schools for which HPS has been providing preventive dental services for decades. (Second Amended Complaint, ¶ 30). Specifically, DHEC falsely informed SCDHHS that HPS did not have a current MOA in place for the dental services it had been providing, even though HPS had continued authority to provide services for the 2018-2019 school year through the MOA

signed by HPS and its supervising dentist on June 3, 2016 and accepted by DHEC on July 26, 2016. (*Id.* at ¶¶ 54-55). As a result of the false information provided by DHEC to SCDHHS, the agency which administers the South Carolina Medicaid program, SCDHHS suspended payment for services rendered by HPS, terminated HPS from the Medicaid program, ultimately causing SCDHHS to seek repayment for services HPS has already provided. (*Id.*). As a result, HPS sustained significant financial damage for services already performed under the MOAs with DHEC. (*Id.* at ¶ 32).

### STANDARD OF REVIEW

“An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCPP.” *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). “That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the ‘facts alleged and the inferences reasonably deducible from the pleading would entitle the plaintiff to relief on any theory of the case.’” *Hager v. McCabe, Trotter & Beverly, P.C.*, 435 S.C. 740, 746, 869 S.E.2d 886, 889 (Ct. App. 2022) (quoting *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009)). “If the facts and inferences drawn from the facts alleged in complaint, viewed in the light most favorable to the plaintiff would entitle the plaintiff to relief on any theory, the grant of a motion to dismiss for failure to state a claim is improper.” *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999).

“In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint.” *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (S.C. 2006). In deciding a motion to dismiss pursuant to Rule 12(b)(6), SCRCPP, “the trial court’s ruling . . . must be bottomed

and premised solely upon the allegations set forth by the plaintiff.” *Williams v. Condon*, 347 S.C. 227, 233, 533 S.E.2d 496, 499 (Ct. App. 2001); *citing Holy Loch Distribs. v. Hitchcock*, 332 S.C. 247, 503 S.E.2d 787 (Ct. App. 1998), *rev’d on other grounds*, 340 S.C. 20, 531 S.E.2d 282 (2000); *Berry v. McLeod*, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997).

## ARGUMENT

### **I. The trial court erred in finding that HPS cannot maintain a cause of action for civil conspiracy against DHEC because DHEC is entitled to immunity under the South Carolina Tort Claims Act.**

In its Order granting in part and denying in part DHEC’s Motion to Dismiss, the trial court erroneously dismissed HPS’s civil conspiracy claim finding that HPS could not maintain a cause of action against DHEC for civil conspiracy because DHEC is immune from tort liability under the South Carolina Tort Claims Act (hereafter, “TCA”). (Order filed Sept. 11, 2023).

“Notwithstanding any other provisions of the law, the South Carolina Tort Claims Act is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee’s official duty.” S.C. Code Ann. §15-78-200. The TCA provides that “[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances...subject to the limitation upon liability...and exemptions from liability...contained herein.” S.C. Code Ann. §15-78-40. The TCA goes on to enumerate forty exceptions to the State’s waiver of immunity that limits government entities’ tort liabilities. S.C. Code Ann. §15-78-60.

The trial court found that three of the exemptions applied, specifically that DHEC is not liable for a loss resulting from: administrative action or inaction (S.C. Code Ann. §15-78-60(2)); adoption, enforcement or compliance with any policy or regulation (S.C. Code Ann. §15-78-60

(4)); or exercised of discretion or judgment by employees in performing their duties (S.C. Code Ann. §15-78-60(5)). (Order filed Sept. 11, 2023). However, the TCA explicitly provides that “[n]othing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee’s conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.” S.C. Code Ann. §15-78-70(b). See *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 826 S.E.2d 585 (S.C. 2019) (“A governmental employee is not afforded immunity under the Tort Claims Act for conduct outside the scope of his official duties, or for conduct that amounts to actual fraud, actual malice, or an intent to harm.”)

In *Skydive*, the plaintiff filed suit against Horry County and other governmental entities for, among other things, conspiring to remove Skydive from the airport in which it leased space, and engaging in conduct designed to ruin or damage Skydive’s business. 426 S.C. 175, 826 S.E.2d 585 (S.C. 2019). The trial court dismissed the plaintiff’s complaint upon a Rule 12(b)(6) motion, finding that defendants were immune from suit pursuant to the TCA because the defendants, who were employees of governmental entities, acted within their official capacities. *Id.* In reversing the trial court’s dismissal, the Supreme Court found that the plaintiff’s complaint contained facts and allegations that “set forth several plausible grounds upon which Skydive could successfully allege Respondents are not entitled to immunity” under the TCA. *Id.*

Regarding Skydive’s civil conspiracy claim, the Supreme Court explained that because a civil conspiracy claim requires a plaintiff to show that the defendant acted for the purpose of injuring the plaintiff, the allegations within the complaint demonstrating that defendants engaged in conduct “designed to ruin or damage” Skydive’s business and “interfere with Skydive’s day-to-day operations,” were enough to satisfy the TCA’s “intent to harm” exception set forth in S.C.

Code Ann. §15-78-70(b). *Id.* Additionally, the Supreme Court found that the plaintiff's allegations and claims that the defendants made false statements about Skydive to other businesses with actual or implied malice, and that certain employees of defendants made fraudulent misrepresentations to Skydive causing damage to its business interests, were enough to satisfy the "actual fraud" or "actual malice" exceptions under the TCA. *Id.*

HPS asserts that the trial court erred in dismissing the civil conspiracy action against DHEC because the Second Amended Complaint contains factual allegations sufficient to state a valid claim for civil conspiracy and demonstrate that DHEC is not entitled to immunity under the TCA. To establish a claim for civil conspiracy, and plaintiff must show "(1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff." *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 861 S.E. 2d 744 (S.C. 2021). While the current law in South Carolina on civil conspiracy no longer requires a plaintiff to show that the defendant acted for the purpose of injuring the plaintiff, HPS has alleged that DHEC acted for that specific purpose in addition to pleading each of the required elements of civil conspiracy.

The Second Amended Complaint alleges that DHEC and other individuals, conspired together for the purpose of injuring and causing damages to HPS. (Second Amended Complaint, ¶¶ 94-95). HPS specifically alleges that DHEC was a participant in a conspiracy to

destroy the public school dental program by preventing dental hygienists from performing much needed care, education and preventative treatment in general, and HPS specifically, in favor of having the services performed by private dentists both in and out of their offices, and to create other public-private partnerships that would enable dentists to misappropriate the dental hygiene program for themselves, to the detriment and destruction of HPS and the children it serves.

(*Id.* at ¶ 23).

In furtherance of the conspiracy, DHEC and the other co-conspirators took multiple overt actions to impede payment to HPS for providing the advanced modalities as part of its preventative dental work. (*Id.* at ¶ 49). Those overt actions included DHEC's wrongful termination of HPS from the Dental Program in 2019, and DHEC's intentional communication of false information to SCDHHS and others. (*Id.* at ¶ 54). Specifically, HPS alleges that on November 18, 2019, certain employees of DHEC, known and unknown, falsely notified public school personnel across the state that HPS was not operating legally in the schools because it did not have a dentist on site, and that HPS was no longer approved to perform services under the Dental Program. (*Id.* at ¶69). This report from DHEC to the public schools was false and caused significant financial and reputational damages to HPS. (*Id.* at 71). HPS alleges that one or more DHEC officials intentionally provided false information to SCDHHS advising that HPS has been operating without the authority of a MOA for several years, such that Medicaid payments to HPS over a period of time had been illegal. (*Id.* at 72). Finally, the Second Amended Complaint asserts a cause of action against DHEC for breach of contract accompanied by a fraudulent act as it relates to DHEC's wrongful termination of the MOA followed by its false communications about HPS to SCDHHS and public schools across the state. (*Id.* at ¶¶ 101-107).

In light of the Supreme Court's ruling in *Skydive*, the allegations contained in the Second Amended Complaint, when taken as true and viewed in the light most favorable to the plaintiff, clearly satisfy the intent to harm exception, the actual malice exception, and the actual fraud exception set forth in S.C. Code Ann. §15-78-70(b).

HPS has also satisfied S.C. Code Ann. §15-78-70(b) in establishing that certain individuals were acting outside the scope of their duties as employees or agents of DHEC in their commission

of intentional torts against HPS, therefore barring DHEC from immunity under the TCA. In its order, the trial court took issue with HPS alleging that DHEC agents or employees were acting outside of the scope of their employment while at the same time alleging that those agents and employees were operating within the scope of their employment at DHEC committing intentional torts against HPS. However, in *Skydive*, our Supreme Court found that “it is entirely appropriate for Skydive to allege that some of an individual’s actions were within the scope of their official duties, and some were not, or even to plead alternative theories of liability depending on whether an individual’s actions were within the scope of their duties.” 426 S.C. 175, 826 S.E.2d 585 (S.C. 2019).

Accordingly, the trial court erred in dismissing the civil conspiracy claim against DHEC.

**II. The trial court erred in dismissing HPS’s cause of action against DHEC for violation of the South Carolina Unfair Trade Practices Act.**

**A. DHEC’s conduct is not exempt from the South Carolina Unfair Trade Practices Act or the South Carolina Tort Claims Act.**

To recover in an action under the [SC]UTPA, the plaintiff must show: “(1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected [the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s).” *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 339 S.C. 332, 387, 732 S.E.2d 166, 174 (2012) (citing *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006)). “The UTPA only creates causes of action in those suffering a loss *as a result of a deceptive act.*” *Collins Holding Corp v. Defibaugh*, 373 S.C. 446, 451, 646 S.E.2d 147, 150 (Ct. App. 2007) (emphasis in original).

In its order, the trial court found that DHEC is exempt from liability under SCUPTA under an exclusion for regulatory bodies which states:

Nothing in this article shall apply to: (a) Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law.

S.C. Code Ann. §39-5-40(a).

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)(1) 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.” In other words, the action or practice fall within the ambit of an action “in the conduct of any trad or commerce” if it only merely affects commerce.

In this case, HPS has alleged that certain officials, employees, or agents of DHEC, along with other third parties, violated SCUPTA by engaging in unfair and deceptive acts in the conduct of the provision of preventative dental care to school-aged children in the State of South Carolina. (Second Amended Complaint, ¶ 86). The effect of DHEC’s unfair and deceptive actions was to prevent dental hygienists, in general, and HPS in particular from being able to provide services at a lower cost so that private dentists could undertake such work exclusively. (Id. at ¶¶17-20). HPS argues that even though multiple state agencies license, regulate and interact and sometimes provide payments with respect to the provision of the provision of dental preventative services by private practitioners, the trade and commerce as between the provider and the patient remains an

act of trade and commerce solely as between the provider and the patient and exempts the actions complained of herein from the provisions of Section 39-5-40(a). Additionally, HPS avers that the TCA does not provide protection from liability of any kind to private organizations or private persons, nor does it provide any protection from liability to an agency or any officer, agent or employee of an agency of the State if the conduct of the agency or the individual was not within the scope of official duties or when the conduct constitutes actual fraud, actual malice, or intent to harm, as is alleged in this case. S.C. Code Ann. §15-78-70(b). Accordingly, the trial court erred in dismissing HPS's claim against DHEC for violation of South Carolina Unfair Trade Practices Act.

B. At all times relevant in this action, DHEC was engaged in "Trade" and "Commerce" as defined by the South Carolina Unfair Trade Practices Act.

The trial court dismissed HPS's SCUPTA claim against DHEC finding that DHEC is not engaged in trade or commerce subjecting it to SCUPTA. "SCUPTA addresses only those unfair methods of competition and unfair and deceptive acts which occur in the conduct of any trade or commerce." 28 S.C. Jur. Unfair Trade Practices Act § 5 (2025) (citing S.C. Code Ann. § 39-5-20(a) (1976)). "Trade and commerce includes the advertising, offering for sale, sale or distribution of any service and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this state." *Id.* "The statute's use of the words 'shall include' clearly suggests the legislature did not intend to limit 'trade' and 'commerce' to only the listed transactions." *Id.* (citing *Baker v. Chavis*, 306 S.C. 203, 208-09, 410 S.E.2d 600, 603-04 (Ct. App.

1991). Further, “[t]he provision of *any* service constitutes commerce within the meaning of the [SC]UTPA” (emphasis added).<sup>2</sup>

In *Baker v. Chavis*, the South Carolina Court of Appeals interpreted the phrase “shall include” in the SCUTPA as a term of enlargement, concluding that “trade” and “commerce” are not confined to the specific transactions listed in § 39-5-10.<sup>3</sup> Similarly, in *Taylor v. Medenica*, the South Carolina Supreme Court held that the provision of any service constitutes commerce under the SCUTPA.<sup>4</sup> The *Taylor* court specifically noted that SCUTPA does not carve out exceptions for professional services.<sup>5</sup> This interpretation aligns with the legislative intent to provide comprehensive consumer protection against unfair or deceptive practices in a wide range of commercial activities.<sup>6</sup>

In the instant matter, it is not disputed that DHEC, through its Public Health Dental Prevention Program, partnered with HPS and other service providers to distribute preventative dental care services in public health settings, including in South Carolina public schools. (Second Amended Complaint, ¶¶ 3-4, 5, 12-13, 16). HPS argues that DHEC’s provision of dental preventative services to individual consumers in South Carolina constitutes trade and commerce within the definitions set forth in South Carolina Unfair Trade Practices Act, S.C. Code Ann. §39-

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<sup>2</sup> *Taylor v. Medenica*, 324 S.C. 200, 217-18, 479 S.E.2d 35, 44 (1996), *reh'g denied*, (Dec. 5, 1996) (“The statute does not exclude professional services from its definition. Accordingly, even if medical laboratory services are considered professional services, they still constitute a trade within the meaning of the UPTA. Moreover, since the performance of useless laboratory tests is capable of repetition...the UPTA’s public interest requirement is satisfied.”).

<sup>3</sup> *Baker v. Chavis*, 306 S.C. 203, 208-09, 410 S.E.2d 600, 603-04 (Ct. App. 1991) (“*See N.C. Turnpike Auth. v. Pine Island, Inc.*, 265 N.C. 109, 143 S.E.2d 319 (1965) (the word “includes” is ordinarily a word of enlargement and not of limitation); *United States v. Gertz*, 249 F.2d 662 (9th Cir.1957) (the word “including” is not a word of all embracing definition but an illustrative application of general principles).”).

<sup>4</sup> *Taylor v. Medenica*, 324 S.C. 200, 217-18, 479 S.E.2d 35, 44 (1996), *reh'g denied*, (Dec. 5, 1996).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

5-10(b). As such, the trial court erred in dismissing HPS's claim for violation of the South Carolina Unfair Trade Practices Act and finding that DHEC was not engaged in trade and commerce.

**III. The trial court erred in dismissing HPS's cause of action against DHEC for breach of contract accompanied by fraudulent act.**

To recover for breach of contract accompanied by a fraudulent act, "a plaintiff must establish: (1) the contract was breached; (2) the breach was accomplished with a fraudulent intention; and (3) the breach was accompanied by a fraudulent act." *Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct.App.1996). "The fraudulent act element is met by any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design." *Perry v. Green*, 313 S.C. 250, 254, 437 S.E.2d 150, 152 (Ct.App.1993).

In its order dismissing HPS's remaining claims, the trial court incorrectly found HPS is unable to sustain a cause of action for breach of contract accompanied by a fraudulent act because there was no contract or MOA between Plaintiff and DHEC. Notwithstanding the August 2019 MOA, which HPS did not sign,<sup>7</sup> Plaintiff had the continued authority to provide services under the June 2016 MOA which was accepted by DHEC on July 26, 2016. (See Second Amended Complaint, ¶ 55-56). The terms for that contract included a termination date of June 30, 2017, although it was subject renewal up to four (4) additional one-year periods. As set forth in the Complaint, DHEC did not require a new MOA for the 2017-2018 or the 2018-2019 school year. Plaintiff maintains that the June 2016 MOA automatically renewed, as it had during the 2017-2018 and 2018-2019 terms, to continue Plaintiff's status as a provider under the DHEC program for the 2019-2020 term.

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<sup>7</sup> HPS did not sign the updated 2019 MOA because it incorporated clinical guidelines that deviated from the proper standard of care for dental hygienists.

Alternatively, Plaintiff had the authority to operate and provide services through the MOA executed in April 2019 which was valid through December 31, 2019. After signing the MOA and submitting it to DHEC, DHEC never indicated to Plaintiff that there were any issues or problems with its status as an approved provider under the DHEC Public Health Dental Prevention Program. After Plaintiff declined to sign the August 2019 MOA, DHEC gave Plaintiff notice that it was terminating the April 2019 MOA effective December 31, 2019. This is the same MOA under which Plaintiff advised DHEC that it would continue operating when Plaintiff initially declined to sign the August MOA. It is illogical that DHEC can claim that no contract existed and thus it cannot be found liable for breach of contract when DHEC in fact terminated the existing April 2019 MOA. If there was no valid contract, there would be no reason for DHEC to notify Plaintiff of its termination.

### CONCLUSION

For the reasons discussed herein, Appellant Heath Promotion Specialists, LLC, respectfully requests the Court reverse the decision of the trial court.

Respectfully submitted,

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