

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2025-000592

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.

REPLY BRIEF

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STATEMENT OF ISSUES OF APPEAL

- I. Did the Trial Court err in dismissing Appellant's cause of action under the South Carolina Unfair Trade Practice Act?

- II. Did the Trial Court improperly apply the South Carolina Tort Claims Act in dismissing Appellant's cause of action for civil conspiracy?

- III. Did the Trial Court err in dismissing Appellant's cause of action for breach of contract accompanied by fraudulent act?

ARGUMENT

I. THE TRIAL COURT IMPROPERLY DISMISSED APPELLANT'S CAUSE OF ACTION FOR VIOLATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT.

As to Issue One, Appellant Health Promotion Specialists, LLC (hereinafter "HPS") stands on the arguments set forth and fully briefed in the Initial Brief of Appellant.

II. THE TRIAL COURT IMPROPERLY APPLIED THE SOUTH CAROLINA TORT CLAIMS ACT IN DISMISSING APPELLANT'S CAUSE OF ACTION FOR CIVIL CONSPIRACY.

In its brief, DHEC incorrectly asserts that HPS has a fundamental misunderstanding about the mechanics of the South Carolina Tort Claims Act ("TCA"), and DHEC's assertion is unfounded. HPS fully understands that the TCA is premised on the State's general immunity from suit, however, the TCA also provides certain exceptions to the State's immunity and specifically provides the only relief to a plaintiff who has suffered a loss proximately caused by a tort of the State or a State agency and its employees acting within the scope of their official duty. S.C. Code Ann. § 15-78-50(a). The TCA provides the "exclusive remedy for any tort committed by an employee of a governmental entity," but provides immunity for those governmental employees who commit a tort while acting within the scope of their official duty. S.C. Code Ann. § 15-78-70(a). But most importantly, in light of the underlying action, 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.”) This is precisely what is alleged in the Second Amended Complaint. (R. pp. 181-210)

HPS has specifically alleged that certain employees and/or agents of DHEC were acting outside the scope of their duties as employees or agents of DHEC and their actions to damage HPS were intentional, constituted actual fraud, and were undertaken to with malice toward HPS with an intent to damage and/or destroy HPS. (Id. at ¶¶ 8, 69, 72, 83, 84). In other words, HPS has alleged facts sufficient to overcome governmental immunity as it applies to the employees and agents of DHEC. HPS cites *Skydive* above and in its Initial Brief in support of the premise that governmental employees are not afforded immunity under the TCA for conduct outside the scope of their official duties, or for conduct that amounts to actual fraud, actual malice, or an intent to harm. 426 S.C. 175, 826 S.E.2d 585 (S.C. 2019). In *Skydive*, the court held, as DHEC so aptly points out, that it was not completely impossible that the plaintiff could plead a claim against the individual governmental employees if they were acting outside the scope of their employment or engaging in conduct that amounts to actual fraud, actual malice, or an intent to harm. *Id.* The court’s holding in *Skydive* should follow here as well. HPS has not only named Respondent DHEC as a defendant in the underlying matter, but has also specifically named “one or more John Does, unidentified current or former agents of South Carolina Department of Health and Environmental Control.” (R. pp. 184-185, ¶ 8). In doing so, HPS has alleged that those individual employees and/or agents of DHEC acted outside the scope of their duties and engaged in conduct that amounts to actual fraud, actual malice, or an intent to harm, barring them from immunity pursuant to S.C. Code Ann. §15-78-70(b). Even if DHEC claims that it is not liable for civil conspiracy or intentional torts, which HPS maintains it is, DHEC is still required to be the named defendant even when the claim arises from the conduct or tort of a governmental employee. The TCA requires that

“a person, when bringing an action against a governmental entity under the provisions of this chapter shall name as a party defendant only the agency or political subdivision for which the employee was acting and is not required to name the employee individually.” S.C. Code Ann. § 15-78-70(c).

Accordingly, for those reasons set forth above and more fully in HPS’s Initial Brief, the trial court erred in finding that DHEC is entitled to immunity under the South Carolina Tort Claims Act.

III. THE TRIAL COURT ERRED IN FINDING THAT NO CONTRACT EXISTED IN DISMISSING APPELLANT’S CAUSE OF ACTION FOR BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACT.

The Trial Court incorrectly found that HPS cannot maintain an action for breach of contract accompanied by fraudulent act because there was no valid contract in effect. The essential terms of a contract are offer, acceptance of the offer, and valuable consideration. *Sauner v. Pub. Serv. Auth. Of South Carolina*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989).

The record demonstrates that HPS provided services through the Dental Program for multiple years under the initial Memorandum of Agreement (“MOA”) signed in 2016. It is undisputed that HPS and DHEC executed an MOA which took effect on July 1, 2016. (R. pp. 113-123). The 2016 MOA was signed by HPS on June 3, 2016 and executed by two DHEC signatories on June 20, 2016 and July 21, 2016. (R. p. 195, ¶¶ 54-55). The terms of the MOA specifically provided that the “MOA will be effective on July 1, 2026 or when all parties have signed, whichever is later, and will terminate on June 30, 2017. This MOA is renewable for four (4)

additional one-year periods based on an annual review of the MDD Provider compliance with the MOA and the DHEC PHDPP Guidelines.”¹ (R. pp. 113-123) (Emphasis added). In other words, the 2016 MOA could have been renewed up to four additional one-year periods without requiring a new MOA to be executed by the parties. The renewal was based upon DHEC’s completion of the annual review.

As set forth in the Second Amended Complaint, DHEC did not require a new MOA for the 2017-2018 school year and renewed the 2016 MOA pursuant to the terms allowing for its renewal for up to four additional one-year periods. (R. p. 195, ¶¶ 55-56). For the 2017-2018 school year, instead of requiring a new MOA upon the June 30, 2017 termination date, DHEC sent an annual evaluation and requested data from HPS, which HPS provided. Thereafter, DHEC renewed the 2016 MOA, which continued for an additional year through June 2, 2018, and confirmed HPS’s continued participation as a provider in the Dental Program. (*Id.*)

For the 2018-2019 school year, HPS completed and provided the requested data for another annual evaluation which was signed by HPS in August 2018. However, DHEC did not sign this annual evaluation, yet it considered the MOA with HPS renewed for an additional year through June 2, 2019. Despite the August 2018 MOA being renewed through June 2, 2019, DHEC sent HPS an updated MOA in April 2019 for a term commencing on July 1, 2018, and terminating on June 30, 2019.² (R. p. 196, ¶ 57). The April 2019 MOA included reference to the DHEC PHDPP guidelines revised September 2018, which were consistent with standard of care for dental hygienists and permitted HPS hygienists to provide the advanced modalities approved by the

¹ Contrary to DHEC’s assertion in its brief, nowhere within the cited provision of the MOA does it mandate that a renewal of the MOA be in writing.

² While the updated April MOA terminated on June 30, 2019, it was also renewable for up to four (4) additional one-year periods based on the annual review, the same as the 2016 MOA. (R. pp. 124-133).

Board of Dentistry. (*Id.*). HPS executed this updated April MOA on April 18, 2019, and continued to provide its services under the Dental Program without any objection from DHEC despite the fact that DHEC did not execute the April MOA. (*Id.* at ¶ 58; R. pp.124-133). In fact, in July 2019, DHEC sent HPS a request for its annual data just as DHEC normally did each year in order to renew the MOA for an additional one-year period, and HPS promptly provided the requested annual data to DHEC. (*Id.* at ¶ 59).

Just a month after HPS provided DHEC with its annual data as requested and despite the existence of the valid MOA signed in April 2019, DHEC presented a new proposed MOA to HPS in August 2019. (R. p. 196, ¶ 61). This MOA was revised to include the 2019 clinical guidelines which deviated from the standard of care for dental hygienists. (*Id.* at ¶¶ 62-64). HPS objected to the 2019 clinical guidelines because it deviated from the proper standard of care for dental hygienists, and therefore, did not sign the August 2019 MOA. However, HPS notified DHEC that it would continue to provide services in accordance with the valid MOA signed in April 2019. (*Id.* at ¶¶ 63-64). On November 22, 2019, DHEC sent a letter to HPS acknowledging that there was a lack of clarity as to which MOA was in effect and advising that it was terminating HPS from the Dental Program and specifically terminating the April 2019 MOA. (*Id.* at ¶ 68).

DHEC In its brief, DHEC asserts that the April 2019 MOA was not valid since it was never executed by DHEC. While it is not disputed that DHEC did not sign the April 2019 MOA, “[i]t is not always necessary, in order to give validity to a contract, that it should be signed by both parties; it may be sufficient if it be signed by one party and accepted, held, and acted upon by the other.” *Peddler, Inc. v. Rikard*, 266 S.C. 28, 32, 221 S.E.2d 115, 117 (1975). When DHEC sent HPS the updated MOA in April 2019, the MOA was for a period commencing on July 1, 2018, and terminating on June 30, 2019. HPS signed the April MOA on April 18, 2019, and submitted it to

DHEC with a little over two (2) months remaining under the applicable school year. (R. p. 196, ¶ 57). HPS continued providing services throughout the rest of the school year with no objection from DHEC, and at no time did DHEC question the validity of the April 2019 MOA. DHEC even went so far as to request the annual data from HPS for the 2018-2019 school year to effectuate the annual review, HPS completed and signed the 2018 annual review, and DHEC acknowledged HPS's participation in the Dental Program for the 2018-2019 calendar year. (Id. at ¶ 66).

Based on DHEC's actions as it relates to the April 2019 MOA, it is clear that DHEC accepted the MOA signed by HPS, held it, and acted upon it without actually signing it. *See, Peddler, Inc. v. Rikard*, 266 S.C. 28, 32, 221 S.E.2d 115, 117 (1975). Therefore, it is not possible for DHEC to argue that the April 2019 MOA was never valid when it in fact acted upon it and only disputed its validity once HPS declined to sign the August 2019 MOA. Furthermore, DHEC had previously accepted and acknowledged other annual reviews/renewals submitted by HPS without signing them, and the record is clear that DHEC was often inconsistent with how it renewed its MOAs, with some years only requiring completion of the annual review and other years requesting that an MOA be signed in the middle of the year.³ Despite the fact that DHEC did not execute the April 2019 MOA, that MOA was valid and enforceable, which is supported by DHEC's actions following HPS's submission of the signed MOA on April 18, 2019.

The Trial Court erred in dismissing HPS's claim for breach of contract accompanied by fraudulent act because the Second Amended Complaint sets forth sufficient factual allegations establishing the existence of a contract between HPS and DHEC, namely the 2016 MOA and the April 2019 MOA; the breach of those contracts by DHEC which was accomplished with a

³ See discussion *Supra*, pg. 4. See also, Tr. p. 15, lines 9 – 13.

fraudulent intention; and that the breach of the existing MOAs was accompanied by a fraudulent act, i.e., DHEC's communication of false information concerning HPS's legal status to SCDHHS and South Carolina public schools. When properly considered in a light most favorable to HPS, the Second Amended Complaint sets forth facts supporting the existence of a valid contract between HPS and DHEC sufficient to survive a Motion to Dismiss pursuant to Rule 12(b)(6), SCRCF. Accordingly, the Trial Court erred in finding that there was no valid contract in existence.

CONCLUSION

For the reasons discussed herein, and set forth in Appellant's Initial Brief, Appellant Heath Promotion Specialists, LLC, respectfully requests the Court reverse the decision of the trial court.

Respectfully submitted,

s/ Haley Hubbard

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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