

Carolyn C. Matthews
Jana E Shealy

FILED

22 May 2012

The South Carolina Court of Appeals

Anonymous No. 1, R.D.H. and Anonymous No. 2,
R.D.H., Appellants,

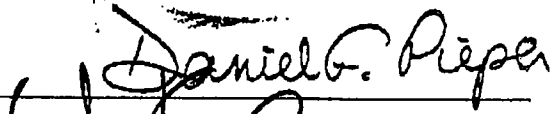
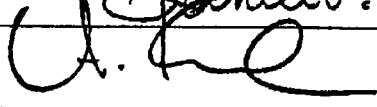
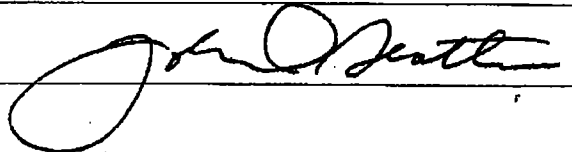
v.

South Carolina Department of Labor Licensing and
Regulation, State Board of Dentistry, Respondents.

Appellate Case No. 2010-181309

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J.
 J.
 J.

Columbia, South Carolina

cc:

Stephanie Nichole Weissenstein
Patrick Donell Hanks
Desa Allen Ballard
Kenneth P. Woodington

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Carolyn C. Matthews, Administrative Law Judge

Case No. 06-ALJ-11-0562-AP
Case No. 06-ALJ-11-0563-AP

Anonymous No. 1 R.D.H. and Anonymous No. 2 R.D.H. Appellant,

v.

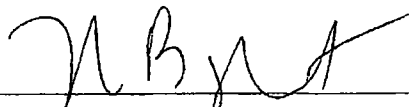
South Carolina Department of Labor, Licensing and
Regulation, State Board of Dentistry Respondent.

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent, does hereby certify that service of the **Return to Petition for Reconsideration** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 14th day of May 2012:

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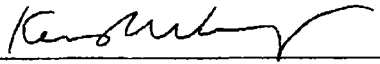
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May 14, 2012

Respectfully submitted,

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controlled by some error of law. If the Court had regarded Appellants' claims on the other issues meritorious, there presumably would have been no need for the Court to remand for consideration of the statutory construction issue that was the subject of the remand to the ALC.

Notwithstanding the contentions above, Respondent submits that it might be appropriate for the Court to amend the per curiam opinion to indicate that any issues remaining from the first appeal were considered and found to be without merit, if such was the result the Court intended. This appears in fact to have been what the Court intended, as indicated above. However, if the Court were to so amend its per curiam order, any doubt about whether the Court addressed the other issues would be eliminated if this case proceeds any further. If amendments or additions appear necessary or desirable, they could be based on the contentions made by Respondent at pp. 22-41 of its post-remand brief.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Appellants' Petition for Reconsideration should be denied, except for a possible amendment or clarification of the per curiam order, as suggested above.

Appellants when the case was before this Court after the remand. Instead, they have raised the issue of these allegedly-undecided matters for the first time after the remand only in their petition for rehearing. Under the well-settled rule, an issue may not be raised for the first time in a petition for rehearing. *See, e.g., Herron v. Century BMW*, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011).

Moreover, even if the Court were otherwise inclined to refer back to the first Brief of Appellants, i.e., the one filed before the case was remanded by this Court, it seems clear that in this appeal after the remand, Appellants expressly declined to re-argue those issues. Respondent, in an abundance of caution, re-briefed all of the issues from the first appeal, as well as the issues arising after the second decision of the ALC. *See Br. of Respondent* 4, 22-41. The response of the Appellants in their Reply Brief after remand, exactly the opposite of what they now argue, was that “the issue of whether the teeth sealed by the two appellants were decayed is not the substantive issue in this appeal, and neither is the issue of ‘proof of harm.’ . . . Therefore Appellants decline to reply to those portions of the brief.”¹ Reply Brief 1. Despite this rather forthright refusal to argue those issues any further, Appellants now claim that the Court should have decided them after all. For the reasons already stated, this request should be denied.

In addition, it appears that this Court, in its November 4, 2009 opinion remanding the case, did in fact decide the issues in question against the Appellants. This is shown by the Court’s citation to *Major v. South Carolina Dept. of Probation, Parole and Pardon Services*, 384 S.C. 457, 464-465, 682 S.E.2d 795, 799 (2009). The remand opinion cited that case for the point that an ALC decision should not be overturned unless it is

¹ The issues there mentioned are the ones that Appellants now claim should be decided.

2. Paragraph B. (Substantial evidence and/or standard of care as an issue of law).

Appellants' next argument is that the issue concerning the standard of care should have been regarded as an issue of law. This issue was also one that was briefed by both parties. The per curiam opinion presumably rejected Appellants' claim on this issue, as indicated by its reference to *S.C. Code Ann. § 1-23-220(b)(1)* and *Spartanburg Regional Medical Center v. Oncology and Hematology Associates of South Carolina, LLC*, 387 S.C. 79, 82, 690 S.E.2d 783, 784 (2010), both of which refer to the standard of review for issues of fact.

Appellants' argument that the standard of care is a completely legal issue is without merit in any event. As the Supreme Court has held, in setting forth a professional standard of care, "we defer to the collective wisdom of a profession, such as physicians, dentists, ophthalmologists, accountants and any other profession which furnishes skilled services for compensation." *Doe v. American Red Cross Blood Services, S.C. Region*, 297 S.C. 430, 435, 377 S.E.2d 323, 326 (1989). In other words, in a case where expert testimony is necessary to establish the standard of care, the standard of care is a question of fact. *See Sharpe v. South Carolina Department of Mental Health*, 292 S.C. 11, 354 S.E.2d 778 (Ct. App.1987)(Bell, J., concurring)(whether defendant failed to observe the standard of care required by law in a particular case is a question of fact for the trier of fact).

3. Paragraph C (Other issues).

Appellants assert in their third and final point that there are other issues left over from their first appeal in this case, and that "Appellants are entitled to have their original appeal addressed." Petition at 6. Appellants did not re-brief those issues in their Brief of

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Carolyn C. Matthews, Administrative Law Judge

Case No. 06-ALJ-11-0562-AP
Case No. 06-ALJ-11-0563-AP

Anonymous No. 1, R.D.H. and Anonymous No. 2, R.D.H.,.....Appellants

v.

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

RETURN TO PETITION FOR RECONSIDERATION

Respondent South Carolina Department of Labor, Licensing, and Regulation, State Board of Dentistry, makes the following response to Appellants' Petition for Reconsideration. Appellants' Petition contains three separate argument headings, designated (A) through (C). Each will be addressed separately below.

1. Paragraph A (*S.C. Code Ann.* § 40-15-110(10)).

Appellants' argument under this heading is virtually the same as certain parts of their argument previously made in this case. Respondent would refer to its Brief of Respondent, pp. 15-21, for its position on those previously-argued issues. This Court properly rejected Appellants' claim that the statutes considered on remand, which are silent on the standard of care, nevertheless had something to say on that issue.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Carolyn C. Matthews, Administrative Law Judge

Case Nos. 06-ALJ-11-0562-AP and 06-ALJ-11-0563-AP

Anonymous No. 1, R.D.H., and
Anonymous No. 2, R.D.H.,

Appellants,

v.

South Carolina Department of Labor,
Licensing and Regulation, State Board
of Dentistry,

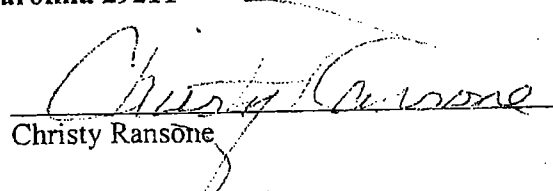
Respondents.

CERTIFICATE OF SERVICE

The undersigned certifies that she has, this date, caused to be served one (1) copy of the **Petition for Reconsideration** on opposing counsel in this matter, by depositing a copy of same in the United States Mail, with sufficient first class postage affixed, addressed as follows:

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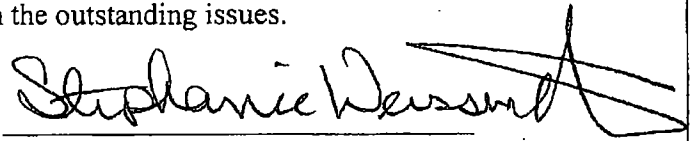

Christy Ransone

May 3, 2012
West Columbia, South Carolina

However, if it affirms the decision of the ALC on remand, the Court of Appeals is still required to issue an order answering the remaining issues from the original appeal.

Therefore, Appellants respectfully request that this court reverse the decision of the Administrative Law Court and determine, as a matter of law, that there is a different standard of care for dental hygienist in the public setting.

Furthermore, and as a separate matter, Appellants asks this Court to address the outstanding issues on appeal and, should the Court desire, establish a briefing schedule and/or schedule additional oral arguments on the outstanding issues.



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May 3, 2012

benefit of sealants in the public health setting, as well as that of actual, practicing dentists.

Clearly, the Board's deference to its witnesses, and its conclusion that the standard of care was a factual issue, was an error, and the decisions resulting therefrom were a mistake. Likewise, by upholding the ALC's preference to rule against the greater weight of the evidence, the Court misapprehended the meaning of and failed to review the Appellants' material in a novel context. *Liberty Mutual* at 619.

Those legal questions asked whether the statutes cited by this Court establish, as a matter of law, a distinct standard of care for dental hygienists working in the public health setting, as opposed to a private dental setting where restorative work is available. There were no evidentiary issues either before the Administrative Law Court (ALC) on remand or before this Court in this appeal. This Court's choice to affirm based, at least in part, on the existence of substantial evidence is an error of law, because no factual issues were presented on remand or in this appeal.

C. THE APPELLANTS' OUTSTANDING ISSUES ON APPEAL MUST BE ADDRESSED.

The prior appeal raised five issues, all of which were argued before this Court in the original oral argument on October 7, 2009. This Court did not decide the other issues and instead remanded to the ALC on the single issue related to the standard of care. Should this Court not reverse the ACL on the issue that was remanded pursuant to this motion, Appellants are entitled to have their original appeal addressed. Rule 220(b), SCACR. If the Court desires additional briefing on those issues, a briefing schedule should be established and, in the Court's discretion, additional oral argument held.

whole record'." *Liberty Mutual Ins. v SC Second Injury Fund*, 363 SC 612, 619, 611 SE2d 297 (Ct. App. 2005) (citing, *Bursey v. South Carolina Dep't of Health & Envl. Control*, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct.App.2004); S.C.Code Ann. § 1-23-380(A)(6)(e) (2005)).

In this case, there was a novel question of law raised regarding the interpretation of a statute, so the appellate court is free to decide the question with no particular deference to the lower court and based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right. See, *Sloan v. Bd. of Physical Therapy Examiners*, 370 S.C. 452, 636 S.E.2d 598, 605-606 (2006) (internal citations omitted).

Both the Board and the appellants presented expert testimony to support a review of the legitimacy of their respective positions regarding the standard of care in the public health setting. Ostensibly, Dr. Sneed, who had no experience in the public health setting, opined there was no difference. Appellant's expert, Dr. Simonsen, together with public health expert, Beverly Dunbar, both explained why it was logical to have a different standard of care in the public health setting. But the question was one of law.

Mistaking the issue as one of fact, both the Board and the ALC gave more credence to the testimony of Dr. Sneed, who, as the record shows, has no experience in the public health setting, exhibited uncertainty regarding the tools hygienists for preventative care and as to the legal responsibilities of dental hygienists. (R. pp. 284-287.). Meanwhile, Appellants presented the testimony of the world's foremost expert on dental sealants as preventative care, who had published articles and reports discussing the

care that is reversible. Primary preventive care and education are defined as promotion and protection of health to avoid the occurrence of disease through community, school, and individual measures or improvements in lifestyle. **These services are to be performed under the direction of the Department of Health and Environmental Control State Dental Coordinator** or the department's designee but do not require that the director or a licensed dentist be present when any public health dental program services are provided. Public health dental program services **include oral screenings using a Department of Health and Environmental Control approved screening system, oral prophylaxis, application of topical fluoride including varnish, and the application of dental sealants.** S.C. Code §40-15-110(a)(10)(emphasis added).

According to *Bell, et al. v. Bell, et al.*, if the purpose of a statute can be reasonably discovered in its language, the purpose will prevail over the literal import of the statute, for the dominant factor in the rule of construction is the intent, not the language, of the legislature." *Bell, et al. v. Bell, et al.*, 229 S.C. 1, 4, 91 S.E.2d 548 (1956)

Therefore, this Court misapplied the law, as stated, and erred in ruling that the pertinent statute does not clearly establish a standard of care for school practitioners different from dental hygienists in the private sector.

B. THE COURT OF APPEALS ERRED IN DETERMINING THE ALC'S DECISION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE; OR, IN THE ALTERNATIVE, THE COURT OF APPEALS FAILED TO TREAT THIS MATTER AS A NOVEL QUESTION OF LAW.

The Court of Appeals held that review of administrative agency decisions is "limited to a determination of whether they are supported by substantial evidence." *Roper Hosp. v. Bd. of S.C. Dep't of Health & Env'tl. Control*, 306 S.C. 138, 140, 410 S.E.2d 558, 559 (1991). The Court did acknowledge that "a reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are 'clearly erroneous in view of the reliable, probative and substantial evidence on the

stated that "a statute must receive a practical, reasonable, and fair interpretation consonant with the **purpose**, design, and policy of the lawmakers"; citing *Carolina Alliance for Fair Emp't v. S.C. Dep't of Labor, Licensing, & Regulation*, 337 S.C. 476, 490, 523 S.E.2d 795, 802 (Ct. App. 1999)(emphasis added). This Court also relied on *Santee Cooper Resort v. S.C. Pub. Servo Comm'n.*, for the principle that, "words used in a statute should be taken in their ordinary and popular significance, unless there is something in the statute requiring a different interpretation." *Santee Cooper Resort v. S.C. Pub. Servo Comm'n.*, 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989). Appellants would show that the Court erred by not adhering to the precedent it cited.

A statute must be construed in the light of its intended purpose. Taking the words of S.C. Code 40-15-110(10)(2003) at their most literal and plain meaning, it is clear that the legislature intended that dental hygienists will use the Department of Health and Environmental Control approved screening and procedures in the application of sealants.

Those guidelines provide, in part:

Sealants have been demonstrated to be a safe and effective long-term method to prevent pit and fissure caries. . . . In addition to preventing carious lesions, sealants can arrest caries progression. . . . Patients who have teeth with questionable decay should . . . be considered for therapeutic sealants. . . . **Interim dental sealant may be used in community and school-based programs.** These sealants are used to slow down the decay process in some teeth that have dentinal caries. . . . The goal of preventing caries through widespread use of sealants will be accomplished best by providing preventative sealants to individuals at high risk and placing therapeutic sealants on carious lesions that are limited to enamel. (R. pp. 392-393; R. p. 878)(emphasis added).

Then, the 2012 version of the applicable statute states that

Nothing in this chapter may be construed to prevent . . . a licensed dental hygienist employed within or **contracted through the public health system from providing** education and **primary preventive**

setting have a different standard of care. The other questions asked in the original appeal remain unanswered¹.

The only issues that were in this, the second appeal, are (1) whether the Administrative Law Court (ALC) erred in determining that the statutes referenced in this Court's order remanding the matter to the ALC did not set forth a separate standard of care for dental hygienists in the public school setting as a matter of law, and (2) whether the ALC erred in determining that the Board even addressed the issue (clearly raised by Appellants throughout these proceedings) when it ruled that the same standard of care applied for both the public health setting and the private setting².

In support of the Petition, Appellants would show that the majority's decision is in error, in part, for the following reasons:

- A. THE PLAIN LANGUAGE OF S.C. CODE §40-15-110(10) ESTABLISHES DIFFERENT STANDARDS OF CARE, AND THE COURT OF APPEALS ERRED IN UPHOLDING THE ADMINISTRATIVE LAW COURT'S DECISION THAT THERE IS ONLY ONE STANDARD OF CARE FOR DENTAL HYGIENISTS.

The Court upheld the ALC's determination that the statutes addressing the work of dental hygienists and the use of sealants did not set forth a standard of care for the public sector different than as applicable in the private practice. In so doing, this Court

¹ Respondent attempted to re-argue those issues for a second time in its briefs in this appeal, and Appellants objected. The original arguments on those issues were already made, and are only ripe for further argument now after this Court has addressed the limited issue that was remanded.

² This Court's decision in the first appeal implicitly recognized that there *could* be a separate standard of care for dental hygienists working in the public health setting. This Court expressly advised the ALC to look at specific statutes to answer the question that it had failed to address when it was asked about the appropriate standard of care during the original Board proceedings. The Board addressed the standard of care as a factual issue, choosing to believe one expert witness over another, when the issue presented was a legal question. In remanding to the ALC, this Court recognized the legitimacy of the argument that the applicable standard of care is a legal question, not a factual one. Still, the ALC chose to review the question under a "sufficiency of the evidence" standard. That is error which should be corrected by this Court on appeal.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
HONORABLE CAROLYN MATTHEWS

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SC Court of Appeals

Docket No. 06-ALJ-11-0562-AP (Case No. 04-45)
Docket No. 06-ALJ-11-0563-AP (Case No. 03-104)

Opinion No. 2012-UP-234 (04/18/12)

Anonymous No. 1, R.D.H., and Anonymous No. 2, R.D.H.

Appellants,

v.

South Carolina Department of Labor, Licensing and Regulation
and South Carolina Board of Dentistry,

Respondent.

PETITION FOR RECONSIDERATION

Appellants petition this Honorable Court for reconsideration of its decision dated April 18, 2012 (2012-UP-234) in this matter, pursuant to Rule 221(a), on the basis that the Court misapprehended a point of law. The focus of this appeal is a decision of the Administrative Law Court made on remand by this Court from the original appeal by these appellants. (Op. No. 2009-UP-504, filed November 4, 2009). This Court remanded to the ALC on only one of the original issues: whether dental hygienists in the school

802 (Ct. App. 1999) ("[A] statute must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers."); Santee Cooper Resort v. S.C. Pub. Serv. Comm'n., 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989) ("Words used in a statute should be taken in their ordinary and popular significance unless there is something in the statute requiring a different interpretation.").

AFFIRMED.

PIEPER, KONFUROS, and GEATHERS, JJ., concur.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Anonymous No. 1, R.D.H., and Anonymous No.
2, R.D.H., Appellants,

v.

South Carolina Department of Labor Licensing
and Regulation, State Board of Dentistry,
Respondents.

Appeal From Administrative Law Court
Carolyn C. Matthews, Administrative Law Court Judge

Unpublished Opinion No. 2012-UP-234
Heard March 20, 2012 – Filed April 18, 2012

AFFIRMED

Desa Ballard and Stephanie Weissenstein, both
of West Columbia, for Appellants.

Kenneth P. Woodington and Patrick Donell
Hanks, both of Columbia, for Respondents.

PER CURIAM: Anonymous No. 1 and No. 2, dental hygienists, appeal from the administrative law court's (ALC) reconsideration of sections 40-15-80(B), -82(1), and -110(A)(10) of the South Carolina Code (Supp. 2011) and determination that no separate standard of care exists for hygienists working in the public school setting. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: S.C. Code Ann. § 1-23-610(B) (Supp. 2011) ("The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact."); Spartanburg Reg'l Med. Ctr. v. Oncology & Hematology Assocs. of S.C., LLC, 387 S.C. 79, 89, 690 S.E.2d 783, 788 (2010) ("Judicial review of administrative agency decisions is therefore 'limited to a determination of whether they are supported by substantial evidence.'" (quoting Roper Hosp. v. Bd. of S.C. Dep't of Health & Envtl. Control, 306 S.C. 138, 140, 410 S.E.2d 558, 559 (1991))); Carolina Alliance for Fair Emp't v. S.C. Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 490, 523 S.E.2d 795,

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
Honorable Carolyn C. Matthews, Administrative Law Judge

Case No. Docket No. 06-ALJ-11-0562-AP
Docket No. 06-ALJ-11-0563-AP

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SC Court of Appeals

Anonymous No. 1, R.D.H., and Anonymous No. 2, R.D.H.
.....APPELLANTS

vs.

South Carolina Department of Labor Licensing and
Regulation, State Board of Dentistry,.....RESPONDENT

CERTIFICATE OF SERVICE

I, Brooks C. Schumacher, do hereby certify that I have this date, served one (1) copy of the **Reply Brief of Appellants** 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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Brooks C. Schumacher
Paralegal

April 22, 2011

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Appellants' Brief on Appeal, it is respectfully submitted the Orders of the Administrative Law Court should be reversed for a finding that a separate standard of care exists for dental hygienists in the school setting; and this matter remanded for purposes of establishing that standard.



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April 22, 2011

issue to the ALC to be addressed, this Court acknowledged, and instructed, this issue had been preserved.

However, "a reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are 'clearly erroneous in view of the reliable, probative and substantial evidence on the whole record'." *Liberty Mutual Ins. v SC Second Injury Fund*, 363 SC 612, 619, 611 SE2d 297 (Ct. App. 2005) (citing, *Bursey v. South Carolina Dep't of Health & Envtl. Control*, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct.App.2004); S.C.Code Ann. § 1-23-380(A)(6)(e) (2005)). The Board wants its decisions to be reviewed decided under the general standard of review used in the majority of administrative cases, specifically that the Board's decision can only be reversed if the decision is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(A)(6)(e). However, the Supreme Court has made it clear that the standard of review in a case such as the one at bar is different.

In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court. The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right.

Sloan v. Bd. of Physical Therapy Examiners, 370 S.C. 452, 636 S.E.2d 598, 605-606 (2006) (internal citations omitted).

This Court recognized that the standard of care for dental hygienists, public or private, had not been clearly defined by the Board or LLR and that, perhaps, the ALC had erred in accepting the Board's reliance on Dr. Sneed's testimony and decision was an error. Furthermore, by remanding this precise



Appellants believe that this Court recognized on the prior appeal that the legislature, by specifically referring to the guidelines promulgated by the SC DHEC and specifically referenced by these statutes, intended hygienists in the public school setting to operate differently than in the private dental sector out of necessity. R.---

Even on remand, the ALC determined that the Board addressed and established a standard of care for dental hygienists "regardless the setting" by the testimony of its expert, Dr. Sneed, a local practitioner with virtually no experience in the area. Nevertheless the Dental Board gave his testimony more credibility than the testimony of leading experts in the field, respected publications and actual practicing dentists presented by Appellants. R. --- It is unfortunate that the Board erroneously decided, against the weight of the evidence, that the placing of sealants in certain situations constituted professional misconduct, despite substantial evidence that the placing of sealants on children who were at risk of not receiving follow-up care was in the child's best interest.

The ALC erred in determining that the standard of care for all hygienists, regardless field of practice, is that "sealants should not be placed over frankly or obviously decayed teeth", as purportedly, adequately established by the Board. R.--- The prevailing opinion is that because the Board believed its own Dr. Sneed over the substantial evidence presented by the Appellants, then this "establishment" of the standard is the only one the lower court could consider. R.---

language such as "there is a different standard of care for dental hygienists in the public school setting." However, the statutes do specifically require dental hygienists in the school setting to perform services "using a [DHEC] approved screening... and the application of dental sealants." S.C. Code Ann. §40-15-110(10)(2003, as amended). So, although the statutory text does not specifically create a separate standard of care, the plain words of the statute clearly establish intent that there be such a dichotomy.

Appellants focused their brief on helping the Court recognize that intent. "A statute must be construed in the light of its intended purpose; and if such purpose can be reasonably discovered in its language, the purpose will prevail over the literal import of the statute, for the dominant factor in the rule of construction is the intent, not the language, of the legislature," *Bell, et al. v. Bell, et al.*, 229 S.C. 1, 4, 91 S.E.2d 548 (1956)(citing *Beaufort County v. Jasper County*, 220 S.C. 469, 68 S.E. 2d 421; *Cain v. South Carolina Public Service Authority*, 222 S.C. 200, 72 S.E. 2d 177)(emphasis added)). Furthermore,

"In interpreting a statute, this Court's primary function is to ascertain the intent of the legislature. Of course, where a statute is complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself. We should consider, however, not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. Finally, there is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects."

Whitner v. State, 328 SC 1, 9, 492 S.E.2d 777 (1997)(internal citations omitted)(emphasis added).

II. QUESTION OF WHETHER A SEPARATE STANDARD SHOULD BE APPLIED TO THE PUBLIC AND PRIVATE SECTOR WAS PRESERVED FOR REVIEW.

A. The original order from the ALC erred in determining that the Board established a standard of care for dental hygienists, and that the proper standard is that sealants should not be placed over frankly or obviously decayed teeth.

As stated in the Appellants' initial brief to this Court, Appellants have, from the beginning of the presentation of this case before the Board years ago, urged the Board to recognize that the standard of care for hygienists working in the public health school-based program is necessarily different than the standard of care in private dentistry. The Appellants have raised a novel question of law by questioning the Board's unilateral and virtually unsupportable decision to arbitrarily determine that the placing of sealants in certain situations constitutes professional misconduct.

The Court recognized the need for the issue to be addressed by remanding the case to the ALC "for reconsideration of the standard of care pursuant to Sections 40-15-80(B), 40-15-82(1), and 40-15-110(A)(10) of the South Carolina Code and the following authorities: S.C. Code Ann. § 1-23-610(B) (Supp. 2008)." *R. Unpublished Op. No. 2009-UP-504 (November 4, 2009).*

Respondents suggest that because the three statutes referenced by this Court's order on remand and the ALC's November 16, 2010 Order on Remand were not specifically cited *en masse* throughout Appellants' brief, then Appellants have not argued the issues in this appeal.

Regarding §§ 40-15-80(B), 40-15-82(1) and 40-15-110(A)(10), Appellants have acknowledged that the literal text of the statutes does not expressly include

ARGUMENT

I. RESPONDENTS SECOND AND FOURTH ARGUMENTS ARE NOT PRESERVED FOR REVIEW IN THIS APPEAL.

Appellant believes that the substantive portions of Respondent's second and fourth arguments on appeal are not preserved for review by this Court due to the fact that they were not the substantive issues before the Administrative Law Court (ALC) on remand and have not been raised by Appellant in this appeal.

As set forth in its initial brief, Appellants contend that the only issues raised and preserved for review are (1) whether the ALC erred in determining that the statutes referenced in this Court's order remanding the matter to the ALC did not set forth a separate standard of care for dental hygienists in the public school setting and (2) whether the ALC erred first in determining that the Board established a standard of care and then erred by upholding the alleged standard.

R. ____

Despite Respondent's preoccupation with those facts in its brief, the issue of whether the teeth sealed by the two appellants were decayed is not the substantive issue in this appeal, and neither is the issue of "proof of harm." Appellants' discussion of the use of sealants as a preventive measure in its brief was in reference to the guidelines established by DHEC, and included to establish and show legislative intent to create the separate standard of care for public sector hygienists when enacting the statutes. It appears Respondent misinterpreted the message of the brief. Therefore, Appellants decline to reply to those portions of the brief.

RD

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
HONORABLE CAROLYN MATTHEWS

Docket No. 06-ALJ-11-0562-AP (Case No. 04-45)
Docket No. 06-ALJ-11-0563-AP (Case No. 03-104)

Anonymous No. 1, R.D.H., and Anonymous No. 2, R.D.H.

Appellants,

v.

South Carolina Department of Labor, Licensing and Regulation
and South Carolina Board of Dentistry,

Respondent.

REPLY BRIEF OF APPELLANTS

RECEIVED

APR 25 2011

SC Court of Appeals

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Carolyn C. Matthews, Administrative Law Judge

Case No. 06-ALJ-11-0562-AP
Case No. 06-ALJ-11-0563-AP

Anonymous No. 1, R.D.H. and Anonymous No. 2, R.D.H.,.....Appellants

v.

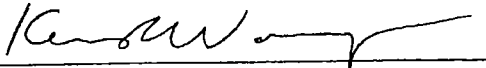
South Carolina Department of Labor, Licensing,
and Regulation, State Board of Dentistry,.....Respondent,

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent, does hereby certify that service of the **Initial Brief of Respondent** and **Respondent's Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 17th day of March 2011:

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Carolyn C. Matthews, Administrative Law Judge

Case No. 06-ALJ-11-0562-AP
Case No. 06-ALJ-11-0563-AP

Anonymous No. 1, R.D.H. and Anonymous No. 2, R.D.H.,.....Appellants

v.

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

**RESPONDENT'S DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Respondent would advise the Court and the Appellants that it has no additional material to designate to be included in the Record on Appeal, beyond the material already designated by Appellants.

I certify that this designation contains no matter which is irrelevant to this appeal.

[Signature block is on following page]

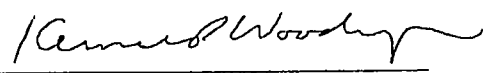
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Orders of the Administrative Law Court should be affirmed.

Respectfully submitted,

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rapidly,” there is a substantial risk of harm to the patient. The risk of harm is exacerbated by the fact that the sealant can cover up the decay, allowing the patients and their parents to have a false sense of security, a phrase used not only by Dr. Sneed, but also by Dr. Simonsen. R. 892.

5. The Issue That Was The Subject Of The Remand Was Not Raised By Appellants Or Preserved For Review.

While LLR realizes that this Court remanded the issue of the three statutes for consideration by the ALC, the fact remains that that issue was not raised by Appellants in their appeal to this Court or for that matter, to the ALC or to the Board.

There is no indication in the arguments of Appellant’s counsel before the Board that this issue was one that was being presented. Nor was it raised in the original Brief of Appellant in this Court. LLR submits that it would be appropriate for the issue not to be addressed, not having been previously raised.

²⁵ This testimony is found at R. 293, lines 16-20; 265, line 24 through 294, line 17. Dr. Sneed reiterated these points at R 300-301.

clearly correct. *See, e.g., In the Matter of Gregory*, 332 S.C. 13, 503 S.E.2d 735 (1998), cited by the ALC. R. 14.²⁴

To the extent that Appellants claim that at least a risk of harm to the public must be shown before they can be disciplined, the record contains substantial evidence that such a risk of harm was present in these cases. Respondent again would quote the testimony of Dr. Sneed, which was deemed the most credible testimony by the Board and the ALC:

... you'd give a false sense of security to the patient and to the parent. . . .[I]t would be very difficult to achieve a hermetic seal, a very good seal.

* * *

And if it breaks, if that seal breaks and you've left decay, it is rampant. It becomes . . . in a matter of months you could have an exposure, a toothache, a root canal. So my concern with sealing a frankly cavitated lesion would be just that. You might get a sealant right now possibly, you may very well, but is it going to stay there. We see it all the time, a portion comes loose, now it leaks; the patient has a false sense of security, it's an opaque sealant, mama sees something white on there, it looks fine, and it may progress extremely rapidly. The same thing happens with a cracked filling. If you have a cracked amalgam and the amalgam is loose but won't fall out, that's the worst possible scenario, because now it's leaking, saliva, bacteria, sugar, so forth are getting up under there.

R. 11.²⁵ To reiterate, if a patient is treated with sealants under circumstances where the sealants are not likely to adhere, with the result that decay progresses "extremely

²⁴ In the present two cases, the record suggests that no actual harm was inflicted on at least some of the teeth of the patients, but only because the patients saw dentists shortly after the sealants were placed. The dentists removed the sealants and did restorations on some of the teeth. The sealants did not remain on those teeth long enough for any harm to have been done.

illnesses cannot be determined to exist without an autopsy. Obviously, teeth are viewed as decayed and are restored as a matter of course without the need to remove the tooth—an action that would make it immaterial what the condition of the tooth was. This is simply one more instance of the testimony of Dr. Simonsen going against common practice and common sense. Again, the hygienists testified that they were trained to spot gross decay and knew they were responsible for identifying it. *See Question 3(a), supra.*

Finally, the Board took great care not to impose an impossible burden on hygienists. The Orders in these cases did no more than require that the hygienists use the tools available to them in a competent and professional manner. The Board issued the most minimal sanctions that could have been issued while still setting forth the standard of care.

4. The Original Order Of The ALC Correctly Held That Proof Of Actual Harm Of A Specific Nature Is Not An Element Of A Professional Disciplinary Proceeding, And The Record Contains Substantial Evidence Of Risk Of Harm To Patients From Sealants Placed Over Frank Decay.

Appellants' final argument is made in their original brief. There they contend that the ALC erred "by concluding that actual harm is not a necessary element of a professional disciplinary proceeding." Original Br. of Appellants 26. Appellants argued in the ALC, as they do in this Court, that in order for a state licensing board to discipline a licensee, there must exist "the presence of harm or the risk of harm to the patient. . . ." Original Br. of Appellants 27. Appellants do not appear to challenge the conclusion of the ALC that no showing of actual harm to a patient must be made before professional discipline can occur. R. 13-14. For the reasons set forth therein, that conclusion was

On remand, Appellants have claimed that this Court's citation of *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 248, 626 S.E.2d 1, 4 (2006), in the remand order is supportive of their contentions on the standard of care. The ALC concluded, however, that this Court "was simply calling attention to the fact that it is the plaintiff's (or here, LLR's) burden to provide evidence of the standard of care and of the defendants' failure to comply with the standard." R. ___ (ALC Order on Remand at 9). The ALC then cited the testimony of Dr. Sneed, already referenced above, with respect to the existence of a single standard of care and its breach.²³

One other argument made by Appellants, based on the testimony of Dr. Simonsen, is that detecting frank decay is so difficult as to be beyond the capabilities of hygienists, or even dentists, when based only on observation or the use of an explorer. They argue that the tooth has to be drilled before the presence of decay can be confirmed. Br. on remand at 3. Their expert, Dr. Simonsen, added another extreme view to this issue, claiming that "we can't define the actual status of that tooth [in terms of whether it is carious] without extracting it and sectioning it and examining it histologically [i.e., microscopically]." R. 344, lines 19-22. This position is similar to saying that internal

²³ In the remand proceedings, Appellants had raised another issue about this Court's citation to *David*, see R. ___ (ALC Order at 9 n. 3.) but that issue, which had probably been abandoned by them long ago, has not been raised by them before this Court in their most recent brief. Appellants have also based an argument on ALC Rule 29(B), Br. after remand at 11-12, but that rule only applies to cases in which the ALC is the finder of fact. It has no relevance in an appeal to the ALC. Appellants also refer to the abolition of the "locality rule," *Id.* at 12-13, but they make no connection between that argument and any aspect of this case. In particular, they do not show that their views about sealants have been adopted anywhere else in the United States. The Supreme Court has held that the locality rule has been replaced with a "national standard of care," *Moultrie v. Medical University of South Carolina*, 280 S.C. 159, 162, 311 S.E.2d 730, 731 (1984), indicating that the standard does not extend beyond the United States.

Appellants made a brief argument in their original Question 1 that the standard of care applied by the Board in these cases is an issue of statutory construction rather than an issue about whether the evidence is substantial.²² Br. of Appellants 6-7. However, as the Supreme Court has held, in setting forth a professional standard of care, "we defer to the collective wisdom of a profession, such as physicians, dentists, ophthalmologists, accountants and any other profession which furnishes skilled services for compensation." *Doe v. American Red Cross Blood Services, S.C. Region*, 297 S.C. 430, 435, 377 S.E.2d 323, 326 (1989). In other words, in a case where expert testimony is necessary to establish the standard of care, the standard of care is a question of fact. *See Sharpe v. South Carolina Department of Mental Health*, 292 S.C. 11, 354 S.E.2d 778 (Ct. App.1987)(Bell, J., concurring)(whether defendant failed to observe the standard of care required by law in a particular case is a question of fact for the trier of fact). The absence of a standard of care in the statutes governing dental hygiene practice in public health settings serves to reaffirm this approach.

Appellants also make a passing claim that the standard of care was set in these cases without notice to the profession, but similar claims were considered and rejected some time ago in *Toussaint v. State Bd. of Medical Examiners*, 303 S.C. 316, 321, 400 S.E.2d 488, 491 (1991). Appellants' claim in this regard is particularly unavailing, because they do not seriously claim not to have known what the standard of care was, but instead have simply tried to get themselves exempted from it.

²² The statute which the hygienists were found to have violated is § 40-15-190(A)(14), which provides that misconduct occurs when a hygienists "has failed to meet the standards of care in the practice of . . . dental hygiene."

same as advocating the application of spray paint over a rusty fender. It is common knowledge that all that would happen in such a case is that the rust would continue to spread, hidden under the poorly-adhering paint. The situation with sealed dentin caries is no different.²¹

Appellants attempt to make these cases unduly complicated. No matter in what setting a dental hygienist practices, there are minimal requirements of competence and professional standards that must be observed. Among those standards is the avoidance of sealing frankly decayed teeth when the decay is readily apparent to a hygienist using the tools available to a hygienist. As the ALC held,

Compliance with this minimal standard of practice should not "chill" the public health dental hygiene program. The Board was careful to note that the hygienists were not required to find decay when decay was not apparent to them using the tools they had available to them. Thus, the Board concluded that "[I]n the settings involved in this and companion cases, it is especially important to determine what the hygienist was able to or should have been able to determine with the means at her disposal."

R. 13, quoting R. 40, Par. 11. These cases, taken together, stand for the idea that a hygienist should be able to spot frank cavitation via the naked eye and/or the use of an explorer, and that when such cavitation is seen, the hygienist should not seal the tooth. This is a minimal standard of care, but it is a clear one, and it is one that was violated in these two cases.

²¹ Or, as Dr. Chadwick very plainly put it, "it's just going to go nuts underneath the [leaky] sealant" R. 232, lines 4-8.

them into restorations rather than sealants. R. 297-299. He also testified that that painstaking procedure was not one which could be performed by hygienists. R. 299, lines 5-7.²⁰

The ALC also noted that "Dr. Simonsen also appears to have based even his revised view on an unduly optimistic scenario," R. 12, which was found in his testimony as follows

. . . I can't imagine that a sealant would be placed over a carious lesion without the parent or the child being informed that there is caries present and that requires attention of the dentist.

Id., referring to R. 375, lines 15-19. The problem with this optimistic view is that if the hygienist overlooked the presence of frank cavitation in placing sealants, the hygienist obviously would be in no position to advise the parents or the child that such frank cavitation was present.

Moreover, in the case of children who never see a dentist after the sealants are placed, the placement of sealants over frank cavitation is not harmless, as Appellants argue, but actually is more harmful than it is for children who see dentists soon after the sealants have been applied. As Dr. Sneed testified, in the children who never see a dentist, the false sense of security remains present, while the teeth continue to decay at an accelerated rate. R. 11. To use a simple analogy, the standard proposed by Appellants' counsel, although apparently not by the appellant hygienists themselves, would be the

²⁰ It should also be noted that, as shown by examining Dr. Simonsen's CV, his career is very much one involving the promotion of sealants. He argued that sealants "should be much more widely used. . . ." R. 353, line 25- 326, line 1. This in itself proves that the view he claims to advocate is not the standard of care that is actually in use.

Ins. Program, 374 S.C. 300, 305, 648 S.E.2d 310, 313 (Ct. App. 2007)(affirming an insurance plan's denial of coverage where the opinions of multiple examining physicians conflicted and the medical records were inconsistent). As the ALC held, there was

substantial evidence to show that the Hygienist[s] deviated from the generally recognized practices and procedures which would be exercised by competent hygienists under the same or similar circumstances. "It is generally recognized that the trier of fact, who has the opportunity to observe the witnesses and listen to their testimony in person, is in the best position to determine issues of witness credibility." *Dixon v. Dixon*, 336 S.C. 260, 263, 519 S.E.2d 357, 358 (Ct. App. 1999). My finding, which is consistent with that of the Board's, is that Dr. Sneed's testimony was more than merely "substantial"; it was the more credible testimony offered because it was internally consistent and consistent with the testimony of the hygienists concerning their standard of care.

R. 13. The ALC Order also held that "the Board correctly credited the opinion of Dr. Sneed (and impliedly also credited the original opinion of Dr. Simonsen) by concluding that 'there is a deviation from the standard of care, regardless of setting (including the public health setting), when sealant is placed over clinically obvious decay.'" R. 12, referring to R. 4, 12.

Appellants cite several studies on p. 15 of their original brief in support of the extreme position they advocate.¹⁹ However, Dr. Sneed testified that those studies involved the placement of sealants over caries in a manner that effectively converted

¹⁹ Also, on pp. 13-14 of their original brief, Appellants referenced a 2008 study. They had previously asked this Court to remand the case so that the Board could review that study and certain other materials, but this Court denied that motion. Respondent submits that this effort to re-introduce this 2008 material into this case should be summarily rejected. Even if the Court elects to review that material, however, Respondent submits that it is irrelevant and immaterial for the reasons set forth at pp. 3-6 of Respondent's March 13, 2008, Return to the Motion to Remand.

In Question 4 of their original brief, Appellants argue that the Board and the ALC misread Dr. Simonsen's e-mail. The e-mail is at R. 891-892. The first answer to this is that even if the e-mail had been misinterpreted, which Respondent denies, the error would be harmless in light of the considerable other evidence of the appropriate standard of care, including the DHEC materials, the testimony of Dr. Sneed and the testimony of the hygienists themselves. Secondly, however, while Dr. Simonsen's e-mail refers in part to inadequately placed sealants, Dr. Sneed testified in effect that sealants placed over frank cavitation are, by reason of that fact, inadequate, because where frank cavitation is present, "it would be very difficult to achieve a hermetic seal, a very good seal." R. 292, lines 18-20. *See also*, R. 292-293; R. 300-301. It would therefore appear that there is no inconsistency between Dr. Simonsen's e-mail and Dr. Sneed's testimony. For both of the reasons stated above, Appellant's Question 4 is without merit.

e. Appellants' remaining arguments on the standard of care.

The essence of Appellants' contentions, both in their appeal to the ALC and in the present appeal, is that Dr. Simonsen's testimony at the hearing should be credited over all other conflicting evidence, presumably including even the previously-expressed views of Dr. Simonsen himself. However, at most, Appellants can only show disagreement among experts, and it is axiomatic that where there is a disagreement among experts, it is the duty of the trial tribunal to determine which evidence is more credible and persuasive. *See, e.g., Edwards v. State*, 200 S.W.3d 500, 520 (Mo. 2006) ("where there is a disagreement among experts, it is the duty of the trial court to determine which evidence is more credible and persuasive"). *Cf. Wilson v. State Budget & Control Bd., Employee*

qualified to opine on the practice of dental hygiene. They seek to raise this issue again on p. 11, n. 3 of their brief on remand. The ALC, while probably not required to address this unpreserved issue, nevertheless reviewed Dr. Sneed's qualifications and concluded that his opinions were "well within his range of expertise as a person familiar with the practice of dentistry and the practice of dental hygiene." R. __ (ALC Order at 9). This conclusion was clearly correct for the reasons stated by the ALC: Dr. Sneed "testified that he had taught dental hygienists in the past, and was familiar with the general responsibilities of dental hygienists and with what they needed to know and should be aware of when they practice." *Id.* See R. 271-272.

d. The initial views of the Appellants' expert.

In his testimony in these cases, the expert retained by the Appellants, Dr. Simonsen, staked out an extreme position with respect to the placement of sealants. He testified that "it is okay to place sealant under any circumstances." R. 366, lines 14-15. He had previously, however, told Dr. Sneed in an e-mail exchange over a year before the hearing that caries could progress under an inadequately placed sealant, thereby leading both to increased decay and a false sense of security on the part of the patient and the patient's parents. R. 378, lines 3-11. The ALC noted that "[w]hile Dr. Simonsen attempted to qualify these remarks at the hearing, his e-mail, which was presumably written before he was retained by the Appellants to testify in this case, makes it clear that he and Dr. Sneed are in agreement that it is inappropriate to place sealants over frank cavitation." R. 12.

might get a sealant right now possibly, you may very well, but is it going to stay there. We see it all the time, a portion comes loose, now it leaks; the patient has a false sense of security, it's an opaque sealant, mama sees something white on there, it looks fine, and it may progress extremely rapidly. The same thing happens with a cracked filling. If you have a cracked amalgam and the amalgam is loose but won't fall out, that's the worst possible scenario, because now it's leaking, saliva, bacteria, sugar, so forth are getting up under there.

R. 11.¹⁶ In light of this testimony, Appellants are simply incorrect in asserting that since "most of these patients never see a dentist, the evidence is undisputed that some sealant, even with caries, is better under any circumstances than no sealant." Dr. Sneed's testimony, which was regarded by the Board and the ALC as being the more credible, clearly disputes Appellants' claim that sealing decay is "better under any circumstances" than not sealing.¹⁷ Appellants are also incorrect in asserting that the Board's decision was based only on its own opinion about the standard. Br. on remand at 10. The Board clearly based its decision about the standard of care on this testimony of Dr. Sneed.¹⁸

The ALC correctly concluded that "Dr. Sneed's testimony was more than merely 'substantial'; it was the more credible testimony offered because it was internally consistent and consistent with the testimony of the hygienists concerning their standard of care." R. 12. On remand, Appellants claimed at oral argument that Dr. Sneed was not

¹⁶ This testimony is found at R. 293, lines 16-20; 265, line 24 through 294, line 17. Dr. Sneed reiterated these points at R. 300-301.

¹⁷ In addition to the testimony of the hygienists to the effect that they would not knowingly place sealant over gross decay, Appellants' brief after remand later disclaims this statement that sealant is "better under any circumstances." They state that "they are not suggesting that hygienists in the school setting should run amuck applying sealants to every problem tooth." Br. after remand at 7.

¹⁸ The Board was also entitled to use its "experience, technical competence and specialized knowledge . . . in the evaluation of the evidence," § 1-23-330(4), although in this instance it is clear that the Board relied on the testimony of Dr. Sneed about the standard.

cited the DHEC decision tree in the course of rejecting Appellants' proposed double standard. R. 12.

c. The testimony of the State's expert.

The most detailed and authoritative rejection of Appellants' proposed double standard is found in the testimony of Dr. Sneed. The ALC summarized Dr. Sneed's testimony as follows:

1. There is only one standard of care in South Carolina with respect to the placement of sealants by dental hygienists over frank cavitation. [R. 282, lines 20-24.] That standard of care applies in both public health settings and in private dental offices. [R. 283, lines 6-9.]
2. That standard of care is that sealants should not be placed over decay which is frank, i.e., involving gross carious lesions. [R. 283, lines 3-5.]
3. A dental hygienist should be able to detect frank cavitation on a molar. R. 255, lines 10-16. The tools available to hygienists for making this determination include visual examination with the naked eye and the use of explorer tools. [R. 284, line 14, through 259, line 14.]

R. 11 (cites to record added). As quoted by the ALC, Dr. Sneed further testified that the reasons for not placing sealants over frank decay are that

... you'd give a false sense of security to the patient and to the parent. . . .[I]t would be very difficult to achieve a hermetic seal, a very good seal.

* * *

And if it breaks, if that seal breaks and you've left decay, it is rampant. It becomes . . . in a matter of months you could have an exposure, a toothache, a root canal. So my concern with sealing a frankly cavitated lesion would be just that. You

hygienists' employers, that govern the conduct of these hygienists in the public health setting. Instead, however, one finds just the opposite.

The DHEC "Guidelines for SC School-Based Dental Prevention Programs," R. 875-882 were incorporated into the contract between DHEC and the hygienists' employer. R. 862-863. Another document, the decision tree endorsed by DHEC, indicates that in the public health setting, sealants should (a) sometimes be placed over caries-free teeth, (b) be placed over teeth when it is not certain that surface (enamel) decay is present, and (c) also be placed over teeth that have only enamel or surface decay. R. 882. However, in instances where there is decay below the surface, extending into the dentin, as in the present cases, the decision tree provides only that the tooth should be restored, i.e., filled. R. 882.¹⁵ There is no suggestion in the decision tree that teeth in the condition of those in the present cases should ever be sealed. Likewise, and as discussed in Question 1 above, the "double standard" that Appellants argue for is not found in the terms of their agreement with DHEC for precisely this public health setting. Thus, even if one were to accept the unusual double standard sometimes (but not always) advocated by Appellants' expert, and discussed at length in the briefs of Appellants, the application of such a standard would be foreclosed as a contractual matter by the standard under which the Appellants were required to operate pursuant to the terms of their contract. The ALC

¹⁵ To the same effect is a "Fact Sheet" by the National Institute of Dental Research, which Appellants selectively quote. That document provides, however, that "Once a full-fledged cavity develops, the tooth cannot repair itself." R. 918. The document then notes that such decayed teeth must be filled and restored.

Appellants themselves, as will be seen). In support of its conclusion, the ALC cited (a) the testimony of both hygienists themselves, (b) the DHEC policies under which these hygienists were operating by contract, (c) the State's expert, Dr. Sneed, and (d) statements of Appellants' own expert, prior to his retention by Appellants. R. 10-13. The evidence from all of these sources, as cited by the ALC, will be briefly summarized below:

a. The hygienists themselves.

To their credit, the two hygienists in these cases did not themselves accept the double standard which is being advocated in this appeal. Hygienist 2 testified that sealants should be placed only on "all kids that don't have gross decay." R. 479, lines 21-22. She also agreed that it was part of her responsibility to be able to spot gross decay. *Id.*, lines 23-25. Hygienist 1 likewise testified that she does not seal gross decay. R. 413, lines 13-17. Hygienist 1 also agreed that part of her training was to enable her to recognize tooth decay. R. 416, line 24 – 417, line 5. Thus it would appear that counsel for the hygienists is advocating a position that even the hygienists themselves do not agree with. The ALC noted this testimony of the hygienists themselves. R. 12-13.

b. The DHEC contractual guidelines and decision tree for the school-based public health dental program.

If, as Appellants contend, "there is a different standard of care applicable to the public school setting," Original Br. of Appellants 8, 16, one would expect to see that standard set forth in the DHEC guidelines, incorporated into the contracts with the

the ALC held, "most of the Board's findings of fact are not actually challenged by this Appellant." *Id.*

Dr. Adams' conclusion about frank decay, rendered particularly credible by having been reached even before the hygienist saw the patient, is clearly "evidence that would allow reasonable minds to reach the conclusion that the administrative agency reached," as the ALC held. R. 9. The ALC's conclusions pertaining to the placement of sealants over gross decay should therefore be affirmed.¹⁴

3. The Original Order Of The ALC Correctly Held That The Standard Of Care For Dental Hygienists, Regardless Of The Setting In Which They Practice, Is That Sealants Should Not Be Placed Over Frankly Or Obviously Decayed Teeth.

Appellants' primary contention of substance in this Court, as it was in the ALC, appears to be an argument that, at least for low-income children, it is better to place sealants over even the grossest decay than to leave the decay alone. Original Br. of Appellants 8-16. The Board held in both cases that there is only one standard of care, because "the dangers described in such inappropriate sealing [over frank or obvious decay] are present in the public health setting as in other settings." R. 31, 38-39. The ALC affirmed, holding that Appellants' contention about a double standard of care "is erroneous because there are minimal requirements of competence and professional standards that must be observed in any setting where a hygienist practices." R. 10. (The Board so held as well. R. 32-33, 40.) The ALC therefore comprehensively rejected the double standard proposed on behalf of the Appellants (although not necessarily by the

¹⁴ The issue about placement of sealants over gross decay being a violation of the standard of care is discussed in Question 2 herein.

effect, R. 250). This argument is reiterated at Original Br. of Appellant 21 and 22. This is simply an incorrect characterization of Dr. Adams' testimony. As Dr. Adams testified:

Q. Would you characterize the decay that you observed on 9/2/03, how would you characterize that decay in terms of frank or incipient or somewhere in between?

A. It was frank. I would consider it frank because just with my naked eyes I could see a halo, an obvious halo, caused by decay on his virgin teeth. There was no question in my mind.

R. 455, line 21 through 456, line 4 (emphasis added). While Dr. Adams did use the explorer to some extent, that elementary tool is part of a hygienist's equipment. *See* R. 418, lines 22-23, where Hygienist 1 testified that she used "[m]y lights and my mirror and my eyes and my explorer." Dr. Sneed also testified that an explorer is part of the equipment used by a hygienist, R. 284-285, as did Katherine Way, a hygienist employed by Dr. Chadwick. R. 250. The ALC held that the testimony of Hygienist 1 and Ms. Way supports the view that an explorer is a common tool used by a hygienist. R. 9. Thus, to the extent that Hygienist 2 argues that the use of an explorer is outside the scope of her practice, such argument is clearly without merit.¹³

Finally, the ALC held that most of Hygienist 2's arguments "pertain only to tooth no. 3, although both the testimony and the Order were to the effect that gross decay was present not only on tooth no. 3, but also on nos. 3, 14, 19 and 30." R. 9, n. 6. As a result,

¹³ The ALC further held that "Hygienist 2 also argues that the opinion of Dr. Adams about the value of sealants was different from that of Appellants' expert, but that argument, even if true, does not relate to Dr. Adams' visual diagnosis of decay." R. 9, n.7.

Dr. Adams, several weeks before the sealants were applied, so the dentist saw the teeth in the same, pre-sealed, condition, that was presented to Hygienist 2 a few weeks later. As the ALC held, "Hygienist 2 placed sealants over teeth nos. 3, 14, 19, and 30, all of which had been diagnosed by Dr. Adams sixteen days earlier as having decay and in need of restoration." R. 8 (emphasis added).

The Board found as a fact that Hygienist 2 "placed sealant over obvious decay on several teeth, #'s 3, 14, 19 and 30." R. 32. The ALC affirmed, noting that "Dr. Adams' conclusion about frank decay, rendered particularly credible by having been reached even before the hygienist saw the patient, is clearly 'evidence that would allow reasonable minds to reach the conclusion that the administrative agency reached.'" *Id.* at 9, quoting *Bursey v. South Carolina Dept. of Health and Environmental Control*, 369 S.C. 176, 631 S.E.2d 899, 906 (2006).

With respect to one of the four sealed teeth, tooth no. 3, Dr. Adams did a fissurotomy (removal of enamel in grooves to get to decay) in the course of a restoration performed on that one tooth after it had been sealed, R. 458, lines 8-13. He testified that the fissurotomy indicated the correctness of his initial conclusion. R. 458, lines 14-17. Appellants argue that that conclusion was confirmed "only after" the fissurotomy, Original Br. of Appellants 20 and 21, but in fact there was nothing in Dr. Adams' testimony to indicate that there was any doubt about his initial finding of decay, with or without the subsequent fissurotomy.

The ALC also rejected the claim made by Appellant that Dr. Adams' "diagnosis depended on a physical examination of the teeth" using his explorer (a metal "pick," in

teeth nos. 3, 19 and 31. The only "inconsistency," if it can be referred to as such, is that Dr. Sneed, the reviewing expert as opposed to the treating dentist, concluded that the photographic evidence of decay on one of the four teeth, no. 15, was "[n]ot as clear as the others, but . . . suspect." R. 278, lines 11-12. However, Dr. Sneed was reviewing photographs of the teeth made after the sealant had been applied, R. 278, lines 13-16, and therefore was not seeing what the hygienist saw, i.e., the visible decay prior to the placement of the sealant.¹¹

While Hygienist 1's argument about "inconsistency" is simply without merit for the reasons noted above, that argument in any event only pertains to one of the four teeth found to have improperly sealed, i.e., tooth no. 15. Therefore, even if the Board's conclusions about that one tooth were rejected (and Respondent denies that such should occur), the evidence of improper sealing of the other three teeth is more than sufficient to support the minimal and moderate discipline imposed by the Board.¹²

B. Hygienist 2 Case (patient Q. G.)

The evidence of placement of sealants over obvious decay was also very clear in the case of Hygienist 2. In that case, the patient had been seen by the testifying dentist,

¹¹ Hygienist 1 points out that the Board found that Dr. Sneed testified as to gross decay in teeth nos. 19, 23 and 31, noting that tooth no. 23 had not been sealed. Original Br. of Appellants 19, citing R. 10, Paragraph 6. However, this argument proves nothing, because the Board did not find misconduct with respect to tooth no. 23. The reference to tooth no. 23 appears to be a typographical error in the Order in any event.

¹² Hygienist 1 also mischaracterizes the testimony of Dr. Chadwick, arguing that he "conceded that the placement of sealants on decayed teeth does not harm patients." Original Br. of Appellants 19, citing R. 231, lines 4-8. On the next page of his testimony, however, Dr. Chadwick noted that "when you seal something up underneath like that and it leaks because it's not sealed, because it's gross caries then it's just going to go nuts underneath the sealant because it is sealed off and protected from the toothbrush." R. 232, lines 4-8.

three silent statutes, the issue of the standard of care is a matter of law, and that a less stringent standard of care should apply when the patients consist mostly of lower-income schoolchildren. That contention was rejected by the ALC, and will be discussed in Question 3 below.

A. Hygienist 1 case (patient M. A).

Hygienist 1 argues, as she did before the ALC, that there is doubt in the record as to which teeth she allegedly sealed improperly. The Board had found as a fact in the case of patient M.A. that "[t]he evidence shows a large and extensive degree of decay which should have been obvious to the [Appellant]." R. 40, Par. 11. Hygienist 1 was found to have improperly "placed sealant over obvious decay on several teeth, #'s 3, 15, 31 and 19." *Id.*

The ALC's first Order rejected Hygienist 1's argument that the record was unclear about as to which teeth were improperly sealed, noting that "the testimony and photographs, as previously summarized, very specifically identified the sealed teeth that were visibly decayed. Further, the Board's Order refers to the specific teeth that the Board found to have been improperly sealed, i.e., nos. 3, 15, 31 and 19." R. 7. The ALC cited both the testimony of the treating dentist, Dr. Chadwick, and the Board's expert reviewer, Dr. Sneed. *Id.*

Hygienist 1 has argued that "the testimony on which the ALC relied was inconsistent." Original Br. of Appellants 19. However, a review of the testimony of Drs. Chadwick and Sneed, as well as the Board's summary of their testimony, will clearly indicate that both Dr. Chadwick and Dr. Sneed concluded there was obvious decay on

trained to recognize decay, as argued elsewhere herein). For all intents and purposes, any argument based on this third statute has been abandoned by Appellants.

2. The Original Order Of The Administrative Law Court Correctly Held That There Was Substantial Evidence That Both Appellants Placed Sealants Over Obvious Decay.

In the cases of both hygienists, the Board made factfindings that certain specific teeth were erroneously sealed when obvious decay was present. The ALC's first Order held that those findings of fact were supported by substantial evidence. R. 6-10. A brief summary of the facts of both cases (already discussed in more detail above) demonstrates that the Board's factfindings were indeed supported by the evidence, and that the ALC's original affirmance of those factfindings was clearly correct.

The familiar standard of review in APA cases, as noted in the first Order below, is that

The possibility of drawing two inconsistent conclusions from the evidence does not prevent an Administrative Agency's finding from being supported by substantial evidence. *Grant v. S.C. Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995). Rather, the appellate court need only find, considering the record as a whole, evidence that would allow reasonable minds to reach the conclusion that the administrative agency reached. *Id.*

Bursey v. South Carolina Dept. of Health and Environmental Control, 369 S.C. 176, 631 S.E.2d 899, 906 (2006). R. 9.

In their most recent brief, Appellants reiterate certain factual arguments that have been rejected by the ALC, which held that substantial evidence existed to support the Board's findings and conclusions. Appellants also claim in effect that even without the

The remainder of Appellants' Issue A is devoted to arguing their view of the facts, and is not directly related to the statutes that were part of the remand. As set forth below, there was substantial evidence to support the decisions below with respect to factual issues.

C. Section 40-15-82(1).

The third of the three statutes referenced in the remand order is § 40-15-82(1).

That section provides as follows:

SECTION 40-15-82. Procedures prohibited from being delegated to dental hygienists.

The following functions and procedures must not be delegated to dental hygienists:

- (1) dental examinations, dental diagnoses, and dental treatment planning;

The ALC held that this statute likewise contains no mention of a standard of care for the placement of sealants in the public school setting. R. ____ [ALC Order 6].

In their current brief to this Court following the remand, Appellants make no argument at all that cites this last statute., although they do refer in passing to the ALC's holding that a determination by a hygienist that frank decay exists is not a diagnosis, but is simply an evaluation or assessment. Br. after remand at 3, 4. The pertinent part of the ALC Order is at R. ____ [ALC Order 6-7]. The ALC correctly held, for the reasons set forth in the Order on remand, that such observations were within the range of functions contemplated in the contracts with the hygienists' employers, and were analogous to the kinds of observations that laypersons could make (although in fact the hygienists are

R. 878 (emphases in original). It can thus be seen the Guidelines recognized three categories of teeth for purposes of deciding whether to apply sealants: a) teeth with no decay that can be sealed if they are structurally the kind of teeth that are prone to become decayed (preventative sealants); (b) teeth with “questionable” decay, i.e., possible surface decay,⁹ that also can be sealed (therapeutic sealants) and (c) teeth with dentinal caries, i.e., deep decay, which are to be sealed, if sealed at all, only if “the size of the lesion is not too large to preclude the procedure (interim sealants). *Id.* When the Guidelines recommend “providing preventative sealants to individuals at high risk,” the word “preventative” is used specifically to refer to sealants placed over nondecayed teeth which are nevertheless at risk to become decayed in the future, absent sealants.

The DHEC-endorsed decision tree, R. 882, does not suggest that sealants might be appropriate in any instance where dentin decay appears.¹⁰ That document lists only the option of “restore” when dentin decay is present. Accordingly, Appellants’ attempt to have the 2003 statutes construed with reference to the Guidelines is unavailing, because the DHEC guidance documents warn against applying sealants in the situations presented by these cases. Any claim to the contrary by Appellants is based on an incomplete reference to the DHEC Guidelines, as well as simply ignoring the DHEC-endorsed decision tree.

⁹ As shown by the decision tree chart, R. 882, “questionable” teeth are those that lie between having no decay at all and having stains that might at most amount to enamel, or surface, caries. See also R. 399, lines 2 – 11 (if . . . there’s a groove of stain, that would be questionable”). In practice and in plain meaning, the term “questionable” does not apply to frank decay, which by definition is not “questionable.”

¹⁰ A witness from DHEC testified that the decision tree was endorsed by that agency. R. 400, lines 14-19.

the two hygienists themselves did not subscribe to the extreme position advocated by their counsel and expert. Instead, they testified that they were trained to spot gross decay, and that they knew they should not place sealants over gross decay. *See* pp. ____, *infra*.

Appellants also argue that the ALC should have taken into account the provisions of other statutes not involved in the remand order, specifically §§ 40-15-110(10)(E) and (F). Br. of Appellants at 5-6, 7-10. Appellants contend that those sections provide support for their position because those statutes refer to the "direction of the Department of Health and Environmental Control." Appellants then use a very selective quotation from the DHEC Guidelines for hygienists in public schools. The pertinent page of the Guidelines is found on p. 878 of the Record. The paragraph entitled "Dental Sealants" provides in pertinent part as follows:

Dental Sealants.

All patients that have teeth with structural characteristics that place them at risk for decay should be considered for preventative sealants. Patients that have teeth with questionable decay should also be considered for sealants (therapeutic sealants)(17-20). A third type of sealant, interim sealant, may be used in community and school based programs. These sealants are used to slow down the decay process in some teeth that have dentinal caries. Interim sealants are not recommended unless . . . the size of the lesion is not too large to preclude the procedure.

According to the proceedings of the workshop on sealant guidelines, "The goal of preventing caries through widespread use of sealants will be accomplished best by providing preventative sealants to individuals at high risk and placing therapeutic sealants on carious lesions that are limited to enamel."

are reversible, any misplacement of them over gross decay can be cured by having a dentist remove the sealants. Br. of Appellants at 7. However, and as the ALC noted,

The statute clearly was not intended to authorize the performance of acts of substandard care that at a minimum would be economically wasteful, and that at worst would be harmful to the dental health of the patient, as detailed in the testimony of Dr. Sneed. Instead, the obvious purpose of the language about reversibility of permitted procedures was to limit hygienists to providing preventive care that is reversible, not to permit them to do substandard work on the ground that any mistakes might be subsequently reversed. As is indicated in the Record, many, if not most, of the public health patients seen by public health hygienists are never subsequently seen by dentists. As a result, any substandard placement of sealants by hygienists, while reversible in theory, is not in most cases actually reversed. The General Assembly could not reasonably have intended to authorize the performance of dental services in instances where such services would be wasteful at best and harmful at worst.

R. __ (ALC Order on Remand at 6). Appellants mention many times that a sealant placed over frank decay can be removed by a dentist before it does any harm. However, the Board and the ALC instead credited the testimony of LLR's expert, Dr. Sneed on this point. As the Board held, for instance, "we agree with [Dr. Sneed's] opinion that the placing of sealants over frank or obvious decay is not within the standard of care in the public health setting or in any other setting" R. 31, 38. Appellants' position is completely inconsistent with another argument they make, which is that few public health setting patients ever see a dentist.

Any suggestion that there might be a different standard seems to be solely the invention of the Appellants' attorneys and expert. This idea finds no support in any statute. Indeed, as the ALC noted in its previous Order, R. __ (10/25/07 Order at 10-11),

B. Section 40-15-110(A)(10).

Section 40-15-110(A)(10), the next provision referenced in the remand order, provides in pertinent part as follows:

SECTION 40-15-110. Exemptions from chapter.

(A) Nothing in this chapter may be construed to prevent:

* * *

(10) a licensed dental hygienist employed within or contracted through the public health system from providing education and primary preventive care that is reversible. . . . Public health dental program services include oral screenings using a Department of Health and Environmental Control approved screening system, oral prophylaxis, application of topical fluoride including varnish, and the application of dental sealants.

(Emphasis added.)

The ALC held that this statute, though phrased differently, was effectively identical to § 40-15-80(B):

This section simply expresses the same thing as § 40-15-80(B), only in converse terms. Instead of saying that hygienists “may” perform the application of sealants, as is stated in § 40-15-80(B), § 40-15-110(A)(10) simply reiterates the point in a converse manner, providing that nothing in the chapter may be construed to prevent hygienists in public health settings from providing certain services, including the application of sealants. Both sections do no more than provide authorization for hygienists to place sealants in public health settings, and neither contains any suggestion that there is a special or separate standard of care in those settings.

R. __ (ALC Order at 5)(emphasis in original).

Appellants offer little argument to the effect that § 40-15-110(A)(10) has anything specific to say about the standard of care. Appellants seem to suggest that since sealants

(B) In school settings, licensed dental hygienists may apply topical fluoride and may perform the application of sealants and oral prophylaxis under general supervision, with written permission of the student's parent or guardian.

As the ALC held,

This section provides only that hygienists in school settings "may perform the application of sealants. . . ." This language does no more than authorize the placement of sealants by hygienists in school settings. There is nothing contained therein that could in any way be read to indicate that there is any special standard of care in school settings.

R. __ (ALC Order at 4).

The hygienists did not argue otherwise in the original appeal to this Court. To the contrary, they went so far as to argue that the silence of § 40-15-80(B) on the standard of care amounts to insufficient notice as to what the standard of care is. Original Br. of Appellant (prior to remand) at 6-7. They noted then that § 40-15-80(B) "does not set forth any criteria regarding the placement of sealants." *Id.* at 7.

In the present appeal, Appellants devote only one sentence to § 40-15-80(B), noting only that the ALC "neglected to consider that this statute defines 'hygienist' in different ways based on the environment of practice." Br. of Appellants at 5. Appellants never say where in the statute these alleged different definitions are to be found, and Respondent is not aware of any such different definitions. Moreover, Appellants never seek to translate this nonexistent distinction into any kind of specific statement on the standard of care in school settings. As a result, they simply have made no real argument that would overcome the clear silence of § 40-15-80(B) on the standard of care.

ARGUMENT

1. **On Remand, The Administrative Law Court Correctly Held That None Of The Three Statutes Referenced By This Court Contain Any Language Establishing A Standard Of Care.**

After reviewing the three statutes referenced in the remand order of this Court, the ALC concluded that all three statutes were silent on the issue of the standard of care. R. ___ (Order at 3). The ALC further noted that “[s]ince the legislature did not set forth an independent standard for hygienists in the Public School setting, this Court will not create one.” *Id.* at 4.

Respondent submits that the ALC Order on remand was clearly correct, because a review of each of the three statutory provisions makes it clear that the General Assembly did not express any particular intention with respect to the standard of care in the public health setting. In their brief following remand, Appellants make only conclusory assertions that the General Assembly intended a different standard of care for the placement of sealants in the public health setting. They do not cite any specific language in any of the three statutes to support their position. Each of the three statutory provisions will be discussed below.

A. **Section 40-15-80(B).**

The first statute cited in this Court’s remand order is § 40-15-80(B). That statute provides as follows:

SECTION 40-15-80. Conditions under which person is considered to be practicing dental hygiene.

* * *

From the above, it is apparent that any issues about the long-moot 2001 temporary regulation about the requirement of a dental preexamination are far removed from the issues in the present two appeals, which relate only to the fact-specific issue of whether the Appellants' conduct was outside the standard of care. There have been tens of thousands of children seen by hygienists employed by these hygienists' employer. *See* R. 284-285, where Hygienist 1 testified that she alone had seen at least 2,500 schoolchildren. Given such a volume of cases, it is not surprising that occasionally a mistake will occur, and that is all the Board found in these two cases. Appellants' emphasis on the issues in the FTC matter is misplaced, and should be disregarded.

In the course of its last stay order during the pendency of the Board's appeal of the immunity issue to the federal courts, the FTC commented on the absence of developments since 2003, noting that "[FTC] Counsel also does not contest [the Dental Board's] argument – and the Commission has thus far seen no evidence to the contrary – that it is not currently engaging in any conduct similar to that challenged in the complaint that might prejudice or harm the public interest."⁸

Finally, in early 2007, the Board and the FTC resumed litigation over the issue of whether the FTC's original claims had been rendered moot. Not long thereafter, in March 2007, the parties entered into a proposed Consent Order that was eventually approved by the full Federal Trade Commission on September 11, 2007. That Consent Order can be found at <http://www.ftc.gov/os/adjpro/d9311/070911decision.pdf>. The Consent Order did not require the Board of Dentistry to take any specific regulatory or policy steps, or to stop engaging in any acts, but instead only required the Board to notify the FTC 30 days in advance, if practicable, in the event that it proposed to take any kind of action with respect to public health dental hygienists such as were involved in the present cases. The Consent Order also required the Board to make certain notifications, and to reaffirm a statement adopted by the Board in 2003, in the course of that litigation, to the effect that the Board supported the 2003 changes in state law, which the Board had always contended to have mooted the FTC litigation in the first place.

⁸ FTC Order of August 9, 2006, granting stay pending resolution of certiorari. That Order is at <http://www.ftc.gov/os/adjpro/d9311/080809ordergrantingstay.pdf>.

never sought since then to enforce such a requirement. The present cases do not involve the issue of a preexamination by a dentist.

The Board moved before the FTC to dismiss the FTC case based on the "state action immunity" doctrine that exists in antitrust law under such cases as *Parker v. Brown*, 317 U.S. 341 (1943). The FTC denied that motion to dismiss in 2004. *In the Matter of South Carolina State Board of Dentistry*, 2004 WL 1814165 (F.T.C. 2004). The Board appealed that denial to the Fourth Circuit in 2004, and the case was in that court for almost two years before that court held that the denial of a motion to dismiss in those circumstances was not immediately appealable. *South Carolina State Bd. of Dentistry v. F.T.C.*, 455 F.3d 436 (4th Cir. 2006). The Board sought certiorari, which was denied on January 16, 2007. 127 S.Ct. 1123 (2007).

In its 2004 Order, the FTC did recognize the possibility that the case had been rendered moot by a combination of the 2003 amendments, the Board's subsequent disclaimer of any intention to reenact, much less enforce, the former preexamination requirement, and the Board's actual nonenforcement of any such requirement ever since 2002.⁷ That part of the FTC Order, which was still one step short of reaching the merits of the FTC's charges, was stayed from not long after it was entered in 2004 until the end of the present certiorari process in early 2007.

⁷ The FTC held that "[w]e exercise our discretion to refer this matter to the administrative law judge for limited discovery for ninety (90) days and an initial assessment of the likelihood that the Board may engage in future unlawful conduct under the 2003 statute." *In the Matter of South Carolina State Board of Dentistry*, 2004 WL 1814165 (F.T.C. 2004).

In February 2002, after the emergency regulation had run its maximum course of two ninety-day periods, Administrative Law Judge Kittrell recommended that language relating to a dentist's preexamination be deleted from the proposed permanent regulation, which was essentially the same as the expired emergency regulation.⁶ This caused the Dental Board to reconsider its approach to the entire issue. A year later, a compromise amendment to the Board's enabling act was passed which effectively eliminated any argument that a dentist's preexamination was needed before sealants could be placed on the teeth of children in a public health dental program. Act No. 45 of 2003. (The compromise was between the representatives of dentists on the one hand and hygienists on the other.)

Well after the 2001 emergency regulation had expired, but before the enactment of the 2003 amendments, the Federal Trade Commission began an investigation to determine whether the 2001 emergency regulation amounted to a form of unfair competition that would require some kind of prospective injunctive relief. Eventually, in September 2003, the FTC filed an action against the Dental Board. However, by that time the issue had essentially resolved itself via the 2003 amendments to the Board's enabling legislation. The Board enacted a resolution in October 2003 to the effect that it had no intention of seeking to reinstate the preexamination requirement, which the Board in the same resolution expressly recognized to have been clearly eliminated by the 2003 amendments. Indeed, the Board had never sought to enforce such a requirement after the 2001 emergency regulation expired in early 2002, now over six years ago, and it has

⁶ *In Re: Proposed Regulation, Document No. 2644*, 2002 WL 385116 (2002).

Appellants have discussed that other litigation, Respondent offers the following summary of that matter.⁵

In 2000, the dentistry statutes were amended, leaving what appeared at the time to the Board of Dentistry to be a need to clarify by regulation that a dentist must examine a child's teeth before sealants are placed on teeth, even in the public health (i.e., low income) setting. Such was unquestionably the law prior to the 2000 amendments. The Board was content to take this step through the normal regulation process, i.e., by seeking General Assembly approval of the proposed regulation, until the Board became concerned, in the summer of 2001, that hygienists might be causing harm to patients by placing sealants over decay. (The incidents in the present cases occurred several years after 2001 and were not the basis for the Board's actions in 2001.) Accordingly, in the summer of 2001, the Board promulgated an emergency regulation to the effect that a dentist must examine a child's teeth before sealants are placed on the teeth.

That 2001 emergency regulation was immediately challenged in litigation by the employer of the hygienists in the present case, but the employer was unsuccessful in obtaining preliminary injunctive relief from the trial court, based in part on failure to exhaust administrative remedies. This Court affirmed the denial of preliminary injunctive relief in an unpublished opinion issued on March 26, 2003. *Health Promotion Specialists, LLC v. South Carolina Board of Dentistry*, Opinion No. 2003-UP-232 (2003).

⁵ Appellants presented much of the same information to the ALC. The ALC's Orders, apparently recognizing the irrelevance of Appellants' discussion of the other litigation, properly disregarded that discussion.

On October 7, 2003, several weeks after the sealants were placed by Hygienist 2, the patient returned to Dr. Adams' office. Sealants had been placed on all four of the molars that Dr. Adams had previously diagnosed as being frankly decayed, such decay having been apparent to Dr. Adams using no tools other than those used by the hygienists, i.e., the explorer and the naked eye. Dr. Adams took a color intra-oral photograph of the four sealed teeth. LLR Ex. 13, R. 727. During that October 7 visit, Dr. Adams only filled one of the four molars, tooth # 3. On that tooth, he removed the sealant and performed a fissurotomy, which is removing the enamel in the grooves to gain access to the decay. R. 458, lines 8-13. He took another intra-oral photograph of just tooth # 3 after the fissurotomy, and then one more photograph of the same tooth following further caries excavation. R. 725, 726. The photo after the fissurotomy and prior to the excavation confirmed to Dr. Adams the correctness of his previous determination of frank decay, based on explorer probing and naked-eye observation. R. 458, lines 14-17.

Dr. Adams restored tooth # 3, but did not do any work at all on the other sealed molars. The patient did not return to Dr. Adams' office after the October 7, 2003 visit.

3. Other issues.

The Statement of Facts in Appellants' original brief to this Court is somewhat unusual, because it contained virtually no discussion of the specific facts of these two cases. Most of Appellants' Statement of Facts in that brief was devoted to a discussion of other litigation, now ended, involving a completely different issue relating to overall Board policy, and not to the standard of care in individual cases. However, since

At the hearing, Dr. Adams was asked about his observations about the level of decay present on the four sealed teeth, i.e., teeth #s 3, 14, 19 and 30 prior to their having been sealed. He testified as follows:

Q. Okay. Do you recall from memory what the level of decay was on those ones that you just called out? And I can really just limit it to the . . . because the only ones that were [subsequently] sealed, I think, were 3, 14, 19 and 30, I believe.

A. Well, clinically speaking, you don't know the depth of it, but using my explorer and visualization, I immediately diagnosed all those teeth [i.e., 3, 14, 19 and 30] as having decay. Using my explorer, my sharp explorer with a light touch, I got a stick, as Dr. Sneed said, just like leather-like, put it in leather and it pulls back and you get a little stick, on all those. Also visualizing, especially number 3, number 3's the one that I definitely recall seeing a dark halo on the occlusal surface from the decay present.

R. 453, line 17 – 418, line 13. (emphasis added). Dr. Adams further testified as follows:

Q. Would you characterize the decay that you observed on 9/2/03, how would you characterize that decay in terms of frank or incipient or somewhere in between?

A. It was frank. I would consider it frank because just with my naked eyes I could see a halo, an obvious halo, caused by decay on his virgin teeth. There was no question in my mind.

R. 455, line 21 through 420, line 4. Dr. Adams also agreed that the decay he observed a few weeks before the sealants were placed "should . . . have been apparent to the hygienist who applied the sealants." R. 456, lines 16-18. His basis for saying this was the presence of an obvious halo of decay, visible to the eye. R. 456, lines 1-4, 19-21.

halo, which to me is indicative of and diagnostic of a pretty large amount of decay in that tooth.

R. 274, lines 5-10.

2. Hygienist 2 case (patient Q. G.).

This matter involves a patient (Q. G.) who was approximately 12 years old at the time in 2003 when the events occurred that are the subject of this case. Q. G. was a patient of Dr. Benjamin Adams, a dentist in Greenville. Dr. Adams first saw this patient in February and March 2003, at which time he diagnosed decay in tooth 30. As a result, Dr. Adams did an occlusal composite restoration on that tooth on March 4, 2003. R. 450, lines 18-20.

The patient returned to Dr. Adams on September 2, 2003. At that time Dr. Adams noted that there was "rampant decay" in the patient's mouth. His chart (LLR Exhibit 12, R. 724) shows that he planned to do restorations, i.e., fillings, on eleven different teeth, including #s 3, 14, 19 and 30. He also planned to seal several other teeth that were decay-free at the time. R. 451.

On September 18, 2003, shortly after this examination of the patient by Dr. Adams, the patient was seen by Hygienist 2 in connection with the public health dentistry program at his school. Hygienist 2 placed sealants over teeth #s 3, 14, 19, and 30, all of which had previously, just a few days before, been diagnosed by Dr. Adams as having decay and in need of restoration. R. 729 (HPS chart indicating sealants placed on #s 3, 14, 19, and 30).

Tooth #3: R. 216-217 and Ex. 3, photo 3, R. 714 and 146.

Tooth #14: R. 218 and Ex. 3, photo 14, R. 712 and 147.

Tooth #15: R. 218 and Ex. 3, photo 15, R. 148.

Tooth #31: R. 220 and Ex. 3, photo 31, R. 150.

Tooth #19: R. 220-221, and Ex. 3, photo 19, R. 151.

A typical finding by Dr. Chadwick is as follows:

- A. A lot of it is just eyes, okay? . . . We just looked at these and why did they seal these teeth. That's sort of where we were coming from. The best example to me is the one labeled 31. [R. 150] I mean, that tooth, you can see right through the enamel and you can see the dentin and the dark.

* * *

That's gross decay.

- Q. Okay. How about 19? [R. 151]

- A. It looks, it looks very similar. It's obviously . . . you know, you can just look even not knowing anything about dentistry, it's black. It's not supposed to be black.

R. 220, lines 2-14; lines 20-24. As Dr. Chadwick summarized his conclusions, "throughout all of these there was gross caries." R. 216, lines 11-12. Dr. Chadwick eventually removed the sealants and filled these and other decayed teeth. R. 210-212.

Dr. William D. Sneed, professor and Chairman of the Department of General Dentistry at MUSC, also reviewed the photographs of this patient's teeth and concluded that there was obvious decay, visible even through the sealants, on teeth 31, 18, 15, 23, and perhaps 19. R. 273-281. On tooth no. 31, for example, he noted that

Looking through the partially optically opaque sealants, you can see a halo of darkness underneath the sealant, extensive

will use the record cites from the original Record on Appeal in the Court of Appeals, and will modify those cites in the Final Brief, if necessary.)

COUNTERSTATEMENT OF FACTS

The facts of the two cases are set forth below in some detail. Essentially, the facts as set forth herein were as found by the Board and affirmed by the ALC, and are also summarized more briefly in Question 2 herein.

1. Hygienist 1 case (patient M. A.).

This matter involves patient M. A., who was about 14 when the events occurred. That patient was seen on April 7, 2003 by Hygienist 1, who on that date placed sealants over the patient's permanent molars.³

About a month later, on May 8, 2003, the patient was seen for the first time by a dentist, Dr. Steven Chadwick. On that date, Dr. Chadwick's hygienist took intra-oral photographs of teeth 2, 3, 14, 15, 18, 19, and 31. Six of these photographs were introduced collectively as LLR Exhibit 3, R. 712-714 and R. 146-152.⁴ Each photograph was numbered to correspond with the number of the tooth photographed, and the number is visible in the lower left corner of each photograph. R. 214, lines 2-6. Dr. Chadwick testified that decay was visually apparent on the following teeth even with the sealants in place:

³ The hygienist's chart indicates that sealants were applied to teeth 2, 3, 14, 15, 18, 19, 30 and 31. R. 715.

⁴ Apparently as a result of an inadvertent error in copying the record, only three of the six photographs appear at R. 712-714, although all six were introduced. A duplicate copy of all seven of them is in the record at R. 146-152. If the Court would prefer to see the originals of these or other photographs, they can of course be supplied.

The case was heard by this Court on October 7, 2009. Following oral argument, this Court held as follows:

We remand to the administrative law judge pursuant to Rule 220(b)(2), SCACR, for reconsideration of the standard of care pursuant to Sections 40-15-80(B), 40-15-82(1), and 40-15-110(A)(10) of the South Carolina Code. . . .

Anonymous No. 1 R.D.H., and Anonymous No. 2 R.D.H. v. South Carolina Department of Labor Licensing and Regulation, State Board of Dentistry, Unpublished Opinion No. 2009-UP-504 (11/4/09).

On remand, the case was briefed and argued before the Administrative Law Court. In an Order filed on November 16, 2010, the ALC considered and rejected Appellants' argument that one or more of the three statutes referenced in the remand order sets forth a standard of care that was violated. R. __ (ALC 2010 Order 3-7). Several other arguments by Appellants, which were not necessarily within the scope of the remand, were also considered and rejected by the Administrative Law Court. After reconsideration was denied, this appeal followed.

Respondent is unsure whether Appellants intend to argue everything they previously argued in their first appeal to this Court, or whether they intend to argue only the points presented in their brief to this Court following the remand. In the event that the former was intended by Appellants, the present brief contains all of Respondent's contentions made in the prior brief filed with this Court prior to the remand, as well as the contentions necessary to address the issues after remand. (In this Initial Brief, Respondent

At the final order hearing, which was held before the Board on April 28, 2006, counsel for LLR requested that the reprimands be anonymous, although otherwise public. R. 1036. The Board accepted the suggestion of public but anonymous reprimands for both Hygienists 1 and 2. R. 34, 41. The Board did not accept the panel recommendation of a fine in the case of Hygienist 2. Accordingly, the only sanctions imposed in these cases were anonymous public reprimands. No fines, suspensions, or other sanctions were imposed.

Upon appeal by the hygienists, the Administrative Law Court affirmed, by Order dated October 25, 2007. R. 3-20. The ALC held that in each of the two cases, there was substantial evidence to show that sealants were placed over obvious decay on the children's teeth. R. 6-10. The ALC also held that the standard of care in the public health setting was no different (i.e., no lower) than that in any other dental practice. *Id.* at 10-13. Finally, the ALC rejected Appellants' remaining arguments, both substantive and procedural. R. 14-20.²

Both hygienists appealed the ALC decision to this Court. On February 25, 2008, Appellants filed a Motion to Remand and Application for Leave to Present Additional Evidence. Respondent filed a Return opposing that motion, and by Order dated April 17, 2008, this Court denied Appellants' Motion to Remand.

² Two arguments made by Appellants in the first ALC proceeding are not argued by them in this Court. These arguments, rejected by the ALC, R. 14-20, were (a) that the initial complaints made to the Board should be produced to them, and (b) that the entire Board should be recused from hearing the case.

COUNTERSTATEMENT OF THE CASE

This is an appeal from an Administrative Law Court Order dated November 16, 2010, and the Order dated January 4, 2011, denying reconsideration. The case was on remand from this Court. The Administrative Law Court affirmed the Orders of the Board of Dentistry in two disciplinary matters that were tried together because they involved similar factual issues.

The two cases here consolidated for appeal were instituted by the Board of Dentistry in October 2004. R. 61-65. The Board alleged in each case that the Appellants, who are licensed dental hygienists, placed sealants over obviously decayed teeth of three school age children. *Id.* The hygienists denied the substantive allegations of the complaints, and also alleged that their actions were within the standard of care. 66-71.

These cases, along with two others involving two other hygienists,¹ were heard by a hearing panel of the Board on December 1 and 2, 2005. (The panel consisted of five members, none of whom were members of the Board.) By agreement of the parties and the panel, the expert testimony presented by both sides, to the extent it was of general application, was permitted to be applied in the cases of all four hygienists. After hearing evidence, on February 6, 2006, the panel recommended that Hygienist 2 be given a public reprimand and a fine of \$500, and that Hygienist 1 be given a public reprimand, but not fined. R. 51, 59.

¹ The Board, after reviewing the evidence, ultimately dismissed the cases against the two hygienists who are not appellants in this appeal.

COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether, on remand, the Administrative Law Court correctly held that none of the three statutes referenced by this Court contain any language establishing a standard of care?
2. Whether the Administrative Law Court correctly held that there was substantial evidence that both appellants placed sealants over obvious decay?
3. Whether the Administrative Law Court correctly held that the standard of care for dental hygienists, regardless of the setting in which they practice, is that sealants should not be placed over frankly or obviously decayed teeth?
4. Whether the Administrative Law Court correctly held that proof of actual harm of a specific nature is not an element of a professional disciplinary proceeding, and whether the record contains substantial evidence of risk of harm to patients from sealants placed over frank decay?
5. Whether the issue that was the subject of the remand was raised by Appellants or preserved for review?

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Carolyn C. Matthews, Administrative Law Judge

Case No. 06-ALJ-11-0562-AP
Case No. 06-ALJ-11-0563-AP

Anonymous No. 1, R.D.H. and Anonymous No. 2, R.D.H.,.....Appellants

v.

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

INITIAL BRIEF OF RESPONDENT

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
Honorable Carolyn C. Matthews, Administrative Law Judge

Case No. Docket No. 06-ALJ-11-0562-AP
Docket No. 06-ALJ-11-0563-AP

Anonymous No. 1, R.D.H., and Anonymous No. 2, R.D.H.
.....APPELLANTS

vs.

South Carolina Department of Labor Licensing and
Regulation, State Board of Dentistry,.....RESPONDENT

CERTIFICATE OF SERVICE

I, Brooks C. Schumacher, do hereby certify that I have this date, served one (1) copy of the **Brief of Appellants and Designation of Matter to be Included in the Record on Appeal** 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:

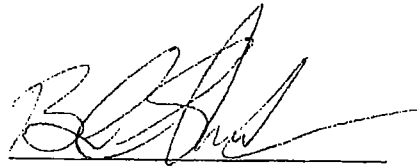
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February 23, 2011

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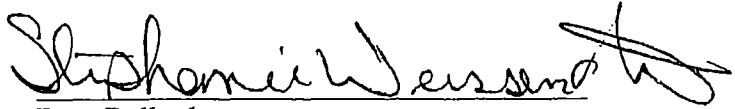
FEB 28 2011

SC Court of Appeals



Brooks C. Schumacher
Paralegal

I certify that this designation contains no matter which is irrelevant to this appeal.

A handwritten signature in black ink, appearing to read 'Stephanie Weissenstein', with a stylized flourish at the end.

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February 23, 2011

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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Carolyn C. Matthews, Administrative Law Judge

Case Nos. 06-ALJ-11-0562-AP and 06-ALJ-11-0563-AP

Anonymous No. 1, R.D.H., and
Anonymous No. 2, R.D.H.,

Appellants,

v.

South Carolina Department of Labor,
Licensing and Regulation, State Board
of Dentistry,

Respondents.

DESIGNATION OF MATTER TO BE INCLUDED
IN THE RECORD ON APPEAL

- 1) Record On Appeal from the Administrative Law Court (Volumes I, II, and III), Filed
October 6, 2008
- 2) 2009 Unpublished Opinion 504 (Remand), filed November 4, 2009
- 3) Order of Judge Matthews on Remand, filed November 16, 2010
- 4) Order Denying Motion for Reconsideration of November 16, 2010, Order, filed
January 4, 2011
- 5) Motion for Reconsideration of November 16, 2010 Order on Remand, filed
December 3, 2010
- 6) Notice of Appeal, filed December 20, 2010
- 7) Supplemental Notice of Appeal, filed January 12, 2011

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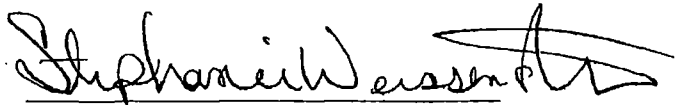
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SC Court of Appeals

CONCLUSION

In these cases, the statutory law in South Carolina, when coupled with the expert testimony on record, clearly establishes that in the public-health setting, dental hygienists may apply sealants as a method of preventative care; and, doing so is within the applicable standard of care. If the Court applies the proper standard of care as to dental hygienists working in the public health setting, it should be clear there was no deviation from the standard of care by Hygienists One or Two.

Wherefore, having fully set forth the grounds for the appeal herein, Appellants pray for an order reversing and vacating the decision of the respondent Board.

Respectfully submitted,



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February 23, 2011

You really have very little control over whether you're going to see the patient again or not . . . perhaps . . . [you] have to assume that if you're seeing a child for the first time at the dentist and they are 12, 13, 14 years old, you have to assume that the likelihood of them following through on your advice . . . is small. And in that case, [the hygienist] has to make some difficult and different decisions than a dentist would in private practice.

(R.).

Appellants introduced the testimony of Dr. Richard Simonsen (R.), who serves as the expert for the Center for Disease Control on school-based sealants projects⁵&⁶. He explained the purpose of the school-based sealant programs is to "designed to introduce children to preventative dentistry and to get them understanding, and their parents understanding, that they need to continue dental care throughout life and, if they have problems, to visit the dentist." (R.). As previously addressed to the courts, Dr. Simonsen acknowledged that one factor in determining how to treat a tooth with possible caries is the likelihood that the patient is likely to obtain dental care. (R.). With that in mind, he explained "the question before us really is can I seal over a small carious lesion or should I remove the caries." (R.).

Clearly, in the school-based program, the hygienists don't have the option of removing the caries. So, when in doubt, after cleaning, they seal, even if there is a suspicion of caries on the tooth. The South Carolina Code of Laws allow hygienists to use sealants and further authorizes them to work in the public arena under the arm of SCDHEC and thus under the guidelines promulgated by SCDHEC.

⁵ Dr. Simonsen has studied sealants since 1973, when he was mentored by Dr. Leon Silvertone, who was then the world's expert on the issue dental bonding and sealants. (R.). Dr. Simonsen had started to use sealants in the clinical setting in Norway, before moving to the United States, but he began his research and clinical trials in 1973. *Id.* He published his first article on sealants in 1977, and continued to publish on the issue. His seminal publication was a 15-year study on sealants that was published in the Journal of the American Dental Association in 1991. He also published a review of the literature (approximately 800 articles) on the subject in 2002, and most recently published an article on the subject in the Dental Clinics of North America.

⁶ As indicated earlier, the South Carolina program is based, at least in part, on recommendations of the CDC, and the South Carolina program is anticipating updated information and protocols for its protocols.

American Red Cross, 297 S.C. 430, 435, 377 S.E.2d 323, 326. (1989)(emphasis added by Court)).

While the Board did not offer much by way of evidence regarding the standard of care, Appellants clearly demonstrated that the preventative dental care provided by them as dental hygienists in the school setting followed the guidelines and protocols prescribed by DHEC in 2001, which in turn are referenced by the statutes considered in this matter. Evidence of industry standards, customs, and practices is "often highly probative when defining a standard of care." 57A Am.Jur.2d *Negligence* § 185 (1999).

The DHEC guidelines were created as a result of a collaborative effort by DHEC, under the guidance of its dental director, Dr. Ray Lala, and with funding from the Centers for Disease Control and its dental health coalition, including representatives from the Dental Association, the Dental Hygienists Association, the Board of Education, and several advocacy groups for children. (R.). South Carolina's protocols are drawn from findings and recommendations regarding use of dental sealants in the school-based public health setting, which are uniformly applied in school-based programs throughout the United States, and are based upon the Centers for Disease Control 1994 Sealant Workshop.⁴ (R.).

In the public health setting, the standard of care permits the dental provider to "accept [for sealing] something that is more incipient or wider or bigger because that's better than nothing." (R.). "[W]e're more likely to seal something they might not in private [practice] because of . . . the factors . . . variables that we have to deal with." (R.). In assessing how to proceed and whether to seal a tooth in a public health school setting,

⁴ The CDC issued updated recommendations in MMWR Recomm Rep 2001, addressing developments in the school-based public health dental program, which DHEC is expected to adopt as well.

pleadings has the affirmative on that issue)(emphasis added); Ford v. Atlantic Coast Line Ry. Co., 169 S.C. 41, 168 S.E. 143 (1932), *aff'd*, 53 S.Ct. 249, 287 U.S. 502. *See also*, Roberts v. Roberts, 296 S.C. 93, 370 S.E.2d 881 (Ct. App. 1988), *aff'd as modified*, 299 S.C. 315, 384 S.E.2d 719 (party having peculiar knowledge of facts or control of the evidence relating to an issue bears the burden of evidence as to that issue); Smith v. Ashmore, 184 S.C. 316, 192 S.E. 565 (1937).

"In King v. Williams, 276 S.C. 478, 279 S.E.2d 618, 620 (1981), the Court abolished the 'locality rule' which adjudged a physician's skills against those of other physicians in his community, and adopted a professional standard of care not bound by any geographical restrictions. We articulated the standard of care which must be observed by a physician as 'that of an average, competent practitioner acting in the same or similar circumstances.'" Doe v. American Red Cross Blood Services, S.C. Region, 297 S.C. 430, 433-434, 377 S.E.2d 323, 325 (1989), *quoting King*, 279 S.E.2d at 620. "[I]n a professional negligence cause of action, the standard of care that the plaintiff must prove is that the professional failed to conform to the generally recognized and accepted practices in his profession. *If the plaintiff is unable to demonstrate that the professional failed to conform to the generally recognized and accepted practices in his profession, then the professional cannot be found liable as a matter of law.*" Id. at 435, 377 S.E.2d at 326 (emphasis added). Further, in Evans v Rite Aid Corporation, 324 S.C. 269, 275 478 S.E.2d 846 (1996) the Supreme Court clarified that in South Carolina the standard of care in professional negligence cause of action is breached when "the professional failed to conform to the generally recognized and accepted practices in his profession." The Court specifically stated, "this standard applies to 'physicians, dentists, ophthalmologists, accountants and any other profession which furnishes skilled services for compensation.'" Id. (*Quoting*,

The Board was specifically asked to identify and set forth the standard of care applicable to the school-based dental health program before evaluating the facts and circumstances presented in the cases of these specific hygienists. Not only did the Board neglect to do so, it failed to acknowledge the possibility that the standard of care might be different, or that the treatment provided was within the public health setting. The reliance by the Board and the ALC on an excerpt of Dr. Sneed's testimony on its behalf, in light of the record and the clear legislative intent, is an error.³

When remanding the case, the Court of Appeals specifically required the Administrative Law Court both to re-examine the standard of care applicable to Appellants and to consider the Board's failure to establish the breach of that standard. (Unpublished Op. No. 09-UP-504). In remanding the case, the Court of Appeals cited David v. McLeod Regional Medical Center, 367 S.C. 242, 248, 626 S.E.2d 1 (2006) for the proposition that "The plaintiff must provide expert testimony to establish both the required standard of care and the defendants' failure to conform to that standard, unless the subject matter lies within the ambit of common knowledge so that no special learning is required to evaluate the conduct of the defendants." *Id.* (internal citation omitted).

The Rules of the Administrative Law Court clearly specify that the Board has the burden of proof in "matters involving the assessment of civil penalties, the imposition of sanctions, or the enforcement of administrative orders." Rule 29(B), SCRALC. *Accordingly, the Board bore the burden of proof with regard to establishing the standard of care, finding that the Appellants breached that standard of care and that sanctions should be imposed. Hoffman v. Greenville County*, 242 S.C. 34, 129 S.E.3d 757 (1963)) (burden of proof is on the party who by the

³ As Appellants have argued throughout this matter regarding the insufficiency of evidence, Dr. Sneed is NOT an expert in public health and has no knowledge or experience as either a practicing hygienist or of the pros and cons of treatment of the public health population.

tools that you use are different, the theories are . . . philosophically different . . . the concepts of public health are different and they are a specialty.

(R.).

B. THE ADMINISTRATIVE LAW COURT MISINTERPRETED THE FACTS AND EVIDENCE AS TO THE USE, SAFETY AND EFFECT OF DENTAL SEALANTS ON THE TEETH OF CHILDREN IN THE PUBLIC SCHOOL SETTING WHEN THOSE CHILDREN WOULD NOT OTHERWISE SEEK OR RECEIVE DENTAL CARE (OR, THE ALC ERRED IN UPHOLDING THE STANDARD OF CARE PURPORTEDLY ESTABLISHED BY THE BOARD).

The ALC misinterpreted the facts and evidence as to the use, safety and effect of dental sealants on the teeth of children in the public school setting when statistics prove those children would not otherwise seek or receive dental care. Thus, the ALC also erred in upholding the standard of care purportedly established by the Board. In so doing the court determined that the

“Board spoke to the issue of the standard of care by referring to it ‘regardless of setting (including the public health setting)....’ Also, in response to a motion made by the Appellants before the Board had heard arguments on the matter, the Board stated that in its opinion, similar language in the Orders of the two hearing panels was sufficient to indicate that consideration had been given to the issue of a different standard of care in the public health setting.” (R.)

The Board was the defendant in this matter and the defendant’s opinion on the case surely cannot be the “evidence” used to establish a standard of care in regard to a medical procedure, especially when the bulk of the record opposes that opinion. (R.) For example, in the absence of testimony and exhibits by the Board establishing exactly how Hygienist I deviated from the standard of care, neither the Board nor this Court knew what teeth were the subjects of the alleged deviation from the standard of care. (R.).

questionable decay should . . . be considered for therapeutic sealants. . . . Interim dental sealant may be used in community and school-based programs. These sealants are used to slow down the decay process in some teeth that have dental caries. . . . The goal of preventing caries through widespread use of sealants will be accomplished best by providing preventative sealants to individuals at high risk and placing therapeutic sealants on carious lesions that are limited to enamel.

(R.).

All children who are seen in school-based dental health programs are referred to a dentist for additional and follow-up treatment, regardless of whether they are suspected to have caries.

(R.). Unfortunately, the statistics on all school-based dental programs establish that seventy-five to eighty-five percent of the children seen in the public health program have never seen a dentist prior to their first contact with the public health program. (R.). Additionally, only approximately fifty percent of the children who are seen for preventative dental care by the hygienists program actually do follow-up with a dentist. (R.). Thus, for a great many children who are seen in the school-based program, the care provided by the dental hygienists is the only dental care the children will receive. Id.

In assessing the standard of care for a public health program, it is critical to understand, as did the General Assembly, that the rate of follow-up is altogether different in the setting of a private dentist's office, where there is a presumption that the patient will receive continuous care. (R.). Because most children who seek treatment in the public health setting are so unlikely to seek follow-up dental treatment in a private office, the prevailing view regarding sealants in the public setting is

When you have a group of individuals who are not in continuous care, you are much more . . . lavish in determining when to seal. In Atlanta [the CDC] in '95, the public health representative is stating when in doubt in a public health setting, seal. . . .

When we say "standard of care" the standard of care in a public health setting [it] is not the standard of care you would find in a general office. . . . The

Consequently, the delivery of dental sealants is a priority for the DHEC School-Based Public Health Dental Prevention Program.” (R.)(emphasis added)).

Furthermore, a fact sheet issued by the SCDHEC sets forth that “Sealants prevent tooth decay by creating a barrier between a tooth and decay-causing bacteria. (R.) Sealants also stop cavities from growing and can prevent the need for expensive fillings. (R.) Sealants are 100% effective if they are fully retained on the tooth. (R.) Sealants are most cost-effective when provided to children who are at highest risk for tooth decay.” (R.)(emphasis added).

The ALC does not recognize that the General Assembly specifically noted that the public health setting, in which dental hygienists provide preventative dental care (as opposed to restorative dental care), has a different standard of care than the private practice setting. The South Carolina Code specifically speaks to the use of sealants by dental hygienists, stating:

Nothing in this chapter may be construed to prevent: a licensed dental hygienist employed within or contracted through the public health system from providing education and primary preventive care that is reversible. Primary preventive care and education are defined as promotion and protection of health to avoid the occurrence of disease through community, school, and individual measures or improvements in lifestyle. These services are to be performed under the direction of the Department of Health and Environmental Control State Dental Coordinator or the department's designee but do not require that the director or a licensed dentist be present when any public health dental program services are provided. Public health dental program services include oral screenings using a Department of Health and Environmental Control approved screening system, oral prophylaxis, application of topical fluoride including varnish, and the application of dental sealants.

S.C. Code Ann. §40-15-110(10) (2003, as amended)(emphasis added).

As a result, South Carolina’s non-statutory guidelines for use of sealants in the public school setting specifically recognize that dental sealants have an established history of both preventing carious lesions as well as arresting existing caries. The guidelines provide:

Sealants have been demonstrated to be a safe and effective long-term method to prevent pit and fissure caries. . . . In addition to preventing carious lesions, sealants can arrest caries progression. . . . Patients who have teeth with

which remains provides some level of protection against the development of pit and fissure caries. But, if the student subsequently goes to a dentist and it is determined that there is caries on the tooth which requires restoration, the sealant is easily removed from the tooth without harm or pain to the patient. (R.)

The statutes allow hygienists to help under-privileged children and the Appellants are not suggesting that hygienists in the school setting should run amuck applying sealants to every problem tooth. This Court appears to have understood Appellant's position and concern about the standard of care and thus remanded the case to the ALC for further review of the statutes that address the use of sealants in the public health setting. (R.)

In the school setting, the General Assembly specifically authorizes hygienists to provide preventative care that "is reversible." S.C.Code Ann. Section 40-15-110(A)(10). If a hygienist places a seal, and a dentist later determines that the tooth needs restorative work, the seal is removed and the restorative work is done – just as DHEC and the General Assembly contemplated.

The ALC's error in interpreting the statutes is also apparent in its discussion of Section 40-15-110. Sections 40-15-110(10)(E) and (F) say that hygienists in the public health setting are to provide services pursuant to the guidelines and supervision of the South Carolina Department of Health and Environmental Control (SCDHEC). S.C. Code Ann. §§40-15-110(10)(E) and (F), 2006 (verify), as amended. South Carolina's guidelines for use of sealants in the public school setting specifically recognize that dental sealants have an established history of both preventing carious lesions as well as arresting existing caries. (R.) The guidelines promulgated by SCDHEC provide, in part: "Dental sealants are effective in preventing pit and fissure caries and are underused, particularly for high-risk children including vulnerable populations less likely to receive private dental care, such as children eligible for free or reduced-cost lunch programs.

widespread use of sealants will be accomplished best by providing preventative sealants to individuals at high risk and placing therapeutic sealants on carious lesions that are limited to enamel.

(R.).

One of the Board's main arguments throughout the case was that Appellants placed sealants over teeth with caries. But, there is also considerable research that the placement of a sealant on a caries lesion does not cause any harm to the tooth. (R.). The usual susceptibility to decay is not altered by having a sealant placed on the tooth. Id. It is absolutely untrue, as argued by at least one of the state's witnesses, that sealants promote decay. "Even if it is placed, and partially lost, it will not create harm." (R.). Thus, when faced with possible caries on a tooth on a student in a public health setting who may or may not receive follow-up dental care, the standard of care is to place a sealant on the tooth. (R.). The issues before the Board in these cases include allegations that certain of the appellants placed dental sealants over "gross decay" or "gross caries." (R.) While it is not possible to seal over gross decay that manifests itself in soft decayed dentin, it is possible to seal over gross decay that is underneath enamel. (R.) "It's perfectly easy to seal even large hidden carious lesions, and . . . it is in the best interests of the patient to do that if . . . you judge that it is unlikely that the child will go for further dental care."² (R.). "In the situation of trying to reduce risk to a child . . . it's good policy to seal caries where the other alternatives options of the child are minimal." (R.).

If the student receives no follow-up care, the growth of the carious lesion may have been arrested. Even if the seal is not properly applied and is partially lost, the part of the sealant

² In the private practice setting, however, the standard of care is different. "The reason we don't recommend in normal private practice to seal carious lesions is that over time sealants wear down, and so there will come a time when a carious lesion that has been sealed could become active again as the sealant wears down to a point where the fissure connection with the oral fluids is once again found. So, that is why in the ideal situation, we don't do it." (R.).

health setting, where few patients ever see a dentist. The statutes, when read together, clearly indicate such intent.

As to Code Section 40-15-80(B), the ALC determined that the statute merely authorizes hygienists to place sealants and that nothing in the statute could be read to indicate a special standard of care in school settings. (R.) The court neglected to consider that this statute defines "hygienist" in different ways based on the environment of practice.

The court also decided that the language of Section 40-15-110 is merely the converse of Section 40-15-80 and, thus only gives hygienists permission to place sealants on teeth. (R.) The ALC borrows the Board's language in interpreting Appellants' arguments and suggests the Appellants seek "carte blanche" to use substandard means of placing sealants. (R.) This is simply untrue. The Appellants have merely tried to address the reversible nature of sealant application as a means to address the Board's concerns that sealants over caries may cause permanent damage to the tooth if no follow-up treatment is received and to demonstrate the positive results sealants yield to children with no private dental care. (R.).

When read with the rest of the hygienist statutes, the Legislature clearly says that that care by hygienists in the public health setting is provided SCDHEC's guidelines. S.C. Code §§40-15-110(10)(E) and (F). These guidelines call for use of sealants in the public school setting and specifically recognize that dental sealants have an established history of both preventing carious lesions as well as arresting existing caries. The guidelines provide, in part:

Sealants have been demonstrated to be a safe and effective long-term method to prevent pit and fissure caries. . . . In addition to preventing carious lesions, sealants can arrest caries progression. . . . Patients who have teeth with questionable decay should . . . be considered for therapeutic sealants. . . . Interim dental sealant may be used in community and school-based programs. These sealants are used to slow down the decay process in some teeth that have dentinal caries. . . . The goal of preventing caries through

A. THE ADMINISTRATIVE LAW COURT ERRED IN DETERMINING THAT THE STATUTES REFERENCED BY THE COURT OF APPEALS ON REMAND DO NOT SET FORTH A SEPARATE STANDARD OF CARE FOR DENTAL HYGIENISTS IN THE PUBLIC SCHOOL SETTING.

The Administrative Law Court reviewed the Board's decision regarding the standard of care as if it were a factual issue and applied both the "layperson" and the "substantial evidence" rules to the question of whether the record supported the Board's ruling on the issue of standard of care. This was error because the General Assembly has specifically recognized, by statute, that the public health setting is different than the private dental practice setting. (R.) Neither the Board nor the ALC considered that issue before when deciding these matters, although Appellants have asserted that issue from Day One. This Court recognized the error and on remand, the ALC was instructed by this Court to consider the standard of care issue in light of three specific statutes. (R.)

The ALC erred both in its interpretation of the legislative intent regarding the statutes addressing school programs and in its application of the statutes to this case. On remand, the ALC ruled that "The statutes referenced by the Court of Appeals are silent regarding the standard of care for the placement of sealants in public school settings . . . Since the legislature did not set forth an independent standard for hygienists in the Public School setting, this Court will not create one." (R.) The ALC also stated that the "the General Assembly could not reasonably have intended to authorize the performance of dental services in instances where such services would be wasteful at best and harmful at worst" (R.).

Appellants have shown that if the courts would acknowledge (as did the Legislature) that most of these patients never see a dentist, the evidence is undisputed that some sealant, even with caries, is better in any circumstance than no sealant. (R.) Using sealants is not substandard care. Certainly the Legislature considered that that some protection was better than none in the public

reprimand and a fine of \$500, and that Hygienist 1 be given a public reprimand, but not fined.
(May 8, 2006).

ARGUMENT

I. **WHETHER THE ADMINISTRATIVE LAW JUDGE ERRED BY CONCLUDING THAT THE BOARD ESTABLISHED THAT THE STANDARD OF CARE FOR DENTAL HYGIENISTS IS THAT SEALANTS SHOULD NOT BE PLACED OVER "OBVIOUSLY" DECAYED TEETH, REGARDLESS OF THE SETTING IN WHICH THE HYGIENISTS PRACTICE.**

Although the lower court properly concluded that a hygienist must evaluate and assess each child's teeth to determine what, if any, preventative treatment is required, the ALC misapplied the "layperson" test to differentiate between the diagnosis of decay and "evaluation" of decay. To prove its point about "obvious decay", the ALC refers to Dr. Chadwick's testimony, which was, "you can just look and not knowing anything about dentistry, it's black. It's not supposed to be black." However, there is testimony in the record that a person can never tell from the surface whether there is truly decay; only when you drill into the tooth can you "confirm" the presence of internal decay or disease. Dr. Sorensen, a leading expert in the field, confirmed this testimony and showed examples of teeth that had black halos but were drilled and there was no disease found. There was, therefore, no "obvious decay".

The standard established by Appellants is that hygienists in the public program should use sealants to protect the tooth and arrest deterioration. The hygienist hopes the child will see a dentist, but understands it is a statistical unlikelihood. But, as shown by the record, tooth decay cannot be "obvious" without exploratory evaluation, the Board's purported standard is incorrect and inapplicable to the public health setting. (*infra*).

STATEMENT OF THE CASE

This matter was previously before this Court after the Administrative Law Court (herein, ALC) affirmed the order of the Dental Board on October 25, 2007. The dental hygienists appealed and this Court remanded the case to the ALC, pursuant to Rule 220(b)(2), SCACR, for reconsideration of whether or not the standard of care in public health dentistry in school settings differs from the standard in private settings, referring specifically to Sections 40-15-80(B), 40-15-82(1), and 40-15-110(A)(10) of the South Carolina Code. (Unpublished Op. No. 09-UP-504). The ALC issued its order on November 16, 2010 (rehearing denied by order dated January 4, 2011).

This litigation involves two dental hygienists who were targets of an investigation by the Board of Dentistry in October of 2004. The Board alleged in each case that the Appellants, Hygienist No. 1 and Hygienist No. 2, who are licensed dental hygienists, placed sealants over obviously decayed teeth of school age children. The sealants were provided by the hygienists to under-privileged students whose dental care is provided almost solely in the school-based public health setting, which is a program operating under the authority of the Department of Health and Environmental Control. The hygienists denied the allegations of the Board, and averred that their actions were within the standard of care for dental hygienist work performed in the school setting.

A panel of the Board addressed this matter over two days in December 2008, at which time expert testimony was presented by both sides.¹ The panel found violations of the standard of care and, the Board accepted the panel's recommendations that Hygienist 2 be given a public

¹ Cases were tried simultaneously involving four hygienists who all provided preventive dental treatment under the public school program. Charges were dismissed against two of the hygienists. The testimony was applied to all four matters, when relevant.

STATEMENT OF THE ISSUES ON APPEAL

It is respectfully asserted that the decision of the Administrative Law Court was erroneous because, both in its initial review of the Board's order and after remand, it failed to apply the proper standard of care for dental hygienists in the public school setting. The lower court failed to require that the Board establish through quantifiable evidence the proper standard of care, and instead relied on the Board's opinion as to the standard. This was an error because the Board is the opposing party in this matter and thus cannot rely on its own opinion to meet its burden.

Furthermore, the Administrative Law Court erred in determining that the South Carolina Legislature has not established a separate standard of care for hygienists working in the public school setting. On remand from this Court, the lower court erred in its narrow reading of individual statutes apart from the greater context of applicable statutory law implicated by the facts of this case. A proper review and application of the entire group of relevant statutes and the SCDHEC guidelines they implicate compels a finding of a separate standard of care for the public setting.

TABLE OF AUTHORITIES

Cases:

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<u>Doe v. American Red Cross Blood Services, S.C. Region</u> , 297 S.C. 430, 433-434, 377 S.E.2d 323, 325 (1989)	12, 13
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
HONORABLE CAROLYN MATTHEWS

Docket No. 06-ALJ-11-0562-AP (Case No. 04-45)
Docket No. 06-ALJ-11-0563-AP (Case No. 03-104)

RECEIVED
FEB 28 2011
SC Court of Appeals

Anonymous No. 1, R.D.H., and Anonymous No. 2, R.D.H.

Appellants,

v.

South Carolina Department of Labor, Licensing and Regulation
and South Carolina Board of Dentistry,

Respondent.

BRIEF OF APPELLANTS

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PER CURIAM: Anonymous Dental Hygienists No. 1 and No. 2 (Hygienists) appeal from the final order of the administrative law court (ALC) affirming the decision of the state Board of Dentistry (Board) to issue public, yet anonymous, sanctions against Hygienists for failing to meet the appropriate standard of care for dental hygienists in South Carolina, namely for placing sealant over clinically obvious decay on the teeth of several children in a school-based public health dental program.¹ We remand to the administrative law judge pursuant to Rule 220(b)(2), SCACR, for reconsideration of the standard of care pursuant to Sections 40-15-80(B), 40-15-82(1), and 40-15-110(A)(10) of the South Carolina Code and the following authorities: S.C. Code Ann. § 1-23-610(B) (Supp. 2008) ("The court of appeals may . . . remand the case for further proceedings . . ."); Major v. S.C. Dep't. of Prob., Parole, & Pardon Servs., __ S.C. __, 682 S.E.2d 795, 797 (2009) (ALC decision should not be overturned unless it is controlled by some error of law); David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 248, 626 S.E.2d 1, 4 (2006) ("The plaintiff must provide expert testimony to establish both the required standard of care and the defendants' failure to conform to that standard. . . ."); Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

REMANDED.

HUFF, THOMAS, and PIEPER, JJ., concur.

¹ In a letter dated October 8, 2009, and received by the Court of Appeals on October 12, 2009, counsel for Hygienists asked to argue against precedent. Hygienists' motion is hereby denied.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Anonymous No. 1 R.D.H., and
Anonymous No. 2 R.D.H., Appellants,

v.

South Carolina Department of
Labor Licensing and
Regulation, State Board of
Dentistry, Respondents.

Appeal from Richland County
Carolyn C. Matthews, Administrative Law Judge

Unpublished Opinion No. 2009-UP-504
Heard October 7, 2009 – Filed November 4, 2009

REMANDED

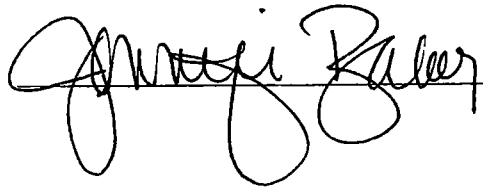
Desa Ballard and P. Christopher Smith, Jr., of West
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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent, does hereby certify that service of the **Brief of Respondent** in the above-captioned action was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 3rd day of October 2008:

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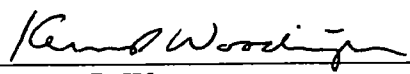
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A handwritten signature in black ink, appearing to read "George Baker", written over a horizontal line.

CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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October 3, 2008

of harm to the patient. . . .” Br. of Appellants 27. Appellants do not appear to challenge the conclusion of the ALC that no showing of actual harm to a patient must be made before professional discipline can occur. R. 13-14. For the reasons set forth therein, that conclusion was clearly correct. *See, e.g., In the Matter of Gregory*, 332 S.C. 13, 503 S.E.2d 735 (1998), cited by the ALC. R. 14.¹⁹

To the extent that Appellants claim that at least a risk of harm to the public must be shown before they can be disciplined, the record contains substantial evidence that such a risk of harm was present in these cases. Respondent again would quote the testimony of Dr. Sneed, which was deemed the most credible testimony by the Board and the ALC:

. . . you’d give a false sense of security to the patient and to the parent. . . .[I]t would be very difficult to achieve a hermetic seal, a very good seal.

* * *

And if it breaks, if that seal breaks and you’ve left decay, it is rampant. It becomes . . . in a matter of months you could have an exposure, a toothache, a root canal. So my concern with sealing a frankly cavitated lesion would be just that. You might get a sealant right now possibly, you may very well, but is it going to stay there. We see it all the time, a portion comes loose, now it leaks; the patient has a false sense of security, it’s an opaque sealant, mama sees something white on there, it looks fine, and it may progress extremely rapidly. The same thing happens with a cracked filling. If you have a cracked amalgam and the amalgam is loose but won’t fall out,

¹⁹ In the present two cases, the record suggests that no actual harm was inflicted on at least some of the teeth of the patients, but only because the patients saw dentists shortly after the sealants were placed. The dentists removed the sealants and did restorations on some of the teeth. The sealants did not remain on those teeth long enough for any harm to have been done.

establish the standard of care, the standard of care is a question of fact. *See Sharpe v. South Carolina Department of Mental Health*, 292 S.C. 11, 354 S.E.2d 778 (Ct. App.1987)(Bell, J., concurring)(whether defendant failed to observe the standard of care required by law in a particular case is a question of fact for the trier of fact).

Appellants also make a passing claim that the standard of care was set in these cases without notice to the profession, but similar claims were considered and rejected some time ago in *Toussaint v. State Bd. of Medical Examiners*, 303 S.C. 316, 321, 400 S.E.2d 488, 491 (1991). Appellants' claim in this regard is particularly unavailing, because they do not seriously claim not to have known what the standard of care was, but instead have simply tried to get themselves exempted from it.

Finally, the Board took great care not to impose an impossible burden on hygienists. The Orders in these cases did no more than require that the hygienists use the tools available to them in a competent and professional manner. The Board issued the most minimal sanctions that could have been issued while still setting forth the standard of care.

3. The ALC Correctly Held That Proof Of Actual Harm Of A Specific Nature Is Not An Element Of A Professional Disciplinary Proceeding, And The Record Contains Substantial Evidence Of Risk Of Harm To Patients From Sealants Placed Over Frank Decay.

Appellants' final argument is that the ALC erred "by concluding that actual harm is not a necessary element of a professional disciplinary proceeding." Br. of Appellants 26. Appellants argued in the ALC, as they do in this Court, that in order for a state licensing board to discipline a licensee, there must exist "the presence of harm or the risk

sealing frankly decayed teeth when the decay is readily apparent to a hygienist using the tools available to a hygienist. As the ALC held,

Compliance with this minimal standard of practice should not “chill” the public health dental hygiene program. The Board was careful to note that the hygienists were not required to find decay when decay was not apparent to them using the tools they had available to them. Thus, the Board concluded that “[I]n the settings involved in this and companion cases, it is especially important to determine what the hygienist was able to or should have been able to determine with the means at her disposal.”

R. 13, quoting R. 40, Par. 11. These cases, taken together, stand for the idea that a hygienist should be able to spot frank cavitation via the naked eye and/or the use of an explorer, and that when such cavitation is seen, the hygienist should not seal the tooth. This is a minimal standard of care, but it is a clear one, and it is one that was violated in these two cases.

Appellants make a brief argument in their Question 1 that the standard of care applied by the Board in these cases is an issue of statutory construction rather than an issue about whether the evidence is substantial.¹⁸ Br. of Appellants 6-7. However, as the Supreme Court has held, in setting forth a professional standard of care, “we defer to the collective wisdom of a profession, such as physicians, dentists, ophthalmologists, accountants and any other profession which furnishes skilled services for compensation.” *Doe v. American Red Cross Blood Services, S.C. Region*, 297 S.C. 430, 435, 377 S.E.2d 323, 326 (1989). In other words, in a case where expert testimony is necessary to

¹⁸ The statute which the hygienists were found to have violated is § 40-15-190(A)(14), which provides that misconduct occurs when a hygienists “has failed to meet the standards of care in the practice of . . . dental hygiene.”

. . . I can't imagine that a sealant would be placed over a carious lesion without the parent or the child being informed that there is caries present and that requires attention of the dentist.

Id., referring to R. 375, lines 15-19. The problem with this optimistic view is that if the hygienist overlooked the presence of frank cavitation in placing sealants, the hygienist obviously would be in no position to advise the parents or the child that such frank cavitation was present.

Moreover, in the case of children who never see a dentist after the sealants are placed, the placement of sealants over frank cavitation is not harmless, as Appellants argue, but actually is more harmful than it is for children who see dentists soon after the sealants have been applied. As Dr. Sneed testified, in the children who never see a dentist, the false sense of security remains present, while the teeth continue to decay at an accelerated rate. R. 11. To use a simple analogy, the standard proposed by Appellants' counsel, although apparently not by the appellant hygienists themselves, would be the same as advocating the application of spray paint over a rusty fender. It is common knowledge that all that would happen in such a case is that the rust would continue to spread, hidden under the poorly-adhering paint. The situation with sealed dentin caries is no different.¹⁷

Appellants attempt to make these cases unduly complicated. No matter in what setting a dental hygienist practices, there are minimal requirements of competence and professional standards that must be observed. Among those standards is the avoidance of

¹⁷ Or, as Dr. Chadwick very plainly put it, "it's just going to go nuts underneath the [leaky] sealant" R. 232, lines 4-8.

Dr. Sneed's testimony was more than merely "substantial"; it was the more credible testimony offered because it was internally consistent and consistent with the testimony of the hygienists concerning their standard of care.

R. 13. The ALC Order also held that "the Board correctly credited the opinion of Dr. Sneed (and impliedly also credited the original opinion of Dr. Simonsen) by concluding that 'there is a deviation from the standard of care, regardless of setting (including the public health setting), when sealant is placed over clinically obvious decay.'" R. 12, referring to R. 4, 12.

Appellants cite several studies on p. 15 of their brief in support of the extreme position they advocate.¹⁵ However, Dr. Sneed testified that those studies involved the placement of sealants over caries in a manner that effectively converted them into restorations rather than sealants. R. 297-299. He also testified that that painstaking procedure was not one which could be performed by hygienists. R. 299, lines 5-7.¹⁶

The ALC also noted that "Dr. Simonsen also appears to have based even his revised view on an unduly optimistic scenario," R. 12, which was found in his testimony as follows

¹⁵ Also, on pp. 13-14 of their brief, Appellants reference a 2008 study. They had previously asked this Court to remand the case so that the Board could review that study and certain other materials, but this Court denied that motion. Respondent submits that this effort to re-introduce this 2008 material into this case should be summarily rejected. Even if the Court elects to review that material, however, Respondent submits that it is irrelevant and immaterial for the reasons set forth at pp. 3-6 of Respondent's March 13, 2008, Return to the Motion to Remand.

¹⁶ It should also be noted that, as shown by examining Dr. Simonsen's CV, his career is very much one involving the promotion of sealants. He argued that sealants "should be much more widely used. . . ." R. 353, line 25- 326, line 1. This in itself proves that the view he claims to advocate is not the standard of care that is actually in use.

present, "it would be very difficult to achieve a hermetic seal, a very good seal." R. 292, lines 18-20. *See also*, R. 292-293; R. 300-301. It would therefore appear that there is no inconsistency between Dr. Simonsen's e-mail and Dr. Sneed's testimony. For both of the reasons stated above, Appellant's Question 4 is without merit.

e. Appellants' remaining arguments on the standard of care.

The essence of Appellants' contentions, both in their appeal to the ALC and in the present appeal, is that Dr. Simonsen's testimony at the hearing should be credited over all other conflicting evidence, presumably including even the previously-expressed views of Dr. Simonsen himself. However, at most, Appellants can only show disagreement among experts, and it is axiomatic that where there is a disagreement among experts, it is the duty of the trial tribunal to determine which evidence is more credible and persuasive. *See, e.g., Edwards v. State*, 200 S.W.3d 500, 520 (Mo. 2006)("where there is a disagreement among experts, it is the duty of the trial court to determine which evidence is more credible and persuasive"). *Cf. Wilson v. State Budget & Control Bd., Employee Ins. Program*, 374 S.C. 300, 305, 648 S.E.2d 310, 313 (Ct. App. 2007)(affirming an insurance plan's denial of coverage where the opinions of multiple examining physicians conflicted and the medical records were inconsistent). As the ALC held, there was

substantial evidence to show that the Hygienist[s] deviated from the generally recognized practices and procedures which would be exercised by competent hygienists under the same or similar circumstances. "It is generally recognized that the trier of fact, who has the opportunity to observe the witnesses and listen to their testimony in person, is in the best position to determine issues of witness credibility." *Dixon v. Dixon*, 336 S.C. 260, 263, 519 S.E.2d 357, 358 (Ct. App. 1999). My finding, which is consistent with that of the Board's, is that

offered because it was internally consistent and consistent with the testimony of the hygienists concerning their standard of care.” R. 12.

d. The initial views of the Appellants’ expert.

In his testimony in these cases, the expert retained by the Appellants, Dr. Simonsen, staked out an extreme position with respect to the placement of sealants. He testified that “it is okay to place sealant under any circumstances.” R. 366, lines 14-15. He had previously, however, told Dr. Sneed in an e-mail exchange over a year before the hearing that caries could progress under an inadequately placed sealant, thereby leading both to increased decay and a false sense of security on the part of the patient and the patient’s parents. R. 378, lines 3-11. The ALC noted that “[w]hile Dr. Simonsen attempted to qualify these remarks at the hearing, his e-mail, which was presumably written before he was retained by the Appellants to testify in this case, makes it clear that he and Dr. Sneed are in agreement that it is inappropriate to place sealants over frank cavitation.” R. 12.

In Question 4 of their Brief, Appellants argue that the Board and the ALC misread Dr. Simonsen’s e-mail. The e-mail is at R. 891-892. The first answer to this is that even if the e-mail had been misinterpreted, which Respondent denies, the error would be harmless in light of the considerable other evidence of the appropriate standard of care, including the DHEC Guidelines, the testimony of Dr. Sneed and the testimony of the hygienists themselves. Secondly, however, while Dr. Simonsen’s e-mail refers in part to inadequately placed sealants, Dr. Sneed testified in effect that sealants placed over frank cavitation are, by reason of that fact, inadequate, because where frank cavitation is

2. That standard of care is that sealants should not be placed over decay which is frank, i.e., involving gross carious lesions. [R. 283, lines 3-5.]
3. A dental hygienist should be able to detect frank cavitation on a molar. R. 255, lines 10-16. The tools available to hygienists for making this determination include visual examination with the naked eye and the use of explorer tools. [R. 284, line 14, through 259, line 14.]

R. 11 (cites to record added). As quoted by the ALC, Dr. Sneed further testified that the reasons for not placing sealants over frank decay are that

. . . you'd give a false sense of security to the patient and to the parent. . . .[I]t would be very difficult to achieve a hermetic seal, a very good seal.

* * *

And if it breaks, if that seal breaks and you've left decay, it is rampant. It becomes . . . in a matter of months you could have an exposure, a toothache, a root canal. So my concern with sealing a frankly cavitated lesion would be just that. You might get a sealant right now possibly, you may very well, but is it going to stay there. We see it all the time, a portion comes loose, now it leaks; the patient has a false sense of security, it's an opaque sealant, mama sees something white on there, it looks fine, and it may progress extremely rapidly. The same thing happens with a cracked filling. If you have a cracked amalgam and the amalgam is loose but won't fall out, that's the worst possible scenario, because now it's leaking, saliva, bacteria, sugar, so forth are getting up under there.

R. 11.¹⁴

The ALC's conclusion with respect to Dr. Sneed's testimony was that "Dr. Sneed's testimony was more than merely 'substantial'; it was the more credible testimony

¹⁴ This testimony is found at R. 293, lines 16-20; 265, line 24 through 294, line 17. Dr. Sneed reiterated these points at R. 300-301.

health setting, sealants should (a) sometimes be placed over caries-free teeth, (b) be placed over teeth when it is not certain that surface (enamel) decay is present, and (c) also be placed over teeth that have only enamel or surface decay. R. 882. However, in instances where there is decay below the surface, extending into the dentin, as in the present cases, the Guidelines provide only that the tooth should be restored, i.e., filled. R. 882. There is no suggestion that teeth in the Guidelines that teeth in the condition of those in the present cases should ever be sealed. In other words, the "double standard" that Appellants argue for is not found in the terms of their agreement with DHEC for precisely this public health setting. Thus, even if one were to accept the unusual double standard sometimes (but not always) advocated by Appellants' expert, and discussed at length in the Brief of Appellants, the application of such a standard would be foreclosed by the standard under which the Appellants were required to operate pursuant to the terms of their contract. The ALC cited the DHEC Guidelines in the course of rejecting Appellants' proposed double standard. R. 12.

c. The testimony of the State's expert.

The most detailed and authoritative rejection of Appellants' proposed double standard is found in the testimony of Dr. Sneed. The ALC summarized Dr. Sneed's testimony as follows:

1. There is only one standard of care in South Carolina with respect to the placement of sealants by dental hygienists over frank cavitation. [R. 282, lines 20-24.] That standard of care applies in both public health settings and in private dental offices. [R. 283, lines 6-9.]

R. 10-13. The evidence from all of these sources, as cited by the ALC, will be briefly summarized below:

a. The hygienists themselves.

To their credit, the two hygienists in these cases did not themselves accept the double standard which is being advocated in this appeal. Hygienist 2 testified that sealants should be placed only on "all kids that don't have gross decay." R. 479, lines 21-22. She also agreed that it was part of her responsibility to be able to spot gross decay. *Id.*, lines 23-25. Hygienist 1 likewise testified that she does not seal gross decay. R. 413, lines 13-17. Hygienist 1 also agreed that part of her training was to enable her to recognize tooth decay. R. 416, line 24 – 417, line 5. Thus it would appear that counsel for the hygienists is advocating a position that even the hygienists themselves do not agree with. The ALC noted this testimony of the hygienists themselves. R. 12-13.

b. The DHEC contractual guidelines for the school-based public health dental program.

If, as Appellants contend, "there is a different standard of care applicable to the public school setting," Br. of Appellants 8, 16, one would expect to see that standard set forth in the DHEC guidelines, incorporated into the contracts with the hygienists' employers, that govern the conduct of these hygienists in the public health setting. Instead, however, one finds just the opposite.

The DHEC "Guidelines for SC School-Based Dental Prevention Programs," R. 875-882 were incorporated into the contract between DHEC and the hygienists' employer. R. 862-863. The decision tree in the Guidelines indicates that in the public

Dr. Adams' conclusion about frank decay, rendered particularly credible by having been reached even before the hygienist saw the patient, is clearly "evidence that would allow reasonable minds to reach the conclusion that the administrative agency reached," as the ALC held. R. 9. The ALC's conclusions pertaining to the placement of sealants over gross decay should therefore be affirmed.¹²

2. The ALC Correctly Held That The Standard Of Care For Dental Hygienists, Regardless Of The Setting In Which They Practice, Is That Sealants Should Not Be Placed Over Frankly Or Obviously Decayed Teeth.

Appellants' primary contention of substance in this Court, as it was in the ALC, appears to be an argument that, at least for low-income children, it is better to place sealants over even the grossest decay than to leave the decay alone. Br. of Appellants 8-16.¹³ As the ALC correctly held, "[t]his contention is erroneous because there are minimal requirements of competence and professional standards that must be observed in any setting where a hygienist practices." R. 10. The ALC accordingly comprehensively rejected the double standard proposed on behalf of the Appellants (although not necessarily by the Appellants themselves, as will be seen). In support of its conclusion, the ALC cited (a) the testimony of both hygienists themselves, (b) the DHEC policies under which these hygienists were operating by contract, (c) the State's expert, Dr. Sneed, and (d) statements of Appellants' own expert, prior to his retention by Appellants.

¹² The issue about placement of sealants over gross decay being a violation of the standard of care is discussed in Question 2 herein.

¹³ This argument is made in Appellants' Question 2. Essentially the same argument is made in Appellants' Question 1, which is discussed below under this heading.

Q. Would you characterize the decay that you observed on 9/2/03, how would you characterize that decay in terms of frank or incipient or somewhere in between?

A. It was frank. I would consider it frank because just with my naked eyes I could see a halo, an obvious halo, caused by decay on his virgin teeth. There was no question in my mind.

R. 455, line 21 through 456, line 4 (emphasis added). While Dr. Adams did use the explorer to some extent, that elementary tool is part of a hygienist's equipment. See R. 418, lines 22-23, where Hygienist 1 testified that she used "[m]y lights and my mirror and my eyes and my explorer." Dr. Sneed also testified that an explorer is part of the equipment used by a hygienist, R. 284-285, as did Katherine Way, a hygienist employed by Dr. Chadwick. R. 250. The ALC held that the testimony of Hygienist 1 and Ms. Way supports the view that an explorer is a common tool used by a hygienist. R. 9. Thus, to the extent that Hygienist 2 argues that the use of an explorer is outside the scope of her practice, such argument is clearly without merit.¹¹

Finally, the ALC held that most of Hygienist 2's arguments "pertain only to tooth no. 3, although both the testimony and the Order were to the effect that gross decay was present not only on tooth no. 3, but also on nos. 3, 14, 19 and 30." R. 9, n. 6. As a result, the ALC held, "most of the Board's findings of fact are not actually challenged by this Appellant." *Id.*

¹¹ The ALC further held that "Hygienist 2 also argues that the opinion of Dr. Adams about the value of sealants was different from that of Appellants' expert, but that argument, even if true, does not relate to Dr. Adams' visual diagnosis of decay." R. 9, n.7.

had been diagnosed by Dr. Adams sixteen days earlier as having decay and in need of restoration.” R. 8 (emphasis added).

The Board found as a fact that Hygienist 2 “placed sealant over obvious decay on several teeth, #'s 3, 14, 19 and 30.” R. 32. The ALC affirmed, noting that “Dr. Adams’ conclusion about frank decay, rendered particularly credible by having been reached even before the hygienist saw the patient, is clearly ‘evidence that would allow reasonable minds to reach the conclusion that the administrative agency reached.’” *Id.* at 9, quoting *Bursey v. South Carolina Dept. of Health and Environmental Control*, 369 S.C. 176, 631 S.E.2d 899, 906 (2006).

With respect to one of the four sealed teeth, tooth no. 3, Dr. Adams did a fissurotomy (removal of enamel in grooves to get to decay) in the course of a restoration performed on that one tooth after it had been sealed, R. 458, lines 8-13. He testified that the fissurotomy indicated the correctness of his initial diagnosis. R. 458, lines 14-17. Appellants argue that the diagnosis was confirmed “only after” the fissurotomy, Br. of Appellants 20 and 21, but in fact there was nothing in Dr. Adams’ testimony to indicate that there was any doubt about his initial diagnosis of decay, with or without the subsequent fissurotomy.

The ALC also rejected the claim made by Appellant that Dr. Adams’ “diagnosis depended on a physical examination of the teeth” using his explorer (a metal “pick,” in effect, R. 250). This argument is reiterated at Br. of Appellant 21 and 22. This is simply an incorrect characterization of Dr. Adams’ testimony. As Dr. Adams testified:

decay on one of the four teeth, no. 15, was “[n]ot as clear as the others, but . . . suspect.” R. 278, lines 11-12. However, Dr. Sneed was reviewing photographs of the teeth made after the sealant had been applied, R. 278, lines 13-16, and therefore was not seeing what the hygienist saw, i.e., the visible decay prior to the placement of the sealant.⁹

While Hygienist 1’s argument about “inconsistency” is simply without merit for the reasons noted above, that argument in any event only pertains to one of the four teeth found to have improperly sealed, i.e., tooth no. 15. Therefore, even if the Board’s conclusions about that one tooth were rejected (and Respondent denies that such should occur), the evidence of improper sealing of the other three teeth is more than sufficient to support the minimal and moderate discipline imposed by the Board.¹⁰

B. Hygienist 2 Case (patient Q. G.)

The evidence of placement of sealants over obvious decay was also very clear in the case of Hygienist 2. In that case, the patient had been seen by the testifying dentist, Dr. Adams, several weeks before the sealants were applied, so the dentist saw the teeth in the same, pre-sealed, condition, that was presented to Hygienist 2 a few weeks later. As the ALC held, “Hygienist 2 placed sealants over teeth nos. 3, 14, 19, and 30, all of which

⁹ Hygienist 1 points out that the Board found that Dr. Sneed testified as to gross decay in teeth nos. 19, 23 and 31, noting that tooth no. 23 had not been sealed. Br. of Appellants 19, citing R. 10, Paragraph 6. However, this argument proves nothing, because the Board did not find misconduct with respect to tooth no. 23. The reference to tooth no. 23 appears to be a typographical error in the Order in any event.

¹⁰ Hygienist 1 also mischaracterizes the testimony of Dr. Chadwick, arguing that he “conceded that the placement of sealants on decayed teeth does not harm patients.” Br. of Appellants 19, citing R. 231, lines 4-8. On the next page of his testimony, however, Dr. Chadwick noted that “when you seal something up underneath like that and it leaks because it’s not sealed, because it’s gross caries then it’s just going to go nuts underneath the sealant because it is sealed off and protected from the toothbrush.” R. 232, lines 4-8.

mostly of lower-income schoolchildren. That contention was rejected by the ALC, and will be discussed in Question 2 below.

A. Hygienist 1 case (patient M. A).

Hygienist 1 argues, as she did before the ALC, that there is doubt in the record as to which teeth she allegedly sealed improperly. The Board had found as a fact in the case of patient M.A. that “[t]he evidence shows a large and extensive degree of decay which should have been obvious to the [Appellant].” R. 40, Par. 11. Hygienist 1 was found to have improperly “placed sealant over obvious decay on several teeth, #’s 3, 15, 31 and 19.” *Id.*

The ALC rejected Hygienist 1’s argument that the record was unclear about as to which teeth were improperly sealed, noting that “the testimony and photographs, as previously summarized, very specifically identified the sealed teeth that were visibly decayed. Further, the Board’s Order refers to the specific teeth that the Board found to have been improperly sealed, i.e., nos. 3, 15, 31 and 19.” R. 7. The ALC cited both the testimony of the treating dentist, Dr. Chadwick, and the Board’s expert reviewer, Dr. Sneed. *Id.*

Hygienist 1 argues that “the testimony on which the ALC relied was inconsistent.” Br. of Appellants 19. However, a review of the testimony of Drs. Chadwick and Sneed, as well as the Board’s summary of their testimony, will clearly indicate that both Dr. Chadwick and Dr. Sneed concluded there was obvious decay on teeth nos. 3, 19 and 31. The only “inconsistency,” if it can be referred to as such, is that Dr. Sneed, the reviewing expert as opposed to the treating dentist, concluded that the photographic evidence of

ARGUMENT

1. **The Administrative Law Court Correctly Held That There Was Substantial Evidence That Both Appellants Placed Sealants Over Obvious Decay.**

In the cases of both hygienists, the Board made factfindings that certain specific teeth were erroneously sealed when obvious decay was present. The ALC held that those findings of fact were supported by substantial evidence. R. 6-10. A brief summary of the facts of both cases (already discussed in more detail above) demonstrates that the Board's factfindings were indeed supported by the evidence, and that the ALC's affirmance of those factfindings was clearly correct.

The familiar standard of review in APA cases, as noted in the Order below, is that

The possibility of drawing two inconsistent conclusions from the evidence does not prevent an Administrative Agency's finding from being supported by substantial evidence. *Grant v. S.C. Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995). Rather, the appellate court need only find, considering the record as a whole, evidence that would allow reasonable minds to reach the conclusion that the administrative agency reached. *Id.*

Bursey v. South Carolina Dept. of Health and Environmental Control, 369 S.C. 176, 631 S.E.2d 899, 906 (2006). R. 9.

With respect to the issue of whether the Board's Orders were supported by substantial evidence, Appellants for the most part simply reiterate the arguments that were rejected by the ALC. The primary thrust of Appellants' appeal appears to be not so much that the factfindings were not supported by substantial evidence, but instead that as a matter of law, a less stringent standard of care should apply when the patients consist

the full Federal Trade Commission on September 11, 2007. That Consent Order can be found at <http://www.ftc.gov/os/adjpro/d9311/070911decision.pdf>. The Consent Order did not require the Board of Dentistry to take any specific regulatory or policy steps, or to stop engaging in any acts, but instead only required the Board to notify the FTC 30 days in advance, if practicable, in the event that it proposed to take any kind of action with respect to public health dental hygienists such as were involved in the present cases. The Consent Order also required the Board to make certain notifications, and to reaffirm a statement adopted by the Board in 2003, in the course of that litigation, to the effect that the Board supported the 2003 changes in state law, which the Board had always contended to have mooted the FTC litigation in the first place.

From the above, it is apparent that any issues about the long-moot 2001 temporary regulation about the requirement of a dental preexamination are far removed from the issues in the present two appeals, which relate only to the fact-specific issue of whether the Appellants' conduct was outside the standard of care. There have been tens of thousands of children seen by hygienists employed by these hygienists' employer. *See R.* 284-285, where Hygienist 1 testified that she alone had seen at least 2,500 schoolchildren. Given such a volume of cases, it is not surprising that occasionally a mistake will occur, and that is all the Board found in these two cases. Appellants' emphasis on the issues in the FTC matter is misplaced, and should be disregarded.

F.T.C., 455 F.3d 436 (4th Cir. 2006). The Board sought certiorari, which was denied on January 16, 2007. 127 S.Ct. 1123 (2007).

In its 2004 Order, the FTC did recognize the possibility that the case had been rendered moot by a combination of the 2003 amendments, the Board's subsequent disclaimer of any intention to reenact, much less enforce, the former preexamination requirement, and the Board's actual nonenforcement of any such requirement ever since 2002.⁷ That part of the FTC Order, which was still one step short of reaching the merits of the FTC's charges, was stayed from not long after it was entered in 2004 until the end of the present certiorari process in early 2007.

In the course of its last stay order during the pendency of the Board's appeal of the immunity issue to the federal courts, the FTC commented on the absence of developments since 2003, noting that "[FTC] Counsel also does not contest [the Dental Board's] argument – and the Commission has thus far seen no evidence to the contrary – that it is not currently engaging in any conduct similar to that challenged in the complaint that might prejudice or harm the public interest."⁸

Finally, in early 2007, the Board and the FTC resumed litigation over the issue of whether the FTC's original claims had been rendered moot. Not long thereafter, in March 2007, the parties entered into a proposed Consent Order that was eventually approved by

⁷ The FTC held that "[w]e exercise our discretion to refer this matter to the administrative law judge for limited discovery for ninety (90) days and an initial assessment of the likelihood that the Board may engage in future unlawful conduct under the 2003 statute." *In the Matter of South Carolina State Board of Dentistry*, 2004 WL 1814165 (F.T.C. 2004).

⁸ FTC Order of August 9, 2006, granting stay pending resolution of certiorari. That Order is at <http://www.ftc.gov/os/adjpro/d9311/080809ordergrantingstay.pdf>.

compromise was between the representatives of dentists on the one hand and hygienists on the other.)

Well after the 2001 emergency regulation had expired, but before the enactment of the 2003 amendments, the Federal Trade Commission began an investigation to determine whether the 2001 emergency regulation amounted to a form of unfair competition that would require some kind of prospective injunctive relief. Eventually, in September 2003, the FTC filed an action against the Dental Board. However, by that time the issue had essentially resolved itself via the 2003 amendments to the Board's enabling legislation. The Board enacted a resolution in October 2003 to the effect that it had no intention of seeking to reinstate the preexamination requirement, which the Board in the same resolution expressly recognized to have been clearly eliminated by the 2003 amendments. Indeed, the Board had never sought to enforce such a requirement after the 2001 emergency regulation expired in early 2002, now over six years ago, and it has never sought since then to enforce such a requirement. The present cases do not involve the issue of a preexamination by a dentist.

The Board moved before the FTC to dismiss the FTC case based on the "state action immunity" doctrine that exists in antitrust law under such cases as *Parker v. Brown*, 317 U.S. 341 (1943). The FTC denied that motion to dismiss in 2004. *In the Matter of South Carolina State Board of Dentistry*, 2004 WL 1814165 (F.T.C. 2004). The Board appealed that denial to the Fourth Circuit in 2004, and the case was in that court for almost two years before that court held that the denial of a motion to dismiss in those circumstances was not immediately appealable. *South Carolina State Bd. of Dentistry v.*

General Assembly approval of the proposed regulation, until the Board became concerned, in the summer of 2001, that hygienists might be causing harm to patients by placing sealants over decay. (The incidents in the present cases occurred several years after 2001 and were not the basis for the Board's actions in 2001.) Accordingly, in the summer of 2001, the Board promulgated an emergency regulation to the effect that a dentist must examine a child's teeth before sealants are placed on the teeth.

That 2001 emergency regulation was immediately challenged in litigation by the employer of the hygienists in the present case, but the employer was unsuccessful in obtaining preliminary injunctive relief from the trial court, based in part on failure to exhaust administrative remedies. This Court affirmed the denial of preliminary injunctive relief in an unpublished opinion issued on March 26, 2003. *Health Promotion Specialists, LLC v. South Carolina Board of Dentistry*, Opinion No. 2003-UP-232 (2003).

In February 2002, after the emergency regulation had run its maximum course of two ninety-day periods, Administrative Law Judge Kittrell recommended that language relating to a dentist's preexamination be deleted from the proposed permanent regulation, which was essentially the same as the expired emergency regulation.⁶ This caused the Dental Board to reconsider its approach to the entire issue. A year later, a compromise amendment to the Board's enabling act was passed which effectively eliminated any argument that a dentist's preexamination was needed before sealants could be placed on the teeth of children in a public health dental program. Act No. 45 of 2003. (The

⁶ *In Re: Proposed Regulation, Document No. 2644*, 2002 WL 385116 (2002).

to the decay. R. 458, lines 8-13. He took another intra-oral photograph of just tooth # 3 after the fissurotomy, and then one more photograph of the same tooth following further caries excavation. R. 725, 726. The photo after the fissurotomy and prior to the excavation confirmed to Dr. Adams the correctness of his previous diagnosis of frank decay, based on explorer probing and naked-eye observation. R. 458, lines 14-17.

Dr. Adams restored tooth # 3, but did not do any work at all on the other sealed molars. The patient did not return to Dr. Adams' office after the October 7, 2003 visit.

3. Other issues.

Appellants' Statement of Facts is somewhat unusual, because it contains virtually no discussion of the specific facts of these two cases. Most of Appellants' Statement of Facts is devoted to a discussion of other litigation, now ended, involving a completely different issue relating to overall Board policy, and not to the standard of care in individual cases. However, since Appellants have discussed that other litigation, Respondent offers the following summary of that matter.⁵

In 2000, the dentistry statutes were amended, leaving what appeared at the time to the Board of Dentistry to be a need to clarify by regulation that a dentist must examine a child's teeth before sealants are placed on teeth, even in the public health (i.e., low income) setting. Such was unquestionably the law prior to the 2000 amendments. The Board was content to take this step through the normal regulation process, i.e., by seeking

⁵ Appellants presented much of the same information to the ALC. The ALC's Order, apparently recognizing the irrelevance of Appellants' discussion of the other litigation, properly disregarded that discussion.

and 30] as having decay. Using my explorer, my sharp explorer with a light touch, I got a stick, as Dr. Sneed said, just like leather-like, put it in leather and it pulls back and you get a little stick, on all those. Also visualizing, especially number 3, number 3's the one that I definitely recall seeing a dark halo on the occlusal surface from the decay present.

R. 453, line 17 – 418, line 13. (emphasis added). Dr. Adams further testified as follows:

Q. Would you characterize the decay that you observed on 9/2/03, how would you characterize that decay in terms of frank or incipient or somewhere in between?

A. It was frank. I would consider it frank because just with my naked eyes I could see a halo, an obvious halo, caused by decay on his virgin teeth. There was no question in my mind.

R. 455, line 21 through 420, line 4. Dr. Adams also agreed that the decay he observed a few weeks before the sealants were placed “should . . . have been apparent to the hygienist who applied the sealants.” R. 456, lines 16-18. His basis for saying this was the presence of an obvious halo of decay, visible to the eye. R. 456, lines 1-4, 19-21.

On October 7, 2003, several weeks after the sealants were placed by Hygienist 2, the patient returned to Dr. Adams' office. Sealants had been placed on all four of the molars that Dr. Adams had previously diagnosed as being frankly decayed, such decay having been apparent to Dr. Adams using no tools other than those used by the hygienists, i.e., the explorer and the naked eye. Dr. Adams took a color intra-oral photograph of the four sealed teeth. LLR Ex. 13, R. 727. During that October 7 visit, Dr. Adams only filled one of the four molars, tooth # 3. On that tooth, he removed the sealant and performed a fissurotomy, which is removing the enamel in the grooves to gain access

in February and March 2003, at which time he diagnosed decay in tooth 30. As a result, Dr. Adams did an occlusal composite restoration on that tooth on March 4, 2003. R. 450, lines 18-20.

The patient returned to Dr. Adams on September 2, 2003. At that time Dr. Adams noted that there was "rampant decay" in the patient's mouth. His chart (LLR Exhibit 12, R. 724) shows that he planned to do restorations, i.e., fillings, on eleven different teeth, including #s 3, 14, 19 and 30. He also planned to seal several other teeth that were decay-free at the time. R. 451.

On September 18, 2003, shortly after this examination of the patient by Dr. Adams, the patient was seen by Hygienist 2 in connection with the public health dentistry program at his school. Hygienist 2 placed sealants over teeth #s 3, 14, 19, and 30, all of which had previously, just a few days before, been diagnosed by Dr. Adams as having decay and in need of restoration. R. 729 (HPS chart indicating sealants placed on #s 3, 14, 19, and 30).

At the hearing, Dr. Adams was asked about his observations about the level of decay present on the four sealed teeth, i.e., teeth #s 3, 14, 19 and 30 prior to their having been sealed. He testified as follows:

Q. Okay. Do you recall from memory what the level of decay was on those ones that you just called out? And I can really just limit it to the . . . because the only ones that were [subsequently] sealed, I think, were 3, 14, 19 and 30, I believe.

A. Well, clinically speaking, you don't know the depth of it, but using my explorer and visualization, I immediately diagnosed all those teeth [i.e., 3, 14, 19

- A. A lot of it is just eyes, okay? . . . We just looked at these and why did they seal these teeth. That's sort of where we were coming from. The best example to me is the one labeled 31. [R. 150] I mean, that tooth, you can see right through the enamel and you can see the dentin and the dark.

* * *

That's gross decay.

- Q. Okay. How about 19? [R. 151]

- A. It looks, it looks very similar. It's obviously . . . you know, you can just look even not knowing anything about dentistry, it's black. It's not supposed to be black.

R. 220, lines 2-14; lines 20-24. As Dr. Chadwick summarized his conclusions, "throughout all of these there was gross caries." R. 216, lines 11-12. Dr. Chadwick eventually removed the sealants and filled these and other decayed teeth. R. 210-212.

Dr. William D. Sneed, professor and Chairman of the Department of General Dentistry at MUSC, also reviewed the photographs of this patient's teeth and concluded that there was obvious decay, visible even through the sealants, on teeth 31, 18, 15, 23, and perhaps 19. R. 273-281. On tooth no. 31, for example, he noted that

Looking through the partially optically opaque sealants, you can see a halo of darkness underneath the sealant, extensive halo, which to me is indicative of and diagnostic of a pretty large amount of decay in that tooth.

R. 274, lines 5-10.

2. Hygienist 2 case (patient Q. G.).

This matter involves a patient (Q. G.) who was approximately 12 years old at the time in 2003 when the events occurred that are the subject of this case. Q. G. was a patient of Dr. Benjamin Adams, a dentist in Greenville. Dr. Adams first saw this patient

1. Hygienist 1 case (patient M. A.).

This matter involves patient M. A., who was about 14 when the events occurred. That patient was seen on April 7, 2003 by Hygienist 1, who on that date placed sealants over the patient's permanent molars.³

About a month later, on May 8, 2003, the patient was seen for the first time by a dentist, Dr. Steven Chadwick. On that date, Dr. Chadwick's hygienist took intra-oral photographs of teeth 2, 3, 14, 15, 18, 19, and 31. Six of these photographs were introduced collectively as LLR Exhibit 3, R. 712-714 and R. 146-152.⁴ Each photograph was numbered to correspond with the number of the tooth photographed, and the number is visible in the lower left corner of each photograph. R. 214, lines 2-6. Dr. Chadwick testified that decay was visually apparent on the following teeth even with the sealants in place:

Tooth #3: R. 216-217 and Ex. 3, photo 3, R. 714 and 146.

Tooth #14: R. 218 and Ex. 3, photo 14, R. 712 and 147.

Tooth #15: R. 218 and Ex. 3, photo 15, R. 148.

Tooth #31: R. 220 and Ex. 3, photo 31, R. 150.

Tooth #19: R. 220-221, and Ex. 3, photo 19, R. 151.

A typical finding by Dr. Chadwick is as follows:

³ The hygienist's chart indicates that sealants were applied to teeth 2, 3, 14, 15, 18, 19, 30 and 31. R. 715.

⁴ Apparently as a result of an inadvertent error in copying the record, only three of the six photographs appear at R. 712-714, although all six were introduced. A duplicate copy of all seven of them is in the record at R. 146-152. If the Court would prefer to see the originals of these or other photographs, they can of course be supplied.

both Hygienists 1 and 2. R. 34, 41. The Board did not accept the panel recommendation of a fine in the case of Hygienist 2. Accordingly, the only sanctions imposed in these cases were anonymous public reprimands. No fines, suspensions, or other sanctions were imposed.

Upon appeal by the hygienists, the Administrative Law Court affirmed, by Order dated October 25, 2007. R. 3-20. The ALC held that in each of the two cases, there was substantial evidence to show that sealants were placed over obvious decay on the children's teeth. R. 6-10. The ALC also held that the standard of care in the public health setting was no different (i.e., no lower) than that in any other dental practice. *Id.* at 10-13. Finally, the ALC rejected Appellants' remaining arguments, both substantive and procedural. R. 14-20.²

Both hygienists appealed the ALC decision to this Court. On February 25, 2008, Appellants filed a Motion to Remand and Application for Leave to Present Additional Evidence. Respondent filed a Return opposing that motion, and by Order dated April 17, 2008, this Court denied Appellant's Motion to Remand.

COUNERSTATEMENT OF FACTS

The facts of the two cases are set forth below in some detail. Essentially, the facts as set forth herein were as found by the Board and affirmed by the ALC, and are also summarized more briefly in Question 1 herein.

² Two arguments made by Appellants below are not argued by them in the present appeal. These arguments, rejected by the ALC, R. 14-20, were (a) that the initial complaints made to the Board should be produced to them, and (b) that the entire Board should be recused from hearing the case.

COUNTERSTATEMENT OF THE CASE

This is an appeal from an Administrative Law Court Order dated October 25, 2007. That Court affirmed the Orders of the Board of Dentistry in two disciplinary matters that were tried together because they involved similar factual issues.

The two cases here consolidated for appeal were instituted by the Board of Dentistry in October 2004. R. 61-65. The Board alleged in each case that the Appellants, who are licensed dental hygienists, placed sealants over obviously decayed teeth of three school age children. *Id.* The hygienists denied the substantive allegations of the complaints, and also alleged that their actions were within the standard of care. 66-71.

These cases, along with two others involving two other hygienists,¹ were heard by a hearing panel of the Board on December 1 and 2, 2005. (The panel consisted of five members, none of whom were members of the Board.) By agreement of the parties and the panel, the expert testimony presented by both sides, to the extent it was of general application, was permitted to be applied in the cases of all four hygienists. After hearing evidence, on February 6, 2006, the panel recommended that Hygienist 2 be given a public reprimand and a fine of \$500, and that Hygienist 1 be given a public reprimand, but not fined. R. 51, 59.

At the final order hearing, which was held before the Board on April 28, 2006, counsel for LLR requested that the reprimands be anonymous, although otherwise public. R. 1036. The Board accepted the suggestion of public but anonymous reprimands for

¹ The Board, after reviewing the evidence, ultimately dismissed the cases against the two hygienists who are not appellants in this appeal.

COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the Administrative Law Court correctly held that there was substantial evidence that both appellants placed sealants over obvious decay?
2. Whether the Administrative Law Court correctly held that the standard of care for dental hygienists, regardless of the setting in which they practice, is that sealants should not be placed over frankly or obviously decayed teeth?
3. Whether the Administrative Law Court correctly held that proof of actual harm of a specific nature is not an element of a professional disciplinary proceeding, and whether the record contains substantial evidence of risk of harm to patients from sealants placed over frank decay?

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THE STATE OF SOUTH CAROLINA
Administrative Law Court

APPEAL FROM THE SOUTH CAROLINA
STATE BOARD OF DENTISTRY

Docket No. 06-ALJ-11-0562-AP
[In Re: Case No. 04-45]
Docket No. 06-ALJ-11-0563-AP
[In Re: Case No. 03-104]

Anonymous No. 1, R.D.H., and Anonymous No. 2, R.D.H. Appellants,

v.

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

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CONCLUSION

A novel question of law regarding the Board's interpretation of statutes in defining misconduct for dental hygienists in the public health setting has been raised. The ALC misapplied its reviewing authority with regard to this case. Regardless of whether or not the proper standard for hygienist or the improper standard as used here is applied, the Board has failed to establish by substantial evidence conduct that falls below either standard. Under the proper standard that should have been applied, the applications of sealants are always proper. However, even if the standard utilized by the Board is considered to be proper, their findings are unsubstantiated and factual support is lacking. Clearly, identification of decay that is "obvious" should require the utilization of dental equipment.

The Board and the ALC also improperly misconstrued the statements and conclusions proffered by a more qualified expert, Dr. Simonsen. If the proper weight is given to Dr. Simonsen's testimony, a much different result must be reached in this matter.

Due to the fact that the incorrect standard of review was applied by the ALC in this matter, due to the fact that the improper standard of care was applied, and due to the fact that there was no showing of a deviation from the correct standard of care and no actual harm has been identified in this case, this Court should reverse the Administrative Law Court's decision in this matter.

[Signature on following page.]

secured to individuals by the Bill of Rights are unreasonable, and not whether it imposes any restrictions on such rights. It has been said that the only limitation upon the exercise of the police power is that such exercise must be reasonable. The validity of a police regulation therefore primarily depends on whether under all the existing circumstances the regulation is reasonable or arbitrary and whether it is really designed to accomplish a purpose properly falling within the scope of the police power.

Id.

The decision of the Board was not reasonable in this instance. It was impossible for the Board to meaningfully weigh competing interests for the simple fact that there was absolutely no evidence of "professional ineptitude" on the part of the appellants, Huber, 316 S.C. at 28, n.2, 446 S.E.2d at 435, n.2.

It is an unfortunate but necessary conclusion that the Board arbitrarily decided against the weight of the evidence that the placing of sealants in certain situations constituted professional misconduct, despite substantial evidence that the placing of sealants on children who were at risk of not receiving follow-up care was in the child's best interest. This decision violates the Board's permissible authority to impose sanctions pursuant to the State's police power because there was no harm or risk of harm to the patient, or other rational basis for the imposition of discipline. The Board's interpretation is simply not "clearly demanded for the public safety, health, peace, morals, or general welfare." McCoy, 8 S.E.2d at 907 (emphasis added).

Appellants have not contended that it was. Appellants argued, correctly, that the State's permissible authority to impose sanctions in a professional disciplinary proceeding pursuant to the State's police power requires the presence of harm or risk of harm to the patient, or other rational basis for the imposition of discipline. "There must be a real connection between the actual provisions of a police regulation and its avowed purpose and to be valid as a legislative exercise of police power, the legislation must be clearly demanded for the public safety, health, peace, morals, or general welfare." McCoy v. Town of York, 193 S.C. 390, 8 S.E.2d 905, 907 (1940), citing Gasque, Inc. v. Nates, 191 S.C. 271, 2 S.E.2d 36 (1939); see also 51 Am.Jur.2d Licenses and Permits § 17 ("As a justification for a licensing requirement as a proper exercise of the police power, the courts generally require a showing that the requirement at least tends to promote the public health, morals, safety, or welfare.") (footnotes omitted).

"The Board must . . . 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." Huber v. Bd. of Physical Therapy Examiners, 316 S.C. 24, 28, n.2, 446 S.E.2d 433, 435, n.2 (1994), citing Wilson v. Bd. of Medical Examiners, 305 S.C. 194, 196-197, 406 S.E.2d 345, 346 (1991).

"The standard by which the validity of an ordinance enacted under the exercise of police power is tested is that the exercise of the power should extend only to reasonable and necessary measures." McCoy, 8 S.E.2d at 907. On this point we quote from 11 Am.Jur. at page 1074:

Too much significance cannot be given to the word 'reasonable' in considering the scope of the police power in a constitutional sense, for the test used to determine the constitutionality of the means employed by the Legislature is to inquire whether the restrictions it imposes on rights

5. THE ADMINISTRATIVE LAW JUDGE ERRED BY CONCLUDING THAT ACTUAL HARM IS NOT A NECESSARY ELEMENT OF A PROFESSIONAL DISCIPLINARY PROCEEDING.

There 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 and that the right of a person to practice his profession for which he has prepared himself is property of the very highest quality. Ezell v. Ritholz, 188 S.C. 39, 198 S.E. 419; Cavassa v. Off, 206 Cal. 307, 274 P. 523. However, it may be observed that no person has a natural or absolute right to practice. . . . It is a right granted upon condition. Dantzler v. Callison, 230 S.C. 75, 94 S.E.2d 177, 186 (1956) (other citations omitted). "The granting of a license to practice certain professions is the method taken by the State, in the exercise of its police power, to regulate and restrict the activity of the licensee. He takes the same, subject to the right of the State, at any time, for the public good to make further restrictions and regulations." Dantzler, 94 S.E.2d at 188.

However, "[t]he right to hold specific employment and the right to follow a chosen profession free from unreasonable governmental interference come within the liberty and property interests protected by the Due Process Clause [of the Fourteenth Amendment]. The liberty interest at stake is the individual's freedom to practice his or her chosen profession; the property interest is the specific employment." Sloan v. South Carolina Bd. of Physical Therapy Examiners, 370 S.C. 452, 636 S.E.2d 598 (2006), quoting Brown v. S.C. State Bd. of Educ., 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990).

Appellants do not grasp the argument made by the Board with regard to proof of harm of a specific nature as being an element of a professional disciplinary proceeding.

frank cavitation in the public health setting was appropriate “[s]imply because you don’t know if the patient is ever going to come back.” (R. p. 380, lines 9-10).

The Administrative Law Judge erred by concluding that “Dr. Simonsen based even his revised view on an unduly optimistic scenario”, that scenario being the informing of the parents of a child who had sealants placed over a carious lesion that the caries is present and that the attention of a dentist is necessary. Appellants cannot comprehend why the Administrative Law Judge would call this an “unduly optimistic scenario” when testimony was provided by the Appellants indicating that the parents were properly advised to have their children visit a dentist in these cases and that all of their patients’ parents are properly advised to do so. (R. p. 410, lines 10-21). All children who are seen in school-based dental health programs are referred to a dentist for additional and follow-up treatment, regardless of whether they are suspected to have caries. (R. pp. 393-394; R. pp. 410-411).

Further, no allegation was made in these cases that the sealants at issue were inadequately placed. (R. pp. 61-65). Because his statements were made on that presumption, they are not applicable here and the Administrative Law Judge erred by making assumptions regarding Dr. Simonsen’s testimony being influenced by the parties that had retained him. By misconstruing the statements made by Dr. Simonsen to reach erroneous conclusions, the ALC heavily relied on those erroneous conclusions to severely discredit the testimony and expert opinions of Dr. Simonsen. Dr. Simonsen’s opinions were not influenced by those who hired him in this matter. If his statements are properly construed and his opinions are given their proper weight, a much different conclusion must be reached than the ones reached by the Board and the ALC.

4. THE ADMINISTRATIVE LAW JUDGE ERRED BY EQUATING DR. SIMONSEN'S STATEMENTS REGARDING INADEQUATELY PLACED SEALANTS TO CONCLUSIONS THAT PLACING SEALANTS OVER FRANK CAVITATION IS INAPPROPRIATE.

According to the ALC and the Board, Dr. Sneed's testimony, upon which the Board apparently relied, can be summarized as follows:

1. There is only one standard of care in South Carolina. . . . That standard of care applies in both public health settings and in private dental offices.
2. That standard of care is that sealants should not be placed over decay which is frank, i.e., involving gross carious lesions.
3. A dental hygienist should be able to detect frank cavitation on a molar [through] visual examination with the naked eye and the use of explorer tools.

See (R. p. 11).

In its brief filed with the ALC, the Board made a specious argument that the testimony of Appellants' expert, Dr. Simonsen, substantiates Dr. Sneed's opinion. Apparently, the ALC erroneously subscribed to that argument. Id. In an e-mail, Dr. Simonsen stated that there is a "potential for limited harm" in situations where sealants are placed over "frank" cavitation because carries or decay could progress under an inadequately placed sealant thereby leading to both increased decay and a false sense of security on the part of the patient and the parent. (R. p. 378, lines 3-7). (Emphasis added.) The Board and the ALC incorrectly presume that Dr. Sneed and Dr. Simonsen are in agreement that it is inappropriate to place sealants over frank cavitation. Rather, Dr. Simonsen's e-mail states his qualification that "[t]his is assuming the worst-case scenario" and was referring to a tooth with soft dentin and massive evidence of decay. Further, Dr. Simonsen testified his opinion quite clearly that placement of sealants on

“frank” cavitation, he acknowledged that the diagnosis was made only after the fissurotomy, when he exposed the carious lesion. No one described the decay as “clinically obvious,” and the photographs and testimony, especially Dr. Adams’, clearly refutes the Board’s conclusion that it was.

The language regarding “clinically obvious” adopted by the panel apparently comes from the diagnosis by Dr. Adams’ hygienist of “rampant decay,” however, her “diagnosis” does not relate to tooth number 3. It is a general description of the patient’s mouth as a whole, and the charges here relate only to Hygienist 2’s treatment of tooth number 3. We know from the direct evidence that tooth number 3 did not have “clinically obvious” decay. This finding is erroneous and must not stand.

As asserted above, the ALC applied the incorrect standard of review to this case. This error is further evidenced by the Administrative Law Judge’s statement regarding this issue: “The burden is on Appellant to show convincingly that the Board’s Final Order is without evidentiary support or is arbitrary or capricious as a matter of law.” (R. p. 7). The ALC should have paid no deference to the Board’s decision due to the fact that this was a novel issue of law regarding the interpretation of a statute. See Sloan, supra. Yet, even applying the APA standard of review, while minimal evidence was presented by the Board’s witnesses regarding the Appellants placing of sealants over disputed levels of decay, this evidence was by no means substantial and was clearly not the “greater weight of the evidence” as asserted by the Administrative Law Judge. See (R. p. 6). Further, as argued below, if a separate standard of care is recognized by this Court for dental hygienists practicing in the public health setting, then the Board’s witnesses’ testimony is clearly insufficient to establish a deviation from that standard of care.

is obviously an overstatement, utilized in support Dr. Adam's decision to report Hygienist 2 to the licensing board. (R. p. 724). "... wrote & sent complaint letter to the S.C. LLR w/ photos.").

Interestingly, Dr. Adams claimed to be completely unaware of the considerable research that sealants can help arrest decay.

Q. And you're familiar with the fact that a properly placed sealant can in fact arrest the development of caries in a tooth if it's properly placed and if the child doesn't see a dentist after that, then we've accomplished some preventative dentistry for that student, correct?

A. According to Dr. Simonsen, yes.

Q. You disagree with Dr. Simonsen?

A. I don't have an opinion on that.

(R. p. 463, lines 8-17).

Q. ... And you don't have an opinion as to whether the placement of sealant on incipient or other kinds of caries in fact seals off the nutrients and stops growth of the caries, correct? You don't have an opinion on that?

A. I have a hard time believing it, but yet I know there are studies on both sides.

(R. p. 465, line 23-p. 466, line 4).

There is insufficient evidence to support the ALC's and the Board's conclusions that Hygienist 2 placed the sealant over "clinically obvious decay" on tooth number 3. As is apparent from Dr. Adams' testimony, only by probing the tooth with the explorer was he able to confirm his diagnosis; the only visible clue he described as the "halo" which he observed from visual inspection. In its plain and ordinary meaning, halo insinuates a ring or circle, not "clinically obvious" decay. Dr. Simonsen described the decay he observed from the photograph as "incipient." While Dr. Adams described it as

examining photos taken by the treating dentist, testified that the visual inspection of the tooth appeared to be incipient decay. (R. p. 471, lines 4-16). The treating dentist, Dr. Adams, did not describe the decay on number 3 as "clinically obvious." Dr. Adams' hygienist noted "rampant decay" in a visit on September 2, 2003, but Dr. Adams himself only planned restorations to teeth numbers 2, 3, and 4 for the next visit. (R. p. 724).

Dr. Adams' diagnosis depended on a physical examination of the teeth, "using my explorer, my sharp explorer with a light touch, I got a stick . . . just like leather-like, put it in leather and it pulls back and you get a little stick." (R. p. 454, lines 5-9). As to tooth #3, he testified that he was able to discern there was likely decay in the tooth using the explorer, and also because on visual inspection because of "a dark halo on the occlusal surface" of the tooth. (R. p. 454, lines 10-13). Had the decay been "rampant" or "obvious" there would have been little need to probe the tooth with the explorer to make the diagnosis, and the visual diagnosis would have been something more than a "halo" around the tooth.

Dr. Simonsen accurately described the carious lesion on tooth number 3 as "incipient." See Petitioner's Exhibit 13. Only after removing the sealant and performing a fissurotomy is decay visible to the naked eye. (R. pp. 725-727).

A. [by Dr. Adams] . . . So the next photo that I took was the one . . . [that] says 'number 3 after sealant removal and fissurotomy. . . fissurotomy is just removing the enamel that's in the grooves. . . gaining access to the decay.'

(R. p. 458, lines 4-7). Only after performing the fissurotomy was Dr. Adams able to conclude that he "was correct" in his initial thought that decay was present. Id.

Dr. Adams described the lesion as "frank" cavitation, which he based upon the visually observing what he described as a "halo." (R. p. 454, line 11-p. 456, line 4). This

incipient decay. (R. p. 471, lines 4-16). Only after removing the sealant and performing a fissurotomy is decay visible to the naked eye. (R. pp. 725-727). In fact, only after performing the fissurotomy was Dr. Adams able to conclude that he "was correct" in his initial thought that decay was present.⁷ (R. p. 457, line 19-p. 458, line 17). Appellants would note that while Dr. Adams may have described it as "frank" cavitation, he acknowledged that the diagnosis was made only after the fissurotomy, when he exposed the carious lesion. Id. Moreover, Dr. Adam's testimony was improperly relied upon by the Board and the ALC as evidence that sealants were placed upon teeth which were obviously decayed. In fact, Dr. Adams testified to the exact opposite. Dr. Adams stated, "Well, clinically speaking, you don't know the depth of it [speaking on tooth decay]." He thereafter described how the use of dental tools allowed him to conclude the teeth had only decay and in the next breath re-characterizes the extent of the decay as frank and visible by his naked eye. Again, Dr. Adams is speaking in post-fissurotomy terms. This negates the Board's conclusion, which was affirmed by the ALC, that decay was "obvious" and is in error. The use of tools to discover decay cannot be considered "obvious decay."

The Panel found that Hygienist 2 placed sealant over "clinically obvious decay." Presumably, the panel was referring to tooth number 3, which was the tooth about which the testimony was offered (although the Panel's report does not attempt to identify the tooth in question). There is no testimony in the record which describes the decay on tooth number 3 as obvious. In fact, Hygienist 2's expert, Dr. Richard Simonsen,

⁷ As Dr. Simonsen explained, "we can't define the actual status of that tooth without extracting it and sectioning it and examining it histologically. . . . I think we have to admit it, that we are guessing when it comes to diagnosing the carious status of pits and fissures. We do our best based on our clinical experience and . . . but that's what it is, a judgment." (R. p. 344, line 20-p. 345, line 5).

panel didn't say, concluding only that Hygienist 1 had placed sealant "over obvious decay on several teeth." (R. p. 58). In the absence of testimony and exhibits establishing exactly what teeth were allegedly the subject of the deviation from the standard of care, any finding of misconduct would be inappropriate and a deprivation of Hygienist 1's due process rights.

Based on the Board's final order, the testimony on which it relied and on which the ALC relied was inconsistent. The Board noted in paragraph 3 of its final order that Dr. Chadwick testified that his opinion was that there was gross decay with regard to teeth numbers 3, 15 and 31 (R. p. 37). However, the Board noted in paragraph 6 of its final order that Dr. Sneed testified that his opinion was that there was gross decay with regard to teeth numbers 19, 23 and 31. (R. p. 38). Appellants would note that tooth number 23 was not even sealed by Hygienist 1. (R. p. 36). Despite these inconsistencies even amongst the experts that the Board apparently chose to rely upon, the Board's conclusion was that Hygienist 1 had improperly sealed teeth numbers 3, 15, 19 and 31. (R. p. 40). The Board made this conclusion while ignoring the fact that its own expert, Dr. Chadwick, conceded that the placement of sealants on decayed teeth does not harm patients and while ignoring the evidence that sealants can slow the progression and even arrest caries. (R. p. 231, lines 4-8; R. p. 366, lines 9-16).

Hygienist 2

Regarding Hygienist 2, Appellants reiterate the expert testimony of Dr. Simonsen that visual inspection of the patient's teeth prior to the fissurotomy⁶ appears to show

⁶ According to the treating dentist, Dr. Adams, a fissurotomy entails "removing the enamel that's in the grooves. . . . Gaining access to the decay." (R. p. 458, lines 10-13).

fillings. . . it looks as though we did about twelve filings on one side of her mouth . . . on that particular day.” Id.

Dr. Chadwick agreed with the Board’s attorney that the identity of the teeth he filled was in his records, “in the left hand column.” (R. p. 211, lines 17-19). He filled another twelve teeth, on the other side of the mouth, at the next visit, for a total of 24 fillings. (R. p. 212, lines 13-20). However, no one ever said which teeth they alleged Hygienist 1 should not have sealed.

Dr. Chadwick offered photos of several teeth, before he had excavated and restored them, showing the sealants placed on the teeth by Hygienist 1. The identification on the photos reflects the number of the tooth shown in the photo. (R. pp. 712-713; R. p. 214, lines 1-7). The photos identify teeth numbers 2, 3, 14, 15, 18, 19 and 31. As is evident from the photos, some of the teeth were only partially sealed. Dr. Chadwick’s testimony is that he filled all of the “back teeth”, including the ones shown in the photographs. (R. p. 212, lines 18-20).

Hygienist 1 testified, and her records reflect, that she cleaned the patient’s teeth and applied sealants on numbers 2, 3, 14, 15, 19, 30 and 31 on April 27, 2003. (R. p. 414, lines 2-16; R. pp. 715-717). She noted that there was decay throughout the mouth, the fissures were “incredibly stained” and the teeth were uniformly “sticky.” Id. Hygienist 1 was knowledgeable enough not to use the explorer too firmly, because she is aware that you can cavitate the patient’s teeth by doing so. Id. “You can transfer bacterium from one tooth to another, so I try to be conservative about that.” Id.

We do not know which of M.A.’s teeth were the subject of the alleged deviation from the standard of care. The complaint didn’t say, the testimony didn’t say, and the

3. THE ADMINISTRATIVE LAW JUDGE ERRED BY CONCLUDING THAT THE BOARD'S FINDING THAT BOTH APPELLANTS PLACED SEALANTS OVER OBVIOUS DECAY IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The issues before the Board, then the ALC, in these cases included allegations that one of the Appellants placed dental sealants over "gross decay" or "gross caries." While it is not possible to seal over gross decay that manifests itself in soft decayed dentin, it is possible to seal over gross decay that is underneath enamel. (R. pp. 358-359). The record in these cases reflects that the Board's finding that both Appellants placed sealants over obvious decay is not supported by substantial evidence. Further, "[i]t's perfectly easy to seal even large hidden carious lesions, and . . . it is in the best interests of the patient to do that if . . . you judge that it is unlikely that the child will go for further dental care." (R. p. 359). "In the situation of trying to reduce risk to a child . . . it's good policy to seal caries where the other alternatives options of the child are minimal." (R. p. 360).

Hygienist 1

As to Hygienist 1 [Docket No. 06-ALJ-11-0562-AP (Case No. 04-45)], the formal accusation did not specify which teeth of the patient M.A. formed the basis for the Board's allegations of professional misconduct against Hygienist 1 as to the accusation that sealants were placed on gross caries. (R. pp. 64-65). During his testimony at the hearing the treating dentist, Dr. Chadwick, also did not specify which teeth of the patient M.A. formed the basis for the Board's allegations of professional misconduct, although he did, by reference to his chart, indicate what teeth he had filled when he first saw M.A. (R. p. 211, lines 1-19). "I did drill fillings on one side of the mouth. . . We did a lot of

and partially lost, it will not create harm.” (R. p. 353, lines 12-13). Thus, when faced with possible caries on a tooth on a student, in a public health setting, who may or may not receive follow-up dental care, the standard of care is to place a sealant on the tooth. (R. pp. 355-356). If the student receives no follow-up care, the growth carious lesion may have been arrested. Even if the seal is not properly applied and is partially lost, the sealant which remains provides some level of protection against the development of pit and fissure caries. If the student subsequently goes to a dentist and it is determined that there is caries on the tooth which requires restoration, the sealant is easily removed from the tooth without harm or pain to the patient.

With disciplinary proceedings having been brought as a result of the placement of sealants in the public health setting, “[w]e have hygienists who are scared to place sealants. And to me, that’s a tragedy. It’s a tragedy of our profession. Sealants should be much more widely used, they’re clearly beneficial.” (R. pp. 353-354). A dental hygienist in the public health setting has to gauge several factors, “and if the judgment is that the likelihood of them going to dentist is small, then I think the natural and only decision is you seal the tooth . . . you’re obligated, I believe, to do whatever you can to slow the progress of the disease. (R. p. 357).

Based on the foregoing, the ALC and the Board erred by failing to recognize that there is a different standard of care applicable to the public health school setting and erred by failing to evaluate the care provided by the Appellants in that light.

Dr. Simonsen acknowledged that one factor in determining how to treat a tooth with possible caries is the likelihood that the patient is likely to obtain dental care. (R. p. 346). With that in mind, "the question before us really is can I seal over a small carious lesion or should I remove the caries." (R. p. 347). Clearly, in the school-based program, the hygienists don't have the option of removing the caries. So, when in doubt, after cleaning, they seal, even if there is a suspicion of caries on the tooth.

The next question, then, is whether the placement of sealants on teeth that may have caries provides good dental care to the patients. It is clear that sealants, properly applied, cut off the flow of oxygen to the site and, if there is caries present, the growth of the caries is arrested. (R. pp. 391-392). Studies from Stanley Handleman and Ron Jordan, as far back as 1976, have addressed the development of caries in teeth that have been sealed with the caries in place. These studies have demonstrated that, not only is no harm done from the placement of the sealants, the sealants can arrest the growth of caries, thereby benefiting the patient, especially if no follow-up dental care is received. (R. pp. 348-349).

Thus, the undisputed conclusion is:

If the lesion is sealed off [using sealants], a successful seal will not allow the bacteria to remain in that lesion to produce acid because they're cut off from the source of nutrition and the lesion will stop progressing. It will not necessarily remineralize or heal itself, but it will stop progressing.

(R. p. 350).

Other research concludes that the placement of a sealant on a caries lesion does not cause any harm to the tooth. (R. p. 352). The usual susceptibility to decay is not altered by having a sealant placed on the tooth. Id. It is absolutely untrue, as argued by at least one of the state's witnesses, that sealants promote decay. "Even if it is placed,

to continue to build the evidence related to sealant effectiveness in preventing caries progression, especially in cavitated lesions. Id. at 174. It is extremely important to note that this report recognizes the sealing of cavitated lesions as an accepted practice that does not deviate from the standard of care.

In understanding the use of sealants in any dental setting, it is imperative to note the difficulty clinicians have in diagnosing caries in the first place. In his post-graduate work in cariology, Dr. Simonsen explained that:

It became very clear that not only . . . are the multifactorial causes of dental caries difficult to detect sometimes, but also it's very difficult for an individual clinician to diagnose caries. . . . It's . . . a very difficult disease to definitively detect and it requires multiple bits of information.

(R. pp. 343-344).

Dr. Adams⁵ drew the same conclusion in his testimony as well. "Clinically speaking," he said, one does not know the extent of decay. A doctor's conclusion of only decay does not equate that Appellants' should have identified obvious decay, if that is even the proper standard.

Dr. Simonsen provided examples of the difficulty in diagnosing caries using the visual and tactile senses by using a series of slides showing what appear to be carious lesions that turned out to have no caries present. (R. pp. 344-345). He concluded:

We have to admit it, that we are guessing when it comes to diagnosing the carious status of pits and fissures. We do our best based on our clinical experience and the knowledge that we've learned and the examination of a particular site at a particular time, and come to a professional judgment; but that's what it is, a judgment. . . .

Id.

⁵ Dr. Benjamin Adams is a dentist in Simpsonville, South Carolina who was introduced by as an expert in general dentistry by SCLLR in the matter of Anonymous No. 2, R.D.H.

some dating as far back as the 1970s, which support his position, it appears that Dr. Sneed needs something more to change his antiquated way of thinking. Yet, Dr. Sneed was deemed by the Dental Board to be more credible.

On that note, a new report recently published in the Journal of Dental Research, which was authored by eleven experts in the field of dental health, directly contradicts the testimony and evidence presented by the Board's expert. See Griffin, S.O., et al, The Effectiveness of Sealants in Managing Caries Lesions, Journal of Dental Research, Volume 87(2), pp. 169-174 (February 2008).⁴ Indeed, the Report virtually mirrors the expert testimony provided by Appellants' expert, Dr. Richard Simonsen, a world-renowned expert on preventative and public health care dentistry, and on dental sealants particularly. Further, the research and Report were funded by the Centers for Disease Control (CDC) and several of the authors of the Report are employed in critical positions for the CDC. Also, one of the authors is a professor at the New York University College of Dentistry.

The report substantiates that the Board's expert's opinions in these matters were erroneous. It begins by stating that "[t]here is strong evidence that sealants are effective in both clinical and school settings for preventing caries in children at various levels of risk." Id. at 169. The report concludes that sealing non-cavitated caries in permanent teeth is effective in reducing caries progression. Id. at 169, 174. Further, while electing to refrain from reaching specific conclusions regarding cavitated teeth due to the fact that non-cavitated lesions accounted for almost 90% of the teeth in the study, the data reflected in the report shows that sealing cavitated lesions slowed progression of the lesions significantly. Id. at 173. The report recommends that further studies are needed

⁴ See <http://jdr.iadrjournals.org>

counties are much more advanced in terms of caries research than the United States and other countries. Id. Just because the U.S. and South Carolina have been slower to adopt this line of thinking generally, the Board should not have discounted the qualified testimony of someone who subscribes to the newer ideas and methods and determine such persons are deviating from the standard of care.

“In King v. Williams, 276 S.C. 478, 279 S.E.2d 618, 620 (1981), this court abolished the ‘locality rule’ which adjudged a physician's skills against those of other physicians in his community, and adopted a professional standard of care not bound by any geographical restrictions. We articulated the standard of care which must be observed by a physician as ‘that of an average, competent practitioner acting in the same or similar circumstances.’” Doe v. American Red Cross Blood Services, S.C. Region, 297 S.C. 430, 433-434, 377 S.E.2d 323, 325 (1989), quoting King, 279 S.E.2d at 620. “[I]n a professional negligence cause of action, the standard of care that the plaintiff must prove is that the professional failed to conform to the generally recognized and accepted practices in his profession. If the plaintiff is unable to demonstrate that the professional failed to conform to the generally recognized and accepted practices in his profession, then the professional cannot be found liable as a matter of law.” Id. at 435, 377 S.E.2d at 326.

The Board failed to provide the testimony of a hygienist that works in the public school setting and who indicates he/she would act differently under similar circumstances. The Board's expert, Dr. Sneed, indicates that he would need five years of research before he will entertain the idea of changing his opinion on a subject. (R. p. 270, lines 17-21). Yet, even though Dr. Simonsen provided citations to many studies,

dentistry, particularly with an expertise in sealants and cariology. (R. pp. 337-340). Dr. Simonsen serves as the expert for the Center for Disease Control on school-based sealants projects. Id. He explained the purpose of school-based sealant programs is "to introduce children to preventative dentistry and to get them understanding, and their parents understanding, that they need to continue dental care throughout life and, if they have problems, to visit the dentist." (R. p. 340). To combat Dr. Simonsen's testimony, the Board introduced Dr. William D. Sneed, who admitted that it takes five years of research to change his opinion on a topic and who conceded that he only "believes" he is familiar with the general responsibilities of dental hygienists. (R. pp. 270-272).

The fact that he was not adequately familiar with the responsibilities of the hygienists is further demonstrated by Dr. Sneed's uncertainty regarding the tools hygienists use and his comparison to what dentists use. (R. pp. 284-287). Clearly, Dr. Sneed's credibility on the issues of sealants and placement by hygienists does not come close to rivaling that of Dr. Simonsen's credibility.

Also clearly, Dr. Sneed's resistance to change and resistance to new and improved methods of practicing dentistry and hygienistry make him an unreliable witness regarding a practice that is just beginning to be accepted in the United States even though it has been widely accepted in other parts of the world for years. The United States lags behind other countries in recognizing the benefits of sealants. Sealants are much more widely used in Europe and particularly Finland, where Dr. Sorensen estimates that eighty-five percent of all twelve-year olds have sealants on their teeth, largely through school-based public health programs. (R. pp. 360-361). In fact, Denmark has a standard of care which specifically includes applying sealants on incipient lesions. (R. p. 362). Scandinavian

dentist, where there is a presumption that there will be continuous care. (R. pp. 316-317).

Because the likelihood of follow-up dental treatment in the public health setting is so small, the prevailing view regarding sealants in this setting is, "when in doubt, use sealant." (R. p. 317).

When you have a group of individuals who are not in continuous care, you are much more . . . lavish in determining when to seal. In Atlanta [the CDC] in '95, the public health representative is stating when in doubt in a public health setting, seal. . . .

Standard of care" in the public health setting is not the standard of care you would find in perio in a general office. The tools that you use are different, the theories are . . . philosophically different . . . the concepts of public health are different and they are a specialty.

(R. pp. 317-319). The ALC's order supports this conjecture in footnote 5. (R. p. 9).

In the public health setting, the standard of care permits the dental provider to "accept [for sealing] something that is more incipient or wider or bigger because that's better than nothing." (R. p. 329). "[W]e're more likely to seal something they might not in private [practice] because of . . . the factors . . . variables that we have to deal with." (R. p. 331). In assessing how to proceed and whether to seal a tooth in a public health school setting,

You really have very little control over whether you're going to see the patient again or not . . . perhaps . . . [you] have to assume that if you're seeing a child for the first time at the dentist and they are 12, 13, 14 years old, you have to assume that the likelihood of them following through on your advice . . . is small. And in that case, [the hygienist] has to make some difficult and different decisions than a dentist would in private practice."

(R. p. 355).

Dr. Richard Simonsen, probably the most published scholar on the issue of dental sealants and school-based dental health programs, testified as an expert in the field of

the United States, and which are based upon the Centers for Disease Control 1994 Sealant Workshop. (R. p. 390).

South Carolina's guidelines for use of sealants in the public school setting specifically recognize that dental sealants have an established history of both preventing carious lesions as well as arresting existing caries. The guidelines provide, in part:

Sealants have been demonstrated to be a safe and effective long-term method to prevent pit and fissure caries. . . . In addition to preventing carious lesions, sealants can arrest caries progression. . . . Patients who have teeth with questionable decay should . . . be considered for therapeutic sealants. . . . Interim dental sealant may be used in community and school-based programs. These sealants are used to slow down the decay process in some teeth that have dentinal caries. . . . The goal of preventing caries through widespread use of sealants will be accomplished best by providing preventative sealants to individuals at high risk and placing therapeutic sealants on carious lesions that are limited to enamel.

(R. pp. 392-393; R. p. 878).

All children who are examined in school-based dental health programs are referred to a dentist for additional and follow-up treatment, regardless of whether they are suspected to have caries. (R. pp. 393-394; R. pp. 410-411). Unfortunately, the statistics on all school-based dental programs establish that seventy-five to eighty-five percent of the children seen in the public health program have never seen a dentist prior to their first contact with the public health program. (R. p. 319). Additionally, only approximately fifty percent of the children who are seen for preventative dental care by the hygienists program actually do follow-up with a dentist. (R. p. 394). Thus, for a great many children who are seen in the school-based program, the care provided by the dental hygienists is the only dental care the children will receive. Id.

In assessing the standard of care for a public health program, it is critical to understand that the rate of follow-up is altogether different than in the setting of a private

2. THE ADMINISTRATIVE LAW JUDGE ERRED BY CONCLUDING THAT THE STANDARD OF CARE FOR DENTAL HYGIENISTS IS THAT SEALANTS SHOULD NOT BE PLACED OVER FRANKLY OR OBVIOUSLY DECAYED TEETH, REGARDLESS OF THE SETTING IN WHICH THE HYGIENISTS PRACTICE.

The ALC and the Board failed to recognize that there is a different standard of care applicable to the public school setting than in the private healthcare setting and failed to evaluate the care provided by the Appellants in that light. Appellants presented significant testimony regarding the purposes of the school-based dental health program, and the standards applicable to the care provided in that setting. (R. p. 354, line 19 – p. 366, line 16; p. 379, line 7 – p. 380, line 10). The Board was specifically asked to identify and set forth the standard of care applicable to the school-based dental health program before evaluating the facts and circumstances presented. Not only did the Board fail to do so, it failed to even acknowledge that the treatment provided was provided in the public health setting or that there might be a different standard applicable.

The preventative dental care provided by the dental hygienists in the school setting follow guidelines and protocols prescribed by DHEC in 2001. (R. pp. 385-398). These guidelines were created via collaborative efforts by DHEC, under the guidance of its dental director, Dr. Ray Lala, and with funding from the Centers for Disease Control, and its dental health coalition, including representatives from the American Dental Association, the Dental Hygienists Association, the Board of Education, and several advocacy groups for children. (R. pp. 389-390). South Carolina's protocols are drawn from findings and recommendations regarding use of dental sealants in the school-based public health setting, which are uniformly applied in school-based programs throughout

question the Board's unilateral and unsupportable decision to arbitrarily determine, without adequate notice either to the profession at large or to the individual Appellants, that placing sealants on teeth in certain situations constitutes professional misconduct when the applicable statute does not set forth any criteria regarding the placing of sealants. See Section 40-15-80(B), supra ("In school settings, licensed dental hygienists may apply topical fluoride and may perform the application of sealants and oral prophylaxis under general supervision, with written permission of the student's parent or guardian.").

Based on our Supreme Court's ruling in Sloan, the ALC should not have applied the APA standard of review to this case and should have instead assessed the legal issues independently and interpreted it in a way comporting best with the law and public policies of the State of South Carolina and with the ALC's sense of law, justice, and right. Such an assessment would have likely rendered an outcome reversing the Board's decision in this matter.

Based on the foregoing, this Court should assess the legal issues independently and interpret them in a way comporting best with the law and public policies of this state and this Court's sense of law, justice, and right. After such an assessment, deciding the questions at issue here with no particular deference to the Board or the ALC, this Court should conclude that a different standard of care exists for dental hygienists working in a public health setting. Further, this Court should conclude that the Appellants did not deviate from that standard of care. Therefore, this Court should reverse the ALC's decision in this matter.

otherwise have received dental care. The matters set forth hereinabove arose from the Appellants' work with this program.

ARGUMENT

1. THE ADMINISTRATIVE LAW JUDGE ERRED BY APPLYING THE INCORRECT STANDARD OF REVIEW TO THE BOARD'S DECISION IN THIS MATTER.

The ALC decided this case under the general standard of review used in the majority of administrative cases reaching the ALC in an appellate posture, which is set forth in the Administrative Procedures Act (APA). Specifically, under that standard, the Board's decision could have only been reversed by the ALC if it was "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(A)(6)(e). The Supreme Court has made it clear that the standard of review in a case such as this one is different.

In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with **no particular deference to the lower court.** Sloan v. Bd. of Physical Therapy Examiners, 370 S.C. 452, 466, 636 S.E.2d 598, 605 (2006) (internal citations omitted) (emphasis added). The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right. Id. at 467, 636 S.E.2d at 605-606 (internal citations omitted).

The Appellants raised a novel question of law regarding the Board's interpretation of statutes related to defining misconduct for dental hygienists in the public health setting. See S.C. Code Ann. §40-15-80(B) (Supp. 2007). Specifically, Appellants

In 2003, the General Assembly amended the law again to hold that the pre-examination requirement did not apply in public health settings. In so doing, the General Assembly thereby recognized that the school-based public health setting is different, both in theory and in application, than the setting of a private dentist's office, and that therefore, different rules apply. The Board again attempted to supersede the legislature's action, which led to the filing of an FTC complaint against the Board. The Federal Trade Commission alleged that the Board acted illegally in depriving children in South Carolina of preventative dental care. In the Matter of the South Carolina State Board of Dentistry, FTC Docket No. 9311 (September 15, 2003). These charges arose out of deliberate and repeated acts by the Board seeking to prevent the operation of a school-based, public health dentistry program which provides preventative health care for school-aged children. According to the Opinion and Order of the FTC dated July 30, 2004, "more than 40 percent of children in South Carolina are Medicaid-eligible and, in the early 1990s, only 12 percent of those received preventative health care." (R. p. 732).³ Ultimately, the FTC and Board entered into a Settlement Agreement and Consent Order (Order dated September 6, 2007, 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. . ."). Decision and Order, Federal Trade Commission, Docket No. 9311 (September 6, 2007).

In the interim, the public health school-based dental program has continued, providing preventative dental care to tens of thousands of children who might not

³ This order was issued by the FTC in response to a motion to dismiss filed by the Board. The matter is currently pending on appeal before the Fourth Circuit Court of Appeals.

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. The 1988 act allowed licensed dental hygienists to provide preventative dental care in schools. The program was not particularly effective, largely because it required a dentist to examine each student immediately before the hygienists were able to provide services. (R. pp. 736-737).

As a result, in 2000 the General Assembly amended the law to eliminate the need for contemporaneous examination by a dentist prior to the provision of preventative dental treatment. 2000 Act No. 298. It further 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

In July 2001, the Board enacted an emergency temporary regulation which sought to overrule the 2000 amendments, and reinstate the pre-examination requirement. The Board proposed a permanent regulation similar to the emergency regulation, but following a hearing before the Administrative Law Court, Case No. 01-ALJ-11-0348-RH, it was determined that the proposed regulation "was unreasonable and contravened state policy to the extent it reinstated the dentist pre-examination requirement that the legislature had eliminated in 2000." (R. p. 740). The Board did not submit the proposed regulation to the General Assembly and the proposed regulation therefore did not take effect. (Id).

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).

charges of substandard care with respect to the placement of sealants over decayed teeth. The Board accepted the recommendation of an anonymous public reprimand of hygienists 1 and 2, but did not accept the panel recommendation of a fine in the case of Hygienist 2.

At the Final Order Hearing, the hygienists moved to recuse the Board members. While two Board members did recuse themselves, the remainder declined to do so. The hygienists also renewed their motion to be supplied with copies of the initial complaints. That motion was also denied. Final Orders in the cases of Hygienist 1 and 2 were issued on May 8, 2006. The hygienists appealed from those orders and the matter was heard by the ALC on January 31, 2007. Judge Matthew's issued her Order affirming the Dental Board on October 25, 2007. This appeal followed.

STATEMENT OF THE CASE

This matter involves two cases, which were initiated by the Board of Dentistry in October of 2004. The Board alleged in each case that the Appellants, Hygienist No. 1 and Hygienist No. 2, who are licensed dental hygienists, placed sealants over obviously decayed teeth of school age children. The hygienists denied those allegations, and also alleged that their actions were within the standard of care for their industry. Prior to the hearing, the hygienists moved for production of all complaints filed against them. This request was denied by a letter from H. Rion Alvey, Administrator of the Board of Dentistry, dated October 12, 2005. The hygienists then filed an appeal from that letter' with this Court. Judge Kittrell heard oral arguments on November 18, 2005, and dismissed the appeal as interlocutory by Order dated November 22, 2005.

This matter was heard by a panel of the Board on December 1 and 2, 2005. By agreement of the parties and the panel, the expert testimony presented by both sides was applied in both cases.¹ After hearing evidence, the panel issued written reports and recommendations for the hygienists on February 6, 2006. In the cases of Hygienists 1 and 2, the panel found violations of the standard of care. The panel recommended that Hygienist 2 be given a public reprimand and a fine of \$500, and that Hygienist 1 be given a public reprimand, but not fined. At the final order hearing, which was held before the Board on April 28, 2006, counsel for LLR requested that the Board follow the panel's recommendation as to both cases. The only exception was LLR's request that the recommended sanctions be made public but anonymous. This request was based on the fact that these hygienists were the first ones in the public school dental program to face

¹ Cases were tried simultaneously involving four hygienists who all provided preventive dental treatment under the public school program. Charges were dismissed against two of the hygienists.

ISSUES ON APPEAL

1. WHETHER THE ADMINISTRATIVE LAW JUDGE ERRED BY APPLYING THE INCORRECT STANDARD OF REVIEW TO THE BOARD'S DECISION IN THIS MATTER.
2. WHETHER THE ADMINISTRATIVE LAW JUDGE ERRED BY CONCLUDING THAT THE STANDARD OF CARE FOR DENTAL HYGIENISTS IS THAT SEALANTS SHOULD NOT BE PLACED OVER FRANKLY OR OBVIOUSLY DECAYED TEETH, REGARDLESS OF THE SETTING IN WHICH THE HYGIENISTS PRACTICE.
3. WHETHER THE ADMINISTRATIVE LAW JUDGE ERRED BY CONCLUDING THAT THE BOARD'S FINDING THAT BOTH APPELLANTS PLACED SEALANTS OVER OBVIOUS DECAY IS SUPPORTED BY SUBSTANTIAL EVIDENCE.
4. WHETHER THE ADMINISTRATIVE LAW JUDGE ERRED BY EQUATING DR. SIMONSEN'S STATEMENTS REGARDING INADEQUATELY PLACED SEALANTS TO CONCLUSIONS THAT PLACING SEALANTS OVER FRANK CAVITATION IS INAPPROPRIATE.
5. WHETHER THE ADMINISTRATIVE LAW JUDGE ERRED BY CONCLUDING THAT ACTUAL HARM IS NOT A NECESSARY ELEMENT OF A PROFESSIONAL DISCIPLINARY PROCEEDING.

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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Carolyn C. Matthews, Administrative Law Judge

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Anonymous No. 1, R.D.H., and
Anonymous No. 2, R.D.H.,

Appellants,

v.

South Carolina Department of Labor,
Licensing and Regulation, State Board
of Dentistry,

Respondents.

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