THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
William P. Keesley, Circuit Court Judge

Case No. 2001-CP-40-3148

Health Promotion Specialists, LLC, and
Palmetto Dental Care, LLC,..... Appellants,

v.

South Carolina Board of Dentistry,..... Respondent.

INITIAL BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the court below correctly dismissed this action based on legislative immunity.

2. Whether the court below correctly held, based on undisputed facts, that the Board of Dentistry is not a "person" under § 39-5-10.

3. Whether the court below correctly held that the promulgation of an emergency regulation by the Board of Dentistry was not an action in the conduct of trade or commerce, as required under § 39-5-20(a).

4. Whether Appellant's suggestion that the Complaint should be permitted to be amended was correctly rejected.

COUNTERSTATEMENT OF THE CASE

This case was originally filed in 2001 by the original Plaintiffs (now only one)[1] against the State Board of Dentistry (the sole remaining Defendant), the South Carolina Dental Association, and three individuals. Eventually, the case was settled with respect to all Defendants except the Board.

Plaintiff challenged an emergency regulation of the Board that was in effect for six months, from the middle of 2001 until the beginning of 2002. The emergency regulation was never renewed thereafter. While Plaintiff has always sought damages, the initial focus of the case was on Plaintiff's request for a temporary injunction, *pendente lite*, against the 2001 emergency regulation remaining in effect. Plaintiff's motion for temporary injunctive relief was denied by Judge Joseph Strickland, Special Circuit Court Judge, in an eight-page order dated August 21, 2001. R. __. Plaintiff appealed the denial of temporary injunctive relief to this Court, which affirmed in an unpublished decision in 2003. *Health Promotion Specialists, LLC v. South Carolina Bd. Of Dentistry*, Op. No. 2003-UP-232. R. ___.

In late 2003, Plaintiff filed a federal case, based on essentially the same facts as the present case.[2] The defendants in that case included most or all of the original

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[1] Because there is now only Plaintiff, the singular terms "Plaintiff" or "Appellant" will be used throughout this brief, even though at times there were originally two plaintiffs in the case.

[2] *Health Promotion Specialists, Inc., a S.C. Corporation v. S.C. Dental Association, et al.*, Civil Action No. 3:03-3230-24 (D.S.C.).

Defendants in the present case, as well as additional private parties. The Board of Dentistry was originally a defendant in the federal case as well, but was voluntarily dismissed by the Plaintiff after the Board filed a Motion to Dismiss based on the Eleventh Amendment.

During the pendency of the federal case, all parties agreed that the present state case should be stayed. Eventually, the federal case settled in its entirety. All defendants in the present case, except the Board, were accordingly dismissed from this case as well, and by Consent Order entered on November 1, 2007, the present case was restored to the docket in the circuit court with only the Board of Dentistry as a defendant.

Plaintiff's sole claim against the Board of Dentistry in the present case is contained in the First Cause of Action, which alleges violations in 2001, by the Board and others, of the South Carolina Unfair Trade Practices Act ("UTPA"), S.C. Code Ann. §§ 39-5-10, *et seq*. R. __ [Second Amended Complaint]

On August 8, 2008, the Board moved for summary judgment on a number of different grounds, including sovereign immunity defenses under the Tort Claims Act, common law legislative and quasi-legislative immunity, certain immunities specifically applicable to UTPA cases, failure to state a cause of action under the UTPA because that Act did not envision making the State a liable party, mootness of

Plaintiff's claims for injunctive relief, and other grounds as set forth in the motion. R. __.

The Board's Motion for Summary Judgment was heard by Judge Keesley on August 25, 2008. Judge Keesley granted the motion in an order filed on June 25, 2010. The order held that certain facts were undisputed, and granted summary judgment for the Board on the following grounds:

(a) The Board's action did not constitute "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" within the meaning of S.C. Code Ann. § 39-5-20(a), because the Board's action did not amount to acts or practices "in the conduct of any trade or commerce." R. __ [Order 5-6]

(b) The Board is not a "person" under §39-5-10. R. __ [Order 6-8]

(c) Plaintiff's action against the Board is barred by sovereign immunity under the Tort Claims Act and by common law legislative immunity. R. __ [Order 8-11]

(d) Plaintiff's claim for injunctive relief has been moot since at least 2003. R. __ [Order 11-12][3]

Judge Keesley also held that a suggestion by the Plaintiff that the Complaint should be permitted to be amended was without merit, both because of

[3] Appellant has not challenged this conclusion of the lower court concerning mootness of the request for injunctive relief.

untimeliness and because the suggested amendment would have been futile. R. __ [Order 12-14].

The Board had raised a number of other possible grounds for dismissal of this action, most of which pertained to the issue of injunctive relief. Judge Keesley's order expressly held that in light of the conclusions reached in the order, it was unnecessary to consider those additional defenses. R. __ [Order 14-15]. The order further stated that it expressed no conclusion about those defenses, other than to note that it was unnecessary to consider them. *Id.*

Plaintiff filed a motion for reconsideration, which was denied by order dated September 29, 2011. This appeal by Plaintiff followed.

COUNTERSTATEMENT OF FACTS[4]

In 2000, the General Assembly enacted Act No. 298 of 2000, which amended the statutes pertaining to the practice of dental hygiene in school settings. Specifically, the General Assembly amended *S.C. Code Ann.* Sections 40-15-80 and 40-15-85 which permitted dental hygienists to perform certain procedures under "general supervision." The amended statutes also provided a definition of "general supervision."

Approximately a year later, on July 13, 2001, the Dental Board issued an emergency regulation clarifying that under the statutes as they then existed,

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[4] The court below held that the facts set forth below were undisputed. R. __ [Order at 3]

students in school settings, usually Medicaid-paid public health settings, were required to be examined by a dentist before dental hygienists could perform such acts as applying sealants to teeth. The Plaintiff in this case employs dental hygienists who work in public health settings. The Board, in promulgating the emergency regulation on July 13, 2001, stated that it, the Board, "has determined that the public health requires immediate promulgation of this regulation," and set forth the reasons for its concerns about public health and safety. R. __ (Exhibit 3). The emergency regulation remained in effect for the two consecutive 90-day periods authorized by the APA, § 1-23-130(C), but not thereafter.

During the pendency of the emergency regulation, the present action was filed, although Plaintiff was unsuccessful in obtaining temporary injunctive relief. Plaintiff also requested a hearing by Administrative Law Court, pursuant to the APA, §§ 1-23-110 and 1-23-111, with respect to the version of the proposed emergency regulation that was intended as a permanent regulation (the proposed permanent regulation was substantially similar to the emergency regulation). Those sections of the APA provide for a public hearing by an Administrative Law Judge to consider the "need and reasonableness" of proposed permanent regulations. In February 2002, four months after the hearing on the permanent regulation, and one month after the 180-day period of the emergency regulation's effectiveness had expired, the ALJ issued a report in which he concluded that the

proposed permanent regulation was "unreasonable" in light of the 2000 amendments. In Re: Proposed Regulation, Document No. 2644, 2002 WL 385116 (S.C. Admin. Law Ct. 2002). This conclusion by the ALJ did not mention that this Court had already expressly concluded just the opposite in the course of denying preliminary injunctive relief. Specifically, Judge Strickland's order of August 21, 2001 in the present case held that "the action taken by the Board is within its power and authority as conferred by statute." R. __ [Exhibit 1, p. 3.]

Although the ALC ruling was merely advisory and in conflict with Judge Strickland's August 2001 order, the Board nevertheless decided not to pursue getting the now-lapsed temporary regulation enacted as a permanent regulation as it then provided. Instead, beginning in early 2002, the Board decided to work with representatives of dental hygienists, including, among others, officers of the Plaintiff corporation, in order to seek consensus for amendments to the legislation governing the practice of dental hygiene in public health settings. A consensus was subsequently obtained. In June 2003, the General Assembly accordingly enacted legislation clarifying the permissibility of certain acts by dental hygienists in public health school settings. The new legislation made it clear that in such settings, an examination by a dentist was no longer a prerequisite to the placement of sealants or other acts by dental hygienists that had been in question. Act No. 45 of 2003.

As Appellant has noted, the above events drew the attention of the Federal Trade Commission in early 2003 or earlier. In the late summer of 2003, the FTC filed a now-settled adjudicative procedure against the Board, but that action was filed only after the 2003 statutory amendments had just been enacted. The Board of Dentistry alleged in that administrative proceeding that the case was moot at its outset, as a result of the 2003 statutory amendments, and in support of that allegation enacted a resolution in October 2003 to the effect that in light of the 2003 amendments, the Board was no longer of the opinion that an examination by a dentist was required by state law. R. __ [Exhibit 4.] The October 2003 resolution also contained an affirmation by the Board that it is "bound by, and in full agreement with, the legislative policy set forth in the 2003 amendments as recited above and does not plan to seek any change to that policy." After four years, the Board and the FTC reached a Consent Agreement that only required the Board to provide certain notifications to the FTC and others in the event that the Board ever sought to make policy changes.. No substantive relief was awarded in the Consent Decree.[5]

Plaintiff claimed in an affidavit filed in 2001 that if the emergency regulation were to be enforced, the Plaintiff Health Promotion Services would be

[5] The FTC Consent Decree is online at http://www.ftc.gov/os/adjpro/d9311/070911decision.pdf.

forced out of business. That did not occur. The emergency regulation was not enjoined, but only remained in effect for six months, ending in early 2002.

SUMMARY OF ARGUMENT

The two primary holdings of the court below were (a) that Plaintiff's action for damages against the Board of Dentistry, based on promulgation of a regulation by the Board, was barred by legislative immunity, a longstanding common law principle that has never been abrogated, and that in fact is preserved by several different provisions of the Tort Claims Act; and (b) the Board was not a "person" under the UTPA, nor did its actions (which were regulatory in nature) constitute "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" under § 39-5-20(a) of the UTPA.

The court below was clearly correct in its rulings. The act of promulgating a regulation is quasi-legislative in nature. Appellant does not contend otherwise. Legislative immunity exists so that a legislative body may be "free to speak and act without fear of criminal and civil liability." *Tenney v. Brandhove*, 341 U.S. 367, 375 (1951). This principle applies with equal force to state agencies performing legislative functions, including the Board of Dentistry in this case. The language of several sections of the Tort Claims Act specifically exempts such quasi-legislative action from the waiver of sovereign immunity.

With regard to the applicability of the UTPA, the court below correctly held that the Board of Dentistry, a state agency that regulates the practice of dentistry and dental hygiene, was not the kind of entity covered by the UTPA, and likewise was not engaged in the kinds of actions prohibited by the UTPA.

Any one of the above three bases for the order below is sufficient in itself to warrant affirmance of the decision of the lower court.

ARGUMENT

1. The court below correctly dismissed this action based on legislative immunity.

The sole act of the Board of which Appellant complains is the promulgation of the 2001 emergency regulation. The circuit court held that Appellant's claim for damages for the promulgation of a regulation was barred by legislative immunity. That aspect of sovereign immunity was not abrogated or supplanted by the Tort Claims Act. In addition, several sections of the Tort Claims Act itself provide that this kind of immunity remains in effect.

As held by the Court below, R. __ [Order 10], the immunity from suit for legislative or quasi-legislative acts is a well-entrenched common law principle in American jurisprudence. In *Tenney v. Brandhove*, 341 U.S. 367 (1951), the U.S. Supreme Court, after tracing the long history of legislative immunity, noted that the states "took great care to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability." 341 U.S. at 375. Since

Appellant alleges in effect that the Board acted with an improper motive in enacting the emergency regulation, it is particularly worth noting the reasons *Tenney* recognized for reconfirming long-settled principles that alleged improper motive (which the Board denies) does not affect legislative immunity:

> The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

Id. at 377.

This unquestioned principle has been recognized in South Carolina as well. *Richardson v. McGill*, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979) ("sound public policy has long recognized an absolute immunity of members of legislative bodies for acts in the performance of their duties"); *see also, Williams v. Condon,* 347 S.C. 227, 240, 553 S.E.2d 496, 503 (Ct. App. 2001) (citing and quoting *Tenney* in a case involving another immunity).

In *O'Laughlin v. Windham*, 330 S.C. 379, 498 S.E.2d 689 (Ct. App. 1998), this Court recognized that common law immunities were preserved and not supplanted by the Tort Claims Act. S.C. Code Ann. § 15-78-20(b) specifically provides that "[a]ll other immunities applicable to a governmental entity, its

employees, and agents are expressly preserved." This preservation of legislative or quasi-legislative immunity is also expressly set forth in the following provisions of the Tort Claims Act, as held by the lower court:

> 1. Section 15-78-60(1)(preserving sovereign immunity for "legislative, judicial, or quasi-judicial action or inaction"). R. __, n. 2 [Order p. 9]
>
> 2. Section 15-78-60(2)(preserving sovereign immunity for "administrative action or inaction of a legislative, judicial, or quasi-judicial nature"). *Id.*
>
> 3. Section 15-78-60(4)(preserving sovereign immunity for "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies." (emphases added). R. __ [Order 8-9].

The order below held that the promulgation of a regulation by a state agency was an action subject to legislative immunity just as is the case for statutes enacted by a legislative body, and for the same reasons: "to protect the freedom of governmental bodies to legislate or promulgate regulations that they believe to be in the public interest, without concern for suits for damages." R. __ [Order 10-11] This conclusion follows from §§ 15-78-60(1), -(2), and –(4), all of which preserve

sovereign immunity for acts of a legislative nature, including "administrative action . . . of a legislative. . . nature" (§ 15-78-60(1)) and adoption of any regulations (§ 15-78-60(4)).

Appellant does not claim that the substance of the regulation was not of a legislative nature. Appellant likewise does not challenge the procedure regarding the promulgation of the regulation. Neither claim would have been meritorious if made. First, there can be no doubt that the promulgation of a regulation by a body other than the legislature itself is nevertheless an action of a quasi-legislative nature. *See, e.g, Supreme Court of Virginia v. Consumers Union of U. S., Inc.*, 446 U.S. 719, 734 (1980) (Supreme Court of Virginia accorded legislative immunity in connection with promulgation of Bar Code); *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (legislative immunity attaches to the legislative function, i.e., all actions taken in the sphere of legitimate legislative activity). In addition, the portions of the Tort Claims Act cited above include all actions of a legislative nature, specifically including regulations. Secondly, Appellant has not challenged the procedure used in the adoption of the regulation by the Board of Dentistry.

Instead, in asserting that the order of Judge Keesley was in error in holding that legislative immunity precluded this action, Appellant relies only on the inapposite concept of discretionary immunity. Appellant cites a number of cases in which the issue of discretionary immunity was raised and discussed. Brief of

Appellant 11-16. However, none of those cases involved actions of a legislative or quasi-legislative nature, as is the case with the Board's promulgation of the regulation at issue in the present case. Instead, Appellant appears to assert that immunity even for legislative acts must be weighed in terms of the discretionary immunity principles set forth in such cases as *Hawkins v. City of Greenville,* 358 SC. 280, 594 S.E.2d 557 (Ct App. 2004). However, in that case and all the others cited for this point in the Brief of Appellant, the complained-of acts were of a non-legislative nature. In addition to not involving legislative action, the cases on which Appellant relies were based on other provisions of the Tort Claims Act such as the discretionary action provision of § 15-78-60(5) or its highway-related counterpart, § 15-78-60(15).[6]

In any event, the principles developed in discretionary immunity cases clearly have no application in cases involving the defense of legislative immunity. All legislative acts unquestionably involve the exercise of discretion, but if a court were to apply discretionary immunity principles to legislative actions, the effect would be to strip the immunity of much, if not all, of its force. In addition, the courts would find themselves reviewing the entire legislative process in a search to determine how much discretion was actually exercised in the enactment of

[6] While Appellant cites *Hawkins v. City of Greenville*, 358 SC. 280, 594 S.E.2d 557 (Ct App. 2004),which mentions § 15-78-60(4), that case involved drainage system design. It had nothing to do with the enactment of legislation.

legislation or regulations. Such a review is clearly at odds with the entire concept of legislative immunity, and should accordingly be rejected.[7]

Appellant itself characterizes its argument on legislative immunity as consisting of a claim that the issue should be regarded as one of fact, with the Board having the burden of proving the facts necessary to establish the immunity. Br. of Appellant 13. The Board does not disagree with this statement concerning the allocation of the burden of proof, but submits that when the issue is one of legislative immunity, as opposed to discretionary immunity in cases not involving legislative action, the only showing the defendant needs to make is that its action took the form of legislation (or quasi-legislation, in a case such as this which involves a regulation). In other words, for example, if the General Assembly were to be sued for damages for having enacted a statute, whether valid or invalid, that body would not need to introduce the journals of the House and Senate to prove

[7] The Supreme Court and this Court have routinely held that legislator's motives, opinions, mental impressions, and decision-making related to legislative actions are not proper areas of inquiry for discovery. For example, in *Pressley v. Lancaster County*, 343 S.C. 696, 542 S.E.2d 366 (Ct. App. 2001), this Court ruled that "[j]udicial inquiry into legislative motivation is to be avoided." 542 S.E.2d at 371. This Court further observed that "[s]uch inquiries endanger the separation of powers doctrine, representing a substantial judicial intrusion into the workings of other branches of government." *Id. See also, South Carolina Dept. of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001) (courts should not inquire into subjective motivation behind a governmental body's decisions); *Greenville County v. Kenwood Enterprises, Inc.*, 353 S.C. 157, 577 S.E.2d 428 (2003); *Bear Enterprises v. County of Greenville*, 319 S.C. 137, 459 S.E.2d 883 (Ct. App. 1995). Therefore, Appellant's suggestion that a legislative or quasi-legislative body must produce evidence of its decision-making and weighing of alternatives to be entitled to legislative immunity is contrary to this existing case law.

that it exercised its discretion after due deliberation, as Appellant would have the Court require. The existence of an enacted statute is the only showing that the General Assembly would need to make in order to demonstrate its entitlement to legislative immunity. Likewise, in the present case, the challenged regulation is before the Court, R. __, and the Board does not need to show anything more in order to be entitled to legislative immunity.[8]

2. The court below correctly held, based on undisputed facts, that the Board of Dentistry is not a "person" under Section 39-5-10.

With respect to the issue of the applicability of the Unfair Trade Practices Act to the Board's promulgation of a regulation, the court below held that Board is not a "person" within the meaning of that statute. Section 39-5-10(a) defines a "person" as including "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity." It does not mention governmental entities. Instead, it lists six different types of private actors: natural persons, corporations, trusts, partnerships, and incorporated or

[8] Appellant also cites to *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006), but it is unclear the significance that Appellant attributes to that decision. Br. of Appellant 11. *Madison* involved allegations of gross negligence and the application of Section 15-78-60(25). It has no apparent relevance to this case, in which Appellant did not even plead a negligence or gross negligence cause of action against the Board. Moreover, the Board did not plead Section 15-78-60(25) or any provision of Section 15-78-60 with a gross negligence exception as an affirmative defense. In *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010), the Supreme Court explained that the gross negligence standard should not be interpolated into other exceptions where a defendant did not plead a section containing a gross negligence standard. In short, in accordance with the holding in *Jones*, a gross negligence exception has no applicable to the legislative immunities provided by §§ 15-78-60(1), -(2), and –(4).

unincorporated associations. The court below held that by only listing private actors, and by omitting any reference to any sort of public entity, the legislature intended only to include private entities within the definition of those persons who can be liable under the UTPA. R. __ [Order 7-8] In so holding, the court cited the doctrine of *ejusdem generis,* which provides that "[w]hen the Legislature uses words of particular and specific meaning followed by general words, the general words are construed to embrace only persons or things of the same general kind or class as those enumerated." *Swanigan v. American Nat. Red Cross,* 313 S.C. 416, 419, 438 S.E.2d 251, 252 (1993). The absence of any kind of public entity in the listing of "persons" in the statute precludes Appellant's claim.

This conclusion is supported by such authorities as *In Charter Communications Entertainment I, LLC v. University of Connecticut, Bd. of Trustees*, 2000 WL 350464, *2 (Conn.Super. 2000), where it was held that language similar to that of the South Carolina UTPA should not be read to include the State. The court applied both the rule of *ejusdem generis* cited above, and the rule that any statutory waiver of sovereign immunity must be narrowly construed.

In addition, and as held by the court below, there is a general principle of longstanding effect that "general words in a statute such as 'persons' will not ordinarily be construed to include the State or political subdivisions thereof." *Hansen v. Com.*, 344 Mass. 214, 219, 181 N.E.2d 843, 847 (1962). As the U.S.

Supreme Court has expressed it, "[t]here is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." *United States v. United Mine Wkrs. of America*, 330 U.S. 258, 275 (1947). *Accord, Brooks v. One Motor Bus*, 190 S.C. 379, 3 S.E.2d 42, 44 (1939), *overruled in part on other grounds*, *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985)("neither the State nor any of its political divisions, is bound by general words in a statute restrictive of a prerogative right, title or interest, unless expressly named").

Appellant's primary contention on appeal is that there is a question of fact as to whether the Board of Dentistry is a "person" under § 39-5-10. In so arguing, however, Appellant makes no reference at all to the discussion in the order below regarding the definition of the term "person" in § 39-5-10(a). Instead, Appellant relies only on inapposite language from other contexts, and even those references do not support Appellant's claim that the Board is not a "person" under § 39-5-10(a).

Appellant first cites § 40-1-20(3), which defines a board or commission under the Department of Labor, Licensing and Regulation (LLR) umbrella as "the group of individuals charged by law with the responsibility of licensing or otherwise regulating an occupation or profession within the State." Even if this statute applied in the context of the UTPA, which it does not, it still does not

support any argument of Appellant, because it simply does not define an LLR board as a "person." Instead, it defines such entities as groups of individuals. Any corporate or governmental entity will normally consist of one or more individuals, but that fact obviously does not answer the question of whether such an entity is a "person" within the context of a specific statute. Plaintiff also cites § 40-1-20(8), another subsection of the same inapposite statute, which provides in its context that "'Person' means an individual, partnership, or corporation." This also fails to provide any support for Appellant's claim, because the Board of Dentistry is not "an individual, partnership, or corporation." Instead, it is a governmental entity.

Appellant next cites Regulation 71-400(P), an occupational safety and health regulation of the Department of Labor. That regulation does include the State and its political subdivisions within the definition of "person," but the context is far different from that of the UTPA. As noted in R. 71-100, quoting *S.C. Code Ann.* 41-15-210, the scope of the OSHA regulations is intentionally very broad. Section 41-15-210 provides that "the Commissioner of Labor may promulgate, modify or revoke rules and regulations which will have full force and effect of law upon being properly certified and filed for the purpose of attaining the highest degree of health and safety protection for any and all employees working within the State of South Carolina, whether employed in the public or private sector." No comparable

rationale is present for including governmental entities within the definition of "person" in § 39-5-10(a).

While Appellant asserts that there is a question of fact as to whether the Board is a "person" under § 39-5-10(a), Appellant offers no suggestion of what that question of fact might be.

Appellant does not directly challenge the reasons set forth in the order of Judge Keesley, R. __ [Order 6-8] for holding that the Board is not a "person" under § 39-5-10(a). The Board submits that this reasoning was correct. The holding that the Board is not a "person" under § 39-5-10(a) is a sufficient reason in and of itself to affirm the decision of the court below, since Appellant's claim was based solely on an alleged violation of the UTPA. *See* R. __ [Second Amended Complaint, pp. 14-15]

3. The court below correctly held that the promulgation of an emergency regulation by the Board of Dentistry was not an action in the conduct of trade or commerce, as required under Section 39-5-20(a).

As the court below held, the UTPA is directed only to actions committed by persons engaging in commerce, as indicated by its clear language prohibiting only "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. Code Ann. § 39-5-20(a) (emphasis added). R. __. [Order 5] The UTPA's definitions section in turn provides that

> "Trade" and "commerce" shall include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate. . . .

S.C. Code Ann. § 39-5-10(b) (emphases added). As the court below held, the Board is clearly not engaged in any of the highlighted commercial activities in the statute that amount to "trade or commerce." R. __. [Order 6] The Board did not advertise, sell, or distribute goods in commerce. The kinds of activities governed by the Act are those that occur in a business context, not acts that occur when a governmental body engages in regulation. *See, e.g., Bretton v. State Lottery Com'n,* 673 N.E.2d 76, 79 (Mass. App. 1996) (activities of a state commission created, protected and regulated by and pursuant to statute "hardly resemble endeavors conducted in a conventional business context"); *Ferrara v. City of Shreveport*, 702 So.2d 723, 726 (La.App. 1997) (in enforcing rules and regulations established by the electrical code, city "did not engage in unfair acts in the conduct of any trade or commerce").

Appellant has cited *Asheville Tobacco Board of Trade, Inc. v. F.T.C.*, 263 F.2d 502 (4th Cir. 1959), but in that case the non-governmental board whose practices were challenged was, according to the court, "a non-stock corporation organized in 1931. Membership is open to warehousemen and purchasers of leaf tobacco." 262 F.2d at 505. In other words, it was not a governmental entity, but

was a trade association whose "regulatory" acts were actually those of persons engaged in commerce themselves. While some of the individuals who comprise the Board are obviously dentists themselves who participate in the market for dentistry services, their actions as a Board are not the actions of the individuals themselves, but solely the actions of a regulatory body.

Appellant argues that the issue of the applicability of the UTPA to the Board's quasi-legislative action presents a novel issue that requires factual development. Br. of Appellants 18-19. However, it has often been held that "[t]he mere fact that a case involves a novel issue does not render summary judgment inappropriate." *Houck v. State Farm Fire and Cas. Ins. Co.* 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005). The determination of the alleged novel issue must require further factual development before an appellate court will remand the case. Here, the pertinent facts necessary to decide the issue are all before the Court. The issue presented is the purely legal issue of whether a regulation promulgated by a state regulatory board constitutes "the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate. . . ." S.C. Code Ann. § 39-5-10(b). As the court below held, it is abundantly clear that the promulgation of a regulation does not fall within that description. Moreover, Appellant makes little to no showing of what facts might remain to be developed if

the case were to be remanded. As a result, Appellant has presented no reason for reversing the decision of the court below, which correctly decided the legal issue presented.

4. Appellant's suggestion that the Complaint should be permitted to be amended was correctly rejected.

The third and final issue presented by Appellant is the claim that a suggested amendment that would have added a conspiracy claim to the Second Amended Complaint should have been permitted. Br. of Appellant 21. The court below held that this suggestion (which was not in the form of a motion) was untimely, having come seven years after the alleged events occurred. R. ___. [Order 12]. Appellant offers no specific reason why this holding was in error.

In addition, the lower court held that an amendment to add Appellant's suggested civil conspiracy and "aiding and abetting" claims would have been futile. R. __ [Order 12] Both of those claims would involve the commission of intentional torts, for which the Board itself, the only remaining defendant in the case, would be immune under S.C. Code Ann. § 15-78-60(17).[9] Appellant does not

[9] The Board may not be held liable for any conspiracy under the Tort Claims Act because S.C. Code Ann. § 15-78-60(17) provides sovereign immunity for the Board where employee conduct constitutes an intent to harm. An essential element of a civil conspiracy claim is the intent to cause damage to the plaintiff. *See*, *LaMotte v. The Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711, 713 (1988) ("civil conspiracy is a combination of two or more persons joining for the purpose of injuring the plaintiff and causing special damage to the plaintiff"). As a result, a governmental entity, such as the Board, cannot be held liable under any conspiracy theory.

address this holding about futility at all. The holding was clearly correct in any event, and as a result, this assertion by Appellant provides no basis for reversal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the orders of the Circuit Court dismissing this action should be affirmed.

Respectfully submitted,

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BY: /s/

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