

Case # 2016-000562

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

SC Court of Appeals

APPEAL FROM ANDERSON COUNTY, SOUTH CAROLINA
COURT OF COMMON PLEAS

HON R. SCOTT SPROUSE, CIRCUIT JUDGE

Case # 2014-CP-04-01780

NANCY C. PEREZ

Petitioner

Vs

SOUTH CAROLINA
DEPARTMENT OF LABOR, LICENSING AND REGULATION –
BOARD OF NURSING

Respondent

INITIAL APPELLATE BRIEF

Nancy C Perez
713 E. Greenville St – D220
Anderson, SC 29621
281-746-4948

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Statement of Issues on Appeal

- 1- Did the Trial Court err when it ruled that administrative law trumps common law rights;**
- 2- Did the the trial court err when it denied Ms. Perez’ right to a jury trial**
- 3- Were the trial court findings of fact supported by the evidence**
- 4- Did the trial court err when it denied Ms. Perez relief pursuant to inverse condemnation proceedings and/or a seizure of property within the meaning of the US Fourth and/or Fifth amendments.**
- 5- Did The trial Court err when it ruled that it had no subject matter jurisdiction over Ms Perez’ complaint.**
- 6- Did the trial court err when it ruled that Ms Perez is not being subjected to cruel and unusual punishment.**

STATEMENT OF THE CASE

Nancy C. Perez was born in Aiken, South Carolina in July 11th, 1948.

She graduated as a License Practical Nurse from Clarendon College, Texas in

1996. Clarendon College is an accredited educational institution. Nancy C. Perez obtained Texas License 160059 on October 9th, 1996. She worked in Texas until May 2014. A total of eighteen (18) Years. The Texas Board of Nursing never brought any disciplinary actions against Ms. Perez. No Texas patient ever sued Ms. Perez for malpractice.

In May 2014 Ms. Perez returned to her native South Carolina. She informed the South Carolina Board of Nursing (SCBON) and submitted an application to resume exercising her common law profession in the state The Patrick B Harris Hospital offered Ms. Perez a full time position earning \$16.16 an hour plus fringe benefits. She informed the SCBON that her employer was demanding to see a SC License. The SCBON refused to let her become gainfully employed.

On August 19th, 2014 she brought this action against the South Carolina Department of Labor , Licensing and Regulation alleging, inter alia, tortious interference with a prospective employment contract and the Taking and/or seizure of her right to earn a living as a nurse. She also complained that her right to jury trial had been transgressed upon.

STANDARD OF REVIEW

A motion to dismiss a claim pursuant to Rule 12(b)(6), SCRPC, must be based solely on the allegations set forth on the face of the complaint¹. The motion will not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case². A judgment on the pleadings is considered to be a drastic procedure by South Carolina courts.³ Therefore, pleadings in a case should be construed liberally and the Court must presume all well pled facts to be true so that substantial justice is done between the parties⁴.

Findings of fact must be supported by evidence⁵.

The complaint alleges that Nancy C Perez is a Practical Nurse. That she worked in Texas for eighteen years , that her Texas License expired in July 31st, 2014. That she moved to her native South Carolina in May 2014 but the South Carolina Board of Nursing refuses to let her earn a living as a nurse.

¹ Overcash v. South Carolina Electric and Gas Co., 614 S.E.2d 619, 364 S.C. 569 (S.C. 05/31/2005)

² id citing Toussaint v. Ham, 357 SE 2d 8, 9 (1987)

³ Id citing Russell v. City of Columbia, 406 SE 338, 339 (1991).

⁴ Id citing Stroud v. Riddle, , 194 S.E.2d 235, 237 (1973).

⁵ *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 SE 2d 773, 775 (1976)

FACTS⁶

Nancy C. Perez was born in Aiken, South Carolina in July 11th, 1948. She graduated as a License Practical Nurse from Clarendon College, Texas in 1996. Clarendon College is an accredited educational institution. Nancy C. Perez obtained Texas License 160059 on October 9th, 1996. She worked in Texas until May 2014. A total of eighteen (18) Years. The Texas Board of Nursing never brought any disciplinary actions against Ms. Perez. No Texas patient ever sued Ms. Perez for malpractice.

In May 2014 Ms. Perez returned to her native South Carolina. She informed the South Carolina Board of Nursing (SCBON) and submitted an application to resume exercising her common law profession in the state The Patrick B Harris Hospital offered Ms. Perez a full time position earning \$16.16 an hour plus fringe benefits. She informed the SCBON that her employer was demanding to see a SC License. The SCBON refused to let Ms Perez practice as a nurse. The SCBON has never advised Ms Perez that Agency has clearly found that abridgement of Ms. Perez' right was necessary for the preservation of the health, safety, and welfare of the public.

⁶ Record on Appeal (ROA) pp. 5—6; 15-17; 67-68

The SC Board of nursing has not alleged that Ms. Perez has been convicted of a crime directly related to nursing within the last ten years.

ARGUMENTS

(a)

A STATUTE IS NOT TO BE CONSTRUED IN DEROGATION OF COMMON LAW RIGHTS

The South Carolina Supreme Court has ruled that a statute is not to be construed in derogation of common law rights⁷. Consequently, Ms Perez respectfully requests that the maxim be fully considered when adjudicating Ms. Perez' common law rights.

At common law nurses had a right to practice their profession without a license⁸. And their right to be gainfully employed could only be terminated by their employer⁹. Any controversy pursuant to the employment contract was ventilated by the judicial branch before a jury, not by a government agency¹⁰.

⁷ Barton v. South Carolina Department of Probation Parole and Pardon Services, 404 S.C. 395; 745 S.E.2d 110 (SC S. Ct - July 3, 2013 citing Doe v. Marion , 361 S.C. 463, 473, 605 S.E.2d 556, 561 (Ct. App. 2004) , **aff'd** , 373 S.C. 90, 645 SE 245 (2007); Gilfillin v. Gilfillin, 344 S.C. 407, 544 S.E.2d 829 (S.C. 03/26/2001)

⁸ Record On Appeal pp 7, 67; 49 -64;

⁹ Record On Appeal (ROA) 49 - 64, Rachel Arnow-Richman, Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination, 66 Florida Law Rev. 1513, p 1524 (2015)

¹⁰ Id; Scott v. Texas State Board of Medical Examiners, 384 S.W.2d 686, 690 (Tex. Sup. 1964)(It is seen from the legislative history of the Medical Practice Act that from the beginning the revocation of a medical license has been committed to the district courts as a judicial function. **It has been traditionally so....**There is a difference, legislatively recognized through the years, between an exercise of the power to examine and issue a medical license, and an exercise of the power to revoke a medical license for cause.

The general assembly's police power is limited to protecting the public interest rather than protecting or promoting the interests of individuals or groups¹¹. But documents obtained from the Clemson University Library show that the nursing profession was regulated by the state for the first time in 1910¹². The documents also show that it was the South Carolina Nursing Association, not the South Carolina general assembly, who requested that nurses be "registered"¹³. Actually, the General Assembly refused to register nurses in 1909¹⁴. The documents show that the health and safety of South Carolinians was not an issue.¹⁵

According to the "Journal of Issues in Nursing "The purpose of the Nursing Practice Act was to "empower the nursing profession and females":The "Historical Review of Nurses' Power over Nursing Practice" ¹⁶, began with an examination of the concept of power.... a historical review or nurses' power over nursing practice ". It goes on to state " a historical review of nurses' power over nursing should factors that influence nurses' power over their practice . Social and cultural factors that influence nursing power have their roots in the view of nursing as women's work . Initially, nursing was a domestic role women were

¹¹ Edens , et al v. City of Columbia, et al, 228 S.C. 563, 91 S.E.2d 280 (S.C. 01/30/1956) citing Bookhart v. Central Elec. Power Co-op., 219 S.C. 414, 65 S.E.2d 781, 788 (1951)

¹² Record On Appeal (ROA) pp 49 - 64,

¹³ id

¹⁴ id

¹⁵ id

¹⁶ ROA pp 54-64
54-64

expected to fulfill in the home. In addition, a lot of nursing work is done in private, behind drawn curtains. **The persistent invisibility of a lot of nursing work decreases nursing social status and perceived value, contributing to powerlessness. "First," the article continues, "nursing has historically been taught in hospitals, perpetuating nursing low status in relation to physicians and other health care providers"**

(b)

**THE TRIAL COURT ERRED WHEN IT DENIED
MS PEREZ RIGHT TO JURY TRIAL**

As shown hereinabove, at common law, only employers could terminate nurses employment. Disputes concerning wrongful termination were settled by the judicial department not a government agency.

Ms. Perez has the right to a jury trial before being deprived of her property. South Carolina Constitution art. I, § 14 provides " [t]he right to a trial by jury shall be preserved inviolate." This guarantee preserves the right to a jury trial in those cases where jury trials were allowed at common law¹⁷. The nursing profession existed at common law and was not regulated by the state before February 23rd, 1910¹⁸.

¹⁷ In the Interest of Stephen W., a Juvenile Under the Age of Seventeen, 409 S.C. 73; 761 S.E.2d 231; 2014 (SC Supreme Court SC - July 16, 2014) citing Mims Amusement Co. v. S.C. Law Enforcement Div., 366 SC 141, 149, 621 S.E.2d 344, 348 (2005)

¹⁸ ROA pp 49 - 53

Ms. Perez' cause of actions pursuant to state law for the recovery of money or for specific real or personal property must be tried by a jury¹⁹. Her federal actions are also triable to a jury²⁰.

The Nursing Act of February 23rd, 1910 allowed aggrieved nurses to access the circuit courts²¹. The act did not, and could not, deprive nurses of the right to jury trial nor the standard of proof.

The Defendants did not, and could not, identify when the S.C. Const. Articles 1, § 3 ; 1 § 23 ; 1 § 14 were amended within the meaning of Art. XVI, § 1 in order deny jury trials to those nursing professionals who were being denied the right to earn a living by practicing their profession.



**THE TRIAL COURT FINDINGS OF FACT
ARE NOT SUPPORTED BY THE EVIDENCE**

- (1) There was no evidence that abridgement of her right to earn a living working as a nurse was necessary for the preservation of the health, safety, and welfare of the public²².

¹⁹ Bateman v. Rouse, 358 S.C. 667, 596 S.E.2d 386 (S.C.App. 05/03/2004) citing Rule 38 (a), SCRPC

²⁰ City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (U.S. 05/24/1999)

²¹ ROA p 53 , Section 7

²² SC Statute 40-1-10. Accord 2009 South Carolina Code 40-33-1315. Recognition of multi-state licensure privilege A party state may, in accordance with that state's due process laws, revoke, suspend, or limit the multi-state licensure privilege of any licensee to practice in its state and may take any other actions under its applicable state laws that are **necessary to protect the health and safety of its citizens**; see also **SECTION 1-23-370 Procedures regarding issuance, denial or renewal of licenses**. No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was

South Carolina and Federal Law provide that Ms. Perez has the right to engage in a lawful profession, trade, or occupation of choice and the same is clearly protected by both the Constitution of the United States and the Constitution of the State of South Carolina²³. The State cannot abridge this right except as a reasonable exercise of its police powers **when it it is clearly found that abridgement is necessary for the preservation of the health, safety, and welfare of the public.** ²⁴. The Defendants have not , and can not , introduce any evidence that Ms. Perez, who held a Texas state license free and clear for

given an opportunity to show compliance with all lawful requirements for the retention of the license. **If the agency finds that public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action.** These proceedings shall be promptly instituted and determined.(emph. Added)

²³ SECTION 40-1-10. ; see also Hawker v. People of State of New York, 170 US 189 (1898); Dent v. State of West Virginia, 129 US 114 , (1889) ; Sloan v. South Carolina Board of Physical Therapy Examiners, 636 S.E.2d 598, 370 S.C. 452 (S.C. 09/25/2006) citing US Constitution Fourteenth Amendment

²⁴ ROA pp 7, 21 Accord 2009 South Carolina Code 40-33-1315. Recognition of multi-state licensure privilege A party state may, in accordance with that state's due process laws, revoke, suspend, or limit the multi-state licensure privilege of any licensee to practice in its state and may take any other actions under its applicable state laws that are **necessary to protect the health and safety of its citizens;** see also **SECTION 1-23-370 Procedures regarding issuance, denial or renewal of licenses.** No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. **If the agency finds that public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action.** These proceedings shall be promptly instituted and determined.(emph. Added)

eighteen years, is a threat to the health and safety of South Carolinians²⁵ .

Findings of fact must be supported by evidence²⁶.

- (2) There was no evidence that the unregulated practice of nursing harmed or endangered the health, safety, or welfare of the public .
 - (a) State Law states that “ No statute or regulation may be imposed under this article upon a profession or occupation except for the exclusive purpose of protecting the public interest when the: (1) unregulated practice of the profession or occupation can harm or endanger the health, safety, or welfare of the public and the potential for harm is recognizable and not remote or dependent upon tenuous argument²⁷;
 - (b) There is no evidence that marketplace , common law or employer mandated regulations were ineffective prior to 1910 thereby making government regulation necessary.
 - (c) Secondly, as shown hereinabove, the SC Nursing Association, not the General Assembly, requested state regulation in order to empower the nurse association and females.
 - (d) Even if it is true that Ms. Perez has been convicted of a crime , there is no evidence that the same has adversely affected her character or her eighteen

²⁵ ROA pp 7, 21

²⁶ Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 SE 2d 773, 775 (1976)

²⁷ SC Statute 40-1-10(B)(1)

years old nursing career hence the relation between a conviction of a crime and the same affecting the health and safety of her patients is a remote concept or dependent upon tenuous argument

(d)

(3) There was no evidence that Ms Perez was convicted of a crime directly related to the Nursing profession²⁸.

South Carolina Law, Section 40-1-140, Effect of prior criminal convictions – states that a person may not be refused an authorization to practice, pursue, or engage in a regulated profession or occupation solely because of a prior criminal conviction unless the criminal conviction directly relates to the profession or occupation for which the authorization to practice is sought. The defendants failed or refused to show that Ms. Perez had been convicted of an act related to the nursing profession

(e)

(4) There was no evidence before the trial court that Ms Perez had been convicted of a crime within the last 10 (ten) years²⁹.

The defendants have failed or refused to show any evidence that Ms Perez has been convicted of any crime within the last ten years³⁰. The Defendants submitted extraneous documentation purportedly showing that Ms Perez had been convicted of a federal crime. Ms Perez objected pursuant to SC Rule of Evidence 609 within

²⁸ ROA p 136, 23

²⁹ ROA pp 23, 137;

³⁰ ROA pp 23, 137

the meaning of Rule 403. She submitted a Motion To Suppress the admission of such material . The Court did not rule on Ms. Perez December 31st, 2014 motion. She subsequently filed a Rule 59 (e) Motion re-arguing the issue.

Consequently , the Defendants failed or refused to show any evidence that Ms Perez has been convicted of a crime within the last ten years , any allegation stating otherwise is irrelevant within the meaning of Rules of Evidence 401-403 and 609 ³¹.

(5) Assuming, arguendo, that the police power invoked is proper then it is unconstitutional as applied

The facts show that Nancy C Perez worked in Texas for eighteen years as a nurse and that the Texas Board of Nursing never brought any type of administrative action against³². Nor did any of Ms. Perez' patients³³.

The general assembly's police power is limited to protecting the public interest rather than protecting or promoting the interests of individuals or groups³⁴. As shown hereinabove, the Nurse Practice Act was motivated by the desire to benefit

³¹United States v. Rogers, 542 F.3d 197 (7th Cir. 09/04/2008); United States v. Cobb, 588 F.2d 607 (8th Cir. 12/07/1978) ; State v. Young, 661 S.E.2d 387, 378 S.C. 101 (S.C. 05/19/2008) ; Green vs Hewett, 407 SE 2d 651, 653 (1991); United States v. Sanders, 964 F.2d 295 (4th Cir. 04/29/1992)

³² ROA 5, 15, 67

³³ id

³⁴ ROA Edens , et al v. City of Columbia, et al, 228 S.C. 563, 91 S.E.2d 280 (S.C. 01/30/1956) citing Bookhart v. Central Elec. Power Co-op., 219 S.C. 414, 65 S.E.2d 781, 788 (1951)

the SC Nurses Association and not to protect the health and safety of South Carolinians.

Courts will not interfere with the enforcement of regulations designed for the protection of health, welfare, and safety of citizens unless they are determined to be unreasonable³⁵. The exercise of police power is subject to judicial correction only if the action is arbitrary and has no reasonable relation to a lawful purpose³⁶.

Assuming, arguendo, that the usage of the police power is authorized in the regulation of nursing then the same is unreasonable in the instant case because Ms. Perez worked as a nurse in Texas for eighteen years without adversely affecting the health or safety of Texans³⁷. Courts must take into consideration an individual's circumstances when considering as applied challenges³⁸. Assuming, arguendo, that Ms. Perez has been convicted of a crime then the connection between such conviction affecting the health and safety is a remote or dependent upon tenuous argument³⁹.

(d)

**THE COURT OF COMMON PLEAS HAS
SUBJECT MATTER JURISDICTION OVER MS PEREZ' COMPLAINT**

³⁵ Main v. Thomason, 342 S.C. 79, 342 S.C. 79, 535 S.E.2d 918, 535 S.E.2d 918 (S.C. 08/14/2000) citing Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955)

³⁶ Id citing Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E.2d 662 (1990).

³⁷ ROA pp 5, 25

³⁸ Educational Media Co.at Virginia Tech, Inc. v. Insley, 12-2183 (4th Cir. 09/25/2013) citing Educational Media Co. at Va. Tech., Inc. v. Swecker, 602 F.3d 583, 589 (4th Cir. 2010)

³⁹ SC Statute 40-1-10(B)(1)

South Carolina circuit courts are vested with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law⁴⁰.

The Defendants did not, and could not, identify when the S.C. Const. Art. V, § 11⁴¹ was amended in order to exclude from the circuit Courts causes of action which are “administrative in nature”⁴². The Defendant did not, and could not, identify when S.C. Const. , article 1, Section 23⁴³ was amended within the meaning of Article 1 , Section 3⁴⁴ in order to make Constitutional provisos discretionary instead of mandatory.

⁴⁰ ROA pp 27, 69, *Rainey v. Haley* , 745 SE 2d 81, 83 (Supreme Court - 06/12/2013) (citing S.C. Const. art. V, § 11); The construction of a statute is a judicial function and responsibility, *Lindsay v. Nat'l Old Line Ins. Co.*, 262 S.C. 621, 628, 207 S.E.2d 75, 78 (1974).

⁴¹ Article V **SECTION 11.** Jurisdiction of Circuit Court. The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law. (1972 (57) 3176; 1973 (58) 161; 1985 Act No. 9.) *Rainey v. Haley* , 745 SE 2d 81, 83 (Supreme Court - 06/12/2013) (citing S.C. Const. art. V, § 11);

⁴² *See Muldrow v. Jeffords*, 144 S.C. 509, 520, 142 SE 602, 605 (1928) According to a well-established rule of law, those who undertake to deprive [a court] of jurisdiction in any given case and give it to [another] must be able to point out **some particular provision of the Constitution** which either expressly or by necessary implication gives jurisdiction of such case to the limited and inferior tribunal to the exclusion of the superior tribunal.”).

⁴³ **SECTION 23.** Provisions of Constitution mandatory. The provisions of the Constitution shall be taken, deemed, and construed to be **mandatory and prohibitory, and not merely directory**, except where expressly made directory or permissive by its own terms. (1970 (56) 2684; 1971 (57) 315.)

⁴⁴ **SECTION 3.** Privileges and immunities; due process; equal protection of laws. The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, **nor shall any person be deprived of life, liberty, or property without due**

The Defendants did not, and could not, identify when S.C. Const. Article 16 was abolished or amended in in order to allow the General Assembly to Amend the Constitution without a Constitutional Convention⁴⁵, in order to add the phrase “ except those cases in which exclusive jurisdiction shall be given to administrative agencies”.

South Carolina Circuit Courts have the Constitutional and statutory authority to declare rights, status and other legal relations⁴⁶.

The South Carolina Supreme Court has ruled that S.C. Const. art. I, § 22 allows an individual who , as here , is being deprived of liberty and property , to access the circuit courts even when a contested case under the APA is not involved⁴⁷ .

process of law, nor shall any person be denied the equal protection of the laws. (1970 (56) 2684; 1971 (57) 315.)

⁴⁵ **SECTION 3.** Constitutional Convention. Whenever two-thirds of the members elected to each branch of the General Assembly shall think it necessary to call a Convention to revise, amend or change this Constitution, they shall recommend to the electors to vote for or against a Convention at the next election for Representatives; and if a majority of all the electors voting at said election shall have voted for a Convention, the General Assembly shall, at its next session, provide by law for calling the same; and such Convention shall consist of a number of members equal to that of the most numerous branch of the General Assembly.

⁴⁶ Rainey v. Haley, 27269 (S.C. 06/12/2013) Citing S.C. Code Ann. § 15-53-20 (2005) and Rule 57, SCRPC .

⁴⁷ ROA pp 29 -30; 70-71; 29; South Carolina Coastal Conservation League v. South Carolina Dep't of Health and Environmental Control, 669 S.E.2d 899, 380 S.C. 349 (S.C.App. 10/23/2008) citing S.C. Const. art. I, § 22 and Ross v. Med. Univ. of S.C. 492 SE 2d 62, 71 (1997)

South Carolina and Federal Law provide that Ms. Perez has the right to engage in a lawful profession, trade, or occupation of choice and the same is clearly protected by both the Constitution of the United States and the Constitution of the State of South Carolina⁴⁸. The State cannot abridge this right except as a reasonable exercise of its police powers when it is **clearly found that abridgement is necessary for the preservation of the health, safety, and welfare of the public**⁴⁹.

The Defendants are presently abridging Ms Perez' rights pursuant to the Fourteenth Amendment and SC Statute § 40-1-10 . They have not, and can not, identify any evidence which shows that allowing Ms Perez to exercise

⁴⁸ SECTION 40-1-10. ; see also Hawker v. People of State of New York, 170 US 189 (1898); Dent v. State of West Virginia, 129 US 114 , (1889) ; Sloan v. South Carolina Board of Physical Therapy Examiners, 636 S.E.2d 598, 370 S.C. 452 (S.C. 09/25/2006) citing US Constitution Fourteenth Amendment

⁴⁹ Id, Accord 2009 South Carolina Code 40-33-1315. Recognition of multi-state licensure privilege A party state may, in accordance with that state's due process laws, revoke, suspend, or limit the multi-state licensure privilege of any licensee to practice in its state and may take any other actions under its applicable state laws that are **necessary to protect the health and safety of its citizens**; see also **SECTION 1-23-370** Procedures regarding issuance, denial or renewal of licenses. No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. **If the agency finds that public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action.** These proceedings shall be promptly instituted and determined.(emph. Added)

her right to work in her lawful vocation is necessary for the preservation of the health, safety, and welfare of the public.

Once the right to practice nursing is lawfully acquired, it is a **property**⁵⁰ right protected by the due process clauses of the state and federal constitutions⁵¹.

Furthermore, the General Assembly has also provided that a preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy⁵².

⁵⁰ The 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." *Brown v. S.C. State Bd. of Educ.*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) (citing *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed. 2d 1377 (1959)); *Baird v. Charleston County*, 333 S.C. 519, 537, 511 S.E.2d 69, 79 (1999) (recognizing same principle); *Ezell v. Ritholz*, 188 S.C. 39, 46-49, 198 S.E. 419, 422-23 (1938) (discussing same principle). "It cannot be doubted that a man's trade or profession is his property." *Byrne's Adminstrs. v. Stewart's Adminstrs.*, 3 S.C. Eq. (3 Des. Eq.) 466, 479 (1812). Likewise, the practices of medicine and physical therapy by properly licensed individuals undoubtedly are cognizable property interests rooted in state law. *Dantzler v. Callison*, 230 S.C. 75, 92, 94 S.E.2d 177, 186 (1956) (stating "[t]here 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"). *Sloan v. South Carolina Board of Physical Therapy Examiners*, 636 S.E.2d 598, 370 S.C. 452 (S.C. 09/25/2006) Liberty or property interests protected under the Due Process Clause "attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law" *Paul v. Davis*, 424 US 693, 710-11 (1976).

⁵¹ *id*

⁵² ROA pp 31-34; 70-71 ; *Bone v. U.S. Food Service*, Case # 27278 (S.C. 06/26/2013) S.C. Code Ann §1-23-380(A) .

(a) Right to Jury Trial

As stated hereinbefore, at common law only employers could terminate a nurses' employment, not a government agency. Disputes concerning the employment contract were adjudicated by the courts.

Consequently, the Department Of Labor , Licensing and Regulation (DLLR) has no statutory or Constitutional authority to adjudicate Ms Perez' case⁵³. The Jurisdiction of the DLLR does not apply where, as here, (1) Ms. Perez has the right to a jury trial before being deprived of her property. South Carolina Constitution art. I, § 14 provides " [t]he right to a trial by jury shall be preserved inviolate." This guarantee preserves the right to a jury trial in those cases where jury trials were allowed at common law⁵⁴.

Ms. Perez' cause of actions pursuant to state law for the recovery of money or for specific real or personal property must be tried by a jury⁵⁵ . Her federal actions are also triable to a jury⁵⁶. Attachment 1 shows that the nursing profession existed

⁵³ State v. Gentry, 610 S.E.2d 494, 363 S.C. 93 (S.C. 03/07/2005) (defining jurisdiction)

⁵⁴ In the Interest of Stephen W., a Juvenile Under the Age of Seventeen, 409 S.C. 73; 761 S.E.2d 231; 2014 (SC Supreme Court SC - July 16, 2014) citing Mims Amusement Co. v. S.C. Law Enforcement Div., 366 SC 141, 149, 621 S.E.2d 344, 348 (2005)

⁵⁵ Bateman v. Rouse, 358 S.C. 667, 596 S.E.2d 386 (S.C.App. 05/03/2004) citing Rule 38 (a), SCRCP

⁵⁶ City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (U.S. 05/24/1999)

at common law and was regulated by the state for the first time on February 23rd, 1910⁵⁷.

Secondly, in her amended complaint Nancy C Perez averred⁵⁸ that Kathryn Nedovic, the defendant's Licensure and Compliance Supervisor, directed Ms. Perez to travel to Colombia and appear before the SC Board Of Nursing and "*answer any questions they [SCBON] may have*". According to Ms. Nedovic, the SCBON can prevent Ms. Perez from working unless she appears before the SCBON and testifies⁵⁹.

But the Fifth and 14th Amendments of the US Constitution prevent the SCBON from coercing Ms. Perez into providing testimony which may be used against her⁶⁰. The protection applies to criminal, civil and administrative proceedings⁶¹.

⁵⁷ A true and correct copy is attached hereto

⁵⁸ First Amended /Supplemented Petition For A Writ of Mandamus and declaratory judgment or, in the alternative, inverse condemnation proceedings. When considering the defendants' motion to dismiss, the facts must be deemed as true, Disabato vs South Carolina Association of School Administrators, 746 S.E.2d 329 (SCT - July 17, 2013)

⁵⁹ id

⁶⁰ Lefkowitz vs Turley, et al, 414 US 70, 77 (U.S. 11/19/1973) (The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings] citing McCarthy v. Arndstein, 266 US 34, 40 (1924), Jackson v. Denno, 378 S 368 (1964), Accord : State v. Hook, 348 S.C. 401, 559 S.E.2d 856 (S.C.App. 12/17/2001) citing S.C. Const. Art. I, § 12, affirmed, State v. Hook, 356 S.C. 421, 590 S.E.2d 25 (S.C. 11/24/2003)

⁶¹ id

The Fifth Amendment prevents the SCBON from penalizing Ms. Perez' for her refusal to testify by preventing her from becoming gainfully employed⁶². The SCBON is an administrative agency hence its officers have no statutory or Constitutional authority to declare and/or rule upon any objection interpose by Ms. Perez during her proposed interrogation⁶³. For that reason, inter alia, the final agency action does not provide an adequate remedy.

By Order dated June 4th, 2015 the trial court denied Ms. Perez' motion to add **Holly Gillespie Pisarik, Esq**, Director of Labor, Licensing and Regulation, as a defendant **in her individual capacity** to the above styled case Ms Perez objects⁶⁴.

South Carolina statute Section 40-1-40 states that the General Assembly created the South Carolina Department of Labor, Licensing and Regulation, in order to protect the public through the regulation of professional and occupational licensees **and the administration of boards** charged with the regulation of professional and occupational practitioners. Subsection **(B)** states that the [Board of Nursing] and the occupations it licenses or

⁶² Gardner v Broderick, 392 US 273, 279 (U.S. 06/10/1968) ; Accord : State v. Hook, 348 S.C. 401, 559 S.E.2d 856 (S.C.App. 12/17/2001) citing S.C. Const. Art. I, § 12, State v. Hook, 356 S.C. 421, 590 S.E.2d 25 (S.C. 11/24/2003)

⁶³ Rainey v. Haley, 27269 (S.C. 06/12/2013) Citing S.C. Code Ann. § 15-53-20 (2005) and Rule 57, SCRCF

⁶⁴ ROA pp 34-35; 71-72;

otherwise regulates must be administered by the Department of Labor, Licensing and Regulation pursuant to this article. Accordingly, Ms. Perez respectfully submits that the DLLR is a proper party.

42 USC 1983 authorizes Ms Perez to file a cause of action against Ms Pisarik, in her official capacity, for transgressing upon her rights⁶⁵. Defendant Pisarik does not have qualified immunity. The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known⁶⁶. Ms. Pisarik has not, and cannot, claim that she was not aware that South Carolina Statute Section 40-1-10 protects Ms. Perez' right – her property interest - to engage in a lawful profession, trade, or occupation of choice.

Ms. Pisarik has not, and cannot, claim that she was not aware that Ms. Perez' right to engage in a lawful profession, trade, or occupation of choice is protected by South Carolina Statute 40-1-10 , and can only be abridged

⁶⁵ Our federal system of government, state as well as federal courts have jurisdiction over suits brought pursuant to 42 U. S. C. §1983, the statute that creates a remedy for violations of federal rights committed by persons acting under color of state law, Haywood v. Drown, 129 S.Ct. 2108, 173 L.Ed.2d 920 (U.S. 05/26/2009) Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635, 122 S.Ct. 1753 (U.S. 05/20/2002)

⁶⁶ Messerschmidt v. Millender, 132 S.Ct. 1235, 182 L.Ed.2d 47 (U.S. 02/22/2012) citing Pearson v. Callahan, 555 U. S. 223, 231 (2009)

when it is clearly found that abridgement is necessary for the preservation of the health, safety, and welfare of the public⁶⁷. The court erred in dismissing Ms. Perez' claims against Ms. Pisarik without identifying the facts upon which it relied for finding that she was entitled to qualified immunity⁶⁸.

XVI

MS PEREZ IS BEING SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT

The facts show that Ms. Perez is being prevented from earning a livelihood as a nurse even though the Defendants have not **found that abridgement is necessary for the preservation of the health, safety, and welfare of the public**⁶⁹ The facts also show that the Defendants claim that they have the authority to prevent her from working as nurse until she travels to Columbia and testifies before the SCBON⁷⁰.

⁶⁷ South Carolina Statute 40-1-10

⁶⁸ Ussery vs Sgt Mansfield, et al, No. 14-7096 (Fourth US Court of Appeals – 2015) citing Behrens v. Pelletier, 516 US 299 , 305 (1996)

⁶⁹ Id, see also Please see SECTION 1-23-370 Procedures regarding issuance, denial or renewal of licenses. No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.(emph. Added)

⁷⁰ ROA pp 10-11 ; 40-42

The Excessive Fines Clause of the Eighth Amendment and S.C. Constitution Article I, § 15 prohibit the government from imposing excessive fines as punishment⁷¹. A civil sanction is punitive if “it can only be explained as serving in part to punish⁷². Courts have stated that they will find a violation of the Excessive Fines Clause if the penalty is **grossly** disproportional to the gravity of a defendant's offense⁷³. The facts show that Ms. Perez has committed no offense.

⁷¹ State v. Ortho-McNeil-Janssen Pharmaceuticals, Inc., Opinion No. 27502 SC Supreme Court - February 25, 2015, U.S. Const. amend. VIII , SC Constitution Article I, § 15

⁷² United States v. Bajakajian, 524 U. S. 321 (1998); Austin v. United States, 509 U.S. 602, 610, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993).

⁷³ State v. Ortho-McNeil-Janssen Pharmaceuticals, Inc., Opinion No. 27502 SC Supreme Court - February 25, 2015

XVII

THE REVERSE CONDEMNATION AND THE SEIZURE OF PROPERTY PROCEEDINGS WERE PROPERLY BEFORE THE TRIAL COURT

Inverse condemnation proceedings⁷⁴ apply when any type of property⁷⁵ – i.e., physical , intangible⁷⁶, intellectual – is affected by a governmental taking. Since 1922 it has been understood that a “regulatory taking” constitutes a taking requiring compensation⁷⁷. Governmental immunity from suit does not shield the government from an action for compensation under

⁷⁴ ROA pp 11-12; 36-40; 77-81;

⁷⁵ Eastern Enterprises v. Apfel, 524 U.S. 498 , 522-523 (U.S. 06/25/1998) (Health benefit funds) (This case does not present the "classi[c] taking" in which the government directly appropriates private property for its own use. See United States v. Security Industrial Bank, 459 U. S. 70, 78 (1982). Although takings problems are more commonly presented when "the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good," Penn Central Transp. Co. v. New York City, 438 U. S. 104, 124 (1978) (citation omitted), economic regulation such as the Coal Act may nonetheless effect a taking, see Security Industrial Bank, supra, at 78. See also Calder v. Bull, 3 Dall. 386, 388 (1798) (Chase, J.) ("It is against all reason and Justice" to presume that the legislature has been entrusted with the power to enact "a law that takes property from A. and gives it to B"). By operation of the Act, Eastern is "permanently deprived of those assets necessary to satisfy its statutory obligation, not to the Government, but to [the Combined Benefit Fund]," Connolly, supra, at 222, and "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change," Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 416 (1922). Whiting v. University of Southern Mississippi, 451 F.3d 339 (5th Cir. 06/02/2006) quoting Bd. of Regents of State Colls. v. Roth, 408 US 564 566-7 (1972) (The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. **These interests -- property interests -- may take many forms.**)

⁷⁶ Nautilus , Inc. v Biosig Instruments, Inc. No. 13-369 (US Supreme Court - June 2, 2014) (patents) ; Kent , et al, v Dulles, 357 US 116 (U.S. 06/16/1958)(Right to travel)

⁷⁷ Pennsylvania Coal Co. v. Mahon, 260 US 393 (1922),

the US Constitution Fifth Amendment takings clause⁷⁸. A Fifth Amendment claim is ripe where, as here, the Plaintiff has been injured by an agency decision⁷⁹. A takings clause "case" or controversy exists once the government has taken private property without paying for it⁸⁰. Thus, it is a taking when a state regulation deprives him of all economically beneficial use of his property⁸¹. Whether or not it was taken for "public use" is irrelevant⁸². It is also irrelevant for 5th Amendment purposes whether the taking was effectuated by the executive, legislative or **judicial branch**⁸³.

"The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, directs that 'private property' shall not 'be taken for public use, without just compensation'⁸⁴. Because the Constitution protects rather than creates property interests, courts must "resort to 'existing rules or

⁷⁸ *Home v. Department of Agriculture*, 12-123 (U.S. 06/10/2013) *supra*, citing *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 US 172 (1985). Accord: *Gen. Services Com'n v. Little-Tex Insulation Co., Inc.* 39 SW 3rd 591, 598-99 (Tex. 2001); *Steele v. City of Houston*, 603 SW 2d 786, 791 (Tex. 1980). See Article I, section 17 of the Texas Constitution

⁷⁹ *Home v. Department of Agriculture*, 12-123 (U.S. 06/10/2013), *supra*, citing *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 US 172 (1985).

⁸⁰ *Home v. Department of Agriculture*, 12-123 (U.S. 06/10/2013) FN 6, *supra*, citing

⁸¹ *Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection*, No. 08-1151 (U.S. 06/17/2010) citing *Lucas v. South Carolina Coastal Council*, 505 US 100, 1019 (1992).

⁸² *Lucas v. South Carolina Coastal Council*, 505 US 1003, (1992); *Pennsylvania Coal Co. v. Mahon*, 260 US 393 (1922).

⁸³ *Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection*, No. 08-1151 (U.S. 06/17/2010) Quoting *PruneYard Shopping Center v. Robins*, 447 US 74 (1980)

⁸⁴ *Urban Developers LLC v. City of Jackson*, 468 F.3d 281, 292 (5th Cir. 2006) (quoting U.S. Const. amend. V) (internal citation omitted)

understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments⁸⁵.

Once the right to practice nursing is lawfully acquired, it is a **property**⁸⁶ right protected by the due process clauses of the state and federal constitutions⁸⁷. At common law, only the Judicial Department could revoke the right to practice a profession.⁸⁸ To state a cause of action for inverse condemnation under the South

⁸⁵ . " Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992) (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972))

⁸⁶ The 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." Brown v. S.C. State Bd. of Educ., 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) (citing Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed. 2d 1377 (1959)); Baird v. Charleston County, 333 S.C. 519, 537, 511 S.E.2d 69, 79 (1999) (recognizing same principle); Ezell v. Ritholz, 188 S.C. 39, 46-49, 198 S.E. 419, 422-23 (1938) (discussing same principle). "It cannot be doubted that a man's trade or profession is his property." Byrne's Adminstrs. v. Stewart's Adminstrs., 3 S.C. Eq. (3 Des. Eq.) 466, 479 (1812). Likewise, the practices of medicine and physical therapy by properly licensed individuals undoubtedly are cognizable property interests rooted in state law. Dantzler v. Callison, 230 S.C. 75, 92, 94 S.E.2d 177, 186 (1956) (stating "[t]here 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"). Sloan v. South Carolina Board of Physical Therapy Examiners, 636 S.E.2d 598, 370 S.C. 452 (S.C. 09/25/2006) Liberty or property interests protected under the Due Process Clause "attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law" Paul v. Davis, 424 US 693, 710-11 (1976).

⁸⁷ id

⁸⁸ Scott v. Texas State Board of Medical Examiners, 384 S.W.2d 686, 690 (Tex. Sup. 1964)(It is seen from the legislative history of the Medical Practice Act that from the beginning the revocation of a medical license has been committed to the district courts as a judicial function. **It has been traditionally so**.... There is a difference, legislatively recognized through the years, between an exercise of the power to examine and issue a medical license, and an exercise of the power to revoke a medical license for cause. Texas Vending Comm. v. Headquarters Corp., 505 SW 2d 402 (Tex. Civ. App. 1974, writ ref'd n.r.e.). (Appellants rely on Scott v. Texas State Board of Medical Examiners, 384 S.W.2d 686 (Tex. 1964)... In Scott, the court was concerned

Carolina constitution, a plaintiff must allege (1) an intentional governmental act; (2) that resulted in his property being taken, damaged, or destroyed; (3) for public use⁸⁹. Once the right to practice medicine is lawfully acquired, it is a right protected by the due process clauses of the state and federal constitutions⁹⁰ and can only be revoked by the district courts⁹¹

The Federal⁹² and the SC⁹³ Constitutions protect vested rights. The Fourteenth Amendment, §1 provides, among other things, that a State may not abridge "the privileges or immunities of citizens of the United States" or deprive "any person of life, liberty, or property, without due process of

with the provision of Tex.Civ.Stat.Ann.Art. 4506 providing a de novo review of the orders of the State Board of Medical Examiners. There the Board had revoked and canceled Scott's license to practice medicine. **The Supreme Court observed that traditionally the revocation of a medical license has been committed to the district courts as a judicial function. The court also recognized, at least in the regulation of the practice of medicine, that a difference existed between an exercise of the power to examine and issue a license, and an exercise of the power to revoke a license.**

⁸⁹ Carolina Chloride, Inc v. Richland County, 394 S.C. 154, 171, 714 S.E.2d 869, 877 (2011) (S.C. 07/25/2011)

⁹⁰ Scott v. Texas State Board of Medical Examiners, 384 S.W.2d 686, 690 (Tex. Sup. 1964), I citing Vernon's Ann.St.Const. art. 1, § 19; U.S.C.A.Const. amend. 14. Sherman v. State Board of Dental Examiners, Tex.Civ.App., 116 S.W.2d 843, error refused. " Waller v. State, 68 S.W.2d 601, 605 (Tex. Civ. App. -- Amarillo 1934, writ ref'd)) Liberty or property interests protected under the Due Process Clause "attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law" Paul v. Davis, 424 US 693, 710-11 (1976).

⁹¹ Texas Vending Comm. v. Headquarters Corp., 505 SW 2d 402 (Tex. Civ. App. – Austin - 1974, writ ref'd n.r.e.) quoting Scott v. Texas State Board of Medical Examiners, supra.; Francisco v. Board of Dental Examiners, 149 S.W.2d 619 (Tex.App. 03/05/1941)

⁹² Vartelas v. Holder, 132 S.Ct. 1479 (U.S. 03/28/2012) quoting Landgraf v. USI Film Products, 511 US 244, 263 (1994) and several provisions of the Constitution, among them, the Ex Post Facto Clause, the Contract Clause, and the Fifth Amendment's Due Process Clause.

⁹³ Sloan v. South Carolina Board of Physical Therapy Examiners, 636 S.E.2d 598, 370 S.C. 452 (S.C. 09/25/2006)

law."⁹⁴

Since the right of the citizen to use his property as he chooses so long as he harms nobody, is an inherent and constitutional right, the police power cannot be invoked for the abridgment of a particular use of private property, unless such use reasonably endangers or threatens the public health, the public safety, the public comfort or welfare⁹⁵.

A law which assumes to be a police regulation but deprives the citizen of the use of his property under the pretense of preserving the public health, safety, comfort or welfare, when it is manifest that such is not the real object and purpose of the regulation, will be set aside as a clear and direct invasion of the right of property without any compensating advantages⁹⁶.

The Fifth Amendment forbids takings in the form of government regulations that effectively deprive a property of all economic value⁹⁷. The Takings Clause applies to the states⁹⁸. Where a State provides an adequate

⁹⁴ McDonald v. City of Chicago, Illinois, No. 08-1521 (U.S. 06/28/2010) quoting District of Columbia v. Heller, 554 US 570 (2008).

⁹⁵ City of Houston v. Johnny Frank's Auto Parts, 480 SW 2d 774 (Tex.Civ.App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.). quoting Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513 (1921).

⁹⁶ Id, see also Cooley, Const.Lim. 248

⁹⁷ Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection, No. 08-1151 (U.S. 06/17/2010) citing Lucas v. South Carolina Coastal Council, 505 US 1003, 1019 (1992).

⁹⁸ Chicago, B & Q.R. Co. v. Chicago, 166 U.S. 226 (1897),

procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.⁹⁹

But the *Williamson County* ripeness doctrine "does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and a claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution."¹⁰⁰

The Fourth Amendment, made applicable to the States by the Fourteenth Amendment¹⁰¹, provides in relevant part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" A "seizure" of property occurs when "there is some meaningful interference with an individual's possessory interests in that property"¹⁰².

The Fourth Amendment applies to civil as well as criminal seizures¹⁰³,

⁹⁹ *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985).

¹⁰⁰ *Town of Nags Head v. Toloczko*, 12-1537 (4th Cir. 08/27/2013) citing *San Remo Hotel, L.P. v. City & Cnty. of S.F., Cal.*, 545 US 323, 346 (2005).

¹⁰¹ *Ker v. California*, 374 U.S. 23, 30, 83 S.Ct. 1623, 1628 (1963),

¹⁰² *Severance v. Patterson*, 566 F.3d 490 (5th Cir. 04/23/2009) citing *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, (1984); *Soldal v. Cook County*, 506 U.S. 56, 61, 113 S.Ct. 538, 543 (1992).

¹⁰³ *Severance v. Patterson*, 566 F.3d 490 (5th Cir. 04/23/2009) citing *Freeman v. City of Dallas*, 242 F.3d 642, 647 n.5 (5th Cir. 2001) (en banc),

and the Supreme Court holds that an interference with individual property rights may be found to breach more than one provision of the Constitution¹⁰⁴. Separate claims for constitutionally unreasonable seizure and taking of property may coexist¹⁰⁵.

Further, the courts have ruled more than once that substantive due process, procedural due process, equal protection and takings claims may be implicated simultaneously in various types of governmental actions that interfere with individual property rights¹⁰⁶.

The Fourth and Fifth Amendments both provide specific constitutional commands¹⁰⁷. That they may have evolved through caselaw to overlap in providing remedies for some deprivations of property interests does not authorize the court to fail to apply one or the other provision¹⁰⁸. Indeed, as Presley noted, the elements of a violation of the two amendments differ, with the touchstone of a takings claim being lack of just compensation and that of a seizure claim being its unreasonableness¹⁰⁹. Further, § 1983 authorizes

¹⁰⁴ Id citing *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49-50, 114 S.Ct. 492, 499 (1993).

¹⁰⁵ Id citing *Presley v. City of Charlottesville*, 464 F.3d 480, 487 (4th Cir. 2006).

¹⁰⁶ Id citing *Simi Inv. Co.: v. Harris County*, 236 F.3d 240, 248-49 (5th Cir. 2000); *John Corp. v. City of Houston*, 214 F.3d 573, 584-85 (5th Cir. 2000).

¹⁰⁷ id

¹⁰⁸ id

¹⁰⁹ *Severance v. Patterson*, 566 F.3d 490 (5th Cir. 04/23/2009)

different damage measures for the claims¹¹⁰.

Mandamus is the highest judicial writ and is issued only when there is a specific right to be enforced, a positive duty to be performed, and no other specific remedy¹¹¹. A writ of mandamus is a coercive writ that orders a public official to perform a ministerial duty¹¹².

CONCLUSION

WHEREFORE Ms Perez respectfully submits

- 1- The Court of Common Pleas had subject matter jurisdiction
- 2- Ms. Perez has the right to compel defendants to perform a ministerial act
- 3- The trial court findings of fact were not supported by the evidence;
- 4- Ms Perez has the right to be compensated pursuant to the Takings clause and/or because of the seizure of her property within the meaning of the Fourth and Fifth Amendments.

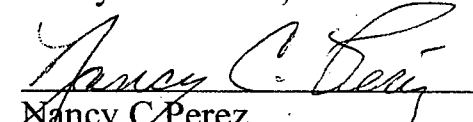
¹¹⁰ City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (U.S. 05/24/1999) citing Heck v. Humphrey, 512 U. S. 477, 483 (1994)

¹¹¹ City of Rock Hill v. Thompson, 349 S.C. 197, 563 S.E.2d 101 (S.C. 03/11/2002)

¹¹² City of Rock Hill v. Thompson, 349 S.C. 197, 563 S.E.2d 101 (S.C. 03/11/2002)

WHEREFORE, Ms. Perez respectfully request that the Relief sought herein ought to be granted.

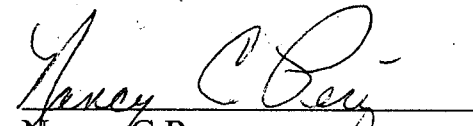
Respectfully Submitted,


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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing "Nancy C Perez' Initial Appellate Brief " was delivered by mailing a copy thereof on March 21st, 2016 to :

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Nancy C Perez

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