THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Appellate Case No.: 2016-000562
Lower Court No.: 2014-CP-04-01780

Nancy C. Perez, Appellant,

v.

South Carolina Department of Labor, Licensing and Regulation—Board of Nursing, Respondent

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INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN DISMISSING THE CASE BECAUSE IT LACKED JURISDICTION TO REVIEW THE STATE BOARD OF NURSING'S LICENSING DECISIONS?

2. WAS THE CIRCUIT COURT'S DISMISSAL OF THE CASE APPROPRIATE BECAUSE APPELLANT FAILED TO EXHAUST HER ADMINISTRATIVE REMEDIES BEFORE THE STATE BOARD OF NURSING?

3. WAS THE CIRCUIT COURT'S DISMISSAL OF THE CASE IN DEROGATION OF APPELLANT'S COMMON LAW RIGHTS?

4. DID THE CIRCUIT COURT ERR IN ANY FINDINGS OF FACT WHEN DISMISSING THE CASE?

5. DID THE CIRCUIT COURT IMPROPERLY DENY APPELLANT THE RIGHT TO A JURY TRIAL?

6. WAS THERE ANY POSSIBLE SEIZURE OR TAKING OF APPELLANT'S PROPERTY FOR INVERSE CONDEMNATION OR CONSTITUTIONAL PURPOSES?

7. WERE APPELLANT'S EIGHTH AMENDMENT AND FIFTH AMENDMENT RIGHTS VIOLATED BY THE STATE BOARD OF NURSING REQUIRING A HEARING APPEARANCE?

8. IF THE CIRCUIT COURT HAD JURISDICTION TO HEAR THE CASE, WAS DENIAL OF THE WRIT OF MANDAMUS PROPER?

STATEMENT OF THE CASE

Appellant appeals the circuit court's dismissal of her *pro se* First Amended Petition for Writ of Mandamus to require the State Board of Nursing for South Carolina ("Board") to issue her a South Carolina license as a licensed practical nurse. Appellant moved to South Carolina from Texas, where she had practiced as a practical nurse for many years. On May 23, 2014, the Board received Appellant's application for reactivation of her lapsed South Carolina nursing license. On the reinstatement application, Appellant answered "No" to the question asking if she

had ever been arrested, charged or convicted in any state or federal court (other than minor traffic violations). The Board thereafter received the criminal background reports which are now conducted on all nurse applicants pursuant to S.C. Code Ann. § 40-33-25 (2011). The FBI report showed a conviction for failure to file a federal tax return.

When discrepancies exist between responses on an application and a criminal background check, the Board requires the applicant's personal appearance before the Board as well as a Board vote before an application for a permanent license can be approved. Appellant declined to appear before the Board's regularly scheduled Board meetings in July and September of 2014 for consideration of her license application.

On August 19, 2014, Appellant filed a *pro se* "Petition for A Writ of Mandamus and Declaratory Judgment, or in the Alternative, Inverse Condemnation Proceedings," in circuit court in Anderson County, which she amended on September 4, 2014. (R. pp.) On September 15, 2014, Respondent filed its Opposition to Pro Se Petition for Writ of Mandamus and Cross Motion to Dismiss Case ("Motion to Dismiss"), accompanied by an Affidavit of Kathryn Nedovic in Support of Respondent's Motion to Dismiss. (R. pp.) On October 8, 2014, Appellant filed a motion to add as a defendant the then-director of the South Carolina Department of Labor, Licensing and Regulation ("LLR") in her individual capacity. This motion is apparently predicated on additional claims of taking or seizure of Appellant's property under the Fourth and Fifth Amendments of the United States Constitution, as an alternative to the inverse condemnation claim pled in the First Amended Petition. (R. pp.) On November 6, 2014, Respondent served and filed an objection to that motion, which included as an exhibit a copy of the Board's October 28, 2014, Order denying Appellant's application until such time as she personally appears before the Board for questioning. (R. pp.)

On July 27, 2015, the circuit court heard Respondent's Motion to Dismiss, which had been continued from an earlier hearing date on June 4, 2015.[1] On June 4, the court heard various *pro se* motions filed by Appellant, including her motion for summary judgment and her motion to add the then-director of LLR, in her individual capacity, as a defendant. (Appellant's Rule 59(e) motion p. 22, R. p.) On June 5, 2015, the circuit court entered a form order denying her motions for summary judgment and to add a defendant. (R. pp.)

On August 10, 2015, the circuit court entered its order dismissing the entire case on jurisdictional grounds ("Order of Dismissal"). (R. pp.) This dismissal occurred prior to Respondent filing any answer to the First Amended Petition. On August 17, 2015, Appellant filed a *pro se* motion to reconsider the Order of Dismissal, pursuant to Rule 59(e), SCRCP. (R. pp.) On August 20, 2015, Appellant filed her first *pro se* Notice of Appeal (Case No. 2015-1784), along with a motion to abate the appeal. (January 13, 2016, Order of this Court R. p.) By an order filed August 26, 2015, this Court dismissed that appeal without prejudice, and remanded to the circuit court for consideration of Appellant's motion for reconsideration. (*Id.*)

On October 28, 2015, Appellant mailed a motion for rehearing of this Court's denial of her Motion to Renew Appellate Proceedings, which earlier motion she had filed because the circuit court had not yet ruled on her motion for reconsideration. This Court returned Appellant's motion filing fee because it no longer had jurisdiction to hear the motion, having sent the remittitur to the circuit court on September 14, 2015. (Nov. 6, 2015, letter R. pp.)

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[1] The caption page of the transcript correctly reflects the date of the hearing; the June 28th date at the top of the other pages of the transcripts is an error. All of Appellant's motions, as well as Respondent's Motion to Dismiss, were originally scheduled to be heard on February 27, 2014, and all of the parties appeared. Ms. Nedovic attended that motion hearing with counsel, prepared to testify if necessary. However, the hearing was rescheduled because well into the hearing, Appellant disclosed facts about her potential employment that caused that circuit court judge to discover that he had a conflict of interest.

Appellant filed an amended second Notice of Appeal on October 26, 2015, (Case No. 2015-2237). (R. p.). On November 16, 2015, she mailed to this Court a motion to dispense with the Trial Court's decision on the motion for reconsideration. (R. pp.) By order filed January 13, 2016, this Court dismissed the second set of notices of appeals without prejudice,[2] and remitted the case to the circuit court on February 17, 2016. (R. pp.)

On February 29, 2016,[3] less than two weeks after the circuit court received the remittitur from Appellant's second set of notices of appeal, Appellant filed a *pro se* Petition for Mandamus in the South Carolina Supreme Court against the circuit court judge because he had not yet ruled on her motion for reconsideration.

On March 8, 2016, the circuit court entered its order denying Appellant's motion for reconsideration. (R. pp.) On March 10, 2016, Appellant withdrew her Petition for a Writ of Mandamus against the circuit court judge, and mailed her third, and current, Notice of Appeal. (R. pp.)

FACTS

Appellant was licensed as a vocational nurse in Texas on October 9, 1996. (Amended Complaint ¶ 3, R. p.) Appellant was first licensed in South Carolina as a licensed practical nurse in early 1997, pursuant to an application dated November 5, 1996. (Nedovic Affidavit ¶ 4A and Exhibit A thereto R. pp. ; Amended Complaint ¶ 4 R. p.) Her South Carolina license

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[2] On January 13, 2016, Appellant also filed an Amended Verified Motion to Dispense with the Trial Court's decision on her motion for reconsideration, which the Count of Appeals denied that same day.

[3] The Petition is erroneously dated March 29, 2016, but the certificate of service reflects the correct date of February 29, 2016.

lapsed on February 3, 1998, because she failed to renew it.[4] (Nedovic Affidavit ¶ 4A R. p.; Board Order ¶ 5A R. p.) Her Texas license expired on July 31, 2014. (Amended Complaint ¶ 3 R. p.) Respondent did not take any action that caused Appellant's Texas or South Carolina nursing licenses to lapse or expire.

The 1996 South Carolina nursing license application asked whether the applicant had been convicted of any crime other than a minor traffic violation. Appellant answered "No" to that question in the 1996 application. (Nedovic Affidavit ¶ 4A and Exhibit A thereto R. pp. ; Board Order ¶ 5A-B R. p.)

On May 23, 2014, the Board received Appellant's application for reinstatement of her South Carolina license. (Nedovic Affidavit ¶ 4B R. p.) On the 2014 application, Appellant answered "No" to the question: "Have you ever been arrested, charged or convicted . . . in any state or federal court (other than minor traffic violations) whether or not sentence was imposed or suspended?" (Nedovic Affidavit ¶ 4B and Exhibit B thereto R. pp.) The Board thereafter received the criminal background reports which are now conducted on all applicants for nursing licenses pursuant to S.C. Code Ann. § 40-33-25 (2011).[5] (Nedovic Affidavit ¶ 4C R. p.) The FBI report indicated a pre-1996 conviction involving federal tax law. (Nedovic Affidavit ¶¶ 4C R. p.) On June 26, 2014, the Board received Appellant's response to the request for information regarding the criminal matter, in which she identified the crime as a violation of 26 U.S.C. § 7203. (Nedovic Affidavit ¶ 8 and Exhibit E thereto R. pp.)

When discrepancies exist between responses on an application and a criminal background check, the Board requires the applicant's personal appearance before the Board as well as a

[4] A lapsed license means the termination of a person's authorization to practice nursing due to the person's failure to renew his or her nursing license within the renewal period. S.C. Code Ann. § 40-33-20(34) (2011).

[5] The federal criminal background record checks were authorized by 2008 Act No. 345, § 1.

Board vote before an application for a permanent license can be approved. The Board has not delegated authority to its LLR staff to issue permanent licenses when such discrepancies exist. (Nedovic Affidavit ¶ 5 R. p. ; Board Order ¶ 6 R. p.)

Even though Appellant failed to truthfully disclose her prior criminal history in both of her South Carolina nursing applications, the Board's staff sought to accommodate her to alleviate the consequences of the delay that Board review of her application would entail. On June 30, 2014, the Board's staff sent Appellant a letter confirming her oral agreement to waive the 30-day notice of hearing and scheduling her for an appearance at the Board's July 25, 2014, meeting for consideration of her reinstatement application. (Nedovic Affidavit ¶ 9 and Exhibit F thereto R. pp.)

However, Appellant rejected all of these accommodations. By letter received by the Board on July 9, 2014, Appellant rescinded her oral waiver of the 30 days' notice and declined to confirm her Board appearance at the upcoming July 25, 2014, meeting. (Nedovic Affidavit ¶ 10 and Exhibit G thereto R. pp.) Even so, on August 28, 2014, the Board's president was advised of Appellant's need for licensure by September 2, 2015, for employment reasons, and on that same day, the Board's President approved offering Appellant the option of a temporary license valid through the Board's September 26, 2014, meeting. (Nedovic Affidavit ¶¶ 13-14 R. p. ; Board Order ¶ 11 R. p.) The fee for a temporary license is only $10.00. *Id.* On August 28, 2014, Appellant declined the offer of a temporary license, indicated that she would not appear in person at the Board's September 2014 meeting, and told a member of the Board's staff that "I'll see you in court." (Nedovic Affidavit ¶¶ 13-14 R. p.) The offer of the temporary license was confirmed by e-mail and by a letter. (Nedovic Affidavit ¶ 15-16 R. p. , Board Order ¶ 11 R. p.) Appellant did not appear at the Board's September 2014 meeting. (Board Order ¶ 13 R. p.)

Instead, on August 19, 2014, Appellant mailed to Respondent the summons and complaint for writ of mandamus in the circuit court. (Appellant's Initial Brief p. 13 R. p. ; Nedovic Affidavit ¶ 17 R. p.) The procedural history of the case is set forth in the Statement of Case and is not repeated here.

ARGUMENTS

Summary of the Arguments

Appellant's lapsed South Carolina nursing license has not been reactivated because she adamantly refuses to appear before the Board for the Board's consideration of her licensure application on the merits. Rather than pursue her administrative remedies to obtain a license, Appellant persists in seeking licensure through a court with no authority to grant it, and instituting repeated appeals of that court's dismissal of the case. The Administrative Law Court ("ALC"), not the circuit court, has jurisdiction to review the Board's final licensing decisions. S.C. Code Ann. §§ 40-1-160 (2011); 40-33-160 (2011); and 1-23-600(D)–(E) (Supp. 2015). A "party aggrieved by the decision of [a licensing] board may appeal to the ALC." S.C. Code Ann. § 40-1-160 (2001). "The review of licensure decisions is governed by section 1-23-380 of the Administrative Procedures Act . . . .". *Osman v. S.C. Dep't of Labor, Licensing and Regulation*, 382 S.C. 244, 248, 676 S.E.2d 672, 675 (2009).

Appellant has not been denied due process. Rather, she has refused to participate in due process and administrative remedies afforded her by S.C. Const. Art. I, § 22 and the South Carolina Administrative Procedures Act ("APA") through her repeated refusals to appear before the Board for consideration of her application. Furthermore, she was offered the option of a

temporary license pending Board review of her application at the Board's September 2014 meeting, but she refused even to apply for it.

Respondent has not taken or seized Appellant's property, either directly or indirectly. Even if a lapsed license were Appellant's property rather than the State's, the lapsed license is in the same status as it was prior to the Board's action. Appellant's lapsed South Carolina license has not been revoked, nor has she been denied an opportunity to reinstate it in the future. Rather, it remains lapsed until she appears before the Board, pursuant to the Board's Order dated October 28, 2014. (R. p.) Again, nothing has been taken or seized.

I. THE CIRCUIT COURT DOES NOT HAVE JURISDICTION TO REVIEW RESPONDENT'S LICENSING DECISIONS

The trial judge correctly ruled that the circuit court lacked jurisdiction to hear this case. In the absence of jurisdiction over the case, all of Appellant's allegations of injury to her rights and all of her motions in this matter are irrelevant. Therefore, Respondent addresses this issue first.

The circuit court does not have jurisdiction to grant professional or occupational licenses, or to review licensing decisions of occupational licensing boards. Nevertheless, that is what Appellant is requesting the circuit court to do. The First Amended Petition seeks a writ of mandamus to force the Board to reinstate a South Carolina nursing license, or to award Appellant damages for inverse condemnation of a nursing license if the circuit court does not issue a writ of mandamus. (First Amended Petition p. 9 R. p.) Under the APA, the Legislature created a procedure that gives exclusive jurisdiction for judicial review of the Board's licensing decisions to the ALC rather than the circuit courts. The ALC also has the jurisdiction to hear petitions for

writs of mandamus, pursuant to S.C. Code Ann. § 1-23-630 (Supp.2015), because a writ of mandamus is a "remedial writ."[6] *Id.*

South Carolina circuit courts are vested with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction is given to inferior courts, and have the appellate jurisdiction as provided by law. S.C. Const. art. V, § 11. "In determining whether the Legislature has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute." *Dema v. Tenet Physician Servs.–Hilton Head, Inc.*, 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009) (noting that DHEC, not the circuit court, has exclusive subject matter jurisdiction to determine whether a violation of the State's Certification of Need and Health Facility Licensure Act has occurred). *Berry v. South Carolina Dept. of Health and Environmental Control,* 402 S.C. 358, 742 S.E.2d 2 (2013) held that the circuit court had no subject matter jurisdiction to hear a case challenging DHEC's penalty for violating a permit because the matter was administrative in nature and exclusively governed by the APA. *Rainey v. Haley*, 404 S.C. 320, 745 S.E.2d 81 (2013) held that the circuit court had no jurisdiction over a complaint seeking declaratory judgment that the governor had violated the State Ethics Act when the governor was a member of the Legislature and that determination of violations by a legislator was solely within the purview of the Legislature.

Here, the relevant statutes granting exclusive jurisdiction to an entity other than the circuit courts are the licensing acts and the APA. S.C. Code Ann. §§ 40-1-70, 40-1-130, 40-33-40, and 40-33-41 (2011) collectively grant the Board exclusive authority to grant or deny applications for reinstatement of nursing licenses. S.C. Code Ann. §§ 40-1-160 and 40-33-160

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[6] However, the ALC would likely deny mandamus, because it has previously held that a decision on the eligibility of an applicant for reinstatement of a license is not a ministerial act. *McDonald v. S.C. Dept of Labor, Licensing and Regulation, Real Estate Commission*, No. 99-ALJ-11-0406-IJ, 1999 WL 1029435 (S.C.Admin.Law.Judge.Div. Oct. 7, 1999).

(2011) mandate that appeals of the Board's licensing decisions are directed to the ALC, in accordance with the APA. Under the APA, licensing matters for which a hearing is required are contested cases. S.C. Code Ann. § 1-23-310(3)–(4) (2005). The APA provides for different stages of review of the Board's final licensing decisions. The first stage occurs with review of the Board's decision by the ALC, an administrative tribunal in the executive branch of government. S.C. Code Ann. §§ 1-23-600(D)–(E) (Supp. 2015). The next level of review occurs in the appellate courts, which are part of the judicial branch of government. S.C. Code Ann. §§ 1-23-600(E), 1-23-610 (Supp. 2015). The circuit courts are not in the chain of judicial review provided by law for the Board's licensing decisions.

Article I, Section 22 of the South Carolina Constitution governs procedural due process for administrative agency decisions. This provision states:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

S.C. Const. Art. I, § 22 is implemented by the APA, which provides procedures to be followed by agencies in reaching judicial or quasi-judicial decisions, including licensure decisions and appeals from those decisions. Because Appellant's application was not routine and could not be approved at staff level, the Board requires her presence at a Board meeting as part of its consideration of the merits of her application for reinstatement of the license. This appearance is part of the due process afforded to Appellant in the licensure process under S.C. Const. Art. I, § 22 and the APA.

Appellant's *pro se* First Amended Petition could possibly be liberally read as an attempt to request an action for declaratory judgment under S.C. Code Ann. § 15-53-20 (2005), although

it is unclear what she is asking the circuit court to declare. (R. p.) However, if Appellant is seeking a declaratory judgment, there is no active case or controversy at this point to give the circuit court jurisdiction pursuant to the Declaratory Judgments Act. Appellant is merely anticipating a possibly negative ruling on the merits of her application, notwithstanding that she had already been offered a temporary license through the September 2014 Board hearing. The Declaratory Judgments Act is not an independent grant of jurisdiction, nor does the Declaratory Judgments Act eliminate the case-or-controversy requirement. *Tourism Expenditure Review Committee v. City of Myrtle Beach*, 403 S.C. 76, 81, 742 S.E.2d 371, 374 (2013). In *Tourism*, the South Carolina Supreme Court reasoned that when the Legislature provides an exclusive statutory process for challenging a particular subject, that process must be followed and no case or controversy exists outside of the mandatory process for decision under the Declaratory Judgments Act. The Supreme Court held that the Declaratory Judgments Act may not be invoked to avoid or circumvent the Legislature's exclusive method for challenging tax fund expenditures, and vacated the circuit court's order for lack of subject matter jurisdiction. *Id.* The same rationale applies here.

II. THE CASE WAS PROPERLY DISMISSED BECAUSE APPELLANT FAILED TO EXHAUST ADMINISTRATIVE REMEDIES

Because Appellant is required to exhaust her administrative remedies, dismissal for failure to state a claim was proper as a matter of law, as Respondent argued at the hearing on the Motion to Dismiss.[7] (Transcript p. 8, lines 1-5 R.) Failure to exhaust administrative remedies by bringing an action pursuant to the APA is sufficient grounds alone to deny a writ of

[7] Under Rule 220(c), SCACR, this Court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal. Pursuant to Rule 208(b)(2), SCACR Respondent requests this Court to affirm for any ground appearing in the record.

mandamus. *Steele v. Benjamin*, 362 S.C. 66, 72-73, 606 S.E.2d 499, 503 (Ct. App. 2004). *See also Bradley v. State Human Affairs Comm'n,* 293 S.C. 376, 380, 360 S.E.2d 537, 539 (1987) (stating "mandamus will not lie when an available administrative remedy has not been pursued to its end"). Here, Appellant filed suit in the circuit court on August 19, 2014, seeking a Writ of Mandamus before even giving the Board an opportunity to make a decision on her licensing application.

Pursuant to the APA, "[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review. . . ." S.C. Code Ann. § 1–23–380 (Supp.2015). Again, Appellant refused even to initiate her administrative remedies by participating in a Board hearing on her application, much less pursue her administrative remedies to their end.

To facilitate a Board review of Appellant's application before her Texas license expired on July 31, 2014, Respondent offered to provide the due process hearing at the Board's July 2014 meeting, if Appellant would waive the required 30 days' advance notice of the hearing. On June 30, 2014, the Board's staff sent Appellant a letter confirming her oral agreement to waive the 30-day notice of hearing so that she could be scheduled for an appearance regarding her reinstatement application at the Board's next meeting on July 25, 2014. (Nedovic Affidavit ¶ 9 and Exhibit F thereto R. pp.) On July 9, 2014, Respondent received Appellant's letter rescinding her oral waiver of the 30 days' notice requirement and declining to confirm her Board appearance at the July 25, 2014, Board meeting. (Nedovic Affidavit ¶ 10 and Exhibit G thereto R. pp.) On August 28, 2014, after being informed of Appellant's need for licensure by September 2, 2015, for employment reasons, the Board's president approved offering Appellant the option of a ten dollar temporary license valid through the Board's meeting in late September.

(Nedovic Affidavit ¶¶ 13-14 R. p. ; Board Order ¶ 11, R. p.) On August 28, 2014, Appellant declined the offer of a temporary license, indicated that she would not appear in person at the Board's September 2014 meeting, and told a member of the Board's staff that "I'll see you in court." (Nedovic Affidavit ¶¶ 13-14 R. p.) Appearance before the Board would not have been futile for Appellant. If the Board's denial of licensure was a certainty, the Board's president would not have authorized the issuance of a temporary license.

The doctrine of exhaustion of administrative remedies requires that where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will act." *Brown v. James*, 389 S.C. 41, 48, 697 S.E.2d 604, 608 (Ct. App. 2010). "This doctrine is well established, is a cardinal principle of practically universal application, and must be borne in mind by the courts in construing a statute providing for review of administrative action." *Id.* In *Garris v. Governing Board of the South Carolina Reinsurance Facility*, 319 S.C. 388, 461 S.E.2d 819 (1995), the South Carolina Supreme Court upheld a circuit court's dismissal of a case where an insurance agent sought declaratory and injunctive relief in circuit court regarding the Reinsurance Facility's pending disciplinary hearing involving the agent's license.

Appellant has not exhausted her administrative remedies because she has repeatedly refused to appear before the Board for consideration of her licensing application. The Board's October 2014 order did not deny Appellant's application on the merits, and merely required her personal appearance before the Board prior to a ruling on the merits of her application. (R. p.) At such time as the Board issues a final order on the merits of her reinstatement application, Appellant is entitled to judicial review, if timely and properly made. As discussed in Argument I above, the ALC has jurisdiction for that review, not the circuit court.

III. THE ORDER OF DISMISSAL WAS NOT IN DEROGATION OF APPELLANT'S COMMON LAW RIGHTS

Appellant appears to suggest in her first argument that the circuit court has authority to disregard nurse licensing statutes and to authorize her to work as a nurse in the absence of the Board's approval of her licensure. Her rationale appears to be that because at common law no nursing license was required, and because registration of nurses with the State was originally voluntary rather than for the safety of the public, that she has a vested common law right to practice nursing. (Appellant's Initial Brief pp. 16-18)

Statutes are frequently enacted in derogation of the common law. When a statute's language is plain and unambiguous, and articulates a clear and definite meaning, other rules of statutory interpretation are not applicable, including the general rule of strictly construing statutes in derogation of the common law. See *Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001). In 1947, the Legislature enacted a statute unambiguously requiring mandatory licensure of practical nurses, which became effective July 1, 1952. 1947 Act. No. 282, Section I, S.C. Statutes at Large, v.45 p 579; S.C. Code Ann. § 56-991 (1952). This unambiguous mandatory licensing requirement supersedes the common law, and did so decades before Appellant ever became a nurse.[8] Therefore, Appellant has no common law right to practice nursing without a license.

Furthermore, although S.C. Code Ann. § 40-1-10 (2011) acknowledges a person's constitutional right to engage in an occupation of choice, and prohibits statutes or regulations from being imposed upon an occupation except to protect the public interest, that provision, which was enacted in 1996, must be interpreted against the historical background of decades of

[8] Applicant asserts she was born after 1947. (Appellant's Initial Brief, Statement of the Case p. 12) Therefore she could not have had any common law right to practice as an unlicensed practical nurse.

mandatory licensure and regulation of practical nurses and other health professionals. In 1956, the South Carolina Supreme Court stated that "no person has a natural or absolute right to practice medicine, surgery, naturopathy or any of the various healing arts. It is a right granted upon condition. . . ." *Dantzler v. Callison,* 230 S.C. 75, 92, 94 S.E.2d 177, 186 (1956). "No person can acquire a vested right to continue, when once licensed, in a business, trade or profession which is subject to legislative control and regulation under the police power, as regulations prescribed for such may be changed or modified by the legislature, in the public interest, without subjecting the action to the charge of interfering with contract or vested rights..." *Id.* at 94-95, 94 S.E.2d at 188. The South Carolina Supreme Court acknowledged in 2006 that the State has broad authority to regulate the medical profession through the enactment of statutes and regulations, and specifically mentioned those governing nursing. *Sloan v. S.C. Bd. of Physical Therapy Examiners*, 370 S.C. 452, 477-478, 636 S.E.2d 598, 611 (2006) (overruled on other grounds by *Joseph v. S.C. Dep't of Labor, Licensing and Regulation*, Op. No. 27666 (S.C. Sup. Ct. filed Sept. 14, 2016) (Shearouse Adv. Sh. No. 37).

IV. THE CIRCUIT COURT MADE NO ERRONEOUS FINDINGS OF FACT

Appellant contends the circuit court erred by failing to make factual findings 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 public. Even if the circuit court had jurisdiction in this case, it would be unnecessary for it to make such a finding because the Legislature already articulated in the licensing statutes numerous specific circumstances under which a licensing board is authorized to abridge a right to work in a licensed profession. Pursuant to S.C. Code Ann. § 40-1-130 (2011), the Legislature expressly gave the Board the authority and discretion to deny an

authorization to practice to an applicant who has committed an act that would be grounds for disciplinary action. One of those grounds for disciplinary action articulated by the Legislature is conviction of a crime of moral turpitude, and the Legislature did not choose to impose a 10-year limit on the age of the conviction.[9] S.C. Code Ann. § 40-1-110(1)(h) (2011). This provision is part of the same legislation as the introductory § 40-1-10 that Appellant cites as acknowledging her protected right to work as a nurse. Furthermore, the Nurse Practice Act also treats an act of moral turpitude as relevant to licensure. S.C. Code Ann. § 40-33-110(A)(1). Under §§ 40-1-110(1)(h) and 40-33-110(A)(1), conviction of a crime of moral turpitude is grounds for discipline, even if the crime is not a felony. 26 U.S.C. § 7203 makes wilful failure to file a federal tax return, supply information, or pay federal tax a crime which is punishable by imprisonment for not more than a year. The South Carolina Attorney General has opined that a conviction under 26 U.S.C. § 7203 by way of a guilty plea is a crime of moral turpitude. Op. S.C. Att'y Gen. 1980 WL 81902 (No. 80-18) (February 6, 1980).

The Legislature gave the Board, instead of the circuit court, the authority to make the initial determination of whether a prior criminal conviction relates to the occupation for which licensure is sought. S.C. Code Ann. § 40-1-140 (2011). That section further states that "a board may refuse an authorization to practice if, based upon all information available, including the applicant's record of prior convictions, it finds that the applicant is unfit or unsuited to engage in the profession or occupation." *Id.*

In addition to having the criminal conviction about which she provided only scant information, Appellant twice misrepresented on two separate applications that she had no criminal convictions. S.C. Code Ann. § 40-33-110(A)(18) (2011) makes obtaining or attempting

[9] In some licensed occupations, the Legislature did choose to provide time limits relevant to licensure. See e.g., S.C. Code Ann. § 40-29-80(A)(18) (2011).

to obtain a license to practice nursing through dishonesty in any phase of the licensing process a disciplinable offense, and therefore relevant to licensure decisions. The Board has every right to require Appellant to appear so that it can make a determination of her fitness for licensure based on all of the relevant facts. The Board takes into account the nature of the offense, the length of time since the offense occurred, and mitigating factors such as the absence of professional discipline or other criminal acts in determining the relevancy to licensure and the applicant's rehabilitation of his or her character. However, Appellant has refused to appear before the Board so that it could obtain the information and sworn testimony from her in order to make that determination.

V. APPELLANT WAS NOT DENIED A RIGHT TO A JURY TRIAL

Even if the circuit court had jurisdiction to hear the case, Appellant was not denied a right to a jury trial. Appellant predicates her right to a jury trial upon her cause of action for deprivation of her property. (Appellant's Initial Brief p.29) The inverse condemnation action is the only cause of action pled in the First Amended Petition upon which Appellant would conceivably have a right to a jury trial, and the only one for which she requested a jury trial. (First Amended Petition R. pp.).

There is no constitutional right to a jury trial in an inverse condemnation case, and the statutory right to a jury trial in such cases is limited to determining the amount of compensation after the judge has determined whether a claim has been established. *Cobb v. S.C. Dep't of Transp.*, 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2005). Here, the circuit court alternatively ruled that if it had jurisdiction of the matter, no such claim existed. For the reasons articulated in the next argument section, the circuit court was correct that the First Amended Petition failed to

state a cause of action for inverse condemnation. The Order of Dismissal did not deprive Appellant of a right to a jury trial.

Appellant further appears to argue that Respondent has no jurisdiction to hear her licensure dispute instead of the circuit court because that would deprive her of a right to a jury trial protected by the South Carolina Constitution. (Appellant's Initial Brief p.29). There is no right to a jury trial in administrative proceedings. Jury trials are limited to courts that are part of the judicial branch of government, and administrative proceedings are conducted by the executive branch of government, rather than the judicial system. S.C. Const., Art. I, § 14 guarantees a trial by jury in civil matters only when that right existed at the time of the adoption of the State Constitution in 1868. *C.W. Matthews Contracting Co. v. South Carolina Tax Comm'n,* 267 S.C. 548, 230 S.E.2d 223 (1976). In 1868, the State had total immunity from lawsuits by its citizens, absent its consent, and thus no right to any trial, much less a jury trial, existed. *See Hodges v. Rainey*, 341 S.C. 79, 92, 533 S.E.2d 578, 584 (2000) (observing that even in 1934, the State was protected by total sovereign immunity and could only be sued in tort or in contract when the State consented).

VI. THERE HAS BEEN NO TAKING OR SEIZURE OF APPELLANT'S PROPERTY FOR INVERSE CONDEMNATION OR CONSTITUTIONAL PURPOSES

As a matter of law under the facts as pled by Appellant, there could be no taking of Appellant's property by inverse condemnation. Accordingly, if the circuit court had jurisdiction to hear the case, dismissal was appropriate under Rule 12(b)(6), SCRCP. The elements of an action for inverse condemnation are: (1) affirmative conduct of a government entity; (2) the conduct effects a taking; and (3) the taking is for a public use. *Carolina Chloride, Inc. v. S.C. Dep't of Transp.*, 391 S.C. 429, 435, 706 S.E. 2d 501, 504 (2011). First, a lapsed occupational

license is not a property interest for which a taking can occur. The Nurse Practice Act expressly states that "[a] license is the property of the State. . . ." S.C. Code Ann. § 40-33-36(A) (2011). Because the license belongs to the State in the first place, there can be no taking of it by the State for purposes of inverse condemnation. Second, even if a lapsed license were Appellant's property rather than the State's, nothing was taken by requiring her to appear before the Board for a hearing on her application for reinstatement because the license is in the same lapsed status as it was prior to the Board's action.

Appellant argues Respondent has unlawfully seized or taken her property in violation of the Fourth and Fifth Amendments to the United States Constitution. These claims were among the amendments Appellant sought to add, which the circuit court denied in its June 5, 2015, order. (R., pp.) Because as a matter of law, no property could have been taken or seized based on Appellant's allegations, the circuit court properly denied Appellant's motion to amend the First Amended Petition to include these claims. Like a cause of action for inverse condemnation, the Fifth Amendment's Takings Clause requires "private property be taken for public use, without just compensation." U.S. Const. amend. V. There has been no taking for public use either of the lapsed license or of Appellant's property rights.

Appellant has a constitutionally recognized *liberty* interest in her freedom to practice her chosen profession; however, the protected *property* interest is the specific employment of Appellant. *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 (1959)). Here, Appellant contends only that she had an offer of employment, contingent upon having a South Carolina nursing license. (Appellant's Initial Brief p. 13) That conditional job offer is not a constitutionally protected vested property interest because she did not satisfy said condition and did not lose a job she already had.

"[R]ights are vested only when they are absolute, complete and unconditional, and not dependent upon any future act, contingency or decision." *U.S. Rubber Co. v. McManus*, 211 S.C. 342, 350, 45 S.E.2d 335, 338 (1947). Because Appellant cannot establish that a vested property right has been taken or seized, her claims for uncompensated taking or seizure under the Fifth and Fourth Amendments fail.

No property has been taken or seized. The Board did not revoke the lapsed South Carolina license, nor did the Board deny Appellant an opportunity to pursue her chosen occupation by reinstating her license in the future. Rather, the license remains in its pre-existing lapsed status until Appellant appears before the Board, pursuant to the Board's Order dated October 28, 2014. It is in her control to finish the process for relicensure.

VII. APPELLANT HAS NOT BEEN SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT OR EXCESSIVE FINES IN VIOLATION OF THE EIGHTH AMENDMENT, NOR HAS HER FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION BEEN VIOLATED

Appellant argues in her Initial Brief that Respondent's actions violate the Eighth Amendment to the U.S. Constitution's prohibitions against cruel and unusual punishment and excessive fines as well as the equivalent provisions of Article 1, Section 15 of the South Carolina Constitution. The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Article 1, Section 15 of the South Carolina Constitution provides in part: "Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained." Neither claim has merit for obvious reasons.

As a matter of law, the Eighth Amendment's prohibition on cruel and unusual punishment applies only to criminal punishments, and is not applicable to civil disciplinary

actions. *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). Although the Excessive Fines Clause of the Eighth Amendment has been applied to civil forfeitures, there still must be payment to the government as punishment for some offense in order for the Excessive Fines Clause to apply. *Browning Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). The Board has not imposed any monetary fine or other discipline upon Appellant. The Board simply denied her application until such time as she appears before the Board at an application hearing. She is free to request a Board appearance so that her application can be considered on the merits.

Appellant further contends the Fifth and Fourteenth Amendments to the U.S. Constitution prevents Respondent from compelling Appellant to give testimony that may be used against her and prevents Respondent from penalizing her for refusing to testify. (Appellant's Initial Brief pp. 30-31) The Fifth Amendment's privilege against self-incrimination applies only to disclosures the witness "reasonably believes could be used in a *criminal* prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 444-445 (1972) (emphasis added). As she was convicted of the tax filing violation more than 20 years ago, there is no Fifth Amendment right against self-incrimination applicable to that crime. Respondent cannot speculate what testimony before the Board might tend to incriminate Appellant in any other criminal matter.

If Appellant chooses to let her license remain lapsed, she need not appear before the Board. That is entirely her choice. However, the Board is within its rights not to consider her license reactivation request until her personal appearance and testimony. Alternatively, she may appear before the Board and assert her constitutional right against self-incrimination if she so chooses. However, if she does invoke the Fifth Amendment privilege against self-incrimination, because this is a civil matter, it would then be permissible for the Board to draw an adverse

inference from the party invoking that privilege. *Griffith v. Griffith*, 332 S.C. 630, 641, 506 S.E.2d 526, 532 (Ct. App. 1998); *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

VIII. DENIAL OF THE WRIT OF MANDAMUS WAS APPROPRIATE

If the circuit court had jurisdiction this matter, the circuit court properly dismissed Appellant's Petition for Dismissal of the Petition for Writ of Mandamus pursuant to Rule 12(b)(6), SCRCP because as a matter of law, the decision of whether to reinstate Appellant's license, and if so, whether subject to any conditions or restrictions, is not ministerial in nature. To obtain a writ of mandamus requiring the performance of an act, the petitioner must show (1) a duty of respondent to perform the act, (2) the ministerial nature of the act, (3) the petitioner's specific legal right for which discharge of the duty is necessary, and (4) a lack of any other legal remedy. *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 494, 685 S.E.2d 600, 606 (2009), *opinion clarified*, 386 S.C. 274, 688 S.E.2d 120 (2009).

A duty is ministerial "when it is absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Wilson v. Preston,* 378 S.C. 348, 354, 662 S.E. 2d 580, 583 (2008). It is ministerial if it is defined by law with such precision as to leave nothing to the exercise of discretion. *Id.* In *In the Interest of Tyson*, 282 S.C. 212, 218-19, 318 S.E. 2d 279, 283 (Ct. App. 1984), this Court further addressed the circumstances in which a court may use its mandamus powers to compel an administrative agency to act. This Court held that:

> Courts will not issue a writ of mandamus to compel or control the action of an administrative agency in the discharge of statutory duties involving the exercise of judgment or discretion unless the attempted performance of the duty or the omission thereof amounts to illegal action or is an arbitrary or capricious abuse of discretion. [citations omitted] When a refusal to act is under consideration, the courts should exercise the utmost circumspection not to substitute their

> own discretion for that of the agency and should interfere by mandamus only when the facts so clearly show a duty to act that there is really no room for the exercise of reasonable discretion against the doing of the act which the court is asked to require performed. The courts should interpose only where it clearly appears that the refusal to perform so misconceives the official duty that the purpose of the law will be defeated. [citation omitted]

Id. Here, mandamus is improper because the licensure decision regarding an applicant who has failed to disclose on license applications a conviction of a crime that may involve moral turpitude is not a ministerial act, but rather is an act of discretion that is quasi-judicial in nature. A ministerial duty to issue the license could not exist here because the Board did not grant LLR staff authority to grant permanent licensure where an applicant has provided a false answer on an application to a question regarding criminal history. (Nedovic Affidavit ¶ 5 R. p. ; Board Order ¶ 6 R. p.) Appellant failed to disclose her conviction for violation of 26 U.S.C. § 7203 both in her initial South Carolina application in 1996 and in her reinstatement application in May 2014. (Nedovic Affidavit, ¶ 4 R. p. ; Board order ¶ 5 R. p.)

Under S.C. Code Ann. § 40-33-110(A)(19) (2011), obtaining or attempting to obtain a license to practice nursing through fraud, deceit or misrepresentation or any other dishonesty in any phase of the licensing process is grounds for discipline. Additionally, pursuant to S.C. Code Ann. § 40-33-41 (2011), the Board has the discretion to deny reinstatement based on evidence of unlawful acts, incompetence, unprofessional conduct, or other misconduct. *See also Trimmier v. S.C. Dep't. of Labor, Licensing and Regulation*, 405 S.C. 239, 245, 746 S.E.2d 491, 494 (Ct. App. 2013), *cert. denied* July 25, 2014 (finding the Board of Dentistry is permitted discretion in determining whether to reinstate a lapsed license). Likewise, reinstatement in this instance is discretionary rather than ministerial.

CONCLUSION

For the reasons discussed above, this Court should uphold the circuit court's dismissal of the case.

Respectfully submitted,

October 17, 2016

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Appellate Case No.: 2016-000562
Lower Court No.: 2014-CP-04-01780

Nancy C. Perez, Appellant,

v.

South Carolina Department of Labor, Licensing and Regulation—Board of Nursing, Respondent

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PROOF OF SERVICE

I certify that I have served the Respondent's Initial Brief and Designation of Matter to Be Included in the Record on Appeal by depositing a copy of it in the United States mail, postage prepaid, on October 17, 2016, addressed to:

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October 17, 2016

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