

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

APPELLANT'S REPLY BRIEF

Nancy C Perez  
713 E. Greenville St – D220  
Anderson, SC 29621  
281-673-0452

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(a)

**MS. PEREZ REPLIES AND EMPHASIZES THAT THE  
DEFENDANTS HAVE FAILED OR REFUSED TO REFUTE THE FACT  
THAT THEY HAVE A MINISTERIAL DUTY TO ALLOW  
MS. PEREZ TO EARN A LIVING IN HER CHOSEN PROFESSION**

The Defendants have submitted their response to Ms. Perez’ initial appellate brief. They have failed or refused to refute the fact that they have a ministerial duty to allow Ms. Perez to earn a living in her chosen profession. In their 24 page brief they did not , and could not , prove that the abridgement

of Ms. Perez' right to work as a nurse is necessary for the preservation of the health, safety, and welfare of the public. Mandamus is a coercive writ which orders a public official to perform a ministerial duty<sup>1</sup>. For a writ of mandamus to issue, the following must be shown: (1) a duty of the 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<sup>2</sup>. A ministerial act or duty is one which a functionary performs because of a legal mandate which is defined with such precision as to leave nothing to the exercise of discretion<sup>3</sup>. The primary purpose or function of a writ of mandamus is to enforce established rights.<sup>4</sup> A "substantial right" means a right that the United States Constitution, the [State] Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect<sup>5</sup>.

a) The Defendants have not , and can not , introduce any evidence that Ms.

**Perez, who held a Texas state license free and clear for eighteen years,**

is a threat to the health and safety of South Carolinians<sup>6</sup>s . Findings of fact

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<sup>1</sup> Id citing Wilson v. Preston, 662 SE 2d 580, 582 (2008);

<sup>2</sup> Id citing Wilson v. Preston, 378 S.C. at 354, 662 S.E.2d at 583.

<sup>3</sup> Id citing Wilson v. Preston, 378 S.C. at 354, 662 S.E.2d at 583

<sup>4</sup> Riverwoods, LLC v. County of Charleston, 349 S.C. 378, 563 S.E.2d 651 (S.C. 05/06/2002) citing Willimon v. Greenville, 132 SE 2d 69 (1963).

<sup>5</sup> In re Adams, 873 N.E.2d 886 (Ohio Supreme Court - 10/03/2007); People v. New York Cent. R. R. Co., 29 NY 418, 421 (NY Appellate – 1864)

<sup>6</sup> ROA pp 7, 21

must be supported by evidence<sup>7</sup>. The Defendants position clearly violates SC Statute 40-1-10(B)(1) because Ms. Perez' potential for harm is a remote concept or dependent upon a tenuous argument<sup>8</sup>

- b) The Defendants did not, and could not, introduce any evidence that Ms Perez was convicted of a crime directly related to the Nursing profession<sup>9</sup>. Please see, **South Carolina Law, Section 40-1-140**, Effect of prior criminal convictions – the statute 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.**

- c) Furthermore, there was no evidence before the trial court that Ms Perez had been convicted of a crime within the last 10 (ten) years<sup>10</sup>. Ms Perez objected pursuant to SC Rule of Evidence 609 within 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 31<sup>st</sup>, 2014 motion. Ms. Perez

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<sup>7</sup> Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 SE 2d 773, 775 (1976)

<sup>8</sup> SC Statute 40-1-10(B)(1) (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 argument;**

<sup>9</sup> ROA p 136, , 23

<sup>10</sup> ROA pp 23, 137;

subsequently filed a Rule 59 (e) Motion re-arguing the issue<sup>11</sup>.

Consequently , any allegation that Ms. Perez was convicted of a crime is irrelevant within the meaning of Rules of Evidence 401-403 and 609 <sup>12</sup>. The Defendants claim that the General Assembly did not choose to impose a 10 year limit on the age of conviction<sup>13</sup> citing SC Code Ann . § 40-1-10(1) (h) (2011). § 40-1-10(1) (h) states that : [(1) A board may cancel, fine, suspend, revoke, or restrict the authorization to practice of an individual who] (h) has been convicted of or has pled guilty to or nolo contendere to a felony or a crime involving drugs or *moral turpitude*. Firstly, The courts have concluded that 26 USC 7203 is not a crime of criminal turpitude<sup>14</sup>. Secondly , SC Rule of Evidence 609 still reads “(b) *Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction,*” . So , in conclusion the defendants position is wholly without a factual or legal foundation.

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<sup>11</sup> ROA pp 14-65

<sup>12</sup>United 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) ; United States v. Mahler, 579 F.2d 730 (2nd Cir. 06/26/1978); 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)

<sup>13</sup> Initial Brief of Respondents p 16

<sup>14</sup> In re John A Shorter , 570 A. 2d 750 (Court of Appeals of the District of Columbia- 1990) (We conclude, first, that section 7203, whose elements are willfulness and nonpayment of a tax when due, Sansone v. United States, 380 US 343 , 351, 13 L. Ed. 2d 882, 85 S. Ct. 1004 (1965), does not, per se, comprise a crime of moral turpitude)

d) The Defendants claim that the 1947 Act , No 282, Section 1, SC Statutes at Large v. 45 p 579; SC Code Annotated § 56-991, effective July 1<sup>st</sup> , 1952 removed Ms. Perez' common Law Rights<sup>15</sup>. That is pure nonsense. The right to earn a living in a chosen profession is protected by the federal and state constitutions<sup>16</sup>. The nursing profession existed at common law , specifically it was not a privilege created by statute. The 1947 Act § 5226 purportedly delegated to an agency the authority to revoke , **without a jury**, the property right to work as a nurse. But the General Assembly, may not authorize that which the Constitution prohibits<sup>17</sup>. 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

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<sup>15</sup> Initial Brief of Respondent, page 14, ¶ 2

<sup>16</sup> Sloan v. South Carolina Board of Physical Therapy Examiners, 636 S.E.2d 598, 370 S.C. 452 (S.C. 09/25/2006) "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 SE 2d 866, 867 (1990) (citing Greene v. McElroy, 360 US 474 , 79 S.Ct. 1400, 3 L.Ed. 2d 1377 (1959)); Baird v. Charleston County, 333 SC 519 , 537, 511 SE 2d 6979 (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 SC 75, 92, 94 SE 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").

<sup>17</sup> Abbeville County School District v. State ( Abbeville I ), 335 SC 58, 515 SE 2d 535 (1999)

inviolable." This guarantee preserves the right to a jury trial in those cases where jury trials were allowed at common law<sup>18</sup>. The nursing profession existed at common law and was not regulated by the state before February 23<sup>rd</sup>, 1910<sup>19</sup>. 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 jury<sup>20</sup>. Her federal actions are also triable to a jury<sup>21</sup>. The Defendants did not, and could not, identify when the S.C. Constitution Articles 1, §§ 1, 3, 14 and 23 were amended within the meaning of Art. XVI, § 1 in order to allow the legislature to deny jury trials to nursing professionals. South Carolina voters have not amended the Constitution in order to deprive nursing professionals of their right to jury trials<sup>22</sup> therefore any statutory provision which purports to deny nurses the right to jury trials is a bold face usurpation and therefore unconstitutional.

e) The Defendants claim that the 1947 Act, No 282, Section 1, SC Statutes at Large v. 45 p 579; SC Code Annotated § 56-991, effective July 1<sup>st</sup>, 1952

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<sup>18</sup> 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)

<sup>19</sup> ROA pp 49 - 53

<sup>20</sup> Bateman v. Rouse, 358 S.C. 667, 596 S.E.2d 386 (S.C.App. 05/03/2004) citing Rule 38 (a), SCRCF

<sup>21</sup> 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)

<sup>22</sup> Sadler v. Lyle, 254 S.C. 535, 176 S.E.2d 290 (S.C. 08/21/1970)

removed Ms. Perez' common Law Rights<sup>23</sup>. That is pure nonsense. The 1947 Act § 5226 penalized those convicted of a **felony, gross immorality, drug or alcohol addiction**. The Defendants have failed of refused to show that Ms. Perez has been convicted of a **felony, gross immorality, or has a drug or alcohol addiction**.

- f) The Defendants have failed to implement the statute according to its terms thereby converting a civil statute to a punitive one in derogation of the Fifth Amendment Double Jeopardy Clause<sup>24</sup>.

(b)

**MS. PEREZ NEED NOT EXHAUST ADMINISTRATIVE  
REMEDIES WHEN , AS HERE, (a) SHE IS CHALLENGING THE  
CONSTITUTIONALITY OF A STATUTE  
AND WHEN IT IS AND EXERCISE IN FUTILITY**

In their response the Appellees claim that Ms. Perez ' case was properly dismissed because she failed to exhaust administrative remedies<sup>25</sup>. That is nonsense. Ms. Perez need not exhaust administrative remedies when she is challenging the constitutionality of a statute<sup>26</sup> and when presenting her case to an ALJ it is an exercise in futility<sup>27</sup>

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<sup>23</sup> Initial Brief of Respondent, page 14, ¶ 2

<sup>24</sup> *Seling v. Young*, 121 S.Ct. 727, 531 U.S. 250, 531 U.S. 250, 148 L.Ed.2d 734 (U.S. 01/17/2001) ; *Hudson v. United States*, 522 U. S. 93, 100 (1997)

<sup>25</sup> Initial Brief of Respondent, pages 11-13

<sup>26</sup> *Ward v. State*, 343 S.C. 14, 343 S.C. 14, 538 S.E.2d 245, 538 S.E.2d 245 (S.C. 11/06/2000)

<sup>27</sup> *Storm M. H., A Minor, By Her Parent, Gayla S. L. Mcswain v. Appellants/Respondents.*, 735 S.E.2d 492, 400 S.C. 478 (S.C. 12/12/2012) citing *Ward v. State*, 343 S.C. 14, 343 S.C. 14, 538

**DEFENDANT GILLESPIE-PISARIK  
FAILED OR REFUSED TO SHOW THAT HER  
DUTIES WERE PURELY DISCRETIONARY THEREFORE  
MS. PEREZ' CLAIMS ARE NOT BARRED BY QUALIFIED IMMUNITY**

The Defendants claim that sovereign immunity immunizes Defendant Ms. Holly Gillespie Pizarik from the damages she caused by summarily, arbitrarily, capriciously and whimsically revoking and/or seizing Ms. Perez' right to work as a nurse and transgressing upon her substantive rights in the process. That assertion is meritless.

The U.S. Supreme Court established the law governing the recovery of compensatory damages under 42 USC § 1983 in Carey v. Phipus , 435 US 247 (1978) and Memphis Community School District v. Stachura, 477 US 299 (1986). Section 1983 litigation is analogous common-law tort action<sup>28</sup>. To be compensated plaintiffs must prove out-of-pocket expenses, such as loss of wages or future earning capacity, medical expenses, and property damages<sup>29</sup>. Compensable damages may also include distress, humiliation,

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S.E.2d 245, 538 S.E.2d 245 (S.C. 11/06/2000) (As stated in Video Gaming, "if the sole issue posed in a particular case is the constitutionality of a statute, a court may decide the case without waiting for an administrative ruling... Requiring a party to raise an issue which cannot be ruled upon by an ALJ makes little sense" and certainly is not effective or appropriate)

<sup>28</sup> Memphis Community School District v. Stachura, 477 US 299, 305-306 (1986).

<sup>29</sup> Id at 307

personal indignity as well as loss of reputation or status, provided that evidence is offered to establish the extent and duration of these injuries<sup>30</sup>.

The position held by Ms Gillespie-Pisarik was **purely ministerial** therefore she is liable for her tortious conduct to the same extent as a person who holds no government position<sup>31</sup>. The defendant did not, and could not, identify which of her duties were discretionary.

When a government official is sued under a theory of direct liability, she may seek summary judgment on qualified immunity grounds. To even be potentially eligible for summary judgment due to qualified immunity, the official must have been engaged in a "discretionary function" when she performed the acts of which the plaintiff complains<sup>32</sup>. It is the burden of the governmental official to make this showing<sup>33</sup>. When a defendant moves for summary judgment based on an affirmative defense the defendant, as movant, bears the burden of proving each essential element of that defense<sup>34</sup>.

The Defendants have failed or refused to do so.

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<sup>30</sup> See *Horing v City of Granite City*, 528 F.3d 624, 637 (7th Cir. 2008) (difficulty in proving abstract damages does not preclude their award, but plaintiff must show that he actually suffered such injuries). The testimony of the plaintiff alone can support the award of such damages, *Harper v City of Los Angeles*, 533 F.3d 1010, 1029 (9th Cir. 2008).

<sup>31</sup> *Patel v McIntire*, 667 F Supp 1131(D.S.C. -1987)

<sup>32</sup> *Harlow v. Fitzgerald*, 457 US 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982)

<sup>33</sup> *In re Allen*, 106 F.3d 582 (4th Cir. 02/06/1997) citing *Barker v. Norman*, 651 F.2d 1107, 1124-1125 (5th Cir. 1981).

<sup>34</sup> *Ross v. Paddy*, 340 S.C. 428, 340 S.C. 428, 532 S.E.2d 612, 532 S.E.2d 612 (S.C.App. 05/26/2000)

(d)

**THE DEFENDANTS EFFECTUATED A LUCAS-TYPE  
TOTAL REGULATORY TAKING OR PER SE  
TAKING WHICH REQUIRES MONETARY COMPENSATION**

The right to earn a living working as a nurse is a property right that enjoys Constitutional protection<sup>35</sup>. In this action the Defendants have effectuated a “Lucas-type total regulatory taking” or per se taking because the regulatory action completely deprives Ms. Perez an of all economically beneficial use of her property<sup>36</sup>.

The Defendants claim that a “license” is the property of the state, citing SC Code Annotated 40-33-36(A)<sup>37</sup>. That is pure nonsense. The Statute reads

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<sup>35</sup> Sloan v. South Carolina Board of Physical Therapy Examiners, 636 S.E.2d 598, 370 S.C. 452 (S.C. 09/25/2006) "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 SE 2d 866, 867 (1990) (citing Greene v. McElroy, 360 US 474 , 79 S.Ct. 1400, 3 L.Ed. 2d 1377 (1959)); Baird v. Charleston County, 333 SC 519 , 537, 511 SE 2d 6979 (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 SC 75, 92, 94 SE 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"). Accord: Board of Regents v. Roth , 408 US 564 (1972)

<sup>36</sup> Lingle v. Chevron U.S.A. Inc., 544 US 528 , 537, 125 S.Ct. 2074, 2081, 161 L.Ed.2d 876 (2005) citing Lucas v. South Carolina Coastal Council, 505 U. S. 1003, 1019 (1992)

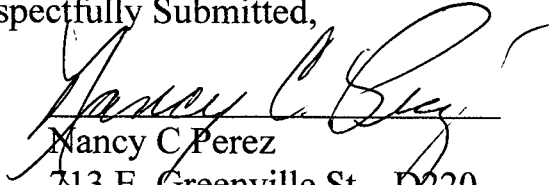
<sup>37</sup> Initial Brief of Respondent, pages 18-19

“License” means a current document issued by the board authorizing a person to practice as an advanced practice registered nurse, a registered nurse, or a licensed practical nurse.”. In conclusion , a License merely recognizes that an individual is qualified to practice as a nurse<sup>38</sup>.

### CONCLUSION

WHEREFORE Ms Perez respectfully submits that for the reasons identified hereinabove the case ought to be reversed and remanded.

Respectfully Submitted,



Nancy C Perez  
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Anderson, SC 29621  
281-673-0452

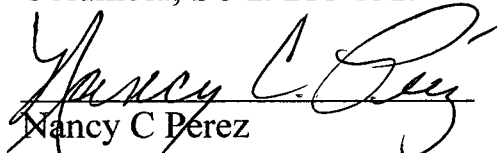
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<sup>38</sup> Code of Laws of South Carolina (1952) Volume 5, Article 4, § 56-992

**CERTIFICATE OF SERVICE**

It is hereby certified that a copy of the foregoing "Nancy C Perez' Reply Appellate Brief " was delivered by mailing a copy thereof on October 21<sup>st</sup>, 2016 to :

Donnell G. Jennings , Esq  
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Nancy C Perez

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