

The Supreme Court of South Carolina

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

v.

South Carolina Board of Dentistry, Respondent.

Appellate Case No. 2011-200626

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the South Carolina Supreme Court.

Upon receipt of this order, the Court of Appeals is hereby directed to forward the case file, all records and briefs and any exhibits on file to this Court.



C.J.
FOR THE COURT

Columbia, South Carolina

December 28, 2012

cc:

Andrew F. Lindemann

Kenneth P. Woodington

Desa Allen Ballard

Stephanie Nichole Weissenstein

William H. Davidson, II

The Honorable Jenny Kitchings



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
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October 08, 2012

Desa Allen Ballard
Ms. Stephanie Nichole Weissenstein
PO Box 6338
West Columbia SC 29171-6338

Re: Health Promotion v. SC Bd of Dntstry (2)
Appellate Case No. 2011-200626

Dear Counsel:

Upon reviewing your amended record on appeal, the following deficiency or deficiencies have been noted under the South Carolina Appellate Court Rules (SCACR), and any deficiency must be corrected within ten (10) days of the date of this letter:

- A proof of service has not been provided. You must serve and file a proof of service substantially in the format shown by Form 7 in Appendix C to part II of the SCACR.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Andrew F. Lindemann
Kenneth P. Woodington
William H. Davidson, II



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
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October 08, 2012

Desa Allen Ballard
PO Box 6338
West Columbia SC 29171-6338

Re: Health Promotion v. SC Bd of Dntstry (2)
Appellate Case No. 2011-200626

Dear Counsel:

Upon reviewing your appellant's final reply brief, the following deficiency or deficiencies have been noted under the South Carolina Appellate Court Rules (SCACR), and any deficiency must be corrected within ten (10) days of the date of this letter:

- The document is not accompanied by the required certificate of counsel.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Andrew F. Lindemann
Kenneth P. Woodington
Stephanie Nichole Weissenstein
William H. Davidson, II



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
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October 08, 2012

Ms. Stephanie Nichole Weissenstein
PO Box 6338
West Columbia SC 29171-6338

Re: Health Promotion v. SC Bd of Dntstry (2)
Appellate Case No. 2011-200626

Dear Counsel:

The following order has been endorsed on your motion for extension of time in the above matter.

"Granted.

FOR THE COURT

By s/ Jenny Abbott Kitchings
CLERK

October 08, 2012."

Please be advised the amended record on appeal, appellant's final brief, appellant's final reply brief, and respondent's final brief have been received.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Andrew F. Lindemann
Kenneth P. Woodington
Desa Allen Ballard
William H. Davidson, II

65785

RECEIVED

OCT 04 2012

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHALD COUNTY
Honorable William P. Keesley, Circuit Court Judge

Case No. 2001-CP-40-03148

Health Promotion Specialists, LLC,.....APPELLANT

vs.

South Carolina Board of Dentistry, ...RESPONDENT

MOTION FOR EXTENSION OF TIME

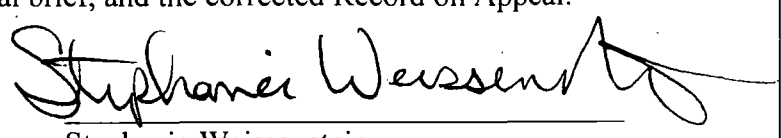
The undersigned counsel attempted to file the Record on Appeal in this matter on October 3, 2012. At that time, it was discovered errors had been made in creating the record, so the Clerk of Court allowed the undersigned to retrieve all but the original filed copy to make the necessary revisions. However, Respondent had already filed its Final Brief, that same day, relying on the incorrect record.

Therefore, Appellant, with consent by Respondent's counsel, hereby requests that this Court grant an extension until October 5, 2012, by which to file all final briefs, including an amended Respondent's final brief, and the corrected Record on Appeal.

GRANTED

JOHN CANNON FEW, C.J.
FOR THE COURT

By: Jenny Abbott Kitchings, UCA
(Clerk) (Deputy Clerk)



Stephanie Weissenstein
BALLARD WATSON WEISSENSTEIN
Post Office Box 6338
West Columbia, South Carolina 29171
Telephone 803.796.9299
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ATTORNEYS FOR APPELLANT

October 4, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHALD COUNTY
Honorable William P. Keesley, Circuit Court Judge

Case No. 2001-CP-40-03148

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SC Court of Appeals

Health Promotion Specialists, LLC, ... APPELLANT

vs.

South Carolina Board of Dentistry, ... RESPONDENT

CERTIFICATE OF SERVICE

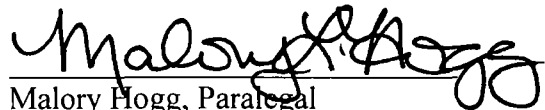
I, Malory Hogg, of Ballard Watson Weissenstein, did this date serve opposing counsel with a copy of Appellant's Motion for Extension to File Final Briefs by personally delivering it to him, addressed to:

KENNETH P. WOODINGTON

1611 Devonshire Drive

Post Office Box 8568

Columbia, South Carolina 29202



Malory Hogg, Paralegal
BALLARD WATSON WEISSENSTEIN
Post Office Box 6338
West Columbia, South Carolina 29171
Telephone 803.796.9299
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E-mail: malory@desaballard.com

October 4, 2012



**Ballard
Watson Weissenstein**
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III
Stephanie Weissenstein
Attorneys at Law

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October 5, 2012

Via Hand Delivery

Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29211

Re: *Health Promotion Specialists et. al. vs. South Carolina Board of Dentistry*
Case No: 01-CP-40-3148

Dear Ms. Kitchings:

Please find enclosed for filing an unbound original and fourteen (14) copies of the Appellants' Final Brief and Final Reply Brief and the Amended Record on Appeal in the above-referenced matter pursuant to SCRCP 210 and 211. Please do not hesitate to contact our office if you should have any questions.

With warm personal regards, I am,

Sincerely yours,

Malory L. Hogg, Paralegal
malory@desaballard.com

Enclosures

c: Kenneth Woodington, Esquire

RECEIVED

OCT 05 2012

SC Court of Appeals

DAVIDSON & LINDEMANN, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

William H. Davidson, II
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Daniel C. Plyler
Joel S. Hughes
Justin T. Bagwell
David A. DeMasters

Of Counsel
Kenneth P. Woodington

*Also Admitted In North Carolina
†Certified Mediator

October 5, 2012

Writer's Email: kwoodington@dml-law.com

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Edgar Brown Building
1205 Pendleton Street
Columbia, South Carolina 29201

RE: Health Promotion Specialists, LLC and Palmetto Dental Care, LLC v. South Carolina Board
of Dentistry
SCCA Tracking Number: 2011-200626
Civil Action Number: 2001-CP-40-3148A
Claim Number: 96745
Our File Number: 103.5629

Dear Ms. Kitchings:

Please find enclosed for filing the original and fifteen copies of the **Corrected Brief of Respondent** in the above-referenced matter. Please file the original and return a clocked-in copy to me in the enclosed envelope.

There was an error in the Record on Appeal served upon counsel for the Respondent, which was corrected on today's date. As such, cites to the Record in the Brief of Respondent, previously filed October 1, 2012, needed to be corrected to reflect the new pages numbers in the corrected Record on Appeal.

By copy of this letter, I am serving a copy on appellants' counsel.

Thank you for your assistance in this matter.

RECEIVED

OCT 05 2012

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
October 5, 2012
Page Two

With highest regards, I am

Sincerely yours,

DAVIDSON & LINDEMANN, P.A.

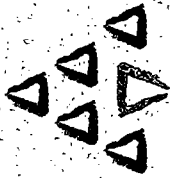


Kenneth P. Woodington

KPW/jmb
Enclosures

cc: (w/ Enclosure)

Desa Ballard, Esquire
Stephanie Weissenstein, Esquire
Law Offices of Desa Ballard
226 State Street
West Columbia, South Carolina 29169



**Ballard
Watson Weissenstein**
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III
Stephanie Weissenstein
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September 14, 2012

Via U.S. Mail

Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29211

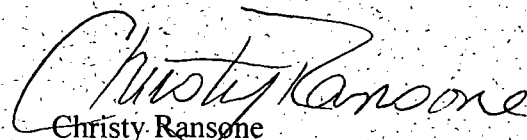
Re: *Health Promotion Specialists et. al. vs. South Carolina Board of Dentistry*
Case No: 01-CP-40-3148

Dear Ms. Kitchings:

Enclosed for filing in the above referenced matter is Appellant's Certificate of Service as to providing parties with a copy of the proposed Record of Appeal. In addition to the required copies of this pleading, I have also included an additional copy which I request be 'clocked' and returned in the envelope provided.

Thank you for your assistance with this matter. With warm personal regards, I am,

Sincerely yours,


Christy Ransone
christy@desaballard.com

c: Ken Woodington, Esquire

RECEIVED
SEP 17 2012
SC Court of Appeals

The South Carolina Court of Appeals

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

v.

South Carolina Board of Dentistry, Respondent.

Appellate Case No. 2011-200626

The Honorable William P. Keesley
Richland County
Trial Court Case No. 2001CP4003148

ORDER

The time for serving and filing the record on appeal to be served on the opposing party and proof of service filed with this Court is hereby extended until September 14, 2012.

FOR THE COURT

BY


CLERK

Columbia, South Carolina

cc: Andrew F. Lindemann
Kenneth P. Woodington
Desa Allen Ballard
Stephanie Nichole Weissenstein
William H. Davidson, II

FILED

8-21-12 *la7*



**Ballard
Watson Weissenstein**
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65225
25
Desa Ballard
Harvey M. Watson III
Stephanie Weissenstein
Attorneys at Law

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August 16, 2012

Via U.S. Mail
Honorable Tanya Gee
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29211

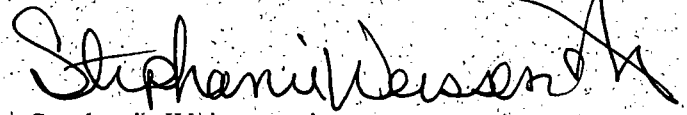
Re: *Health Promotion Specialists et. al. vs. South Carolina Board of Dentistry*
Case No: 01-CP-40-3148

Dear Ms. Gee:

I am writing to request a 14 day extension of time for the preparation and service of the Record of Appeal on parties in the above matter. With the granting of this request, according to our records, the new deadline for service of the Record on Appeal will be Thursday, August 30, 2012. As such, pursuant to Rule 211, final briefs will be required to be filed on or before September 19, 2012.

With this correspondence, I am also sending our \$25.00 check as payment of the filing fee for this request. Opposing counsel has been contacted and does not oppose this request. Thank you for your time and assistance with this matter. With warm personal regards, I am,

Sincerely yours,


Stephanie Weissenstein
stephanie@desaballard.com

Enclosure

c: Kenneth Woodington, Esquire

1st
8/20
9/4

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AUG 17 2012
SC COURT OF APPEALS



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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July 19, 2012

Ms. Stephanie Nichole Weissenstein
PO Box 6338
West Columbia SC 29171-6338

Re: Health Promotion v. SC Bd of Dntstry (2)
Appellate Case No. 2011-200626

Dear Counsel:

The following order has been endorsed on your motion for extension of time in the above matter.

"Granted.

FOR THE COURT

By s/ V. Claire Allen
Deputy Clerk

July 19, 2012."

Please be advised the appellant's initial reply brief has been received and is accepted as filed.

You must serve the Record on Appeal on the opposing parties and file the proof of service with this Court no later than August 20, 2012.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Andrew F. Lindemann
Kenneth P. Woodington
Desa Allen Ballard
William H. Davidson, II



**Ballard
Watson Weissenstein**
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III
Stephanie Weissenstein
Attorneys at Law

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226 State Street | West Columbia, SC 29169 | ph 803.796.9299 | fx 803.796.1066 | desaballard.com

July 13, 2012

Via U.S. Mail ~~and Facsimile~~

Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29211

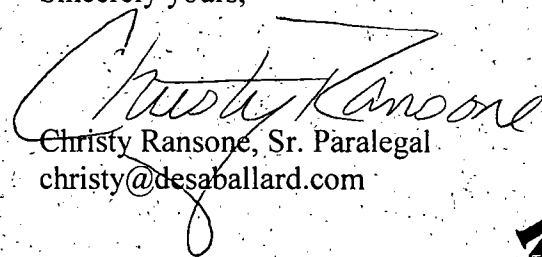
Re: *Health Promotion Specialists et. al. vs. South Carolina Board of Dentistry*
Case No: 01-CP-40-3148

Dear Ms. Kitchings:

Please find enclosed Appellant's Initial Reply Brief for filing in the above matter. I have also provided an extra copy of the pleading which I request be 'clocked' and returned in the envelope provided.

Thank you for your time and attention to this matter. With warm personal regards, I am,

Sincerely yours,


Christy Ransone, Sr. Paralegal
christy@desaballard.com

Enclosure

c: William H. Davidson, Esq.
Andrew F. Lindemann, Esq.
Kenneth P. Woodington, Esq.

RECEIVED
JUL 17 2012
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2001-CP-40-03148

Health Promotion Specialists, LLC, and Palmetto Dental Care LLC,
with Health Promotion Specialists, LLC as

.....APPELLANT

vs.

South Carolina Board of Dentistry RESPONDENT

APPELLANT'S REPLY BRIEF

Desa Ballard
Stephanie Weissenstein
Ballard Watson Weissenstein
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West Columbia, South Carolina 29171
Telephone: 803-796-9299
Facsimile: 803-796-1066
E-mail: stephanie@desaballard.com
ATTORNEYS FOR APPELLANTS

Other counsel of record:

WILLIAM H. DAVIDSON
ANDREW F. LINDEMANN
KENNETH P. WOODINGTON
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
Attorneys for Respondent

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JUL 17 2012
SC Court of Appeals

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ARGUMENT

I. THE BOARD IS SUBJECT TO THE SAME LIABILITY AS AN INDIVIDUAL, AND THEREFORE SUBJECT TO CLAIMS AGAINST A "PERSON" UNDER THE UNFAIR TRADE PRACTICES ACT.

Respondents contend that the Board of Dentistry is not a "person" under the Unfair Trade Practices Act (UTPA). Appellant reiterates, however, that under § 15-78-40, the Tort Claims Act specifically provides "the State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the *same extent as a private individual* under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." S.C. Code § 15-78-40 (1986, as amended)(emphasis added). If the Board is liable to the same extent as an individual, then they are subject to potential liability that applies to "persons" under the UTPA.

The real issue then, is whether the immunities asserted by the Board are applicable and prevent imposition of that liability. If facts exist that show the Board did not act in a protected legislative manner, with mere negligence in their discretion, then it can be established the Board's actions give rise to an actionable claim arising under the UTPA just as for any individual person.

II. APPLICABILITY OF LEGISLATIVE IMMUNITY IS A QUESTION OF FACT, AND BECAUSE MORE THAN ONE EXCEPTION TO LIABILITY IS RAISED AS A DEFENSE, ALL EXCEPTIONS APPLY THE SAME STANDARD.

Appellants assert that Judge Keesley's order was affected by error because there are questions of fact as to whether the Board is entitled to the legislative immunity, and whether the Board can be sued for its tort (i.e. commission of unfair trade practices) if

that immunity does not apply¹. In response to Appellant's brief, Respondent Board contends that Appellant's citation of authority regarding discretionary immunity is inapplicable to objections regarding the underlying order that held that legislative immunity precluded this action. Nevertheless, principles of discretionary immunity affect determinations of the applicability of the legislative immunity are interrelated, and thus relevant to this Court's review.

When, as the Board has done in this matter by raising both discretionary and legislative immunity, "a governmental entity asserts various exceptions to the waiver of immunity, [the Court] is to read exceptions that do not contain the gross negligence standard in light of exceptions that do contain the standard". Steinke vs. SC Dept L&LR 336 S.C. 373, 395, 520 S.E.2d 142 (1999)(citing Duncan v. Hampton County School Dist. # 2, 335 S.C. 535, 517 S.E.2d 449 (1999) (reading discretionary immunity exception in light of exception to immunity in which governmental entity exercises its duty in a grossly negligent manner, such that discretionary immunity will not protect the government if it exercises that discretion in a grossly negligent² manner).

The Steinke court recognized that "the trial court often faces Tort Claims Act cases in which at least one of the asserted exceptions contains the gross negligence standard while other asserted exceptions do not." Id at 398. The Court held that "when an exception containing the gross negligence standard applies, that same standard will be

¹ "Dismissal under Rule 12(b)(6) is seldom appropriate when the defense of immunity is pleaded. In such cases the court must determine whether the public official acted within the scope of his discretionary authority." Freemantle v. Preston, S.C. Supreme Court Order 27138 (June 27, 2012)(quoting, Jensen v. S.C. Dep't of Soc. Servs., 297 S.C. 323, 333, 377 S.E.2d 102, 108 (Ct. App. 1988).

² "Gross negligence is the intentional, conscious failure to do something which is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." Richardson v. Hambright, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988). Gross negligence is ordinarily a mixed question of law and fact. See Clyburn v. Sumter County School District #17, 317 S.C. 50, 451 S.E.2d 885 (1994).

read into any other applicable exception". Id at 398.³ The gross negligence standard is relevant to several of the affirmative defenses of immunity that may be raised under the Torts Claim Act, and is relevant in this particular circumstance because there is a question of fact as to whether the Board was acting in its legislative capacity, or instead acting as an entity thwarting commerce.

In this case, at paragraph 57 of its Answer to the Second Amended Complaint, the Respondent Board claimed several of the immunities pursuant to the South Carolina Tort Claims Act, S. C. Code Ann. § 15-78-10, etc seq., including but not limited to:

- § 15-78-60 (1) (legislative, judicial, or quasi-judicial action or inaction);
- § 15-78-60(2) (administrative action or inaction of a legislative, judicial, or quasi-judicial nature);
- § 15-78-60(4) (adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies);
- § 15-78-60(5) (the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee);
- § 15-78-60(13) (regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection, of any property to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety);

³ At paragraph 64 of the Second Amended Complaint, it was alleged that the Respondent Board acted in reckless disregard. R. ____.

- § 15-78-60(17) (employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude); and
- §15-78-60(20)(an act or omission of a person other than an employee including but not limited to the criminal actions of third persons).

Respondent asserts that it is immune from suit because its actions were "clearly" done in the Board's legislative capacity. Appellant asserts that what the Board was doing, or attempting to do, by passing a purported "emergency regulation" is a question of fact with competing assertions from both parties. Respondent contends the Board was legislating, while Appellant alleges that the Board "was not acting in furtherance of a clearly articulated and affirmatively expressed state policy". (R. ___, Second Amended Complaint). "The Board acted to thwart the policy of South Carolina, as expressed by its Governor and state legislature, and did so for anti-competitive reasons and to protect the profits of the dentists" who made up the Board. (Id.).

Claiming protection under the legislative immunity includes an obligation to "show that such immunity is justified for the governmental function at issue." Hafer v. Melo, 502 U.S. 21, 28-29, 112 S.Ct. 358, 363, 116 L.Ed.2d 301 (1991). If a governmental body has the minimal burden of merely articulating the defense and not the burden of persuasion in the face of detailed factual allegations to the contrary, then agencies like the Board of Dentistry "would avail itself of an affirmative defense but effectively be relieved of proving the defense" which the State Supreme Court has stated "flies in the face of the well-established rule that the party pleading an affirmative defense 'has the burden of proving it.'" Pike v. SCDOT, 343 S.C. 224, 331, 540 S.E.2d 87 (2000).

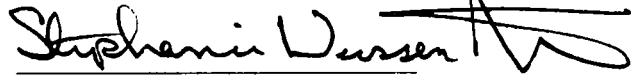
So, despite Respondent's attempt to distinguish itself from cases like Pike by claiming that Pike is merely about discretionary immunity, the burden is the same in the context of legislative immunity. Whether the legislative immunity applies turns on the question of whether the acts in question were discretionary rather than ministerial, and whether the action of the Board in passing the regulation even *really* was legislative. See, Hawkins v. City of Greenville, 358 SC. 280, 594 S.E.2d 557 (Ct App. 2004). It was for this purpose that Appellant cited Hawkins v. City of Greenville and similar cases in its brief, and why those cases are applicable despite Respondent's dismissal thereof in its brief.

Thus, whereas the five subsections of the Tort Claims Act will generally shield a governmental entity from liability when it exercises discretion in the form of judicial action, legislation, or administrative regulation, the immunity is not absolute. The entity must still prove certain facts in order to be entitled to the immunity, not merely invoke the name of the immunity and be resolved of any further obligation. It is a question of fact whether the Board was legislating such that immunity remains, and summary judgment should not have been granted given the disputed factual nature of its applicability.

CONCLUSION

For the reasons set forth above and previously more fully in Appellant's brief, with the support of the record hereto, Appellant respectfully renews its request that this Court remand this case to the lower court for full development of the facts at trial.

Respectfully submitted by:

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

Stephanie Weissenstein

Ballard Watson Weissenstein

Post Office Box 6338

West Columbia, South Carolina 29171

Telephone: 803-796-9299

Facsimile: 803-796-1066

E-mail: stephanie@desaballard.com

ATTORNEYS FOR APPELLANTS

July 13, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHALD COUNTY
Honorable William P. Keesley, Circuit Court Judge

Case No. 2001-CP-40-03148

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

vs.

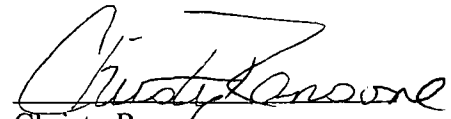
South Carolina Board of Dentistry RESPONDENT

CERTIFICATE OF SERVICE

I, Christy Ransone, do hereby certify that I, served on July 13, 2012 one (1) copy of the **Appellant's Initial Reply Brief** in the above-captioned matter on the following by placing same in United States Mail, with sufficient first-class postage affixed and addressed as follows:

WILLIAM H. DAVIDSON
ANDREW F. LINDEMANN
KENNETH P. WOODINGTON
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202

July 23, 2012


Christy Ransone
Sr. Paralegal

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHALD COUNTY
Honorable William P. Keesley, Circuit Court Judge

Case No. 2001-CP-40-03148

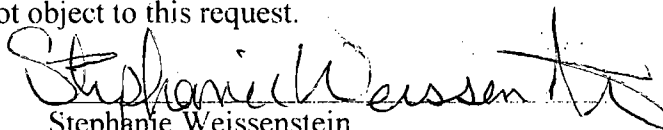
Health Promotion Specialists, LLC,.....APPELLANT

vs.

South Carolina Board of Dentistry, ...RESPONDENT

MOTION FOR EXTENSION OF TIME

Appellant, by and through its undersigned counsel, hereby requests that this Court grant an extension until July 13, 2012, by which to file the initial reply brief. Opposing counsel, Kenneth P. Woodington, does not object to this request.



Stephanie Weissenstein
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GRANTED

JOHN CANNON FEW, C.J.
FOR THE COURT

By: V. Claire Allen
(Clerk) (Deputy Clerk)

July 6, 2012

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHALD COUNTY
Honorable William P. Keesley, Circuit Court Judge

Case No. 2001-CP-40-03148

Health Promotion Specialists, LLC,.....APPELLANT

vs.

South Carolina Board of Dentistry, ...RESPONDENT

CERTIFICATE OF SERVICE

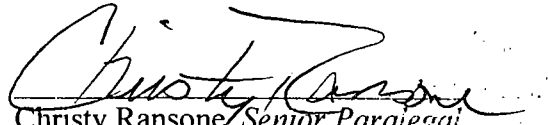
I, Christy Ransone, of Ballard Watson Weissenstein, did this date serve opposing counsel with a copy of Appellant's Motion for Extension to File Initial Reply Brief by depositing same in the United States Mail, proper postage affixed, and addressed to:

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July 6, 2012

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SC Court of Appeals



**Ballard
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PERSISTENT. UNWAVERING.

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July 06, 2012

Via U.S. Mail

Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Health Promotion Specialists et. al. vs. South Carolina Board of Dentistry*
Case No: 01-CP-40-3148

Dear Ms. Kitchings:

Please find enclosed for filing in the above matter Appellant's Motion for Extension of time for filing of the initial reply brief. I have also provided an additional copy of this pleading which I request be clocked and returned to our office in the envelope herewith. Also enclosed is our check in the amount of \$25.00 in payment of the filing fee for this motion.

Opposing counsel has been contacted regarding this request and has confirmed he is not opposed with the granting of this extension. Thank you for your time and assistance in this matter. With warm personal regards, I am,

Sincerely yours,

Christy Ransone, Sr. Paralegal
christy@desaballard.com

Enclosures

c: Kenneth Woodington, Esq.

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JUL 09 2012
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2001-CP-40-3148

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

Appellants,

v.

South Carolina Board of Dentistry,.....

Respondent.

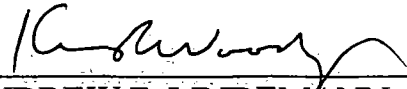
**RESPONDENT'S DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

The Respondent proposes that the following be included in the Record on
Appeal:

- (1) All material designated by Appellant.
- (2) Amended Answer to Second Amended Complaint.
- (3) Attachments to Defendant's Memorandum in Support of Motion for Summary Judgment.

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

DAVIDSON & LINDEMANN, P.A.

BY: 
ANDREW F. LINDEMANN
WILLIAM H. DAVIDSON, II
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Counsel for Respondent

Columbia, South Carolina

June 29, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2001-CP-40-3148

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

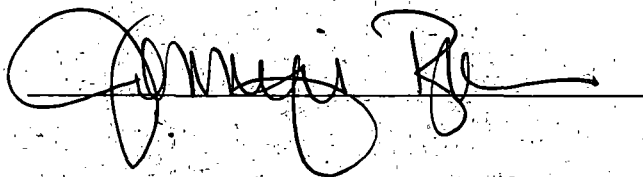
v.

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

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent, does hereby certify that service of the **Initial Brief of Respondent** and **Respondent's Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 29th day of June 2012:

Desa Ballard, Esquire
Stephanie Weissenstein, Esquire
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June 29, 2012

Writer's Email: kwoodington@dml-law.com

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Health Promotion Specialists, LLC and Palmetto Dental Care, LLC v. South Carolina Board of Dentistry, South Carolina Dental Association, Dr. Charles Maxwell, Dr. Charles E. Millwood and James H. Zorn, Jr.
SCCA Tracking Number: 2011200626
Civil Action Number: 2001-CP-40-3148A
Claim Number: 96745
Our File Number: 103.5629

Dear Ms. Kitchings:

Please find enclosed for filing the originals and one copy each of the **Initial Brief of Respondent** and **Respondent's Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. Please file the originals and return a clocked-in copy of each document to me in the enclosed envelope.

By copy of this letter, I am serving copies on appellants' counsel.

Thank you for your assistance in this matter.

With highest regards, I am

Sincerely yours,

DAVIDSON & LINDEMANN, P.A.



Kenneth P. Woodington

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SC Court of Appeals

KPW/jmb
Enclosures

The Honorable Jenny Abbott Kitchings
June 29, 2012
Page Two

cc: (w/ Enclosures)

Desa Ballard, Esquire
Stephanie Weissenstein, Esquire
Law Offices of Desa Ballard
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2001-CP-40-3148

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

v.

South Carolina Board of Dentistry, ... Respondent.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

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Other Citations

Act No. 298 of 2000.

Act No. 45 of 2003.

In Re: Proposed Regulation, Document No. 2644,
2002 WL 385116 (S.C. Admin. Law Ct. 2002)

COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the court below correctly dismissed this action based on legislative immunity.
2. Whether the court below correctly held, based on undisputed facts, that the Board of Dentistry is not a "person" under § 39-5-10.
3. Whether the court below correctly held that the promulgation of an emergency regulation by the Board of Dentistry was not an action in the conduct of trade or commerce, as required under § 39-5-20(a).
4. Whether Appellant's suggestion that the Complaint should be permitted to be amended was correctly rejected.

COUNTERSTATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

- (a) The Board's action did not constitute "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" within the meaning of S.C. Code Ann. § 39-5-20(a), because the Board's action did not amount to acts or practices "in the conduct of any trade or commerce." R. ____ [Order 5-6]
- (b) The Board is not a "person" under §39-5-10. R. ____ [Order 6-8]
- (c) Plaintiff's action against the Board is barred by sovereign immunity under the Tort Claims Act and by common law legislative immunity. R. ____ [Order 8-11]
- (d) Plaintiff's claim for injunctive relief has been moot since at least 2003. R. ____ [Order 11-12]³

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

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

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

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

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

COUNTERSTATEMENT OF FACTS⁴

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

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

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

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

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

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

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

ARGUMENT

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

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

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

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

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

Id. at 377.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondent

Columbia, South Carolina

June 29, 2012

The South Carolina Court of Appeals

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

v.

South Carolina Board of Dentistry, Respondent.

Appellate Case No. 2011-200626

The Honorable William P. Keesley
Richland County
Trial Court Case No. 2001CP4003148

ORDER

The time for serving and filing the respondent's initial brief and designation of matter is hereby extended until July 23, 2012.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:

Andrew F. Lindemann
Kenneth P. Woodington
Desa Allen Ballard
Stephanie Nichole Weissenstein
William H. Davidson, II

FILED

7-3-12 LAP

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2001-CP-40-3148

RECEIVED

JUN 18 2012

SC Court of Appeals

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

Appellants,

v.

South Carolina Board of Dentistry,.....

Respondent.

**MOTION FOR EXTENSION
TO FILE INITIAL BRIEF**

The Respondent moves this Court for an additional seven day extension of time until June 29, 2012, by which to file the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal.

The motion is based on the following grounds:

1. The Initial Brief is currently due to be filed and served on June 22, 2012.

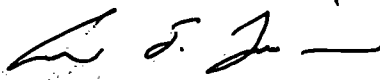
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2. Counsel for the Respondent requires additional time to complete the preparation of the Initial Brief because Kenneth P. Woodington is currently out of state on vacation until June 25, 2012. Additionally, Andrew Lindemann will be out of state in Pennsylvania for depositions on June 19, 20 and 21, 2012. In addition, Mr. Lindemann has the first case for trial in the Spartanburg County Court of Common Pleas beginning on June 25, 2012.

3. Counsel for the Appellant has consented to the requested extension.

WHEREFORE, the Respondent respectfully requests that it be allowed additional time, through and including June 29, 2012, by which to file and serve its Initial Brief and Designation of Matter to be Included in the Record on Appeal.

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
KENNETH P. WOODINGTON
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondent

Columbia, South Carolina

June 18, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2001-CP-40-3148

RECEIVED

JUN 18 2012

SC Court of Appeals

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

Appellants,

v.

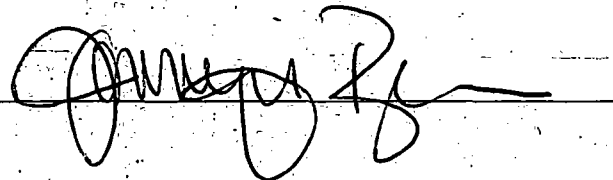
South Carolina Board of Dentistry,.....

Respondent.

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent, does hereby certify that service of the **Motion for Extension of Time to File Initial Brief** in the above-captioned matter was made upon all counsel of record by placing a copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 18th day of June 2012:

Desa Ballard, Esquire
Stephanie Weissenstein, Esquire
Law Offices of Desa Ballard
226 State Street
West Columbia, South Carolina 29169



DAVIDSON & LINDEMANN, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

William H. Davidson, II
Andrew F. Lindemann*
James M. Davis, Jr.†
Robert D. Garfield
Michael B. Wren

1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202-8568
Telephone: (803) 806-8222
Facsimile: (803) 806-8855
www.dml-law.com

Daniel C. Plyler
Joel S. Hughes
Justin T. Bagwell
David A. DeMasters

Of Counsel
Kenneth P. Woodington

*Also Admitted In North Carolina
†Certified Mediator

June 18, 2012

Writer's Email: alindemann@dml-law.com

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Edgar Brown Building
1205 Pendleton Street
Columbia, South Carolina 29201

RE: Health Promotion Specialists, LLC, and Palmetto Dental Care, LLC v. South Carolina
Board of Dentistry
SCCA Tracking Number: 2011200626
Civil Action Number: 2001-CP-40-3148A
Claim Number: 96745
Our File Number: 103.5629

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven copies of the **Motion for Extension to File Initial Brief** in the above referenced matter. Please file the original and return a clocked-in copy to me by way of my courier. I have not enclosed the \$25.00 filing fee since the moving party is an agency of the State of South Carolina.

By copy of this letter, I am serving a copy on appellant's counsel.

Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Andrew F. Lindemann

AFL/jmb
Enclosures

RECEIVED

JUN 18 2012

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
June 18, 2012
Page Two

cc: (w/ Enclosure)

Desa Ballard, Esquire
Stephanie Weissenstein, Esquire
Law Offices of Desa Ballard
226 State Street
West Columbia, South Carolina 29169



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

May 31, 2012

Mr. Andrew F. Lindemann
South Carolina Board of Dentistry
PO Box 8568
Columbia SC 29202-8568

Re: Health Promotion v. SC Bd of Dntstry (2)
Appellate Case No. 2011-200626

Dear Counsel:

The following order has been endorsed on your motion for extension to file initial brief in the above matter.

"Granted.

By s/ V. Claire Allen, Deputy Clerk
For the Court

May 31, 2012."

Please be advised the respondent's initial brief and designation of matter must be served and filed no later than June 22, 2012.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Kenneth P. Woodington
Desa Allen Ballard
Stephanie Nichole Weissenstein
William H. Davidson, II

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2001-CP-40-3148

RECEIVED

MAY 23 2012

SC Court of Appeals

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

Appellants,

v.

South Carolina Board of Dentistry,.....

Respondent.

**MOTION FOR EXTENSION
TO FILE INITIAL BRIEF**

The Respondent moves this Court for a thirty day extension of time until June 22, 2012, by which to file the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal.

The motion is based on the following grounds:

1. The Initial Brief is currently due to be filed and served on May 23,

2012.

GRANTED
JOHN CANNON FEW, C.J.
FOR THE COURT

FILED

By: _____
(Clerk) (Deputy Clerk)

2nd
5/23/12
6/22/12

2. Counsel for the Respondent requires additional time to complete the preparation of the Initial Brief because of other obligations, including another brief due in this same Court on May 22, 2012, an out of town deposition as well as an out of state deposition this week. Additionally, counsel for the Respondent had two cases set as #1 for trial the week of May 14, 2012 that he had to prepare for although neither case was called to trial.

3. Counsel for the Appellant has consented to the requested extension.

WHEREFORE, the Respondent respectfully requests that it be allowed additional time, through and including June 22, 2012, by which to file and serve its Initial Brief and Designation of Matter to be Included in the Record on Appeal.

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
KENNETH P. WOODINGTON
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondent

Columbia, South Carolina

May 23, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2001-CP-40-3148

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

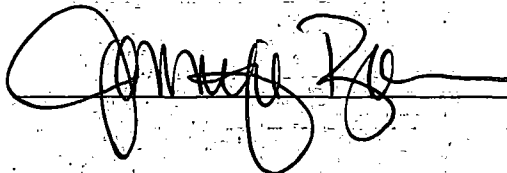
v.

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

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent, does hereby certify that service of the **Motion for Extension of Time to File Initial Brief** in the above-captioned matter was made upon all counsel of record by placing a copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 23rd day of May 2012:

Desa Ballard, Esquire
Stephanie Weissenstein, Esquire
Law Offices of Desa Ballard
226 State Street
West Columbia, South Carolina 29169



DAVIDSON & LINDEMANN, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

William H. Davidson, II
Andrew F. Lindemann*
James M. Davis, Jr.†
Robert D. Garfield
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Daniel C. Plyler
Joel S. Hughes
Justin T. Bagwell
David A. DeMasters

Of Counsel
Kenneth P. Woodington

*Also Admitted In North Carolina
†Certified Mediator

May 23, 2012

Writer's Email: alindemann@dml-law.com

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Edgar Brown Building
1205 Pendleton Street
Columbia, South Carolina 29201

RE: Health Promotion Specialists, LLC, and Palmetto Dental Care, LLC v. South Carolina
Board of Dentistry
SCCA Tracking Number: 2011200626
Civil Action Number: 2001-CP-40-3148A
Claim Number: 96745
Our File Number: 103.5629

RECEIVED

MAY 23 2012

SC Court of Appeals

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven copies of the **Motion for Extension to File Initial Brief** in the above referenced matter. Please file the original and return a clocked-in copy to me by way of my courier. I have not enclosed the \$25.00 filing fee since the moving party is an agency of the State of South Carolina.

By copy of this letter, I am serving a copy on appellant's counsel.

Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Andrew F. Lindemann

AFL/jmb
Enclosures

The Honorable Jenny Abbott Kitchings
May 23, 2012
Page Two

cc: (w/ Enclosure)

Desa Ballard, Esquire
Stephanie Weissenstein, Esquire
Law Offices of Desa Ballard
226 State Street
West Columbia, South Carolina 29169

Left 6 messages

Charles gross

Hartman v.

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Lesly ross843 284 1090

Tommy Goldstein

Alan toan ibaoum

Record on appeal

Final brief

Pages missing from roa

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Hartman v horizon motors

Bill Hood

Anderson attorney

Respondent

Pro se appellant

Transcript

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Holtzclaw v waldrof

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Claire

The South Carolina Court of Appeals

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

v.

South Carolina Board of Dentistry, Respondent.

Appellate Case No. 2011-200626

ORDER

The time for serving and filing the Respondent's Initial Brief and Designation of Matter is hereby extended until May 23, 2012.

FOR THE COURT

BY Jenny A. Kitching
CLERK

Columbia, South Carolina

cc: Andrew F. Lindemann
Kenneth P. Woodington
Desa Allen Ballard
Stephanie Nichole Weissenstein
William H. Davidson, II

FILED
5-7-12 UAF

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April 18, 2012

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Kenneth P. Woodington

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APR 18 2012

SC Court of Appeals

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Edgar Brown Building
1205 Pendleton Street
Columbia, South Carolina 29201

RE: Health Promotion Specialists, LLC, and Palmetto Dental Care, LLC v. South Carolina Board of Dentistry
SCCA Tracking Number: 2011200626
Civil Action Number: 2001-CP-40-3148A
Claim Number: 96745
Our File Number: 103.5629

Dear Ms. Kitchings:

This letter is to request a thirty day extension of time to file the Initial Brief of Respondent and Designation of Matter in the above-referenced appeal. The Initial Brief of Respondent is presently due on April 23, 2012.

I am unable to complete the preparation of my client's Initial Brief because of other deadlines and obligations, which include other appellate briefs due in the Fourth Circuit and this Court in the past week. In addition, I have had a case up for trial this week in Charleston County and a scheduled trial in the Administrative Law Court on April 23rd.

I have not enclosed the \$25.00 check for the filing fee since the movant is a state agency. If you require a formal motion for this extension, please advise.

If you have any questions, please let me know. Thank you for your consideration of this request.

4/23/12 1st
5/23/12

The Honorable Jenny Abbott Kitchings
April 18, 2012
Page Two

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Andrew F. Lindemann

AFL/jmb

cc: Desa Ballard, Esquire
Stephanie Weissenstein, Esquire
Law Offices of Desa Ballard
226 State Street
West Columbia, South Carolina 29169

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHALD COUNTY
Honorable William P. Keesley, Circuit Court Judge

Case No. 2001-CP-40-03148

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

vs.

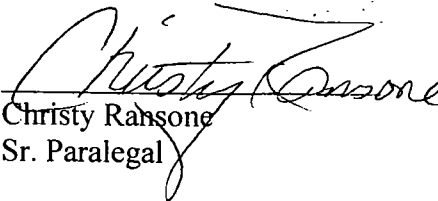
South Carolina Board of Dentistry RESPONDENT

AMENDED CERTIFICATE OF SERVICE

I, Christy Ransone, do hereby certify that I, served on March 23, 2012 one (1) copy of the **Appellant's Initial Brief and Designation of Matter** in the above-captioned matter on the following by placing same in United States Mail, with sufficient first-class postage affixed and addressed as follows:

WILLIAM H. DAVIDSON
ANDREW F. LINDEMANN
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1611 Devonshire Drive
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April 4, 2012


Christy Ransone
Sr. Paralegal

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SC Court of Appeals



**Ballard
Watson Weissenstein**
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Harvey M. Watson III
Stephanie Weissenstein
Attorneys at Law

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April 04, 2012

Via U.S. Mail

Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
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Columbia, South Carolina 29211

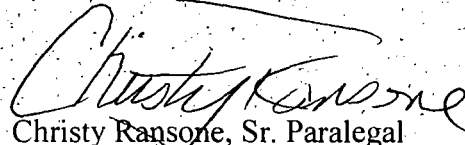
Re: *Health Promotion Specialists et. al. vs. South Carolina Board of Dentistry*
Case No: 01-CP-40-3148

Dear Ms. Kitchings:

Please find enclosed Appellant's Amended Certificate of Service for filing in the above matter. I have also included an extra copy and request it be 'clocked' and returned in the envelope I have provided.

With warm personal regards, I am,

Sincerely yours,


Christy Ransone, Sr. Paralegal
christy@desaballard.com

Enclosure

c: Kenneth Woodington, Esquire

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APR 06 2012

SC Court of Appeals



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
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March 29, 2012

Desa Ballard, Esquire
Stephanie Weissenstein, Esquire
Ballard Watson Weissenstein
226 State Street
West Columbia, SC 29169

Re: Health Promotion v. SC Bd of Dntstry (2)
2011200626

Dear Counsel:

We have received the Appellants' Initial Brief and Designation of Matter in the above case. Within ten days of the date of this letter, please provide proof you served the Designation of Matter on the opposing counsel.

Additionally, the caption should read as follows:

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

v.

Appellants,

South Carolina Board of Dentistry,

Respondent.

Any future filings by any party to this appeal must feature the above caption.

Very truly yours,

Jenny A. Kitchings
CLERK

JAK/laf

cc: William H. Davidson, Esquire
Andrew F. Lindemann, Esquire
Kenneth P. Woodington, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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MAR 26 2012

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

SC Court of Appeals

Case No. 2001-CP-40-03148

Health Promotion Specialists, LLC,.....APPELLANT

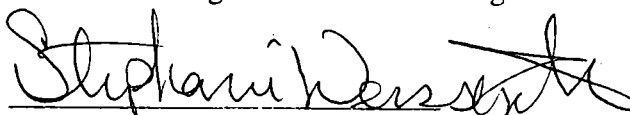
vs.

South Carolina Board of Dentistry RESPONDENT

APPELLANT'S DESIGNATION OF MATTER

1. Memorandum Order granting summary judgment, February 8, 2010
2. Order granting summary judgment, July 9, 2010
3. Order denying motion for reconsideration, September 29, 2011
4. Motion for summary judgment and memorandum in support, dated August 8, 2008
5. Memorandum in opposition to summary judgment, dated August 22, 2008
6. Motion for reconsideration, July 21, 2010
7. Transcript of Record, August 25, 2008
8. Second Amended Complaint, February 4, 2004
9. Complaint by the Federal Trade Commission against the S.C. Board of Dentistry
10. In Re: Proposed Regulation, Document No. 2644, 2002 WL 385116 (S.C. Admin. Law Ct. 2002)
11. In the Matter of the South Carolina State Board of Dentistry, FTC Docket No. 9311 (September 15, 2003)

I certify that this designation contains no matter which is irrelevant to this appeal. Appellant reserves the right to supplement this designation with the filing of the Reply brief.



Stephanie Weissenstein
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March 23, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHALD COUNTY
Honorable William P. Keesley, Circuit Court Judge

Case No. 2001-CP-40-03148

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SC Court of Appeals

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

vs.

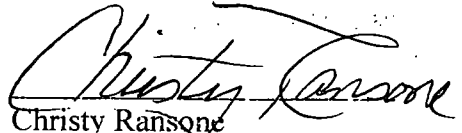
South Carolina Board of Dentistry RESPONDENT

CERTIFICATE OF SERVICE

I, Christy Ransone, do hereby certify that I have this date, served one (1) copy of the **Appellant's Initial Brief** in the above-captioned matter on the following by placing same in United States Mail, with sufficient first-class postage affixed and addressed as follows:

WILLIAM H. DAVIDSON
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March 23, 2012


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March 23, 2012.

Via U.S. Mail
Honorable Tanya Gee
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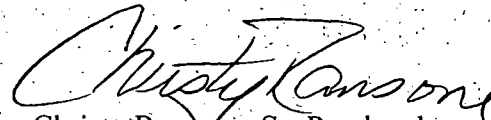
Re: *Health Promotion Specialists et. al. vs. South Carolina Board of Dentistry*
Case No: 01-CP-40-3148

Dear Ms. Gee:

Please find enclosed for filing Appellant's Initial Brief for the above matter. I have also provided an additional copy of the pleading with the request it be 'clocked' and returned in the enclosed envelope.

Thank you for your assistance with this matter. With warm personal regards, I am,

Sincerely yours,


Christy Ransone, Sr. Paralegal
christy@desaballard.com

Enclosures

c: Kenneth Woodington, Esquire

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MAR 26 2012
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2001-CP-40-03148

Health Promotion Specialists, LLC,.....APPELLANT

vs.

South Carolina Board of Dentistry RESPONDENT

APPELLANT'S INITIAL BRIEF

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MAR 26 2012

SC Court of Appeals

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ISSUES ON APPEAL

- I. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT BY ASSERTING CONCLUSIONS OF LAW BASED ON FINDINGS OF MATERIAL FACTS THAT SHOULD BE LEFT TO A JURY.
 - A. WHETHER THE DENTAL BOARD IS A PERSON AND IS IMMUNE FROM BEING SUED UNDER THE SOUTH CAROLINA TRADE PRACTICES ACT ARE QUESTIONS OF FACT.
 - B. THE COURT ERRED IN DETERMINING, AS A MATTER OF LAW, THAT THE BOARD IS IMMUNE FROM BEING SUED.
- II. THE COURT ERRED IN DETERMINING THE BOARD COULD NOT BE SUED, AS A MATTER OF LAW, UNDER THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT.
- III. THE COURT ERRED IN DENYING APPELLANT'S MOTION TO AMEND THE COMPLAINT.

STATEMENT OF THE CASE

This case was filed in July 2001 by Appellant Health Promotion Specialists (herein HPS or Appellant) after the South Carolina Board of Dentistry (herein the Board or Respondent) adopted an "emergency" regulation on July 1, 2001 governing the practices of dental hygienists in school settings, re-imposing the requirement that the child be first examined by a dentist¹. That regulation had been removed in 2000 by the General Assembly. 2000 Act No. 298. For the emergency regulation to become effective, it required the approval only of the Board, a majority of which consists of practicing dentists who are elected by other South Carolina licensed dentists (*i.e.* the Board members are not appointed by the legislature or otherwise publicly elected).

HPS sought an injunction of the temporary regulation, which was denied by Order of Judge Strickland by order dated August 8, 2001. (Case No. 2001-CP-40-3148A). That order was affirmed by the Court of Appeals *solely* on the basis that HPS failed to exhaust all administrative remedies before seeking the Court's assistance. (Ct. App. Unpublished Op., filed March 26, 2003).

In August, 2001, the Board published a proposed permanent regulation substantially identical to the emergency regulation, and HPS caused that proposal to be submitted to the administrative law court (ALC) for review, as was required by statute. (Case No. 01-ALJ-11-0348-RH). After a public hearing to determine whether the proposed permanent regulation was a reasonable exercise of the Board's authority, the ALC judge issued a report concluding that the Board's proposed permanent regulation was unreasonable and contravened state policy to the extent it reinstated the dentist pre-examination requirement that the legislature had eliminated in 2000. *In Re: Proposed*

¹ *e.g.* A supervising dentist had to examine the patient no more than 45 days prior to treatment by a dental hygienist in the school setting.

Regulation, Document No. 2644, 2002 WL 385116 (S.C. Admin. Law Ct. 2002). The Board did not submit the proposed legislation to the General Assembly.

A year later, in April of 2003, the Board filed its Motion to Dismiss in the injunction action. No discovery had taken place at the time. In September of 2003, before a hearing was scheduled on the April motion, the Federal Trade Commission (FTC) issued a complaint against the Board based on the same conduct that formed the grounds of both this action and the FTC action involving the Board. The FTC's "STATEMENT OF THE CASE" stated only:

1. Respondent South Carolina Board of Dentistry ("the Board"), which consists almost entirely of practicing dentists, restrained competition in the provision of preventive dental care services by unreasonably restricting the delivery of dental cleanings, sealants and topical fluoride treatments in school settings by licensed dental hygienists. Although the South Carolina General Assembly passed legislation in 2000 eliminating a statutory requirement that a dentist examine each child before a hygienist may perform cleanings or apply sealants in school settings, the Board in 2001 re-imposed the very examination requirement that the legislature had eliminated, and extended it to the application of topical fluoride in school settings as well. The effect of the Board's action was to deprive thousands of school children - particularly economically disadvantaged children - of the benefits of preventive oral health care services. The Board's anti-competitive action, undertaken by self-interested industry participants with economic interests at stake, was contrary to state policy and was not reasonably related to any countervailing efficiencies or other benefits sufficient to justify its harmful effects on competition and consumers.

This state court action was stayed after the institution of the action by the FTC, and all defendants in the present case, except the Board, were dismissed from both the federal case and this one. By Consent Order entered on November 1, 2007, this injunction case was restored to the docket in the Circuit Court and on June 10, 2010, the revised motion to dismiss was granted. Appellant's motion for reconsideration was denied by Order filed September 27, 2011.

STATEMENT OF THE FACTS

In 1988, the General Assembly enacted legislation aimed at increasing the availability of preventative dental care for school aged children, regardless of Medicaid eligibility. 1988 Act No. 439. The 1988 act allowed licensed dental hygienists to provide preventative dental care in schools. The original program was not particularly effective, largely because of it required a dentist to examine each student immediately before the hygienists were able to provide services. S.C. Code §40-15-80(C)(2)(pre-2000.) It further allowed the hygienists to perform certain preventative dentistry techniques "in school settings . . . under general supervision." S.C. Code Ann. Section 40-15-80(B).²

Prior to amendments in 2000, South Carolina statutes provided that a dental hygienist could provide cleanings and sealants in a school setting only if:

- (1) a supervising dentist examined the patient no more than 45 days before the treatment;
- (2) a supervising dentist provided written authorization for the procedures;
- (3) the patient was not an active patient of another dentist; and
- (4) the patient's parents provided written permission for the treatment.

The 2000 amendments removed all but the requirement for parental consent. Thus, after the 2000 amendments, the Board could not condition the care by a dental hygienist in a school setting on prior review by a dentist of the patient. Naturally, this amendment directly affected the dentists' (e.g. the Board members) economically.

In or around January 2001, appellant HPS began providing services in schools to carry out the General Assembly's intention to improve oral hygiene in school children.

² "General supervision" means that a licensed dentist on the South Carolina Department of Health and Environmental Control's public health dentist has authorized the procedures to be performed but does not require that a dentist be present when the procedures are performed." Section 40-15-85(2).

By fall of that year, HPS had established relationships with twenty-one school districts in South Carolina and had hired additional hygienists to meet the increasing demand. Although the new law had been in effect for some time, the Board waited until July of 2001 to enact the "emergency" legislation under the guise of clarification. Coincidentally, the "emergency regulation" was enacted just after the legislature went out of session and was not around to stop it, so the law would be good for the full six months allowable. The emergency regulation overlapped the beginning of the school year and thereby interrupted the flow of business for people like HPS.

One month later, HPS submitted the proposed amended law to the Administrative Law Court (ALC) for public hearing. In February 2002, four months after the hearing at the ALC on the permanent regulation, and one month after the 180-day period of the emergency regulation's effectiveness expired, Judge Kitrell issued a report concluding that the proposed permanent regulation was "unreasonable" in light of the 2000 amendments. *In Re: Proposed Regulation Document No. 2644*, 2002 WL 385116 (S.C. Admin. Law Ct. 2002). The ALC judge's conclusion did not mention that Judge Strickland's Order of August 21, 2001 held, "the action taken by the Board is within its power and authority as conferred by statute," insofar as it created the "clarified" regulation.

In 2003, the General Assembly amended the law again to specifically set forth that the pre-examination requirement did not apply in public health settings. The Board again attempted to supersede the legislature's action, which led to the filing of a FTC complaint against the Board that alleged the Board acted illegally in depriving children in South Carolina of preventative dental care. (*Supra; In the Matter of the South Carolina State Board of Dentistry*, FTC Docket No. 9311 (September 15, 2003). These charges

against the Board arose out of deliberate and repeated acts by the Board in seeking to prevent the operation of a school-based, public health dentistry program which provides preventative health care for school-aged children. Ultimately, the FTC and Board entered into a Settlement Agreement and Consent Order (Order dated September 6, 2007; Docket 9311), whereby the "Board may not directly or indirectly require that a dentist conduct an examination of a patient as a condition of a dental hygienist who is working in a public health setting. . ."

Meanwhile, in this injunction litigation, the Board filed its motion for dismissal in April 2003 and HPS filed an amended complaint. That May, the South Carolina General Assembly enacted legislation that expressly and definitively established that while dentist examination requirements are applicable in some settings, the requirement did not apply to dental hygienists' bestowment of preventive dental hygiene services, including cleanings, sealants and topical fluoride, when they are working in public health settings under the direction of the Department of Health and Environmental Control. S.C. Code §§40-15-80 and 40-15-85 (2000, as amended). Nonetheless, the Board initially maintained its position that in all settings where a dental hygienist provided services - whether public health or private practice-- a licensed dentist first had to see the patient and provide a treatment plan. Finally, on or around October 16, 2003, the Board passed resolution that affirmed it would not seek to usurp the legislation (SC. Code § 10-16-2003).

At the conclusion of the FTC's litigation against the Board in 2007, this case was restored to the docket and the Board renewed its motion; HPS requested leave to amend its complaint. The Court issued an opinion denying HPS' request to amend and dismissed the action, calling it an order granting summary judgment, although there was no



evidence presented at the hearing to establish any findings of fact (See generally, Transcript). The motion for reconsideration was denied in 2010 and this appeal followed.

ARGUMENT

I. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT BY ASSERTING CONCLUSIONS OF LAW BASED ON FINDINGS OF MATERIAL FACTS THAT SHOULD BE LEFT TO A JURY.

In ruling on summary judgment, the court sets forth several conclusions which Appellant HPS asserts are questions of material facts which should have been left to the jury, as follows:

The Board's motion, though styled as a motion for summary judgment, was really presented to the court with only the support of case law and matters appearing on the face of the pleadings. Clearly, in the June 25, 2010 order, the Court looked well beyond the allegations of the pleadings and made the findings of fact set forth in the Order, which are improper since the supposed "facts" are disputed.

"Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 376-77, 597 S.E.2d 181, 184 (Ct. App. 2004)(quoting, Murray v. Holnam, Inc., 344 S.C. 129, 138, 542 S.E.2d 743, 747 (Ct.App.2001) (citing Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing & Regulation, 337 S.C. 476, 523 S.E.2d 795 (1999)). Furthermore, in determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988).

A trial court may grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC; *See also*,



Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997)). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.” (FIND CASE FOR 561 S.E.2d at 656). In this case, there was virtually no discovery conducted, as no depositions had been taken and virtually no documentation had been traded³. In fact, prior to hearing the Board’s motion for summary judgment, the Court tabled HPS’ pending to compel. (Tr. P. __, lines ____).

A. THE COURT ERRED IN RULING THAT THE DENTAL BOARD IS NOT A PERSON AND IS IMMUNE FROM BEING SUED UNDER THE SOUTH CAROLINA TRADE PRACTICES ACT.

When the Court issued its order granting summary judgment, it set forth as conclusions of law certain facts which are properly reserved for determination by the ultimate fact finder. Appellant sought reconsideration based on the error of law as to summary judgment and the Court upheld its ruling. The primary issue here is that the Court held, both as a matter of law and as a fact, that the Board cannot be sued under the South Carolina Unfair Trade Practices Act because the Board is not a “person” and because the Board is immune from suit. In footnote 5 of the Order, the trial court found that the Board is “unquestionably” a government entity entitled to the immunities. Appellant would show that whether the Board can be sued and whether it is a “person” are actually material questions of fact, as more fully set forth herein, below.

The first issue is whether the Dental Board is a “person” under South Carolina law. The Enabling Act, at §40-1-20(3)(2011 amend), defines “board or commission” as being the group of individuals charged by law with the responsibility of licensing or

³ Respondent, in the trial court and in their pleadings, asserted discovery had been plentiful. Appellant would show that while discovery had taken place in the federal court action, virtually no discovery had been processed in this case, which was stayed completely, entirely inactive as a result for years.

otherwise regulating an occupation or profession within the State. Except as otherwise designated, "board" is used in this article to reference both boards and commissions". Id. According to the American Heritage Dictionary, a "person" is an individual⁴, partnership, or corporation (The American Heritage Dictionary of the English Language, Fourth Edition; Houghton Mifflin Company: 2000). Section 40-1-20(3), defines "Board" or "Commission" for purposes of the Department of Labor Licensing and Regulations (LLR) matters as "the group of *individuals* charged by law with the responsibility of licensing or otherwise regulating an occupation or profession within the State. Except as otherwise indicated, "board" is used in this article to refer to both boards and commissions." (emphasis added).

Subparagraph (8) defines a "Person" as being "an *individual*, partnership, or corporation."Id. (emphasis added). Regulation 71-400, which sets forth in South Carolina Statutes the definitions applicable to the LLR, and which defines a "person" as any individual, partnership, joint venture, cooperative association, corporation, organization of employees, or the State of South Carolina or any political subdivision thereof. S.C. Code Ann. Regs. 71-400 (emphasis added). (See also, Meek v. United States, 136 F.2d 679 (6th Cir., 1943); Bowe v. Judson C. Burns, 137 F.2d 37 (3rd Cir., 1943). S.C. Code Ann. Regs. 71-1004).

Based on these facts, it could be concluded that the laws of South Carolina clearly establish that the Board of Dentistry is a "person" for the purposes of applying both the Torts Claim Act and the Unfair Trade Practices Act, so either there is a question of material fact as to the identity of the Board or the lower court misapplied the law. If, however, this Court believes the issue of the Board's identity is instead a question of law,

⁴ The American Heritage Dictionary defines "individual" as being a single human considered apart from a society or community".

Appellant would show that the lower Court neither addressed that legal issue nor established *as a matter of law* that the Board is not a "person" under the UTPA. Either way, summary judgment was premature.

B. THE COURT ERRED IN DETERMINING, AS A MATTER OF LAW, THAT THE BOARD IS IMMUNE FROM BEING SUED.

The second major error was the conclusion that the Board's actions are protected by the shields of legislative and common law immunities. In the second amended complaint in this case, HPS alleges that the Board did not undertake a legitimate and appropriate exercise of discretion in engaging in the work of passing the emergency legislation. Similar to the lower court in this case, the circuit court in Madison ruled the Department was immune from liability for negligence, relying on S.C.Code Ann. § 15-78-60(25) (2005). Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 638 S.E.2d 650 (S.C. 2006). Section 15-78-60(25) provides that a governmental entity is not liable from "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner." However, "gross negligence is ordinarily a mixed question of law and fact." Madison at 655. (internal citations omitted). On review, of Madison, the Supreme Court concluded that in most cases, gross negligence is a factually controlled concept whose determination best rests with the jury. Id. at 661. When the evidence supports but one reasonable inference, it is solely a question of law for court, but otherwise it is an issue best resolved by the jury and, in that case, the Court concluded "that the issue of whether Department acted in a grossly negligent manner is a factual issue for a jury". Id.

The Board answered Appellant's charge and argued, and the Court held, that the Tort Claims Act specifically preserves sovereign immunity for "adoption, enforcement,

or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any chapter, provision, ordinance, resolution, rule, regulation, or written policies." (Order pg 8)(citing S. C. Code Ann. §. 15-78-60(4)(emphases added)). The order further held that Appellant's claim was barred by a purported quasi-legislative immunity. (Order pg 9)⁵. Specifically, the Board argued that the Court should grant judgment in its favor as to all claims seeking money damages, citing the subsections 1, 2 and 4 of S.C. Code Ann. 15-78-60, which read as follows:

"The governmental entity is not liable for a loss resulting from: (1) legislative, judicial, or quasi-judicial action or inaction; (2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature; . . . (4) adoption or enforcement or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies; [or] . . ." S.C. Code Ann. §§ 15-78-60(1), (2) and (4).

The Board relied on the case of O'Laughlin v Windham for the proposition that the General Assembly, when enacting 15-78-20(B), intended that all other immunities previously available to government agencies under the common-law would be preserved. Olaughlin v. Windham, 330 S.C, 379,498 S.E.2d 689 (Ct. App. 1998). The Board repeatedly argues that it gets sovereign immunity for "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies", citing SC. Code Ann. § 15-78-60(4). The Board also relies on the case of Williams v. Condon, which came later and held the common law prosecutorial immunity is not supplanted by the Tort Claims Act. 347 S.C. 227, 553

⁵ The Board argued that "in this particular case, there is absolutely no question, as a matter of law, that the board was acting in a quasi-legislative capacity. It issued an emergency regulation, which is within its authority to do so, is consistent with Judge Strickland's rulings and that is what they have been sued for." Tr Pg 11 Lines 19-25

S.E.2d 496 (Ct. App. 2001). The Board argues that same must be true with respect to the common law principles of legislative and quasi-legislative immunity.

What the Court failed to recognize and apply is that "immunity under the Tort Claims Act is an affirmative defense that must be proved by the defendant at trial". Frazier v. Badger, 361 S.C. 94, 101, 603 S.E.2d 587, 590 (2004). That HPS alleges that the Board acted with an improper motive in enacting the emergency regulation speaks to the elements of its unfair trade practices claim and is not a basis for appeal today. HPS argues that whether the Board is entitled to immunity is a question of fact that the Board has to prove.

This Court, in Hawkins v. City of Greenville, stated that for each of the specific provisions set forth in S.C. Code Ann. §15-78-60, the determination of immunity from tort liability turns on the question of whether the acts in question were discretionary rather than ministerial. Hawkins v. City of Greenville, 358 SC. 280, 594 S.E.2d 557 (Ct App. 2004). The five subsections of that statute will generally shield a governmental entity from liability when it exercises discretion in the form of judicial action, legislation, or administrative regulation. But, and it is a big but, the immunity is not absolute because the entity must prove certain facts in order to be entitled to the immunity. Sovereign immunity in South Carolina is dead. (See, Wells v. City of Lynchburg, 331 S.C. 296, 302, S.E.2d 746, 749 (Ct. App. 1998) (expressly noting that the common law doctrine of sovereign immunity has been abolished in South Carolina and that all immunity issues are now resolved by reference to the Tort Claims Act)). Discretionary immunity is contingent on proof the government entity, when faced with alternatives, actually weighed competing considerations and made a conscious choice. Further, the entity must establish, in weighing the competing considerations and alternatives, it utilized accepted

professional standards appropriate to resolve the issue. Strange v. S.C. Dept. of Hwys. & Pub. Transp., 314 S.C. 427, 429, 445 S.E.2d 439, 440 (1994). The governmental entity bears the burden of establishing discretionary immunity as an affirmative defense. Niver v. S.C. Dept. of Hwys. & Pub. Transp., 302 S.C. 461, 463, 395 S.E.2d 728, 730 (Ct.App.1990). The provisions of the Tort Claims Act that establish limitations on and exemptions to the liability of the State must be liberally construed in favor of limiting the liability of the State. Giannini v. S. Carolina Dept. of Transp., 378 S.C. 573, 591, 664 S.E.2d 450, 459 (2008)(See also, S.C.Code Ann. § 15-78-20(f) (Supp.2005)).

In this case, if the Board wanted the discretionary immunity provided under the Tort Claims Act, it was obligated to establish and prove that its members, when faced with alternatives, actually weighed competing considerations and then made a conscious choice to act. Furthermore, the Board had to show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them. Id. (see also, Sabb v. South Carolina State University, 350 S.C. 416, 567 S.E.2d 231 (2002); Steinke v. South Carolina Dept. of Labor. Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999); Summer v. Carpenter, 328 S.c. 36, 492 S.E.2d 55 (1997); Creech v. South Carolina Wildlife and Marine Resources Dept., 328 S.C. 24, 491 S.E.2d 571 (1997); Strange v. South Carolina Dept. of Highways and Public Transp., 314 S.C. 427, 445 S.E.2d 439 (1994)).

Consider Steinke v. South Carolina Dept. of Labor. Licensing and Regulation, in which LLR was denied immunity under the discretionary function exception to the Tort Claims Act in a wrongful death action that alleged the Department negligently failed to investigate the credible notices of improper modifications to a licensed device that was used to carry bungee jumpers and spectators. Steinke v. S. Carolina Dept. of Labor,

Licensing & Regulation, 336 S.C. 373, 520 S.E.2d 142, (1999). In Steinke, the Department contended it was immune from suit under §15-78-60(12) because under that section, a governmental entity is not liable for a loss resulting from "licensing powers or functions, including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority except when the power or function is exercised in a grossly negligent manner." Id. at 393. The trial judge instructed the jury on this exception, but the Court determined there was "scant evidence that Department officials exercised their discretion; evidence showed that the Department received three credible notices of modifications in question, but nonetheless took no more than a cursory glance". Id. at 393-394.

As the Supreme Court has recognized, when a governmental entity seeks to establish discretionary immunity, the "standard is inherently factual." Pike v. SCDOT, 343 S.C. 224, 540 S.E.2d 87 (2000). In Pike, the Supreme Court held that "when a governmental entity asserts the affirmative defense of discretionary immunity under the Tort Claims Act, the burden of proof is on the governmental entity and this burden is one of persuasion by a preponderance of the evidence. Accordingly, the Court of Appeals correctly analyzed this issue in terms of whether a jury issue was presented." Id. at 232. The Department of Transportation argued that if the Court required them to establish their immunity against Pike's claims by the preponderance of the evident, then "the Court will, in effect, judicially abolish the defense by allowing juries to second guess the DOT's discretionary decisions." The Supreme Court decided that if a governmental entity merely has the burden of production, not the burden of persuasion, then agencies like the DOT "would avail itself of an affirmative defense but effectively be relieved of proving

the defense. This, in our opinion, flies in the face of the well-established rule that the party pleading an affirmative defense 'has the burden of proving it.'" Id. at 231. (Citing, Hoffman v. Greenville County, 242 S.C. 34, 39, 129 S.E.2d 757, 760 (1963); *accord* McCabe v. Sloan, 184 S.C. 158, 162, 191 S.E. 905, 906 (1937) ("It seems unnecessary to cite authorities in support of the postulate that when one pleads an affirmative defense, the burden is on him to prove it.")). This is not a determination that can be made on the face of HPS' Second Amended Complaint and it is not a question of law.

As counsel for HPS stated at the hearing on this motion, "We don't just give governments carte blanche to run roughshod all over the rights of their citizens and hide behind the Tort Claims Act for immunity. They've got to prove that . . . their deliberations had procedural integrity. We don't sue them for getting the wrong answer, but they've got to prove that they were basically doing what government does." Tr. p. 40, ll. 2-10. The government, especially an agency whose individual members benefit fiscally from the regulations it passes, cannot do whatever it wants by way of regulation and then hide behind the Torts Claim Act; surely, that could not be the legislature's or judiciary's intent⁶.

⁶ The manner in which the Board members are elected (40-15-20), that is, by other dentists, arguably establishes the Board is as a quasi-trade association whose members are elected by their peers to represent their collective interests. In fact, the Governor only has the authority to "reject" the members voted onto the Board by the other dentists. Furthermore, and interestingly enough, the sole hygienist representative is elected by the Board—of dentists. Therefore, the dental hygienist professionals don't have any vote as to who becomes a member of the Board to represent their interest.

II. THE COURT ERRED IN DETERMINING THE BOARD COULD NOT BE
SUED, AS A MATTER OF LAW, UNDER THE SOUTH CAROLINA UNFAIR
TRADE PRACTICES ACT.

The Unfair Trade Practices Act, §39-5-10 *et seq.*, provides that

Any person who suffers any ascertainable loss of money or property,
real or personal, as a result of the use or employment by another *person*
of an unfair or deceptive method, act or practice declared unlawful [by
the Act] may bring an action. . . to recover actual damages⁷.

An unfair trade practice has been defined as a practice which is offensive to public policy
or which is immoral, unethical, or oppressive.” Wogan v. Kunze, 366 S.C. 583, 606, 623
S.E.2d 107 (Ct. App. 2005)(citing, DeBondt v. Carlton Motorcars, Inc., 342 S.C. 254,
269, 536 S.E.2d 399, 407 (Ct.App.2000)).” To be actionable under the South Carolina
Unfair Trade Practices Act (SCUTPA), the unfair or deceptive act or practice must have
an impact upon the public interest. Id. at 607(citing Haley Nursery Co. v. Forrest, 298
S.C. 520, 381 S.E.2d 906 (1989)). “An impact on the public interest may be shown if the
acts or practices have the potential for repetition.” Singleton v. Stokes Motors, Inc., 358
S.C. 369, 379, 595 S.E.2d 461, 466 (2004) (citing, Crary v. Djebelli, 329 S.C. 385, 387,
496 S.E.2d 21, 23 (1998)).

The potential for repetition may be shown in either of two ways:

- (1) By showing the same kind of actions occurred in the past, thus making it
likely they will continue to occur absent deterrence; or
- (2) By showing the company's procedures created a potential for repetition of
the unfair and deceptive acts. Id.

A party bringing a private cause of action under SCUTPA must allege and prove the
defendant's actions adversely affected the public interest. Daisy Outdoor Adver. Co. v.
Abbott, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996); Wogan v. Kunze, 366 S.C. 583,
606-607623 S.E.2d 107 (Ct. App. 2005) (citing Haley Nursery Co. v. Forrest, 298 S.C.

⁷ Sullivan and MacGregor, *Elements of Civil Causes of Action*, Fourth Edition. S.C. Bar CLE
Division:2009

520, 381 S.E.2d 906 (1989)). "An impact on the public interest may be shown if the acts or practices have the potential for repetition." Singleton v. Stokes Motors, Inc., 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004) (citing Crary v. Djebelli, 329 S.C. 385, 387, 496 S.E.2d 21, 23 (1998)).

The Board argued that there is no case law in South Carolina that allows a SCUTPA claim to be asserted against a state entity because the SCUTPA requires that the unfair methods of competition or unfair deceptive acts or practices must be "in the conduct of any trade or commerce". The Board argues that the SCUTPA claim fails as a matter of law because HPS purportedly failed to allege any facts that would bring that claim within the specific statutory definition under §39-5-20(A) and because the Board is not a "person" as contemplated by the Act. (*see supra*). (Tr. p. 15, ll. 14-24).

Appellant would aver that if the case law does not exist in South Carolina, it is because this whole issue of whether a Board is a "person" whose actions (e.g. regulation of a profession) affects commerce, such that it falls within the coverage of SCUTPA, is a novel issue. There is established law in this State that novel issues of law do not, and should not, be decided on summary judgment because the issues need a full development of a factual record. In Doe v Batson, 338 S.C. 291, 525 S.E.2d 909, 915 (Ct. App. 1999), the court determined that "it is imperative that factual foundations are adequately explored, thereby allowing the court to enter this novel area fully informed." The Batson court relied on ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997), for the proposition that, "although all issues of novel impression do not require a trial, summary judgment is inappropriate where further inquiry into the facts is needed to clarify the application of the law." Id.

To that end, HPS brought a cause of action under a state statute in state court seeking state remedies. As to whether the Dental Board is a "person" that effects trade or commerce as defined by the Act, Appellant would show those are novel questions of fact which should not have been summarily decided. Furthermore, as dentistry constitutes "trade or commerce" under the SCUTPA, whether the regulation of that profession also constitutes an act effecting trade or commerce under the SCUTPA is also a novel questions of fact. See, Taylor v. Medenic, 324 S.C. 200, 217, 479 S.E.2d 35, 45 (1996) ("The provision of *all* service constitutes commerce within the meaning of the UTPA. The statute does not exclude professional services from its definition.") (emphasis in original)).

Appellant would show that when the Board passes a regulation, that endeavor constitutes an act "in the conduct of dentistry". The South Carolina legislature has expressly stated it intended that courts, when interpreting S.C. Code § 39-5-20(a), "will be guided by the interpretations given by the Federal Trade Commission and the federal courts to §5(a)(1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)), *as from time to time amended.*" S.C. Code Ann. § 39-5-20(b) (emphasis added). The pertinent part of the Federal Trade Commission Act (FTCA) states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful". In other words, the action or practice falls within the ambit of an action "in the conduct of any trade or commerce" if it only, merely affects commerce.

In this case, Appellant alleged in its Second Amended Complaint that the Board promulgated anti-competitive regulations for the dental profession. As stated above, the trial court, and this court, are to be guided by FTC and by court interpretations of §

5(a)(1) of the FTC Act (15 U.S.C. § 45(a)(1), and its amendments). The FTC Act has made clear that an act or practice need only "affect" commerce to constitute conduct of any trade or commerce. Additionally, the United States Court of Appeals for the Fourth Circuit, when interpreting a former and stricter version of §5(a)(1), found *that a regulatory board's promulgation of regulations constituted an act "in commerce."* (CITATION, emphasis added). It was clear enough from the allegations of the Second Amended Complaint that HPS charge the Board with conspiring with others to violate SCUTPA and/or that the Board aided and abetted others in their endeavors to so violate. This matter should not have been dismissed on summary judgment.

This matter is so much more than purportedly moot legislation and the Dental Board. HPS suffered monetary damages and both HPS and other professions regulated by LLR are at risk to suffer continuing and future damages if the Boards, like the Dental Board here, are allowed to engage in this perpetual and repetitive actions.

III. THE COURT ERRED IN DENYING APPELLANT'S MOTION TO AMEND THE COMPLAINT.

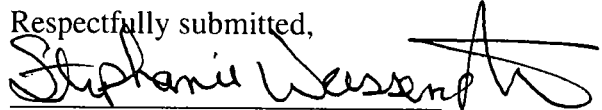
When the Court prematurely granted summary judgment, it also rejected Appellant's request to amend the complaint to allege conspiracy by the Board to violate the SCUTPA. The Court accepted the argument that the Board would be prejudiced by the amendment since the case has so long been on the docket. However, Appellant would show that because this case was stayed, for years, pending the resolution of the FTC action, this case was not active for the length of time alluded to by the Court. When the case was restored and the Board filed a new motion for summary judgment, discovery had not been conducted. Appellant is informed and believes that, at the summary judgment stage, the Board would not have been unduly prejudiced.

"The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. . . This rule strongly favors amendments and the court is encouraged to freely grant leave to amend." Parker v. Spartanburg Sanitary Sewer District, 362 S.C. 276, 286, 607 S.E.2d 711, 716-717 (Ct. App. 2005); Pool v. Pool, 329 S.C. 324, 328-29, 494 S.E.2d 820, 823 (1998). Further, in the LaMotte v. Punch Line case, the South Carolina Supreme Court actually recognized a cause of action for conspiracy to violate SCUTPA. LaMotte v Punch Line of Columbia, Inc., 296 SC 66, 70, 370 SE2d 711 (1988). HPS believes it could establish facts that would prove the Board could be a co-conspirator in a conspiracy to violate the SCUTPA and that the Board may also be found to have aided and abetted others in violations of SCUTPA. As discovery has not been undertaken in this case, as the record would show, Appellant believes that it is well within the contemplation of Rule 15(a). SCRCP.

CONCLUSION

The pleadings in this case clearly set forth more than a scintilla of evidence that, when viewed in favor of HPS, who was the nonmoving party, that the Dental Board may be sued under the South Carolina Unfair Trade Practices Act and that the Board has the obligation to establish facts and evidence that it is entitled to an immunity set forth by the Tort Claims Act. Further, there is adequately pled fact that the Board's conduct in enacting these types of regulations effect commerce, and that similar conduct has been perpetrated and is likely to be perpetrated again by this Board, and others at the Department of Labor Licensing and Regulation, against other members of the public. For these reasons, and the other reasons set forth herein, summary judgment should have been denied and HPS should have been granted leave to amend the complaint.

Respectfully submitted,



Stephanie Weissenstein

Desa Ballard

Ballard Watson Weissenstein

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ATTORNEYS FOR APPELLANTS

March 23, 2012



The South Carolina Court of Appeals

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March 20, 2012

Desa Ballard, Esquire
Stephanie Weissenstein, Esquire
Ballard Watson Weissenstein
226 State Street
West Columbia, SC 29169

Re: Health Promotion v. SC Bd of Dntstry (2)
2011200626

Dear Counsel:

The following Order has been endorsed on your Motion for Extension of Time in the above entitled case on appeal.

"Granted.

John Cannon Few C.J.
For the Court

By s/ V. Claire Allen
Deputy Clerk

March 20, 2012."

Please be advised the Appellant's Initial Brief and Designation of Matter must be served and filed no later than March 23, 2012.

Very truly yours,

V. Claire Allen, Deputy
CLERK

JAK/laf

cc: William H. Davidson, Esquire
Andrew F. Lindemann, Esquire
Kenneth P. Woodington, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHALD COUNTY
Honorable William P. Keesley, Circuit Court Judge

Case No. 2001-CP-40-03148

Health Promotion Specialists, LLC,.....APPELLANT

vs.

South Carolina Board of Dentistry, ...RESPONDENT

MOTION FOR EXTENSION OF TIME

Appellant, by and through its undersigned counsel, hereby requests that this Court grant an extension until March 23, 2012, by which to file the initial brief and designation of matter to be included in the record on appeal. Opposing counsel, Kenneth P. Woodington, does not object to this request.

GRANTED
JOHN CANNON FEW, C.J.
FOR THE COURT

By: V. Claire Allen
(Clerk) (Deputy Clerk)

FILED
3/20/12 CAF

March 16, 2012

Stephanie Weissenstein

Stephanie Weissenstein
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3rd

3/19/12

RECEIVED

MAR 19 2012

SC Court of Appeals

3/23/12

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHALD COUNTY
Honorable William P. Keesley, Circuit Court Judge

Case No. 2001-CP-40-03148

Health Promotion Specialists, LLC,.....APPELLANT

vs.

South Carolina Board of Dentistry, ...RESPONDENT

CERTIFICATE OF SERVICE

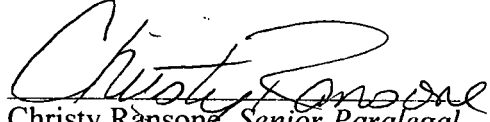
I, Christy Ransone, of Ballard Watson Weissenstein, did this date serve opposing counsel with a copy of Appellant's Motion for Extension to File Initial Brief and Designation of Matter by depositing same in the United States Mail, proper postage affixed, and addressed to:

KENNETH P. WOODINGTON

1611 Devonshire Drive

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Christy Ransone, Senior Paralegal

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RECEIVED

MAR 19 2012

March 16, 2012

SC Court of Appeals



**Ballard
Watson Weissenstein**
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III
Stephanie Weissenstein
Attorneys at Law

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March 16, 2012

Via U.S. Mail
Honorable Tanya Gee
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Health Promotion Specialists et. al. vs. South Carolina Board of Dentistry*
Case No: 01-CP-40-3148

Dear Ms. Gee:

I have enclosed for filing in the above matter Appellant's final Motion for Extension of Time. I have also provided an additional copy of the pleading which I request be 'clocked' and returned in the enclosed envelope. With this correspondence I am also sending our \$25.00 check in payment of the filing fee for this motion.

Opposing counsel has been contacted regarding this request and has informed our office he has no opposition to granting the extension. Thank you for your time and assistance with this matter. With warm personal regards, I am,

Sincerely yours,

Christy Ransone, Sr. Paralegal
christy@desaballard.com

Enclosures

c: Kenneth Woodington, Esquire

RECEIVED
MAR 19 2012
SC Court of Appeals

3/19/12
PJC



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

March 6, 2012

Desa Ballard, Esquire
Stephanie Weissenstein, Esquire
Ballard Watson Weissenstein
226 State Street
West Columbia, SC 29169

Re: Health Promotion v. SC Bd of Dntstry (2)
2011200626

Dear Counsel:

The following Order has been endorsed on your Motion for Extension of Time in the above entitled case on appeal.

"Granted.

John Cannon Few C.J.
For the Court

By s/ V. Claire Allen
Deputy Clerk

March 06, 2012."

Please be advised the Appellant's Initial Brief and Designation of Matter must be served and filed no later than March 19, 2012.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc: William H. Davidson, Esquire
Andrew F. Lindemann, Esquire
Kenneth P. Woodington, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHALD COUNTY
Honorable William P. Keesley, Circuit Court Judge

Case No. 2001-CP-40-03148

Health Promotion Specialists, LLC, ...APPELLANT

vs.

South Carolina Board of Dentistry, ...RESPONDENT

MOTION FOR EXTENSION OF TIME

Appellant, by and through its undersigned counsel, hereby requests that this Court grant an extension until March 19, 2012, by which to file the initial brief and designation of matter to be included in the record on appeal. The grounds for this request for extension are the complicated nature of the case and the undersigned's scheduled surgery in early February has caused unexpected additional recovery time. Opposing counsel, Kenneth P. Woodington, does not object to this request.

GRANTED
JOHN CANNON FEW, C.J.
FOR THE COURT
By: *V. Elaine Allen*
(Clerk) (Deputy Clerk)

RECEIVED

FEB 17 2012

SC Court of Appeals

February 16, 2012

FILED

3/16/12 WAP

Stephanie Weissenstein

Stephanie Weissenstein
BALLARD WATSON WEISSENSTEIN
Post Office Box 6338
West Columbia, South Carolina 29171
Telephone 803.796.9299
Facsimile 803.796.1066
E-mail: Stephanie@desaballard.com

ATTORNEYS FOR APPELLANT

2/17/12

3/19/12

2nd

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHALD COUNTY
Honorable William P. Keesley, Circuit Court Judge

Case No. 2001-CP-40-03148

Health Promotion Specialists, LLC,.....APPELLANT

vs.

South Carolina Board of Dentistry, ...RESPONDENT

CERTIFICATE OF SERVICE

I, Christy Ransone, of Ballard Watson Weissenstein, did this date serve opposing counsel with a copy of Appellant's Motion for Extension to File Initial Brief and Designation of Matter by depositing same in the United States Mail, proper postage affixed, and addressed to:

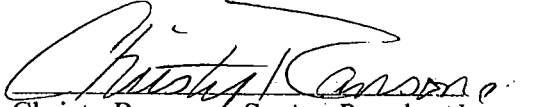
KENNETH P. WOODINGTON

1611 Devonshire Drive

Post Office Box 8568

Columbia, South Carolina 29202

RECEIVED
FEB 17 2012
SC Court of Appeals


Christy Ransone, Senior Paralegal
BALLARD WATSON WEISSENSTEIN
Post Office Box 6338
West Columbia, South Carolina 29171
Telephone 803.796.9299
Facsimile 803.796.1066
E-mail: christy@desaballard.com

February 16, 2012



**Ballard
Watson Weissenstein**
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III
Stephanie Weissenstein
Attorneys at Law

Post Office Box 6338 | West Columbia, SC 29171
226 State Street | West Columbia, SC 29169 | ph 803.796.9299 | fx 803.796.1066 | desaballard.com

February 16, 2012

Via U.S. Mail

Honorable Tanya Gee
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29211

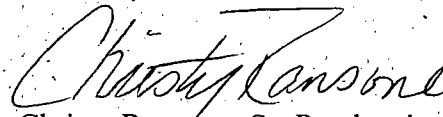
Re: *Health Promotion Specialists et. al. vs. South Carolina Board of Dentistry*
Case No: 01-CP-40-3148

Dear Ms. Gee:

I have enclosed for filing in the above matter Appellant's second Motion for Extension of Time. I have also provided an additional copy of the pleading which I request be 'clocked' and returned in the enclosed envelope. With this correspondence I am also sending our \$25.00 check in payment of the filing fee for this motion.

Opposing counsel has been contacted regarding this request and has informed our office he has no opposition to granting the extension. Thank you for your time and assistance with this matter. With warm personal regards, I am,

Sincerely yours,


Christy Ransone, Sr. Paralegal
christy@desaballard.com

Enclosures

c: Kenneth Woodington, Esquire

RECEIVED
FEB 17 2012
SC Court of Appeals

The South Carolina Court of Appeals

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

v.

South Carolina Board of Dentistry, Respondent.

The Honorable William P. Keesley
Richland County
Trial Court Case No. 2001-CP-40-03148

ORDER

For good cause having been shown, the time for Appellant's Initial Brief and Designation of Matter to be served and filed in the above entitled matter is hereby extended until February 17, 2012.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY *V. Claire Allen, Deputy*
CLERK

Columbia, South Carolina
cc: Desa Ballard, Esquire
Stephanie Weissenstein, Esquire
William H. Davidson, Esquire
Andrew F. Lindemann, Esquire
Kenneth P. Woodington, Esquire

FILED

1-18-12 *AF*



**Ballard
Watson Weissenstein**
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III
Stephanie Weissenstein
Attorneys at Law

226 State Street
West Columbia, SC 29169
Phone: 803.796.9299
Fax: 803.796.1088
www.desaballard.com

FAX TRANSMISSION COVER SHEET

Date: January 18, 2012
To: Lori
Fax: 734-1496
806-8855
734-1821
Re: Health Promotion Specialists et. al. vs. South Carolina Board of Dentistry
Sender: Christy Ransone
Client No: 050636-005

The original will x will not be mailed to you.

**YOU SHOULD RECEIVE 2 PAGE(S), INCLUDING THIS COVER SHEET.
IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL (803) 796-9299.**

Lori,

I have enclosed a copy of the Invoice received from the court reporter. The was received by our office via certified mail on December 13, 2011.

Thanks!

c: Ken Woodington
Court Administration

The information contained in the facsimile is attorney privileged and confidential information intended for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited and will be considered as a tortuous interference in our confidential relationship. If you received this transmission in error, or if you encounter difficulty with your receipt of this transmission, please call (803) 796-9299.



State of South Carolina
The Circuit Court of The Eleventh Judicial Circuit

Stacy L. Sheppard
Circuit Court Reporter
Registered Professional
Reporter

100 Lunsford Lane
Lexington, SC 29072

December 2, 2011

Christy Ransone
P.O. Box 6338
West Columbia, SC 29171

In Re: Health Promotion Specialists, LLC v. SC Board of Dentistry

Dear Ms. Ransone:

Delivered is the requested Transcript of Record in the above-referenced matter before Judge Keesley in Columbia on August 25, 2008.

The total cost for the transcript is \$149.50 plus \$10.00 for postage and handling; for a total amount of \$159.50.

Payment is due upon receipt.

Paid

Sincerely,

Stacy L. Sheppard

Stacy L. Sheppard, RPR
Circuit Court Reporter

NOTE: PURSUANT TO RULE 607(h)(1)(B), SCACR, "A COURT REPORTER SHALL RECEIVE THE FEE OF \$.75 PER PAGE FOR FURNISHING A COPY OF A PREVIOUSLY PREPARED TRANSCRIPT." ALL REQUESTS FOR COPIES OF THE ATTACHED TRANSCRIPT FROM OPPOSING PARTY OR NON-PARTIES SHOULD BE SENT TO:
Stacy L. Sheppard
100 Lunsford Lane
Lexington, SC 29072

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHALD COUNTY
Honorable William P. Keesley, Circuit Court Judge

Case No. 2001-CP-40-03148

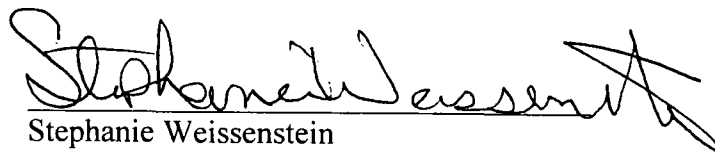
Health Promotion Specialists, LLC,.....APPELLANT

vs.

South Carolina Board of Dentistry, ...RESPONDENT

MOTION FOR EXTENSION OF TIME

Appellant, by and through its undersigned counsel, hereby requests that this Court grant an extension until February 17, 2012, by which to file the initial brief and designation of matter to be included in the record on appeal. The grounds for this request for extension are the complicated nature of the case and the undersigned's scheduled surgery in early February. Opposing counsel, Kenneth P. Woodington, does not object to this request.



Stephanie Weissenstein
BALLARD WATSON WEISSENSTEIN
Post Office Box 6338
West Columbia, South Carolina 29171
Telephone 803.796.9299
Facsimile 803.796.1066
E-mail: Stephanie@desaballard.com

ATTORNEYS FOR APPELLANT

January 11, 2012

1/12/12
2/17/12 1st

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHALD COUNTY
Honorable William P. Keesley, Circuit Court Judge

Case No. 2001-CP-40-03148

Health Promotion Specialists, LLC,.....APPELLANT

vs.

South Carolina Board of Dentistry, ...RESPONDENT

CERTIFICATE OF SERVICE

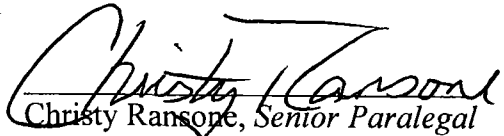
I, Christy Ransone, of Ballard Watson Weissenstein, did this date serve opposing counsel with a copy of Appellant's Motion for Extension to File Initial Brief and Designation of Matter by depositing same in the United States Mail, proper postage affixed, and addressed to:

KENNETH P. WOODINGTON

1611 Devonshire Drive

Post Office Box 8568

Columbia, South Carolina 29202



Christy Ransone, Senior Paralegal

BALLARD WATSON WEISSENSTEIN

Post Office Box 6338

West Columbia, South Carolina 29171

Telephone 803.796.9299

Facsimile 803.796.1066

E-mail: christy@desaballard.com

January 11, 2012



**Ballard
Watson Weissenstein**
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III
Stephanie Weissenstein
Attorneys at Law

Post Office Box 6338 | West Columbia, SC-29171
226 State Street | West Columbia, SC 29169 | ph 803.796.9299 | fx 803.796.1066 | desaballard.com

January 11, 2012

Via U.S. Mail

Honorable Tanya Gee
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Health Promotion Specialists et. al. vs. South Carolina Board of Dentistry*
Case No: 01-CP-40-3148

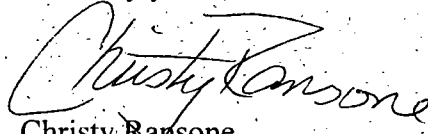
Dear Ms. Gee:

Please find enclosed Appellant's Motion for Extension of Time for filing in the above matter. I have also provided a check in the amount of \$25.00 for the filing fee and an extra copy of the pleading which I request be 'clocked' and returned in the envelope provided.

Opposing counsel has been contacted and had no opposition to the granting of the extension. If you have any questions, please contact our office.

Thank you for your time and attention to this matter. With warm personal regards, I am,

Sincerely yours,


Christy Ransone
christy@desaballard.com

c. Kenneth Woodington, Esquire



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

November 29, 2011

Desa Ballard, Esquire
Stephanie Weissenstein, Esquire
Ballard Watson Weissenstein
226 State Street
West Columbia, SC 29169

Re: Health Promotion v. SC Bd of Dntstry (2)
2011200626

Dear Counsel:

The following Order has been endorsed on your Motion to File Rule 207 Notification Out of Time in the above entitled case on appeal.

"Granted.

John Cannon Few C.J.
For the Court

By s/ V. Claire Allen
Deputy Clerk

November 29, 2011."

Please notify the court when the transcripts have been received.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc: William H. Davidson, Esquire
Andrew F. Lindemann, Esquire
Kenneth P. Woodington, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHALD COUNTY
Honorable William P. Keesley, Circuit Court Judge

RECEIVED

NOV 09 2011

Case No. 2001-CP-40-03148

SC Court of Appeals

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

vs.

South Carolina Board of Dentistry RESPONDENT

**MOTION TO FILE RULE 207 NOTIFICATION
OUT OF TIME**

Appellants seek permission of the Court to comply with the notification requirements of Rule 207(a)(1), SCACR, out of time. In support of this motion, Appellant would show:

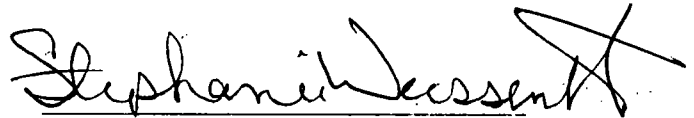
- A. Appellant filed its notice of appeal on October 4, 2011, so notice that the transcript had been ordered was therefore due on October 14, 2011, per Rule 207(a)(1).
- B. By virtue of internal error, the deadline for the Rule 207 notification was calendared as being thirty days from date of filing the Notice of Appeal, rather than ten.
- C. Further, the office of Appellant Counsel had difficulty in their attempt to obtain from Court Administration the name of the Court Reporter who



transcribed the August 25, 2008 hearing. Fortunately, Mr. Woodington, who also Respondent's trial counsel, had taken note of the Court Reporter's contact information and provided that to the undersigned.

- D. Notice that the transcript had been ordered was sent to the Court on October 31, 2011 (a copy enclosed herewith). It was on receipt, subsequently, of the Court's October 28th letter that the calendaring error became apparent.

Based on the foregoing, counsel for Appellant apologizes for the error and respectfully request the Court accept Appellant's Rule 207 notification, out of time.



Desa Ballard
Stephanie Weissenstein
Ballard Watson Weissenstein
Post Office Box 6338
West Columbia, South Carolina 29171
Telephone 803.796.9299
Facsimile 803.796.1066
E-mails: desab@desaballard.com
stephanie@desaballard.com

ATTORNEYS FOR APPELLANT

November 7, 2011

Other counsel of record:

WILLIAM H. DAVIDSON
ANDREW F. LINDEMANN
KENNETH P. WOODINGTON
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
Attorneys for Respondent

GRANTED
JOHN CAMPBELL, C.J.
FOR THE COURT
By: V. Claire Allen
(Clerk) (Deputy Clerk)

FILED
11/29/11 14

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHALD COUNTY
Honorable William P. Keesley, Circuit Court Judge

Case No. 2001-CP-40-03148

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

vs.

South Carolina Board of Dentistry RESPONDENT

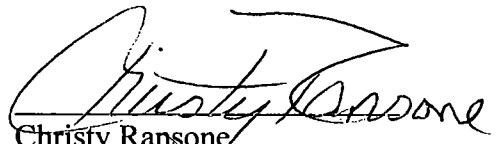
CERTIFICATE OF SERVICE

I, Christy Ransone, do hereby certify that I have this date, served one (1) copy of the **Motion to File Rule 207 Notification Out of Time** in the above-captioned matter on the following by placing same in United States Mail, with sufficient first-class postage affixed and addressed as follows:

WILLIAM H. DAVIDSON
ANDREW F. LINDEMANN
KENNETH P. WOODINGTON
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202

Court Administration
1015 Sumter St # 200
Building 1015
Columbia, SC 29201-3747

November 7, 2011


Christy Ransone
Sr. Paralegal



**Ballard
Watson Weissenstein**
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III
Stephanie Weissenstein
Attorneys at Law

Post Office Box 6338 | West Columbia, SC 29171
226 State Street | West Columbia, SC 29169 | ph 803.796.9299 | fx 803.796.1066 | desaballard.com

October 31, 2011

Via U.S. Mail
Honorable Tanya Gee
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29211

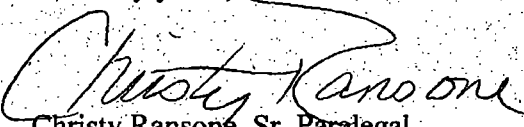
Re: *Health Promotion Specialists et. al. vs. South Carolina Board of Dentistry*
Case No: 01-CP-40-3148

Dear Ms. Gee:

I am writing to inform your office and counsel that we have received notice from the court reporter that she has received our request, but prepares transcripts in the received and it may be up to 60 days before the transcript will be ready. I have enclosed a copy of that email for review.

With warm personal regards, I am,

Sincerely yours,


Christy Ransone, Sr. Paralegal
christy@desaballard.com

Enclosure

c: Kenneth Woodington, Esquire
Client

Christy Ransone

From: Sheppard, Stacy L. [SSheppard@sccourts.org]
Sent: October 28, 2011 9:45 AM
To: Christy Ransone
Subject: Health Promotion Specialists v. SC Board of Dentistry

Dear Ms. Ransone:

I am in receipt of your request for a transcript of record for the above-referenced case. I prepare transcripts in order of receipt. I am given 60 days in which to complete the transcript of record. Extensions of time may be granted, if necessary.

Thank you, Stacy Sheppard



**Ballard
Watson Weissenstein**
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III
Stephanie Weissenstein
Attorneys at Law

Post Office Box 6338 | West Columbia, SC 29171
226 State Street | West Columbia, SC 29169 | ph: 803.796.9299 | fx: 803.796.1066 | desaballard.com

November 07, 2011

Via U.S. Mail
Honorable Tanya Gee
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED

NOV 09 2011

SC Court of Appeals

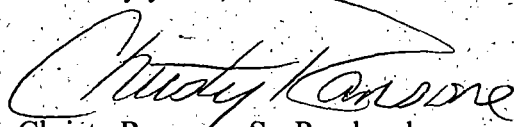
Re: *Health Promotion Specialists et. al. vs. South Carolina Board of Dentistry*
Case No: 01-CP-40-3148

Dear Ms. Gee:

Please find enclosed for filing in the above matter Appellant's Motion to File Rule 207 Out of Time. I have also provided an extra copy and request it be 'clocked' and returned in the envelope I have provided. Our check in payment of the \$25.00 filing fee has also been included.

Thank you for your time and attention to this matter. With warm personal regards, I am,

Sincerely yours,


Christy Ransone, Sr. Paralegal
christy@desaballard.com

Enclosures

c: Kenneth P. Woodington, Esquire
Court Administration



**Ballard
Watson Weissenstein**
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III
Stephanie Weissenstein
Attorneys at Law

Post Office Box 6338 | West Columbia, SC 29171
226 State Street | West Columbia, SC 29169 | ph 803.796.9299 | fx 803.796.1066 | desaballard.com

November 01, 2011

Via U.S. Mail and Facsimile
Court Administration
200 Columbia SC 29201-3739
Building 1015

Re: *Health Promotion Specialists et. al. vs. South Carolina Board of Dentistry*
Case No: 01-CP-40-3148

Dear Sir or Madam:

Please find enclosed copies of correspondence related to the request for a transcript in the above matter. If you have any questions, please contact our office.

With warm personal regards, I am,

Sincerely yours,

Christy Ransone, Sr. Paralegal
christy@desaballard.com

Enclosures

c: Honorable Tonya Gee, Court of Appeals
Kenneth Woodington, Esquire

RECEIVED
NOV 02 2011
SC Court of Appeals



**Ballard
Watson Weissenstein**
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III
Stephanie Weissenstein
Attorneys at Law

Post Office Box 6338 | West Columbia, SC 29171
226 State Street | West Columbia, SC 29169 | ph 803.796.9299 | fx 803.796.1066 | desaballard.com

October 24, 2011

Via U.S. Mail
Deborah M. McCurdy
1403 Geiger Avenue
Columbia, SC 29201-1713

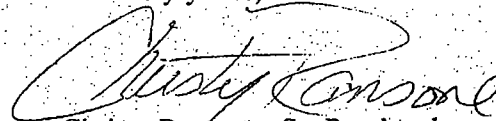
Re: *Health Promotion Specialists et. al. vs. South Carolina Board of Dentistry*
Case No: 01-CP-40-3148

Dear Ms. McCurdy:

It is our understanding you were the court reporter assigned at the motion hearing for the Motion for Summary Judgment heard on or about March 13, 2009 in the above matter. We would like to request a copy of the transcript be provided to our office at the earliest possible date. Please provide us with an invoice and we will send the necessary payment.

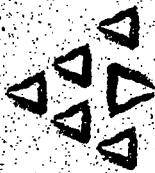
If you have any questions, please contact our office. With warm personal regards, I am,

Sincerely yours,


Christy Ransone, Sr. Paralegal
christy@desaballard.com

c: Honorable Tonya Gee
Kenneth P. Woodington, Esquire

RECEIVED
NOV 02 2011
SC Court of Appeals



**Ballard
Watson Weissenstein**
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III
Stephanie Weissenstein
Attorneys at Law

Post Office Box 6338 | West Columbia, SC 29171
226 State Street | West Columbia, SC 29169 | ph 803.796.9299 | fx 803.796.1066 | desaballard.com

October 25, 2011

Via U.S. Mail
Stacy L. Sheppard
100 Lunsford Lane
Lexington, SC 29072

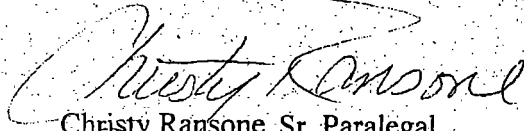
Re: *Health Promotion Specialists et. al. vs. South Carolina Board of Dentistry*
Case No: 01-CP-40-3148

Dear Ms. Sheppard:

It is our understanding you were the court reporter assigned at the motion hearing for the above matter held on or about August 25, 2008. We would like to request a copy of the transcript be provided to our office at the earliest possible date. Please provide us with an invoice and we will send the necessary payment.

If you have any questions, please contact our office. With warm personal regards, I am,

Sincerely yours,


Christy Ransone, Sr. Paralegal
christy@desaballard.com

c: Honorable Tonya Gee
Kenneth P. Woodington, Esquire

RECEIVED
NOV 02 2011
SC Court of Appeals



**Ballard
Watson Weissenstein**

PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III
Stephanie Weissenstein
Attorneys at Law

Post Office Box 6338 | West Columbia, SC 29171
226 State Street | West Columbia, SC 29169 | ph 803.796.9299 | fx 803.796.1066 | desaballard.com

October 31, 2011

Via U.S. Mail
Honorable Tanya Gee
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29211

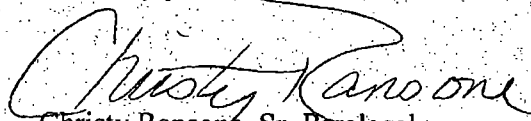
Re: *Health Promotion Specialists et. al. vs. South Carolina Board of Dentistry*
Case No: 01-CP-40-3148

Dear Ms. Gee:

I am writing to inform your office and counsel that we have received notice from the court reporter that she has received our request, but prepares transcripts in the received and it may be up to 60 days before the transcript will be ready. I have enclosed a copy of that email for review.

With warm personal regards, I am,

Sincerely yours,


Christy Ransone, Sr. Paralegal
christy@desaballard.com

Enclosure

c: Kenneth Woodington, Esquire
Client

RECEIVED
NOV 02 2011
SC Court of Appeals

Christy Ransone

From: Sheppard, Stacy L. [SSheppard@sccourts.org]
Sent: October 28, 2011 9:45 AM
To: Christy Ransone
Subject: Health Promotion Specialists v. SC Board of Dentistry

Dear Ms. Ransone:

I am in receipt of your request for a transcript of record for the above-referenced case. I prepare transcripts in order of receipt. I am given 60 days in which to complete the transcript of record. Extensions of time may be granted, if necessary.

Thank you, Stacy Sheppard

RECEIVED
NOV 02 2011
SC Court of Appeals



**Ballard
Watson Weissenstein**
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III
Stephanie Weissenstein
Attorneys at Law

Post Office Box 6338 | West Columbia, SC 29171
226 State Street | West Columbia, SC 29169 | ph 803.796.9299 | fx 803.796.1066 | desaballard.com

October 31, 2011

Via U.S. Mail

Honorable Tanya Gee
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29211

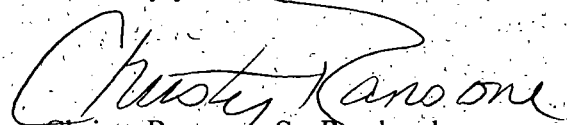
Re: *Health Promotion Specialists et. al. vs. South Carolina Board of Dentistry*
Case No: 01-CP-40-3148

Dear Ms. Gee:

I am writing to inform your office and counsel that we have received notice from the court reporter that she has received our request, but prepares transcripts in the received and it may be up to 60 days before the transcript will be ready. I have enclosed a copy of that email for review.

With warm personal regards, I am,

Sincerely yours,



Christy Ransone, Sr. Paralegal
christy@desaballard.com

Enclosure

c: Kenneth Woodington, Esquire
Client

RECEIVED

NOV 01 2011

SC Court of Appeals

Christy Ransone

From: Sheppard, Stacy L. [SSheppard@sccourts.org]
Sent: October 28, 2011 9:45 AM
To: Christy Ransone
Subject: Health Promotion Specialists v. SC Board of Dentistry

Dear Ms. Ransone:

I am in receipt of your request for a transcript of record for the above-referenced case. I prepare transcripts in order of receipt. I am given 60 days in which to complete the transcript of record. Extensions of time may be granted, if necessary.

Thank you, Stacy Sheppard

RECEIVED

NOV 01 2011

SC Court of Appeals



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 28, 2011

Desa Ballard, Esquire
Stephanie Weissenstein, Esquire
Ballard Watson Weissenstein
226 State Street
West Columbia, SC 29169

Re: Health Promotion v. SC Bd of Dntstry (2)
2011200626

Dear Counsel:

We have received your transcript request in the above matter. However, this request did not notify the Office of Court Administration as required in Rule 207(a)(1) of the South Carolina Appellate Court Rules.

Furthermore, our records indicate that the transcript was to be ordered by October 14, 2011. You must file a Motion to Order the Transcript Out of Time and furnish proof you served this request on the Office of Court Administration within ten (10) days of this letter, or your appeal may be dismissed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc: William H. Davidson, Esquire
Andrew F. Lindemann, Esquire
Kenneth P. Woodington, Esquire



**Ballard
Watson Weissenstein**
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III
Stephanie Weissenstein
Attorneys at Law

Post Office Box 6338 | West Columbia, SC 29171
226 State Street | West Columbia, SC 29169 | ph 803.796.9299 | fx 803.796.1066 | desaballard.com

October 24, 2011

Via U.S. Mail
Deborah M. McCurdy
1403 Geiger Avenue
Columbia, SC 29201-1713

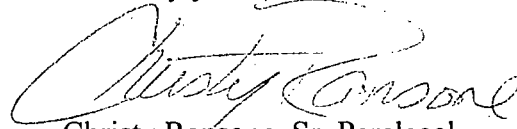
Re: *Health Promotion Specialists et. al. vs. South Carolina Board of Dentistry*
Case No: 01-CP-40-3148

Dear Ms. McCurdy:

It is our understanding you were the court reporter assigned at the motion hearing for the Motion for Summary Judgment heard on or about March 13, 2009 in the above matter. We would like to request a copy of the transcript be provided to our office at the earliest possible date. Please provide us with an invoice and we will send the necessary payment.

If you have any questions, please contact our office. With warm personal regards, I am,

Sincerely yours,



Christy Ransone, Sr. Paralegal
christy@desaballard.com

c: Honorable Tonya Gee
Kenneth P. Woodington, Esquire

RECEIVED

OCT 25 2011

SC Court of Appeals



**Ballard
Watson Weissenstein**
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III
Stephanie Weissenstein
Attorneys at Law

Post Office Box 6338 | West Columbia, SC 29171
226 State Street | West Columbia, SC 29169 | ph 803.796.9299 | fx 803.796.1066 | desaballard.com

October 25, 2011

Via U.S. Mail
Stacy L. Sheppard
100 Lunsford Lane
Lexington, SC 29072

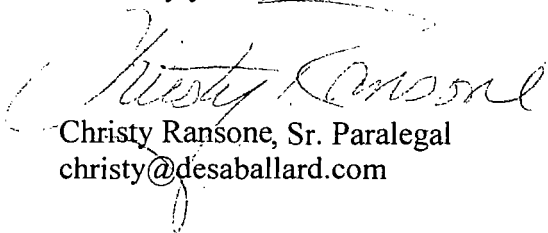
Re: *Health Promotion Specialists et. al. vs. South Carolina Board of Dentistry*
Case No: 01-CP-40-3148

Dear Ms. Sheppard:

It is our understanding you were the court reporter assigned at the motion hearing for the above matter held on or about August 25, 2008. We would like to request a copy of the transcript be provided to our office at the earliest possible date. Please provide us with an invoice and we will send the necessary payment.

If you have any questions, please contact our office. With warm personal regards, I am,

Sincerely yours,


Christy Ransone, Sr. Paralegal
christy@desaballard.com

c: Honorable Tonya Gee
Kenneth P. Woodington, Esquire

RECEIVED
OCT 26 2011
SC Court of Appeals



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
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www.sccourts.org

October 18, 2011

Desa Ballard, Esquire
Stephanie Weissenstein, Esquire
Ballard Watson Weissenstein
226 State Street
West Columbia, SC 29169

Re: Health Promotion v. SC Bd of Dntstry (2)
Case Tracking #: **2011200626**
2001-CP-40-03148

Dear Counsel:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1205 Pendleton Street, Columbia, S.C. 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

NOTE: If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S.C. Code Ann. Section 14-8-200(b)(1998), as

amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases:

- 1) any final judgment from the circuit court which includes a sentence of death;
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58;
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance;
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state;
- 5) any final judgment from the circuit court pertaining to elections and election procedure;
- 6) any order limiting an investigation by a State Grand Jury under S.C. Code Ann. Section 14-7-1630;
- 7) any order of the family court relating to an abortion by a minor under S.C. Code Ann. Section 44-41-33.

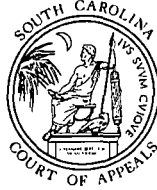
Very truly yours,

V. Claire Allen, Deputy

Tanya A. Gee
CLERK

TAG/laf

cc: William H. Davidson, Esquire
Andrew F. Lindemann, Esquire
Kenneth P. Woodington, Esquire
The Honorable Jeanette W. McBride



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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www.sccourts.org

October 18, 2011

Desa Ballard, Esquire
Stephanie Weissenstein, Esquire
Ballard Watson Weissenstein
226 State Street
West Columbia, SC 29169

Re: Health Promotion v. SC Bd of Dntstry (2)
Case Tracking #: **2011200626**
2001-CP-40-03148

Dear Counsel:

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc: William H. Davidson, Esquire
Andrew F. Lindemann, Esquire
Kenneth P. Woodington, Esquire
The Honorable Jeanette W. McBride

The Supreme Court of South Carolina

RE: Interim Guidance Regarding Personal Data Identifiers and
Other Sensitive Information in Appellate Court Filings

ORDER

Under the Federal Constitution, our State Constitution, and our common law, court records are presumptively open to the public, and these records may only be sealed by a court based on specific findings that the need for secrecy outweighs the presumption of openness. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006); Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991). Therefore, with some few exceptions,¹ documents filed with this Court or the South Carolina Court of Appeals (appellate court) are available to the public unless sealed by order of the appellate court in which the matter is pending.

Several commercial vendors have recently requested copies of briefs filed with the appellate courts, and it is anticipated that these and other appellate filings will be available electronically from both private and public sources in the future. The ready availability of these documents raises significant privacy concerns. While this problem is currently under review by the Chief Justice's Task Force on Public Access to Court Records, we adopt the following interim guidance regarding personal data identifiers and other sensitive information in documents filed in the appellate courts.

Parties shall not include, or will partially redact where inclusion is necessary, the following personal data identifiers from documents filed with an appellate court:²

1. Social Security Numbers. If a social security number must be included, only the last four digits of that number should be used.
2. Names of Minor Children. If a minor is the victim of a sexual assault or is involved in an abuse or neglect case, the minor's name will be completely redacted and a term such as "victim" or "child" should be used. In all other cases, only the minor's first name and first initial of the last name (i.e., John S.) should be used.
3. Financial Account Numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used.
4. Home Addresses. If a home address must be included, only the city and state should be used.

Parties wishing to file documents containing the personal data identifiers listed above may file unredacted documents under seal, together with redacted versions for the public file. The sealed unredacted documents shall be filed in a separate Appendix and the bottom of each page of the Appendix shall be marked "Sealed." No order of the appellate court will be required to file this sealed Appendix. The number of copies of the Appendix to be served and filed shall be the same as that required for the brief, record on appeal, motion or other filing that includes the redacted documents.

If the caption of the case contains any of the personal data identifiers listed above, the parties should file a motion to amend the caption to redact the identifier. This should be done contemporaneously with the filing of the notice of appeal or the commencement of the case with the appellate court. Without a motion to the appellate court, the caption of a juvenile delinquency matter from the family court shall be redacted to only use the juvenile's first name and first letter of the juvenile's last name (i.e., In the Interest of John S., a Juvenile.)

A party seeking to seal material beyond those personal identifiers listed above, must file a motion to seal with the appellate court in which the matter is pending. This is true even if the lower court or administrative tribunal may have issued an order sealing the record. Until the motion is ruled on, the clerk of the appellate court shall treat the material as if it is sealed. Parties and counsel are reminded that the standard established in Ex parte Capital U-Drive-It, Inc. and Davis v. Jennings, supra, must be met before any request to seal all or a portion of a record will be granted. Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, or national security information.

Attorneys are expected to discuss this matter with their clients so that an informed decision can be made about the inclusion of sensitive information. The appellate courts and their staff will not review filings for redaction or to determine if materials should be sealed; the responsibility for insuring that information is redacted or sealed rests with counsel and the parties.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

August 13, 2007

¹ See, e.g., Rule 12 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR; Rule 12 of the Rules for Judicial Disciplinary Enforcement contained in Rule 502, SCACR; Rule 402(n), SCACR; and Rule 403(l), SCACR.

² This restriction shall not apply when this information is required or requested by the appellate court. For example, the application for admission to practice law under Rule 402, SCACR, requires many of these personal identifiers to be disclosed.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHALD COUNTY
Honorable William P. Keesley, Circuit Court Judge

Case No. 2001-CP-40-00008

RECEIVED

OCT 05 2011

SC Court of Appeals

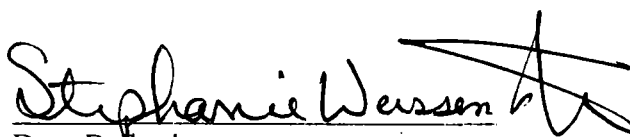
Health Promotion Specialists, LLC,
and Palmetto Dental Care, LLC,.....APPELLANT

vs.

South Carolina Board of Dentistry RESPONDENT

NOTICE OF APPEAL

Appellants Health Promotion Specialists, LLC, appeal the orders of the Honorable William P. Keesley dated June 22, 2010, and the order denying rehearing dated September 26, 2011, a copy of which was received by the undersigned on or about October 3, 2011. A copy of both orders on appeal are attached hereto and incorporated by reference.



Desa Ballard
Stephanie Weissenstein
Ballard Watson Weissenstein
226 State Street
West Columbia, South Carolina 29169
Telephone 803.796.9299
Facsimile 803.796.1066
E-mails: desab@desaballard.com
stephanie@desaballard.com

ATTORNEYS FOR APPELLANT

October 4, 2011

Other counsel of record:

WILLIAM H. DAVIDSON
ANDREW F. LINDEMANN
KENNETH P. WOODINGTON
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

OCT 05 2011

APPEAL FROM RICHARD COUNTY
Honorable William P. Keesley, Circuit Court Judge

SC Court of Appeals

Case No. 2001-CP-40-03148

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

vs.

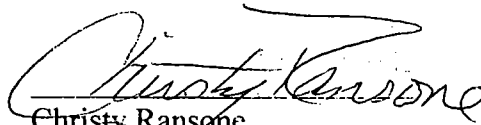
South Carolina Board of Dentistry RESPONDENT

CERTIFICATE OF SERVICE

I, Christy Ransone, do hereby certify that I have this date, served one (1) copy of the **Notice of Appeal** in the above-captioned matter on the following by placing same in United States Mail, with sufficient first-class postage affixed and addressed as follows:

WILLIAM H. DAVIDSON
ANDREW F. LINDEMANN
KENNETH P. WOODINGTON
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202

October 4, 2011


Christy Ransone
Sr. Paralegal



**Ballard
Watson Weissenstein**
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III
Stephanie Weissenstein
Attorneys at Law

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226 State Street | West Columbia, SC 29169 | ph 803.796.9299 | fx 803.796.1066 | desaballard.com

October 04, 2011

Via U.S. Mail
Honorable Tanya Gee
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29211

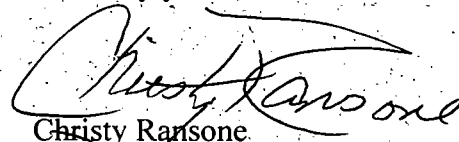
Re: *Health Promotion Specialists et. al. vs. South Carolina Board of Dentistry*
Case No: 01-CP-40-3148

Dear Ms. Gee:

Please find enclosed Appellants Notice of Appeal for filing in the above matter along with our check in the amount of \$100.00 as payment of the filing fee. I have also provided and additional copy which I request be "clocked" and returned in the envelope provided.

Thank you for your time and assistance. With warm personal regards, I am,

Sincerely yours,


Christy Ransone
christy@desaballard.com

Enclosures

c: Honorable Janette W. McBride, Richland County Clerk of Court
Kenneth P. Woodington, Esquire

RECEIVED

OCT 05 2011

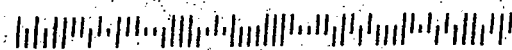
SC Court of Appeals



Law Offices of Desa Ballard

226 State Street
West Columbia, SC 29169

To: Honorable Tanya Gee
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29211



STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

HEALTH PROMOTION SPECIALISTS,
ET AL.,

Plaintiffs,

-vs-

SOUTH CAROLINA BOARD OF
DENTISTRY,

Defendant.

IN THE COURT OF COMMON PLEAS

ORDER ON MOTION TO ALTER
OR AMEND

Case Number: 2001-CP-40-03148

2011 SEP 27 AM 9:31
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

RICHLAND COUNTY
FILED

Wpd
#1

On June 22, 2010, the court issued an order granting summary judgment to the defendant on various grounds. A motion was filed under Rule 59, SCRCPP, seeking to have the court alter or amend the judgment. The motion was decided on written submissions, though the court agrees with the plaintiffs' counsel and declines to consider the most recent submission from the defendant as being submitted in an untimely fashion. The court apologizes for the extended delay in deciding the matter. Having reviewed the materials and reconsidered the case, the motion is denied.

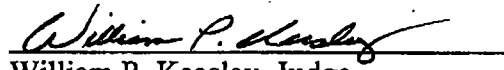
Plaintiffs' counsel did an extremely thorough job of raising 11 assertions that counsel believes warrant vacating the previous order. The court feels that the original order sets forth the determinations about as well as the court can state them. There certainly is room for disagreement, and this is a very difficult case, with elements of an abuse of power, which the court may have erred in interpreting. Respectfully, however, the court does not believe that it made findings that were outside those permitted on summary judgment; that it made findings that

were not supported by the record; that it ignored or misconstrued precedent; that it erroneously interpreted the Tort Claims Act and its immunities; that it jumbled applicable law related to legislative as opposed to executive branch entities; or, that it improperly denied the request to amend, in light of the procedural history of this case. In short, the court stands by the original rulings.

THEREFORE, IT IS ORDERED that the motion for reconsideration is denied.

AND IT IS SO ORDERED.

September 26, 2011


William P. Keesley, Judge

#2

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,

v.

South Carolina Board of Dentistry,

Defendant.

Civil Action No. 01-CP-40-3148

ORDER

2010 JUN 25 AM 10:23
JANETTE W. McBRIDE
C.C.P. & G.S.

RICHLAND COUNTY
FILED

WPK
#1

The South Carolina State Board of Dentistry ("Board"), which is the sole remaining Defendant in this action, has moved for summary judgment on a number of different grounds. The motion was heard by the undersigned. After hearing argument from both sides, the Court concludes that the Board is entitled to judgment as matter of law for the reasons discussed below.

BACKGROUND

A. Procedural History.

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

Plaintiff challenged an emergency regulation of the Board that was in effect for six months, from the middle of 2001 until the beginning of 2002. While Plaintiff has always sought damages, the initial focus of the case was on Plaintiff's request for a temporary injunction, pendente lite,

¹ Because there is now only Plaintiff, the singular term "Plaintiff" will be used throughout this Order, even though at times there were originally two plaintiffs in the case.

against the 2001 emergency regulation remaining in effect. Plaintiff's motion for temporary injunctive relief was denied by Judge Joseph Strickland, Special Circuit Court Judge, in an eight-page Order dated August 21, 2001. Plaintiff appealed the denial of temporary injunctive relief to the Court of Appeals, which affirmed in an unpublished decision in 2003. *Health Promotion Specialists, LLC v. South Carolina Bd. Of Dentistry*, Op. No. 2003-UP-232 (filed March 26, 2003).

In late 2003, Plaintiff filed a federal case based on essentially the same facts as the present case. The defendants in that case included most or all of the original Defendants in the present case, as well as additional private party defendants. The Board was originally a Defendant in the federal case as well, but was voluntarily dismissed by the Plaintiff after the Board filed a Motion to Dismiss based on the Eleventh Amendment.

WPM
#2
During the pendency of the federal case, all parties agreed that the present state case should be stayed. Eventually, the federal case was settled in its entirety. All defendants in the present case, except the Board, were accordingly dismissed from this case as well, and by Consent Order entered on November 1, 2007, the present case was restored to the docket in this Court.

As is discussed in more detail herein, Plaintiff's sole claim against the Board in the present case is contained in the First Cause of Action, which alleges violations in 2001, by the Board and others, of the South Carolina Unfair Trade Practices Act ("UTPA"), S.C. Code Ann. §§ 39-5-10, *et seq.* See, Second Amended Complaint Paragraphs 71-77.

The Board has moved for summary judgment on a number of different grounds, including sovereign immunity defenses under the Tort Claims Act, common law legislative and quasi-legislative immunity, certain immunities specifically applicable to UTPA cases, failure to state a cause of action under the UTPA because that Act did not envision making the State a liable party, mootness of Plaintiff's claims for injunctive relief, and other grounds as set forth in the motion.

B. Findings of Fact.

For purposes of disposing of the case by summary judgment, the following facts are undisputed:

1. In 2000, the General Assembly enacted Act No. 298 of 2000, which amended the existing statutes pertaining to the practice of dental hygiene in school settings.
2. In July 2001, the Dental Board issued an emergency regulation clarifying that under the 2000 statutory amendments, students in school settings, usually Medicaid-paid public health settings, were required to be examined by a dentist before dental hygienists could perform such acts as applying sealants to teeth.
3. The Plaintiff in this case employs dental hygienists who work in public health settings.
4. The Board, in promulgating the emergency regulation on July 13, 2001, stated that it, the Board, "has determined that the public health requires immediate promulgation of this regulation," and set forth the reasons for its concerns about public health and safety. The emergency regulation remained in effect for the two consecutive 90-day periods authorized by the APA, § 1-23-130(C).
5. During the pendency of the emergency regulation, the present action was filed. Plaintiff was unsuccessful in obtaining temporary injunctive relief.
6. Plaintiff also requested a hearing by the Administrative Law Court, pursuant to the APA, §§ 1-23-110 and 1-23-111, with respect to the version of the proposed emergency regulation that was intended as a permanent regulation (the proposed permanent regulation was substantially similar to the emergency regulation).²
7. In February 2002, four months after the hearing on the permanent regulation, and one month after the 180-day period of the emergency regulation's effectiveness expired, the ALJ issued a report in which he concluded that the proposed permanent regulation was "unreasonable" in light of

² Those sections of the APA provide for a public hearing by an Administrative Law Judge to consider the "need and reasonableness" of proposed permanent regulations.

the 2000 amendments. *In Re: Proposed Regulation, Document No. 2644*, 2002 WL 385116 (S.C. Admin. Law Ct. 2002).

8. This conclusion by the ALJ did not mention that this Court had already expressly concluded just the opposite in the course of denying preliminary injunctive relief. Specifically, Judge Strickland's Order of August 21, 2001 in the present case held that "the action taken by the Board is within its power and authority as conferred by statute."

9. Although the ALC ruling was merely advisory and in conflict with Judge Strickland's August 2001 Order, the Board nevertheless decided not to pursue getting the by-then-lapsed temporary regulation enacted as a permanent regulation as it then provided.

10. Instead, beginning in early 2002, the Board decided to work with representatives of dental hygienists, including, among others, officers of the Plaintiff corporation, in order to seek consensus for amendments to the legislation governing the practice of dental hygiene in public health settings. A consensus was subsequently obtained.

11. In June 2003, the General Assembly accordingly enacted legislation clarifying the permissibility of certain acts by dental hygienists in public health school settings. Act No. 45 of 2003. The new legislation made it clear that in such settings, an examination by a dentist was no longer a prerequisite to the placement of sealants or other acts by dental hygienists that had been in question.

12. As Plaintiff has noted, the above events drew the attention of the Federal Trade Commission (FTC) in early 2003 or earlier. In the late summer of 2003, the FTC filed a now-settled adjudicative proceeding against the Board, but that action was filed only after the 2003 statutory amendments had just been enacted. The Board of Dentistry alleged in that administrative proceeding that the case was moot at its outset as a result of the 2003 statutory amendments, and in support of that allegation enacted a resolution in October 2003 to the effect that in light of the 2003 amendments,

the Board was no longer of the opinion that an examination by a dentist was required by state law. The October 2003 resolution also contained an affirmation by the Board that it is "bound by, and in full agreement with, the legislative policy set forth in the 2003 amendments as recited above and does not plan to seek any change to that policy." After four years, the Board and the FTC reached a Consent Agreement that only required the Board to provide certain notifications to the FTC and others in the event that the Board ever sought to make policy changes.. No substantive relief was awarded in the Consent Decree.³

13. Plaintiff claimed in an affidavit filed in 2001 that if the emergency regulation was to be enforced, the Plaintiff Health Promotion Services would be forced out of business. That did not occur. The emergency regulation was not enjoined, but only remained in effect for six months, ending in early 2002.

CONCLUSIONS OF LAW

- WML
#5
1. The Board's action did not constitute "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" within the meaning of S.C. Code Ann. § 39-5-20(a), because the Board's action did not amount to acts or practices "in the conduct of any trade or commerce."⁴

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

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

³ The FTC Consent Decree is online at <http://www.ftc.gov/os/adjpro/d9311/070911decision.pdf>.

⁴ This conclusion is distinct from the antitrust state action immunity conclusion discussed below. That defense would assume that the Board engaged in conduct covered by the UTPA. The present defense, based on the clear language of the statute, is that the Act simply does not cover acts not performed in the context of engaging in business or commerce.

S.C. Code Ann. § 35-5-10(b)(emphases added). It cannot seriously be claimed that that the Board is engaged in any of the highlighted commercial activities in the statute that amount to "trade or commerce." It did not advertise, sell, or distribute goods in commerce. The kinds of activities governed by the Act are those that occur in a business context, not acts that occur when a governmental body engages in regulation. *See, e.g., Bretton v. State Lottery Com'n*, 673 N.E.2d 76, 79 (Mass. App. 1996)(activities of a state commission created, protected and regulated by and pursuant to statute "hardly resemble endeavors conducted in a conventional business context"); *Ferrara v. City of Shreveport*, 702 So.2d 723, 726 (La.App. 1997)(in enforcing rules and regulations established by the electrical code, city "did not engage in unfair acts in the conduct of any trade or commerce");

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

For these reasons, the Court holds that the Board's action of promulgating a regulation lies outside the definition of conduct regulated by the UTPA, and that as a result, Plaintiff's UTPA claim is dismissed for failure to state facts sufficient to constitute a cause of action.

While the above holding is sufficient in and of itself to support the dismissal of this action, the Court also holds that the case is dismissed for the alternative reasons set forth below.

2. The Board is not a "person" under S.C. Code Ann. § 39-5-10.

The Court concludes as well that the Board, as a state agency, is not a "person" under § 39-5-10(a). That section defines a "person" as including "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity." Plaintiff

argues, as set forth more fully in the footnote below, that the statute was intended to include governmental agencies as potential defendants, as shown by the use of the term "other legal entity" in the definition quoted above. The Court, however, concludes that Plaintiff's interpretation of the statute is precluded by the doctrine of *ejusdem generis*. That doctrine provides that "[w]hen the Legislature uses words of particular and specific meaning followed by general words, the general words are construed to embrace only persons or things of the same general kind or class as those enumerated." *Swanigan v. American Nat. Red Cross*, 313 S.C. 416, 419, 438 S.E.2d 251, 252 (1993).

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The statute does not mention governmental entities. Instead, it lists six different types of private actors: natural persons, corporations, trusts, partnerships, and incorporated or unincorporated associations. The Court concludes that by only listing private actors, and by omitting any reference to any sort of public entity, the legislature intended only to include private entities within the definition of those persons who can be liable under the UTPA. In *Charter Communications Entertainment I, LLC v. University of Connecticut, Bd. of Trustees*, 2000 WL 350464, *2 (Conn.Super. 2000), the court held that similar language to that of the South Carolina UTPA should not be read to include the State. The court applied both the rule of *ejusdem generis* cited above, and the rule that any statutory waiver of sovereign immunity must be narrowly construed.

Finally, there is a general principle of longstanding that "general words in a statute such as 'persons' will not ordinarily be construed to include the State or political subdivisions thereof." *Hansen v. Com.*, 344 Mass. 214, 219, 181 N.E.2d 843, 847 (1962). As the U.S. Supreme Court has expressed it, "[t]here is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." *United States v. United Mine Wkrs. of America*, 330 U.S. 258, 275

(1947). *Accord, Brooks v. One Motor Bus*, 190 S.C. 379, 3 S.E.2d 42, 44 (1939), *overruled in part on other grounds, McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) (“neither the State nor any of its political divisions, is bound by general words in a statute restrictive of a prerogative right, title or interest, unless expressly named”).

For all of the following reasons, then, the Board is not a “person” within the meaning of the Act, and this action is dismissed for that reason as well.⁵

3. Plaintiff’s action against the Board is barred by sovereign immunity under the Tort Claims Act and by common law legislative immunity.

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The only specific allegation of wrongdoing that Plaintiff makes against the Board in support of its claim for damages is simply that the Board promulgated the 2001 emergency regulation. Second Amended Complaint, Paragraphs 1, 41. The short answer to this claim, and one which constitutes another reason for the dismissal of this action, is that the Tort Claims Act specifically preserves sovereign immunity for “adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies.” *S.C. Code Ann.* § 15-78-60(4)(emphases added).⁶ The Tort Claims Act therefore simply and literally makes the Board’s

⁵ Plaintiff cites a federal case, *City of Charleston v. Hotels.com LP*, 487 F.Supp.2d 676, 680 n.1 (D.S.C. 2007), for a holding that certain municipal corporations can be “persons” under § 39-5-10(a). This Court would point out that that case is distinguishable, because the governmental agencies were in the position of plaintiffs, rather than defendants, and the district court had already noted that other provision of the Act, § 39-5-130, expressly provides that city attorneys may bring UTPA actions with the approval of the Attorney General. Moreover, any such reference in the Order in that case was unnecessary to the decision therein, because § 39-5-130 provided ample authority to support the district court’s conclusion, making it unnecessary to consider whether § 39-5-10(a) applied. Finally, this Court, based on the doctrine of *ejusdem generis* noted above, simply respectfully disagrees with the conclusion of the district court in the case.

⁶ The immunity extends to any “governmental entity,” defined by § 15-78-30 of the Tort Claims Act as including the State and its boards and commissions. The State Board of Dentistry is unquestionably a governmental entity entitled to the immunities preserved in the Act.

action in adopting a regulation immune from a suit for damages.⁷ In addition, the Tort Claims Act defenses notwithstanding, Plaintiff's claim is barred by common law legislative or quasi-legislative immunity.

Plaintiff's only argument against legislative immunity is a claim that because § 15-78-60(4) also contains other immunities relating to enforcement or failure of enforcement of laws, which the courts of this state have characterized as discretionary immunities, then legislative immunity should also be regarded as a discretionary immunity. However, neither of the two cases Plaintiff cites for this novel proposition had anything to do with the enactment of legislation, and there is nothing in either of the two cases that specifically discusses immunity for the enactment of legislation, as opposed, for instance, to its discretionary enforcement or nonenforcement.⁸

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Moreover, Plaintiff overlooks the fact that the Tort Claims Act does not supplant common law immunities, including legislative and quasi-legislative immunity. In *O'Laughlin v. Windham*, 330 S.C. 379, 498 S.E.2d 689 (Ct. App. 1998), the Court of Appeals recognized that common law immunities were preserved and not supplanted by the Tort Claims Act. S.C. Code Ann. § 15-78-20(b) specifically provides that "[a]ll other immunities applicable to a governmental entity, its employees, and agents are expressly preserved." In *O'Laughlin*, the Court concluded that common law judicial immunity may be asserted in addition to Tort Claim Act defenses. Later, in *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001), the Court of Appeals held that common law

⁷ Other similar provisions of the Tort Claims Act are § 15-78-60(1)(preserving immunity for "legislative, judicial, or quasi-judicial action or inaction" and 15-78-60(2)(preserving immunity for "administrative action or inaction of a legislative, judicial, or quasi-judicial nature").

⁸ The two cases cited by Plaintiff are *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004) and *Proctor v. DHEC*, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006). Neither was remotely concerned with a claim of liability for the enactment of legislation or of a regulation. *Hawkins* involved allegations of negligent design and maintenance of a municipal drainage system, and *Proctor* concerned allegations of negligent failure to restore a tire operator to a rebate list. Obviously, these actions were substantially different in nature from the enactment of legislation or of a regulation.

prosecutorial immunity is not supplanted by the Tort Claims Act. The same is true with respect to the common law principles of legislative and quasi-legislative immunity. *See also, Proctor v. DHEC*, 368 S.C. 279, 628 S.E.2d 496, 503 (Ct. App. 2006) (The Tort Claims Act "expressly preserves all existing common-law immunities").

The immunity from suit for legislative or quasi-legislative acts is a well-entrenched common law principle in American jurisprudence. In *Tenney v. Brandhove*, 341 U.S. 367 (1951), the U.S. Supreme Court, after tracing the long history of legislative immunity, noted that the states "took great care to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability." 341 U.S. at 375. Since the Plaintiff in this case alleges in effect that the Board acted with an improper motive in enacting the emergency regulation, it is particularly worth noting the reasons *Tenney* recognized for reconfirming long-settled principles that alleged improper motive (which the Board denies) does not affect legislative immunity:

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

Id. at 377.

The immunity exists just as strongly in the case of enactment of a regulation by a state agency as it does with respect to the passage of a statute by the legislature, and for the same reasons—to protect the freedom of governmental bodies to legislate or promulgate regulations that they believe to be in the public interest, without concern for suits for damages. This Court concluded that based on both the clear language of the Tort Claims Act and the centuries-old common law principles of legislative immunity embodied therein, the enactment of a regulation by

the Board is clearly an action that is immune from suit. On this additional basis, this action is dismissed in its entirety.

4. Plaintiff's claim for injunctive relief has been moot since at least 2003.

Plaintiff also claims that it is entitled to permanent injunctive relief barring similar actions by the Board, even though over eight years have passed without any effort by the Board to enact any similar such regulations. As noted above, in October 2003, following the 2003 changes to the statutes, the Board passed a resolution to the effect that in view of the 2003 changes to the legislation, the Board would no longer seek to take any steps that would require a preexamination by a dentist in the settings involved in this case. Indeed, the Board had never sought to enforce such a requirement after the 2001 emergency regulation expired in early 2002, now over eight years ago, and it has never sought since then to enforce such a requirement. The FTC recognized as long ago as 2004 that this action by the Board might ultimately make the FTC's litigation with the Board moot.⁹ From 2004 through early 2007, the case was in the federal courts on the issue of whether a *Parker v. Brown* immunity denial was subject to interlocutory review.

During those federal court proceedings, the FTC stayed further action on the mootness issue, pending the outcome of appeals in the federal courts. In 2006, in the course of its last stay order during the pendency of the Board's appeal of the immunity issue to the federal courts, the FTC commented on the absence of developments since 2003, noting that "[FTC] Counsel also does not contest [the Dental Board's] argument – and the Commission has thus far seen no evidence to the contrary – that it is not currently engaging in any conduct similar to that challenged in the complaint that might prejudice or harm the public interest."

⁹ The FTC held in 2004 that "[w]e exercise our discretion to refer this matter to the administrative law judge for limited discovery for ninety (90) days and an initial assessment of the likelihood that the Board may engage in future unlawful conduct under the 2003 statute." *In the Matter of South Carolina State Board of Dentistry*, 2004 WL 1814165 (F.T.C. 2004).

No reasonable claim can now be made that the Board has any intention of resuming the conduct that was rendered moot in 2003 with the amendments to the Board's legislation that occurred in that year. It is well settled that "[a] statutory change . . . is usually enough to render a case moot. . . ." *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994). Among the many cases so holding are *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112 (4th Cir. 2000.) (same); *Citizens for Responsible Government State Political Action Committee v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000) ("the repeal of a challenged statute is one of those events that makes it 'absolutely clear that the allegedly wrongful behavior'--here, the threat of prosecution under one of the repealed sections--'could not reasonably be expected to recur,' quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000)); *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 171 (4th Cir. 1991), *cert. denied*, 505 U.S. 1219 (district court injunction had become "pointless because the enjoined statute has been superseded by a significantly amended statutory scheme and is no longer in effect").

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Accordingly, it is difficult to see how it can be argued that there is a need to enjoin the Board from attempting to require an examination by a dentist before a hygienist could apply sealants or perform oral prophylaxis in a public health setting. Indeed, it is not only highly unlikely that the Board would insist on a dentist's examination in such circumstances, it is now legally impossible as a matter of state law. Accordingly, Plaintiff's injunctive relief claims should be, and are, dismissed as moot.

5. Plaintiff is not entitled to amend its complaint.

Finally, Plaintiff has suggested in its memorandum in opposition to summary judgment, pp. 19-20, n. 6, that it should be permitted to amend its complaint further, in order to allege that the Board engaged in conspiracy with others in violating the UTPA, or to allege that it aided and abetted others in their violations of the Act. The Court would first note that this case was initially

filed in 2001 and discovery has been done. The Complaint in the present case was last amended in early 2004, and the Court is advised that extensive discovery in the related federal case occurred in 2005.¹⁰ As a result, the suggested amendments come at a very late date, and, the Court declines to permit the Plaintiff to amend its complaint to add theories of the case after so much time has elapsed. Even as of the summer of 2008, when Plaintiff first suggested the possibility of an amended pleading, the acts complained of were seven years in the past. The Court concludes that it would unduly prejudice the Board to be required to defend against arguably new theories of the case when so much time has elapsed. As the Supreme Court has held in the context of discussing the statute of limitations, “[p]arties should act before memories dim, evidence grows stale or becomes nonexistent, or other people act in reliance on what they believe is a settled state of public affairs.” *State ex rel. Condon v. City of Columbia*, 339 S.C. 8, 19, 528 S.E.2d 408, 413 - 414 (2000).

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Even if timely, however, Plaintiff’s suggested amendments should still be denied as futile. The Tort Claims Act retains sovereign immunity for state agencies when the case involves “employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.” *S.C. Code Ann. § 15-78-60(17)*(emphasis added). Plaintiff’s suggested civil conspiracy and “aiding and abetting” claims both involve the commission of intentional torts.

The above-cited statute clearly exempts from the waiver of sovereign immunity any tort involving “intent to harm.” There is no question that civil conspiracy and “aiding and abetting,” at least in the present context, constitute torts that would involve intent to harm. The tort of civil conspiracy has been held by at least one circuit court to be one for which the Tort Claims Act does not waive sovereign immunity. *Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005)(the Supreme Court noted that that circuit court holding had not been appealed). Civil conspiracy is

¹⁰ By the time the discovery occurred, the Board was not a party to the federal case, but one of its members still remained in the case and participated in the discovery.

unquestionably an intentional tort. CJS Conspiracy § 14 (“[a] civil conspiracy is an intentional tort requiring a specific intent to accomplish the contemplated wrong”). The “aiding and abetting” claim would presumably relate to the other causes of action in the case, all of which constitute intentional torts. Those claims include (a) intentional interference with a contractual relationship, (b) intentional interference with prospective advantage, and (c) business defamation. As a result, those claims would also be ones for which the Tort Claims Act has not waived the Board’s sovereign immunity. As a result, any suggestion by Plaintiff that its Second Amended Complaint should be amended once again is without merit, both for reasons of untimeliness as well as futility.

6. Other defenses.

In view of the rulings above, the Court concludes that it is unnecessary to address other defenses raised by the Board. These include the following:

- Wae #14
- A. The issue of whether the Board is exempt from suit under the UFTPA under § 39-5-40(a), which exempts “[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law.”
 - B. The issue of whether *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny confer immunity on the Board because the Board’s actions were state actions. This type of immunity is normally not addressed unless the state agency might otherwise be liable, or unless state sovereign immunity principles do not apply, such as in federal cases or cases that did not involve state legislative or quasi-legislative activity.
 - C. Law of the case as applied to Plaintiff’s claim for injunctive relief.
 - D. Exhaustion of administrative remedies required under *S.C. Code Ann.* § 1-23-150, as applied to Plaintiff’s claim for injunctive relief.

E. The two-year statute of limitations.

F. Plaintiff's claim for attorney's fees.

G. The issue of whether Plaintiff can recover punitive or treble damages against the State or any agency thereof.

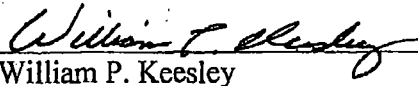
The Court expresses no conclusion regarding these defenses, other than simply to note that the grounds already cited for dismissal make it unnecessary to consider them.

CONCLUSION

For the foregoing reasons, the Court concludes that the Board's Motion for Summary Judgment should be granted, and that this action should be, and hereby is, dismissed with prejudice in all respects.

AND IT IS SO ORDERED.

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William P. Keesley
Circuit Court Judge,
Fifth Judicial Circuit

Edgefield, South Carolina


April 22, 2010