

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

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SC Court of Appeals

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

.....APPELLANT

vs.

South Carolina Board of DentistryRESPONDENT

APPELLANT'S FINAL REPLY BRIEF

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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 UPTA 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 (R 4) 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 LLR 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 (R 55), 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. 38)

- § 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. 36) “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. (R 37)

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).

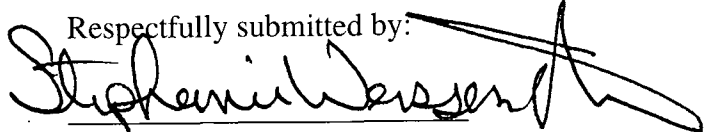
So, despite Respondent's attempt to distinguish itself from cases like Pike by claiming that Pike is merely about discretionary immunity, the burden is the same in the context of legislative immunity. Whether the legislative immunity applies turns on the question of whether the acts in question were 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:



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October 5, 2012

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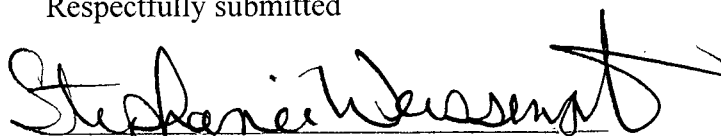
vs.

South Carolina Board of DentistryRESPONDENT

CERTIFICATE OF COUNSEL

Counsel for Appellants hereby certify that the herein **Final Reply Brief of Appellant**¹
complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Respectfully submitted



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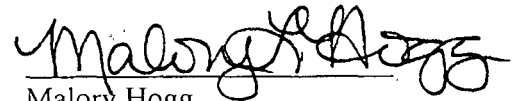
vs.

South Carolina Board of Dentistry RESPONDENT

CERTIFICATE OF SERVICE

I, Malory L. Hogg, do hereby certify that I have this date, served one (1) copy of the **Appellants' Final Brief and Appellant's Final 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:

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