No. 24-703

In the Supreme Court of the United States

RYAN HAYGOOD, ET AL.,
PETITIONERS,

v.

CAMP MORRISON, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS MORRISON, OGDEN, GLORIOSO, AND MOORHEAD

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QUESTIONS PRESENTED

1. Whether the award of attorneys' fees in favor of respondents was warranted under 42 U.S.C. § 1988, where petitioners had actual knowledge of their alleged injuries to support their 42 U.S.C. § 1983 claim by no later than September 26, 2011, and where this federal suit filed more than one year later on February 13, 2013 is so clearly time barred that it lacks arguable merit and is frivolous.

2. Whether the attorneys' fee award, as adjusted by the Fifth Circuit, was reasonable.

RULE 29.6 STATEMENT

Respondents Camp Morrison, Barry Ogden, Dana Glorioso, and Karen Moorhead are individuals for whom no corporate disclosure statement is required.

RELATED PROCEEDINGS

Pursuant to Rule 15.2, the following proceeding is directly related to this case within the meaning of Rule 14.1(b)(iii) and not identified in the petition:

1. *Haygood v. Dies*, No. 554,003 "C" (1st Judicial District Court, Caddo Parish, Louisiana), filed September 26, 2011.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page(s)

Cases: Page(s)

Cases: Page(s)

Cases: Page(s)

Other Authorities:

Rules:

Other Authorities:

INTRODUCTION

Petitioners' characterization of the issue before the Court fails to reflect the procedural history of the case or the express reasoning of the courts below. Instead, petitioners posit that the Fifth Circuit has created a new rule or standard for when a litigant may be entitled to attorney fees under 42 U.S.C. § 1988(b). This "new rule," the alleged deviation from this Court's jurisprudence, and the purported circuit split are illusory. Indeed, there is no divergence from or conflict over applicable legal rules on when a claim is properly deemed to lack arguable merit and frivolous for the purpose of awarding attorney fees pursuant to § 1988. In turn, petitioners do not present an important issue warranting the Court's consideration.

Instead, petitioners attempt to blur the line between a "meritorious claim" and a claim that "arguably lacks merit" in the context of awarding fees under 42 U.S.C. § 1988. According to petitioners, the courts below erred in not considering the "frivolity factors" and the merits of the claim while hanging their hat on the Fifth Circuit's comment that petitioners' "due process rights were likely violated by at least some of the named defendants during the pendency of the Board's investigation." Pet. App. 10a. The error in petitioners' argument is evidenced by a reading of the written reasons of the courts below. *See* Pet. App. 3a-19a, 39a-53a, 59a-69a. The Fifth Circuit expressly found that the untimeliness *outweighed* the merits: "[the] federal complaint was so clearly time-barred that it lacked arguable merit." Pet. App. 14a. *See also* Pet. App. 10a ("… the propriety of the § 1983 fee award turns on whether the district court properly

found the federal complaint time-barred and whether the time bar outweighed the underlying merits. It did."). Petitioners are seeking to have the "merits of the claim" question as the sole consideration on whether a claim "lacks arguable merit" for the purposes of § 1988 attorney fees.

A claim can have merit with respect to its factual allegations and claimed injury and still be frivolous or lack arguable merit for the purpose of § 1988. S*ee e.g., CRST Van Expedited, Inc. v. E.E.O.C.*, 578 U.S. 419, 433–34 (2016) ("A plaintiff's claim may be frivolous, unreasonable, or groundless if the claim is barred by state sovereign immunity, *C.W. v. Capistrano Unified School Dist.*, 784 F.3d 1237, 1247–1248 (C.A.9 2015), or is moot, *Propak Logistics*, 746 F.3d, at 152."). In this case, the Federal Complaint lacked arguable merit and was frivolous because it was clearly untimely and, moreover, petitioner filed an identical lawsuit in state court some seventeen months before filing their federal suit.

Next, the fallacy of petitioners' argument that malicious prosecution is the "analogous tort" for accrual purposes is revealed by taking petitioners' analysis and legal arguments to their logical extreme. Petitioners claim that their § 1983 claim was rooted in malicious prosecution and, thus, the courts below erred in finding the claim clearly time barred as the accrual period did not begin until a favorable termination of the underlying administrative proceeding. But if petitioners are correct, their § 1983 claim is still not ripe and exists in perpetuity because no "favorable termination" ever occurred – only an unfavorable termination.

While it is correct that the Louisiana Fourth Circuit Court of Appeal overturned the Dental Board's 2010 decision revoking Dr. Haygood's dental license, it *remanded* the matter for a new hearing, which never occurred. *See* Pet. App. 105a. In 2016, Dr. Haygood entered a Consent Decree[1] with the Dental Board wherein he admitted committing certain violations of the Louisiana Dental Practice Act that were the subject of the Dental Board's November 2010 decision – the same administrative proceeding and decision that is the subject of this lawsuit (Pet. App. 112a) *and* the State Court suit filed in 2011 (Opp. App. 1a). Again, there was a termination of the 2010 Dental Board's administrative proceeding, but it was not favorable. Petitioners' argument that the accrual period for "malicious prosecution" should have been considered by the courts below when determining whether the § 1983 claim was *clearly* time barred lacks merit.

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[1] *See* Agreement Containing Consent Decree By and Between C. Ryan Haygood, D.D.S. (License No. 5334) and the Louisiana State Board of Dentistry, LOUISIANA STATE BOARD OF DENTISTRY,http://www.lsbddocs.org/Content/Documents/Discipline/Dentists/5334/D5334.pdf (last visited Jan. 29, 2025) ("Dr. Haygood acknowledges engaging in prohibited payment of something of value in exchange for referral of patients and acknowledges substandard care of patients, but denies all other allegations…"). The Court may take judicial notice of the Consent Decree, which is a public document. *See, e.g.*, *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

STATEMENT

Petitioners' argument is undermined by one simple, undisputed truth: petitioners' 2011 State Petition (Opp. App. 1a) and the 2013 Federal Complaint (Pet. App. 112a) are virtually identical – not only in facts but in alleged damages. Indeed, much of the Federal Complaint is an exact copy of the State Petition. This inescapable fact belies petitioners' argument that petitioners "reasonably believed" or had a "good faith basis" to believe the § 1983 claim was timely when filed for the first time in federal court in 2013. *See* Pet. at 20, 28, 29. And it belies the argument that petitioners relied upon the accrual period for "malicious prosecution" in their professed "good faith" belief the 2013 Federal Complaint was timely.

More importantly, this fact makes the cases relied upon by petitioners inapplicable and distinguishable. And petitioners' continuous representation that the reason the lower courts found the § 1983 claim frivolous was *solely* because it was untimely is inaccurate. The district court and the Fifth Circuit found that, by no later than September of 2011, when the State Court Petition was filed (Opp. App. 1a), petitioners were fully aware of their cause of action and alleged damages (Pet. App. 13a-14a, 64a-65a) but waited until 2013 to file the Federal Complaint and assert a § 1983 claim for the first time. Further, the district court found that the Federal Complaint failed to plausibly state a cause of action under § 1983, further supporting that the claim was frivolous and lacked merit. *See* Pet. App. 65a.

According to petitioners, the frivolity factors the courts are to consider include "whether the plaintiff's

claim was so obviously meritless that it was dismissed prior to trial." Pet. at 8-9. Again, the Fifth Circuit found that petitioners' Federal Complaint, regardless of the merits of the allegations, "was so clearly time-barred that it lacked arguable merit." Pet. App. 14a. And the Fifth Circuit's analysis *considered* petitioners' argument that malicious prosecution should have been considered the analogous tort but the Fifth Circuit rejected this argument. *See* Pet. App. 13a ("That means malicious prosecution and/or fabrication of evidence cannot be the analogous tort.") To contend the Fifth Circuit did not consider the "merits" of the case and the "frivolity factors" to such an extent that this Court's review is warranted due to "divergence" from caselaw and a resulting split in the appellate circuits is demonstrably false.

Finally, petitioners' entire argument and premise for this Court's consideration falls apart unless the Court were to agree that the "analogous" tort, for the purpose of the § 1983 claim and the date of accrual, is malicious prosecution. As discussed herein, malicious prosecution is not the analogous tort and petitioners' argument does fall apart.

PROCEDURAL BACKGROUND

Petitioners filed two separate lawsuits related to an administrative proceeding before the Louisiana State Board of Dentistry ("Dental Board") wherein Dr. Haygood's dental license was revoked.[2] Specifically, in response to multiple patient complaints lodged with the Dental Board, an

[2] The Dental Board's administrative process is established by Louisiana law. *See* La. R.S. 37:751 *et seq*.

investigation ensued,[3] which culminated in a formal hearing panel of the Dental Board revoking Dr. Haygood's dental license on November 8, 2010 for violations of the Louisiana Dental Practice Act, La. R.S. 37:751 *et seq.*

The first lawsuit was filed in State Court on September 26, 2011 ("State Petition") naming a myriad of individuals, including respondents, who were involved in various ways in the administrative proceedings before the Dental Board. *See* Opp. App. 1a. The State Petition asserted general tort liability, a Louisiana Unfair Trade Practice claim ("LUTPA") (La. R.S. 51:1404 *et seq.*), violation of Art. 1 § 2 of the Louisiana State Constitution (Due Process), and conspiracy. *Id.* at 4a, 6a, 24a.

Seventeen months later, the second suit—this suit—was filed in federal court on February 13, 2013 ("Federal Complaint") asserting claims under LUTPA, the Sherman Anti-Trust Act, defamation, 42 U.S.C. § 1983, and conspiracy. *See* Pet. App. 146a-148a. As to the § 1983 claim, like the constitutional claim in the State Petition, petitioners assert a violation of Due Process. Pet. App. 147a-149a. It is undisputed that the two lawsuits contain identical factual allegations and involve the same nucleus of operative facts. *Cf.* Pet. App. 112a and Opp. App. 1a. Indeed, the Federal Complaint is mostly a verbatim recitation of the State Petition. *See* Pet. App. 4a-5a.

To summarize, petitioners claim the actions of respondents (and others) resulted in (or contributed to) the revocation of Dr. Haygood's dental license; namely, that he did not receive a fair proceeding

[3] *See, e.g.,* LAC 46:XXXIII.801.

before the Dental Board (an administrative proceeding). *See* Pet. App. 147a-149a. The date petitioners became aware of the alleged injury was the day Dr. Haygood's dental license was revoked—November 8, 2010. At a minimum, the claim began to accrue when the September 2011 State Petition (Opp. App. 1a) was filed, which alleged the same common nucleus of operative facts as the Federal Complaint (Pet. App. 112a) but failed to assert a § 1983 claim.

Respondents filed a Motion to Dismiss under Rule 12(b)(6) as to all of petitioners' claims in the Federal Complaint. Specifically, dismissal was sought based upon prescription (statute of limitations) as to the defamation, LUTPA, and § 1983 claims. And dismissal of the LUTPA, Sherman Act, and defamation claims was sought based upon the failure to state a claim.

The district court granted respondents' Motion to Dismiss. *See* Pet. App. 86a. Relevant here, the district court found the § 1983 claim was time barred, as petitioners "clearly knew, or should have known, of the overt acts which might constitute a § 1983 violation at least two years before the instant suit was filed." *Id.* at 76a. Specifically, the district court found that the prescriptive period (*i.e.*, accrual date) began on or about November 8, 2010 — the date of the "single act of the Dental Board revoking Dr. Haygood's Dental License." *Id.* at 77a.

As an aside, the district court's ruling that the § 1983 claim was untimely is final and unappealable. While petitioners attempted to appeal that ruling, they failed to timely file their notice of appeal. *See Haygood v. Dies*, No. 18-30866, 2023 WL 2326424, at *4 (5th Cir. Mar. 2, 2023). Thus, whether the § 1983

claim was time barred cannot be re-adjudicated. The only issue is whether the § 1983 claim was so clearly time barred that the Fifth Circuit was correct in finding the claim was frivolous and lacking arguable merit, thus warranting an award of attorney fees under 42 U.S.C. § 1988.

As the prevailing parties, respondents sought an award for reasonable attorney fees pursuant to 42 U.S.C. § 1988(b) and La. R.S. 51:1409 (LUTPA) on the grounds that the § 1983 and LUTPA claims were frivolous, groundless, and brought in bad faith or for purposes of harassment. Notably, in opposing respondents' Motion for Attorney Fees, petitioners argued that the filing of the State Court Petition in September of 2011 interrupted the statute of limitations due to a claim of conspiracy (*i.e.*, a claim against one co-conspirator interrupts the statute of limitations as to all conspirators) – *not* that the claim was timely because the § 1983 claim sounded in malicious prosecution. *See* Memorandum in Opposition to Motion to Dismiss, District Court R. Doc. 52, at 20. And any effort to argue that *McDonough*, 588 U.S. 109 (2019), was an intervening change in the law *after* petitioners' motion for reconsideration was filed must be rejected as, like *McDonough*, this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), held that "a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor." *Id.* at 489.

The district court granted respondents' Motion for Attorney's Fees and held that the § 1983 claim was "clearly time-barred," "meritless and [] properly deemed frivolous." Pet. App. 62a, 67a. In response, petitioners filed a Motion for Reconsideration *solely*

as to the award of fees under LUTPA. District Court R. Doc. 302-1. To be clear, petitioners did not address the award pursuant to § 1988 and, moreover, did not argue that the proper, analogous tort to be considered was malicious prosecution and, therefore, the Federal Complaint was arguably timely and not frivolous. The district court denied the Motion for Reconsideration. *See* Pet. App. 59a.

Next, the district court issued its Memorandum Ruling as to the sum certain amount of attorney fees to be awarded. *Id.* at 43a. With respect to recoverable attorney fees in the case of multiple claims, only some of which are statutorily recoverable, the district court found that "all of Plaintiff's claims rest on a common core of operative facts such that it would be impracticable to separate the hours attributable to each related claim." *Id.* at 49a. And the district court noted that respondents "have exercised sound billing judgment in seeking this award of attorney's fees by excluding entries related to Plaintiffs' case pending in State Court and writing off otherwise unnecessary entries before submitting time records…." *Id.* Finally, the district court expressly stated that it "conducted a thorough review of the Detailed Time Report submitted" by respondents, *id.*, and, after such review and applying the lodestar method, awarded $110,261.16 in attorney fees and $732.46 in costs. *Id.* at 52a.

As to the sum certain award, petitioners again filed a Motion for Reconsideration. This motion was the *first* time Haygood argued that malicious prosecution was the analogous tort for the § 1983 claim and, thus, the claim was arguably timely and not frivolous. District Court R. Doc. 326-2 at 22. The motion was denied and the district court found that

"this Court has previously addressed in great detail not only the propriety of the award of attorney fees, but also its lodestar analysis to reach the quantum of attorney fees" and "considered the interwoven nature of the many claims and proceedings in this case, all of which involved a common core of facts and were based on related legal theories." *Id.* at 40a-41a.

Petitioners appealed the fee award to the Fifth Circuit. After briefing and oral argument, the appellate court affirmed the district court's finding that the § 1983 claim was clearly untimely because, at a minimum, petitioners were aware of their cause of action under § 1983 at the time the State Petition was filed in September of 2011 (*see* Opp. App. 1a), and, therefore, the accrual period began no later than that date. *See* Pet. App. 3a, 13a-14a. Accordingly, the Fifth Circuit found the 2013 Federal Complaint was "so clearly time-barred that it lacked arguable merit." *Id.* at 14a.

As to the actual fee award, the Fifth Circuit reduced the amount. Specifically, in its Detailed Time Report, respondents submitted time for undersigned – private attorneys – and time for attorneys at the Louisiana Attorney General's Office. As to the latter, because there were no available details as to the nature of the work performed to support each billing entry, the Fifth Circuit found this prevented the application of the lodestar method and, thus, reduced the fee award by the amount of fees attributable to the Louisiana AG's office. *Id.* at 16a-17a.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit's Opinion Does Not Create A New Standard, Circuit Split, Or Divergence From This Court's Jurisprudence

In certain civil rights cases, including § 1983 actions, a court has discretion to award the prevailing party "a reasonable attorney's fee." 42 U.S.C. § 1988(b). This Court has held that § 1988 authorizes an attorney's fee award to a defendant "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation." *Fox v. Vice*, 563 U.S. 826, 833 (2011) (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)); *see also Cantu Servs., Inc. v. Frazier*, 682 F. App'x 339, 342 (5th Cir. 2017). The addition of the "frivolity" factors is intended to ensure the "equitable considerations" in fee-shifting are warranted when the award is against a plaintiff. *Fox*, 563 U.S. at 833. And the "presence of reasonable allegations in a suit does not immunize the plaintiff against paying for the fees that his frivolous claims imposed." *Id.* at 834.

Generally, in determining whether a plaintiff's claims are frivolous, courts should consider "whether the plaintiff established a *prima facie* case, whether the defendant offered to settle, and whether the court held a full trial." *Myers v. City of W. Monroe*, 211 F.3d 289, 292 (5th Cir. 2000). However, these factors are "guideposts," and frivolousness must be judged on a case-by-case basis. *Doe v. Silsbee Indep. Sch. Dist.*, 440 F. App'x 421, 425 (5th Cir. 2011) (per curiam). But "[w]here a claim is 'so lacking in merit' as to render it groundless, it may be classified as frivolous." *Provensal v. Gaspard*, 524 F. App'x 974, 976 (5th Cir.

2013) (citing *United States v. Mississippi*, 921 F.2d 604, 609 (5th Cir. 1991)).

A. Numerous Appellate Courts Have Found a Clearly Time Barred Case Frivolous

Petitioners argue that the Fifth Circuit's decision "diminished [the] 'frivolity' standard for time-barred civil rights claims which, when satisfied, negates considerations of all other 'frivolity factors.'" Pet. at 18 – 19. In addition to this over-simplification of the issue and mischaracterization of the Fifth Circuit's decision, petitioners fail to mention that other federal appellate courts have found that a clearly time barred claim is properly deemed frivolous. By way of example are the following:

- **1st Circuit:** *Street v. Cameron*, 959 F.2d 230, 1992 WL 63518, at *1 (1st Cir. 1992) ("Pro se plaintiff Richard Street appeals from a district court judgment that dismissed his 42 U.S.C. § 1983 complaint on the ground that it was barred by the statute of limitations and therefore frivolous within the meaning of 28 U.S.C. § 1915(d). We affirm.");

- **2d Circuit:** *Smith v. New York City Transit Authority (NYCTA)*, 201 F.3d 432, 1999 WL 1212562, at *1 (2d Cir. 1999) ("[A] complaint may be dismissed as frivolous prior to service where it is clear from the face of the complaint that the claim is time-barred under the applicable statute of limitations.") (citing *Neitzke v. Williams*, 490 U.S. 319, 325, 327 (1989); *Pino v. Ryan*, 49 F.3d 51, 54 (2d Cir. 1995));

- **4th Circuit:** *Lawrence v. Cooper*, 398 F. App'x 884 (4th Cir. 2010) (affirming district court's dismissal of untimely § 1983 claim as frivolous);

- **6th Circuit:** *Rowsey v. Police Dept. Metropolitan Nashville*, 22 F. App'x 539, 540 (6th Cir. 2001) ("A case is frivolous if it lacks an arguable basis either in law or fact… A suit that is clearly time-barred lacks an arguable basis in law.") (citing *Neitzke*, 490 U.S. at 325; *Pino*, 49 F.3d at 53-54);

- **8th Circuit:** *Stoling v. Arkadelphia Human Dev. Ctr.*, 81 F. App'x 83, 84 (8th Cir. 2003) ("[T]he District Court found Stoling's complaint time-barred before defendant was ever served. We have approved the sua sponte dismissal of a 42 U.S.C. § 1983 complaint as frivolous under § 1915 when it was apparent that the statute of limitations had run, even though the statute of limitations is an affirmative defense."); *see also Denoyer v. Dobberpuhl*, 208 F.3d 217 (8th Cir. 2000) ("Thus, we conclude the district court did not err in dismissing these claims as frivolous based on the expiration of the statute of limitations.") (citing *Myers v. Vogal*, 960 F.2d 750, 750-51 (8th Cir. 1992) (per curiam));

- **9th Circuit:** *Puett v. Carnes*, 21 F.3d 1115, 1994 WL 126700, at *1 (9th Cir. 1994) ("Because it is clear from the face of the complaint that Puett's claim is time-barred, the district court properly dismissed this claim as frivolous.") (citing *Franklin v. Murphy*, 745 F.2d 1221, 1229-30 (9th Cir. 1984));

- **10th Circuit:** *Raile v. Ortiz*, No. 05-1345, 2006 WL 991102 (10th Cir. 2006) (finding

the district court correctly dismissed the time-barred complaint as frivolous).

As evidenced by this sampling of federal appellate courts, the Fifth Circuit's opinion at issue did not create a circuit split, there is no diminishment of any legal rule or standard, and there is no divergence from the Fifth Circuit's previous rulings. As cited above, the factors are guideposts, not etched-in-stone considerations. Even petitioners cite *Manuel v. Joliet*, wherein the Court noted that "common-law principles are meant to guide rather than control the definition of § 1983 claims, serving 'more as a source of inspired examples than of prefabricated components.'" 580 U.S. 357, 370 (2017) (quoting *Hartman v. Moore*, 547 U.S. 250, 258 (2006)). Petitioners' stance is as unsound as they profess the Fifth Circuit's opinion to be because petitioners posit that if the claim has any "merit" it cannot be the subject of attorney fees under § 1988. But Petitioners' stance glosses over the finding that this suit was "clearly" time barred and, moreover, ignores the filing of an identical lawsuit in State Court some 17 months before filing this federal suit. *See* Opp. App. 1a.

And petitioners' cited case law fares no better in bolstering their argument of a divergence in the standard. For example, petitioners cite *Hoover v. Armco, Inc.*, 915 F.2d 355 (8th Cir. 1990) for the proposition that "asserting a time-barred claim alone does not justify an award of attorney fees." And *Hoover* does, in fact, make that general statement. But petitioners fail to note that, in *Hoover*, the Eighth Circuit *did* affirm the award of attorney fees because the plaintiff filed a clearly time barred complaint:

> Merely pleading the time-barred demotion claim was not bad faith. Armco, however, did raise the statute of limitations as a defense in its answer to Hoover's original complaint. Aware of this, Hoover continued to include the time-barred claim in four amended complaints. Not until the district court granted Armco summary judgment did Hoover relinquish this claim. In our opinion, Hoover acted in bad faith by continuing to assert the time-barred demotion claim after Armco raised an undisputed statute of limitations defense. We thus affirm the district court's award of attorney's fees for defending against this claim.

Id. at 357. Further, *Hoover* did not involve a § 1983 claim or the "frivolity factors" related to a § 1988 award of attorney fees, but a claim under ERISA and the "bad faith exception to the American Rule." *Id.*

B. The Fifth Circuit's Holding Does Not Run Afoul of *McDonough*

As to the claimed divergence from this Court's rulings, petitioners rely primarily upon *McDonough v. Smith*, 588 U.S. 109 (2019), and the accrual period for a claim of malicious prosecution. Specifically, petitioners theorize that the Federal Complaint was not clearly time barred (and deemed frivolous and arguably without merit) because the "analogous tort" was malicious prosecution, which does not accrue until a "favorable termination." *See e.g.,* Pet. at 25. But "malicious prosecution" is not the analogous tort here.

First, this case does not involve criminal proceedings – a threshold consideration for a

"malicious prosecution" claim due to "pragmatic concerns" identified by this Court in *McDonough*. Specifically, this Court held that the statute of limitations on a fabrication of evidence claim did not begin to run until plaintiff's "***criminal*** proceedings against the defendant (*i.e.*, the § 1983 plaintiff) have terminated in his favor." *Id.* at 114 (emphasis added). In so holding, this Court explained its rationale: "This conclusion follows both from the rule for the most natural common-law analogy (the tort of malicious prosecution) *and* from the practical considerations that have previously led this Court to defer accrual of claims that would otherwise constitute an untenable collateral attack on a ***criminal*** judgment." *Id.* at 114 (emphasis added). The Court went on to further clarify its holding:

> We follow the analogy where it leads: McDonough could not bring his fabricated-evidence claim under § 1983 prior to favorable termination of his prosecution. As *Heck* explains, malicious prosecution's favorable-termination requirement is rooted in pragmatic concerns with avoiding parallel ***criminal*** and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments.

Id. at 117-18 (internal citations omitted) (emphasis added). And as cited in *McDonough*, the Court made a similar finding in *Heck v. Humphrey*, 512 U.S. 477 (1994):

> One element that must be alleged and proved in a malicious prosecution action is termination of the prior ***criminal*** proceeding in favor of the accused. This requirement

> 'avoids parallel litigation over the issues of probable cause and guilt ... and it precludes the possibility of the claimant [sic] succeeding in the tort action after having been convicted in the underlying ***criminal*** prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction.' Furthermore, 'to permit a convicted ***criminal*** defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit.' *Ibid*. . . . We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding ***criminal*** judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his ***conviction*** or confinement, just as it has always applied to actions for malicious prosecution.

Heck, at 484 (emphasis added) (internal citations omitted).[4] And the consistency of this Court's position

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[4] *See also Horne v. Polk*, CV-18-08010-PCT-SPL, 2019 WL 1676016, at *2 (D. Ariz. Apr. 17, 2019), *aff'd*, 19-15942, 2020 WL 3469112 (9th Cir. June 25, 2020) ("However, *Heck* applies only when there is an extant ***conviction***. *Bradford v. Scherschligt*, 803 F.3d 382, 386 (9th Cir. 2015)) (citation omitted) (emphasis added); *Devey v. City of Los Angeles*, 129 F. App'x 362, 364 (9th Cir. 2005) (stating that *Heck* tolling does not apply when a plaintiff does not face ***criminal*** charges); *Printup v. Dir., Ohio Dep't of Job & Family Servs.*, 654 F. App'x 781, 791 (6th Cir. 2016) (stating that *Heck* does not apply to cases that do not involve a ***criminal*** conviction).

on a malicious prosecution claim requiring an underlying criminal proceeding was reiterated more recently in the Court's 2022 Opinion in *Thompson v. Clark*, 596 U.S. 36 (2022):

> In accord with the elements of the malicious prosecution tort, a Fourth Amendment claim under § 1983 for malicious prosecution requires the plaintiff to show a favorable termination of the underlying ***criminal*** case against him. The favorable termination requirement serves multiple purposes: (i) it avoids parallel litigation in civil and ***criminal*** proceedings over the issues of probable cause and guilt; (ii) it precludes inconsistent civil and ***criminal*** judgments where a claimant could succeed in the tort action after having been convicted in the ***criminal*** case; and (iii) it prevents civil suits from being improperly used as collateral attacks on ***criminal*** proceedings. Cf. *Heck*, 512 U.S. at 484–485, 114 S.Ct. 2364; see also *McDonough v. Smith*, 588 U.S. ——, ——, 139 S.Ct. 2149, 2157, 204 L.Ed.2d 506 (2019)").

Thompson, at 44 (emphasis added).

Second, the underlying *administrative* proceeding did not end in a favorable termination. While it is correct that the Louisiana Fourth Circuit Court of Appeal found Dr. Haygood's right to due process was violated during the 2010 administrative proceeding, such a finding was limited to the actions of one defendant in this suit (*not* respondents). *See* Pet. App. 102a-105a. Moreover, the Fourth Circuit *remanded* the matter to the Louisiana State Board of Dentistry

for another administrative hearing, which never occurred because on June 9, 2016, Dr. Haygood entered a Consent Decree as to some of the charges that were the subject of the 2010 administrative proceeding. *See id.* at 105a. Thus, even assuming its applicability or availability, petitioners' § 1983 claim could not sound in "malicious prosecution" as the matter was never *favorably* terminated, but it was terminated with Dr. Haygood admitting to violations.

Petitioners cite the Fifth Circuit's decision in *Fusilier v. Zaunbrecher*, 806 F. App'x 280 (5th Cir. 2020), regarding timeliness and accrual. But like other cases relied upon by petitioners, *Fusilier* involved a criminal proceeding/prosecution. Consider the Fifth Circuit's definition of "malicious prosecution" in *Fusilier*: "As the Supreme Court added just last year, malicious prosecution involves a claim that a 'defendant instigated a ***criminal*** proceeding with improper purpose and without probable cause.'" 806 F. App'x at 282 (quoting *McDonough*, 588 U.S. at 116) (emphasis added). This (an administrative proceeding followed by a civil suit) is simply not an instance where "malicious prosecution" is the proper accrual period to be applied under the reasoning expressed by this Court in *McDonough v. Smith*, 588 U.S. 109, 115 (2019).

At best, the analogous tort could be abuse of process:

> Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to

> accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance. Consequently in an action for abuse of process it is unnecessary for the plaintiff to prove that the proceeding has terminated in his favor, or that the process was obtained without probable cause or in the course of a proceeding begun without probable cause.

Aly v. City of Lake Jackson, 453 F. App'x 538, 540 (5th Cir. 2011). And an abuse of process § 1983 claim begins to accrue *at the time of the alleged constitutional violation*. *See id.* at 540 (emphasis added). *See also Rose v. Bartle*, 871 F.2d 331, 351 (3d Cir. 1989); *Langman v. Keystone Nat'l Bank & Tr. Co.*, 672 F. Supp. 2d 691, 701 (E.D. Pa. 2009), *aff'd sub nom. Langman v. Keystone Nazareth Bank & Tr. Co.*, 502 F. App'x 220 (3d Cir. 2012) ("'To establish a claim for abuse of process it must be shown that the defendant (1) used a legal process against the plaintiff; (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the plaintiff.' The statute of limitations for an abuse of process claim begins to run as soon as the right to institute and maintain a suit arises" and does not require a favorable termination.) (internal citations omitted).

Petitioners were aware of the revocation of Dr. Haygood's dental license on or about November 8, 2010 (Pet. App. 123a), and all allegations against respondents relate to purported conduct or actions that occurred *prior* to November 8, 2010 and *during* the administrative process. *See* Pet. App. 112a. Petitioners' § 1983 claim was clearly prescribed when this suit was filed on February 13, 2013 and, thus,

appropriately characterized by the lower courts as "meritless," "frivolous," and lacking "arguable merit." Pet. App. 13a-14a, 67a. *See also Dang v. Moore*, No. 23-35505, 2025 WL 274819, at *1 (9th Cir. Jan. 23, 2025) ("Dang's 42 U.S.C. § 1983 constitutional claims arising from the disciplinary investigation and Disciplinary Order accrued, at the latest, by the time Dang received the original Disciplinary Order. We reject Dang's argument that those § 1983 claims are based on a continuing violation: on the contrary, the operative alleged illegal acts occurred in connection with the disciplinary investigation and the issuance of the Disciplinary Order."); *Mallet v. New York State Dep't of Corr. & Cmty. Supervision*, No. 22-2884, --- F.4th ---, 2025 WL 77230, at *4 (2d Cir. Jan. 13, 2025) ("A Section 1983 claim does not accrue until the plaintiff 'has a complete and present cause of action.'… The accrual analysis involves two steps. We begin by 'identifying the specific constitutional right alleged to have been infringed.' *McDonough v. Smith*, 588 U.S. 109, 115 […] (2019)…Next, we ask when the *plaintiff knew or had reason to know of 'the injury which is the basis of his action,' i.e., the alleged injury which—according to the plaintiff—amounts to an infringement of that constitutional right*.") (emphasis added) (some internal citations omitted). But even if the date of revocation is not the start date for accrual, the claim started to accrue no later than when petitioners filed their State Court Petition (Opp. App. 1a), as found by the Fifth Circuit. *See* Pet. App. 13a-14a.

C. Analogous Appellate Opinions With Similar Outcomes

In further debunking petitioners' argument that the Fifth Circuit's ruling created a new rule/standard, a divergence from established jurisprudence, and a circuit split, a recent case out of the Tenth Circuit and another out of the Seventh Circuit, evaluating very similar facts and procedural histories as here, reach the same conclusion as the Fifth Circuit.

In *Gardner v. Schumacher*, No. 23-2150, 2024 WL 5199962, at *1 (10th Cir. Dec. 23, 2024), the court addressed the timeliness of a § 1983 claim in the context of the revocation of a dentist's license. After an administrative proceeding, the New Mexico Board of Dental Health Care revoked the plaintiff's dental license in November of 2019. On January 23, 2023, the dentist filed suit in state court urging a violation of his due process rights due to financial conflicts of interest and destruction of evidence during the administrative proceeding. The case was removed to federal court and defendants moved for judgment on the pleadings based upon the untimeliness of the 2023 lawsuit.

In affirming the dismissal, the Tenth Circuit found that a civil rights action begins to accrue when a plaintiff "knows or has reason to know of the injury which is the basis of the action." *Gardner*, 2024 WL 5199962, at *2. Further, "[s]ince the injury in a § 1983 case is the violation of a constitutional right, such claims accrue when the plaintiff knows or should know that his or her constitutional rights have been violated.' To determine when a claim accrues, we must 'identify the constitutional violation and locate it in time.'" *Id.* Citing this Court, the appellate court

found that "in a § 1983 suit [ ] 'the proper focus is on the time of the *discriminatory act*, not the point at which the *consequences* of the act become painful.'" *Id.* (quoting *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (per curiam)). And just like the district court here, the Tenth Circuit found that "Dr. Gardner's § 1983 claim challenges actions leading up to and culminating in the Board's revocation decision. Because Dr. Gardner knew or had reason to know of the violation of his constitutional rights at that time, his § 1983 claim accrued when the Board issued its revocation decision in November 2019." *Id.*

Next, the Seventh Circuit's decision in *Kelly v. City of Chicago*, 4 F.3d 509 (7th Cir. 1993) involved the revocation of the plaintiff's liquor license and a § 1983 due process claim. *Kelly* presents similar facts and procedural history (*i.e.*, review of an administrative decision by a state court) and produces a similar outcome. The court found that "the date of the alleged constitutional violation—the revocation of the license—was the date of accrual." *Id.* at 512. Moreover, the court found that the state appeal process available in response to an administrative proceeding did not affect the accrual date:

> Just because the state believed that fairness compelled it to allow judicial review of its decision to revoke the liquor license, does not mean that the date of injury is postponed until exhaustion of the appeals process. The injury occurred at the time of the revocation; tellingly, it is that very injury which caused the bar owners to avail themselves of the state appeals process. They took too long to avail themselves of the federal process, and their claim therefore is time-barred.

Id. at 512-13.

Kelly and *Gardner* are just two examples of federal appellate courts reaching the same decision as the lower courts here. *See also Kim v. Ali*, No. 24-1448, 2024 WL 5135645, at *2 (3d Cir. Dec. 17, 2024) ("Under federal law, a cause of action accrues, and the statute of limitations begins to run, 'when the plaintiff knew or should have known of the injury upon which its action is based.'"); *Taylor v. City of Mobile Police Dep't*, No. 24-11888, 2024 WL 4624660, at *4 (11th Cir. Oct. 30, 2024) ("Generally, a § 1983 claim accrues, and the statute of limitations begins to run, when the facts that would support a claim are apparent or should be apparent to a person of reasonably prudent regard for her rights. Under this standard, the plaintiff "must know or have reason to know" that she was injured and who inflicted the injury. *Id.* at 562.") (internal citation omitted).

The various appellate cases cited herein evidence that the Fifth Circuit did not create a new standard or new rule on the accrual date for a § 1983 claim or on when a prevailing party is entitled to fees under § 1988. Moreover, the Fifth Circuit's ruling did not diverge from other appellate circuits, create a circuit split, or err in its holding.

II. The Lower Courts Did Not Err In Awarding Attorney Fees

A. §1983 Statute of Limitations and Accrual

Per this Court, "a State's personal injury statute of limitations should be applied to all § 1983 claims." *Owens v. Okure*, 488 U.S. 235, 240-41 (1989). And "where state law provides multiple statutes of limitations for personal injury actions, courts

considering § 1983 claims should borrow the general or residual statute for personal injury actions." *Id*. at 249-50. The Fifth Circuit has approved application of Louisiana's one-year personal injury statute of limitations to a § 1983 action. *See Brown v. Pouncy*, 93 F.4th 331, 332 (5th Cir. 2024), *cert. denied*, No. 23-1332, 2024 WL 4426679 (U.S. Oct. 7, 2024). While the federal courts look to state law for its tolling provisions, the date of accrual for a § 1983 claim is a question of federal law. *See Wallace v. Kato*, 549 U.S. 384, 388 (2007). And "[u]nder federal law, a cause of action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Gartrell v. Gaylor*, 981 F.2d 254, 257 (5th Cir. 1993).

Here, petitioners were aware of the alleged constitutional violations by November 8, 2010, when Dr. Haygood's dental license was revoked by the Dental Board. But at a minimum, petitioners clearly had sufficient knowledge of the alleged constitutional violations and the alleged damages when petitioners filed their State Petition in September of 2011. *See* Opp. App. 1a. The dismissal of the § 1983 claim was properly dismissed as clearly time barred.

B. Malicious Prosecution Is Not The Analogous Tort

Petitioners rely upon this Court's decision in *McDonough v. Smith*, 588 U.S. 109 (2019), in arguing that malicious prosecution is the analogous tort and, moreover, that such a claim does not begin to accrue until there is a favorable termination of the prosecution.

As discussed above, petitioners fail to show that malicious prosecution was the analogous tort as (1)

there was no criminal proceeding at issue and (2) there was a termination of the administrative proceeding, but it was not a favorable termination at to petitioners.

C. The Award of Attorney Fees Pursuant to 42 U.S.C. § 1988 Was Warranted

Petitioners' argument that the courts below engaged in *post hoc* considerations and failed to give weight to petitioners' factual allegations is without merit. The district court found attorney fees appropriate as the § 1983 claim was clearly untimely: "[P]laintiffs clearly knew, or should have known, of the overt acts which might constitute a § 1983 violation at least two years before the instant suit was filed." Pet. App. 76a. And as held by the Fifth Circuit: "the February 13, 2013 federal complaint was so clearly time-barred that it lacked arguable merit." Pet. App. 14a. Petitioners' factual allegations, even assumed true, do not change the fact that the claim was untimely. Indeed, it is petitioners' factual allegations that establish, on the face of the Complaint, that the § 1983 claim was untimely.

As cited above, it is not just the Fifth Circuit that holds that clearly time-barred suits are properly deemed frivolous. As petitioner's § 1983 claim was clearly time barred when filed in 2013, the granting of respondents' motion for attorney fees was appropriate under 42 U.S.C. § 1988.

D. The Fee Award Is Reasonable

As held by this Court, a district court is afforded substantial deference in determining appropriate and reasonable attorney fee awards:

> We emphasize, as we have before, that the determination of fees "should not result in a second major litigation." The fee applicant (whether a plaintiff or a defendant) must, of course, submit appropriate documentation to meet "the burden of establishing entitlement to an award." *Ibid.* But trial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time. And appellate courts must give substantial deference to these determinations, in light of "the district court's superior understanding of the litigation." We can hardly think of a sphere of judicial decisionmaking in which appellate micromanagement has less to recommend it.

Fox v. Vice, 563 U.S. 826, 838 (2011) (internal citations omitted).

Petitioners simply state that "[e]ven the most cursory review of [respondents'] time reports reveal dozens of entries entirely unrelated to their defense of the § 1983 claims." Pet. App. 33a. Respondents were awarded fees under LUTPA as well, not just in relation to the § 1983 claim. In any event, petitioners reference broad categories of alleged unrelated fees without providing any specifics (Pet. App. 33a), such as billing entries or time billed for such entries that should have been excluded. Like petitioners' failure at the district court level, petitioner never effectively traverses the fees billed or the fees ultimately

awarded. In fact, years passed between the filing of respondents' Detailed Time Report and the district court's award of a sum certain in attorney fees with petitioners never filing anything challenging any of the time entries submitted by respondents. *See* Pet. App. 40a.

Next, petitioners' contention that all the district court did was perform "simple addition" without appropriate scrutiny of the billing entries (Pet. App. 33a) is a misrepresentation. The Fifth Circuit noted that the district court "went line-by-line, multiplying the hours worked by a reasonable hourly rate," to make clear the thoroughness with which the district court reviewed respondents' Detailed Time Report, not that the district court did nothing more than "simple addition." Pet. at 33. Indeed, this is made clear by the Fifth Circuit's statement that "Haygood avers that the district court did not closely scrutinize the time reports" but "[t]he record belies that contention for most of the fees awarded." Pet. App. 15a. And the district court expressly stated that it "conducted a thorough review of the Detailed Time Report submitted" by respondents. Pet. App. 49a.

At the time of respondents' Motion for Attorney Fees, the case had been pending for close to five years and the motion practice both prior to and after the court's dismissal of respondents was extensive. For example, in addition to the filings related to respondents' Motion to Dismiss, there was petitioners' multiple efforts to file amended complaints, multiple motions for reconsideration, and efforts to have an entirely new plaintiff joined, all of which had to be opposed or responded to by respondents as their dismissal from the case, at those points in time, was not final.

Courts have cautioned that an adjustment of the lodestar either up or down should only be made in the "rare case," and a simple calculation of an attorney's reasonable hourly rate by reasonable hours worked is presumptively appropriate. *Blum v. Stenson*, 465 U.S. 886, 902, n.18 (1984) ("The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate."). Considering the amount of work performed and the extremely reasonable hourly rate for counsel for respondents, the court's fee award is reasonable.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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JANUARY 2025

OPPOSITION APPENDIX

— APPENDIX A—
FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

RYAN HAYGOOD, DDS, AND HAYGOOD DENTAL CARE, LLC

V.

ROSS H. DIES, ROSS H. DIES, DDS, J. CODY COWEN, DDS AND BENJAMIN A. BEACH, DDS, A PROFESSIONAL DENTAL LIMITED LIABILITY COMPANY, CAMP MORRISON, BARRY OGDEN, KAREN MOORHEAD AND DANA GLORIOSO

CIVIL ACTION NO.: 554,003-C

Filed: September 27, 2011

PETITION FOR DAMAGES

NOW INTO COURT, through undersigned counsel, comes RYAN HAYGOOD, DDS and HAYGOOD DENTAL CARE, LLC which hereby shows as follows:

1.

Made defendants herein are Dr. Ross H. Dies, an individual of the full age of majority and a resident of Caddo Parish, Louisiana; Ross H. Dies, DDS, J Cody Cowen, DDS and Benjamin A. Beach, DDS, A Professional Dental Limited Liability Company with its principal place of business in Caddo Parish, Louisiana; Camp Morrison, an individual of the full age of majority and a resident of Orleans Parish, Louisiana; C. Barry Ogden, an individual of the full age of majority and a resident of Orleans Parish, Louisiana; Karen Moorhead, an individual of the full age of majority and a resident of Union Parish, Louisiana; and Dana Glorioso, an individual of the full age of majority and a resident of Rapides Parish, Louisiana.

2 .

Ryan Haygood, DDS is an individual of the full age of majority who, at all times pertinent hereto, lived in Bossier Parish, Louisiana. This petition complains of wrongful acts and damages occurring in Caddo and Bossier Parish, Louisiana.

3 .

Dr. Haygood graduated from Bossier High School in 1993, and from Louisiana Tech University in 1997, Magna Cum Laude with a degree in molecular biology. Thereafter he graduated from Louisiana State University of Dentistry with a Doctors of Dental Surgery degree in 2000. After graduation from dental school, Dr. Haygood moved to North Carolina. He worked at Baptist Hospital in Winston-Salem for a year and then moved to Wake

Forest and was in private practice from August 2001 – October 2005. Thereafter, Dr. Haygood taught at UNC School of Dentistry in Chapel Hill.

4 .

Shortly after graduation from dental school, Dr. Haygood was licensed and commenced the practice of dentistry in the State of Louisiana, opening offices in Shreveport and Bossier City, Louisiana.

5 .

Dr. Haygood was a resident of the Shreveport/Bossier City area and it was his desire to establish professional practice in that community.

6 .

Dr. Haygood commenced his practice through a limited liability company named "Haygood Dental Care, LLC and began to actively advertise his professional services in the Shreveport/Bossier City community.

7 .

Dr. Haygood and Haygood Dental Care, LLC allege that the defendants named herein, acting individually and in concert, aiding, encouraging and abetting one another, and in conspiracy with one another have sought to and actually have deprived Dr. Haygood and Haygood Dental Care, LLC of their good standing and relationships with friends, colleagues, dental patients and potential customers, and other members of the dental

profession through the intentional and malicious acts set forth hereinbelow.

8 .

Dr. Haygood and Haygood Dental Care, LLC allege that the defendants, acting in concert began to communicate malicious and non-privileged communications, both for initial publication and foreseeable republication, which communications were designed to cause harm to Haygood in the dental profession and among his friends, colleagues and patients, actual and potential.

9 .

Dr. Haygood and Haygood Dental Care, LLC allege that by virtue of defendants' participation in highly irregular and unlawful actions in connection with the investigation, prosecution and adjudication of decisions by the Louisiana State Board of Dentistry in "Re: Ryan Haygood, DDS, License No. 5334", defendants knowingly and intentionally deprived Dr. Haygood of his right to a fair and impartial hearing; presented knowingly false or exaggerated claims, provided evidence obtained through unlawful means; and took other actions which deprived Dr. Haygood of the right and privilege to conduct his livelihood as a licensed dentist in the State of Louisiana.

1 0 .

On November 8, 2010, the Louisiana State Board of Dentistry, whose members included but not limited to a disciplinary committee consisting of Dr. Samuel Trinca, Dr. Dean Manning and Dr. James Moreau issued an Opinion, finding by "clear

and convincing evidence" under the Louisiana Dental Practice Act multiple counts of engaging in conduct intending to defraud the public, and, incredibly findings by Dr. Haygood guilty by "clear and convincing evidence" of *charges which had been dismissed* by the Board of Dentistry. Maximum fines were levied as to all counts. This proceeding was a sham and the product of the actions of the defendants and those Board members who aided and abetted them.

1 1 .

Plaintiffs are informed and believe and therefore allege that defendants were aided and abetted in their activities by Bryan Begue; Dr. Conrad P. McVea, III, Dr. H.O. Blackwood, Dr. Johnny Black; Dr. Robert Hill, and perhaps others. Plaintiffs reserve the right to supplement and amend these pleadings as discovery dictates.

1 2 .

Plaintiffs allege that the defendants and their co-conspirators on the Louisiana Board of Dentistry knowingly engaged in conduct which deprived Dr. Haygood of due process under Art. 1 §2 of the Louisiana State Constitution of 1974. Plaintiffs further allege that defendants were motivated by (i) actual and implied malice; (ii) improper competitive considerations and; (iii) of financial considerations to permit the Board to make recoveries of fines.

THE LOUISIANA STATE BOARD OF DENTISTRY

1 3 .

The Louisiana State Board of Dentistry (the "Board") is a state board of the State of Louisiana. The Board was created under the provisions of La. R.S. 37:751 et seq. The Board, as provided by La. R.S. 36:259(E) is under the supervision and control of the Louisiana Department of Health and Hospitals. The Board is composed of 14 members, 13 licensed and practicing dentists and one dental hygienist. All members are appointed by the Governor and serve 5 year terms. The Board has 5 employees. The Board is charged with the responsibility of screening applicants, preparing and administering examinations, issuing licenses for dentists and dental hygienists, and investigating bona fide complaints in the field of dentistry. Operations of the Board are funded by examination fees, license fees and fines imposed on miscreant professionals.

1 4 .

The Board and its Disciplinary Committee stand in a relation of trust to the public, the profession and those who appear before that body. Its deliberations are to be conducted in utmost confidence

1 5 .

By statute, the Board's power to investigate is limited as follows:

> "The Board shall investigate complaints of illegal evidence or a violation of this chapter,

> *when evidence is presented to the Board*…" (emphasis added)

Moreover, the Board has authority to investigate "charges brought, which must be made under oath, noticed and docketed." (emphasis added)

16.

When the Board performs an investigation, in good faith and determines to adjudicate a formal administrative complaint against a dentist or other dental professional, the Board is obligated to conduct such hearing in a manner which, although not necessarily perfect, must meet minimum levels of fairness, independence and neutrality, free from malicious or competitive biases or financial influences.

17.

In addition to the foregoing, Louisiana law requires that such hearing be conducted in a manner which maintains the *appearance* of fairness, neutrality, and freedom from the taint of improper influences, such as competitive considerations, financial strains on the Board, and maliciousness on the part of its participants.

18.

The financial statements for the Board for the year end June 30, 2009 as set forth in the independent auditor's report on financial statements submitted by Leroy Chustz and Beverly A. Ryall, CPAs, stated as follows under "Financial Highlights":

> "The Louisiana State Board of Dentistry's liabilities exceeded its assets at the close of fiscal year 2009 by $62,962.00, which represents a 267.4 per cent increase from last fiscal year. The net assets decreased by $100,569.00 (or 267.4 per cent). The Louisiana State Board of Dentistry's revenue decreased $61,740.00) or 6.4 per cent) and the net results from activities decreased by $49,702.00 (or 88.7 per cent)."

1 9 .

The same financial statements for year end June 30, 2009 stated as follows under "Variations Between Original and Final Budgets":

> "Revenues were $210,000.00 under budget, due mainly to lower than expected revenue from license renewals and enforcement actions. Expenditures were approximately $148,000.00 under budget due mainly to lower than expected salaries and benefit expenses, operating expenses and fixed asset acquisitions."

2 0 .

The Board's basic financial statements and independent auditor's report for the year ending June 30, 2010 stated as follows:

> "Net assets of the Louisiana State Board of Dentistry decreased by $41,276.00 (or 65.6 per cent) from June 30, 2009 to June 30, 2010. Causes of this decrease include an increase in legal and investigation cost due to an increase in disciplinary actions and an

> increase in computer support services due to the implementation of a new data base and the computer hardware that supports it."

2 1 .

On Friday, May 7, 2010, the Board conducted a special meeting in New Orleans, Louisiana. According tot he Minutes of that meeting, Mr. Barry Ogden, Executive Director of the Board "brought the Board's attention to the financial statements for the nine month period ending March 31, 2010. He explained that the Board currently had an unprecedented eight formal proceedings against licensees and that those proceedings had driven up the Board's legal and investigative fees."

DR. ROSS H. DIES

2 2 .

Ross Dies has been a Louisiana dentist for the past 25 years, and is a principal in Shreveport-Bossier Family Dental Care, LLC. The activities Dr. Dies complained of were performed on behalf of Shreveport-Bossier Family Dental Care, LLC.

2 3 .

Beginning with the opening of Dr. Haygood's dental practices in Shreveport and Bossier in December, 2005, Dr. Haygood and Dr. Dies became direct, primary competitors in the professional practice of dentistry in the greater Shreveport/Bossier community. Their professional limited liability companies are also direct, primary competitors.

2 4 .

At all times pertinent hereto, Dr. Dies had developed a strong personal dislike and profound animosity toward Dr. Haygood, expressing that opinion to others both in and out of the dental profession.

2 5 .

In order to establish his new dental practice, Dr. Haygood did not buy an existing dental practice but, rather built a new practice "from the ground up". All of his patients were "new patients".

2 6 .

In 2006, in an effort to obtain new patients, Dr. Haygood began an active publicity campaign for his new dental practices in Shreveport-Bossier, which resulted in a significant increase in patients seeking Dr. Haygood's professional services in those communities. Although such advertising among dentists is perfectly lawful, many dentists, particularly older dentist in Louisiana frown on such publicity.

2 7 .

Dr. Haygood's efforts to obtain new patients were enormously successful, to the apparent consternation of some other area dentists. Because the population of the Shreveport-Bossier market did not grow during the time period that Haygood established his practice, the "new patients" obtained by Dr. Haygood were necessarily patients

who were lost by other, competing dentists in the Shreveport-Bossier area.

2 8 .

Shortly after Dr. Haygood's advertising campaign began in earnest, and his practice began to experience rapid growth, complaints began to be filed with the Board about alleged improper professional practices of various sorts attributable to Dr. Haygood. Dr. Haygood is informed and believes, and therefore alleges that these complaints were encouraged, if not directly solicited by Dr. Haygood's competitors.

2 9 .

False complaints were filed against Dr. Haygood with various taxing authorities, including the United States Internal Revenue Service. Additionally, anonymous internal posting containing false and derogatory information about Dr. Haygood began to appear, which expressed the opinions of persons claiming to be knowledgeable about his practice. Because Dr. Haygood had never before experienced this type and scope of personal and professional attacks, he believes that such complaints were initiated, encouraged and/or solicited by competitors.

3 0 .

Beginning in late 2006 and the early months of 2007, the Board undertook to investigate, prosecute, and adjudicate a wide variety of claims against Dr. Haygood, with a zeal which caused the Board and its agents and contractors (i) to exceed their lawful authority; (ii) to violate Dr. Haygood's

rights to due process; (iii) which caused the participants to lose their neutrality; (iv) simultaneously performed inconsistent confused adjudicatory and prosecutorial roles; (v) to conduct themselves in a manner which was unlawful and at least in one case violative of the criminal laws of the State of Louisiana; (vi) in violation of the Board's duty of trust; and (vii) in violation of the Board's duty to maintain such investigations in confidence.

3 1 .

Beginning no later than March 22, 2007, Dr. H.O. Blackwood, a director of the Board and competitor of Dr. Haygood from northwest Louisiana, communicated directly and indirectly with C. Barry Ogden, executive director of the Board, and Camp Morrison, an investigator for the Board, and developed a scheme to contact "highly motivated" dentists in the Shreveport-Bossier area seeking potential complaints against Dr. Haygood. One of those highly motivated dentists was Dr. Dies.ln late March 2007, Ogden authorized the issuance of subpoenas for patients of various dentists in northwest Louisiana including Dr. Haygood's patients for this purpose. As of this time, without any investigation, both Ogden and Morrison had developed a theory or opinion that Haygood had a "predilection for diagnosing unnecessary periodontal work. The defendants sought to find evidence in support of that theory.

3 2 .

Although plaintiffs are currently unaware of the exact nature of discussions between the dentists who participated in this scheme or the

other persons involved in the investigation, Plaintiffs now know that many, if not most, patients refused to participate in it, despite suggestions they had been improperly cared for by Dr. Haygood.

3 3 .

Plaintiffs allege that C. Barry Ogden communicated with Camp Morrison and Dr. Ross Dies throughout the investigation and adjudication proceeding in an effort to assist Dr. Dies in removing Dr. Haygood as a competitor in the practice of dentistry in the State of Louisiana.

3 4 .

No later than June 7, 2007, Ogden and Morrison designated defendant Dr. Ross Dies as their "expert", and forwarded medical records to him, ostensibly for a neutral and independent evaluation of "complaints", the vast majority of which were apparently unsupported by written, sworn complaint from patients.

3 5 .

The Board was well aware that Dr. Dies was a direct competitor with Dr. Haygood and in fact, Camp Morrison later described Dies' relationship with Dr. Haygood as an "antagonist" competitor.

3 6 .

When Barry Ogden and Camp Morrison communicated with Dr. Dies and sought his assistance as a "expert" they admonished him that "all this must be held in strictest confidence". Further, Morrison assured him that there was no

risk to his participation in the scheme, guaranteeing that he would "receive the benefit of immunity as you will be acting on behalf of the LSBD and hence be an agent of the State."

37.

By July, 2007, Dr. Dies began to submit written evaluations of the records of patients which were the subject of the investigation all of which found the treatment and professional actions of Dr. Haygood to be improper. This correspondence was studded with inaccuracies, falsehoods, exaggerations and improper assumptions.

38.

Whatever the value of Dr. Dies' opinions might have been, the Board belatedly recognized his antagonistic relationship with Dr. Haygood and his obvious bias. Accordingly, the Board submitted the patient records, many of which were still apparently unsupported by sworn complaints, to Dr. Donald Harris, a dentist in New Iberia.

39.

Although the Board is to be credited for its belated recognition of Dies' obvious bias, remarkably it continued to allow the proceedings to be tainted with that antagonism and bias as a result of : (i) sending Dies' findings to Harris in an effort to influence Harris' opinion; (ii) actually utilizing the testimony of Dr. Dies at the final trial of this matter as an "expert" (in addition to Dr Harris); and (iii) as set forth hereinbelow, permitting Dr. Dies to continue to participate in the "investigation" in various roles that far

surpass any proper authority with which he might otherwise have been vested.

40.

In or about September 2007, apparently not satisfied with the evidence compiled to date, Camp Morrison developed a scheme which involved his employment of Karen Moorhead and Dana Glorioso to act as unlicensed investigators, retained to pose as patients and to present Dr. Haygood's office with false medical histories and symptoms.

41.

Mr. Morrison, who is a licensed private investigator under the laws of the State of Louisiana, was well aware that this scheme is expressly prohibited under Louisiana law (La. R.S. 37:3520)

42.

Notably, both Moorhead and Glorioso were dental assistants who worked with former and current Board members with the knowledge and consent of Board prosecutor Thomas Arcenaux. Board Investigator Camp Morrison contacted their employers Dr. White Graves and Dr. Louis Joseph regarding the use of these dental assistants and presenting themselves under fraudulent pretenses. Both Graves and Joseph were responsible for the care of their assistants, and had misdiagnosed these patients. This placed the hygienists in the position of either testifying adversely against Haygood or admitting mis-diagnosis by their own employers. These witnesses, like others involved in the investigation, were not only acting in contravention

to Louisiana criminal law but also hopelessly compromised by their role on behalf of the prosecution of the case.

43.

The Board conducted informal hearings involving Dr. Haygood on March 13, 2009, and November 13, 2009. A final complaint was issued against Dr. Haygood on March 10, 2010.

44.

In an effort to bring additional pressure to bear on Dr. Haygood, the Board determined to bring charges against his two hygienists, Wendy Green and Julie Snyder, both dental hygienists who were accused of aiding and abetting alleged fraudulent conduct by Haygood.

45.

In March, 2010, Dr. Dies hired one of these two hygienists, Wendy Green, despite the pending charges against her and his role as Board "expert" in the charges against Dr. Haygood.

46.

Dr. Dies was fully aware of the pending charges against Ms. Green and began talking to her about the pending investigations prior to her interview with his dental office. Green was ultimately hired, but before she worked her first day at the office, Dr. Dies approached Green and offered her immunity on behalf of the Board for changing her testimony and testifying against Dr. Haygood. During the same conversation, Dr. Dies freely spoke of his "hate" for Haygood.

47.

Despite their impropriety, Dies' actions on behalf of the Board were apparently authorized or at least were subsequently ratified by a phone call made within 24 hours by a Board representative to Green's attorney relating that a "deal" could be arranged with Green for immunity in exchange for "cooperation", in the form of testimony against Dr. Haygood.

48.

While employed with Dr. Dies, Green also interacted with Dr. Dies' partner, Dr. Cody Cowen, who professed knowledge of the supposedly confidential proceedings against Haygood and Haygood's patients. Dr. Cowen and Dr. Dies made frequent reference to "our friends at the Board" when talking with Green.

49.

Subsequently, Green left Dies' practice for employment with Dr. Heilman, whereupon Dr. Dies contacted Heilman and asked him to "probe around about Haygood". Ultimately, Green was unwilling to testify to the Board's satisfaction and the Board continued to pursue claims against her to completion.

50.

Also in late 2008 Dr. Ross Dies, who was simultaneously participating in the “investigation” began surreptitiously seeking to purchase Dr. Haygood’s dental practice. Dr. Haygood determined to enlist the services of a business broker for a

possible sale of his dental practice, a step which was fostered by the burden of the investigation and the cost incurred in connection therewith. Dr. Dies surreptiously contacted the business broker hired by Dr. Haygood for this purpose and, making representations that he was interested in purchasing that practice, obtained highly confidential financial information pertaining Dr. Haygood's medical practice.

5 1 .

The Board set a formal hearing before the Disciplinary Committee ("Committee") consisting of Dr. Samuel Trinca, Dr. D. Manning and Dr. James Moreau on September 24-25, 2010 and October 22-23, relative to the formal administrative complaint lodged against Dr. Haygood.

5 2 .

Defendant Ogden determined to appoint Brian Begue, an attorney who serves on the staff of the Board to act as "independent counsel" for the Committee during the hearings for Dr. Haygood.

5 3 .

The duties of an independent counsel are carefully defined by statute so as to allow the Board the benefit of legal counsel on evidentiary and procedural issues but to remain entirely neutral so as to avoid conflict of interest in acting as counsel both in an adjudicatory role and a prosecutorial role. Specifically, La. C. 46-923(D) states as follows:

> "During and before adjudication hearing, the chairman shall rule upon evidentiary

> objections and other procedural questions, but in his discretion may consult with the entire hearing panel in executive session. At any time, the hearing panel may be assisted by legal counsel retained by the Board for such purpose, who is independent of complaint counsel and who has not participated in the investigation or prosecution of the case. If the Board or hearing panel is attended by such counsel, the chairman may delegate to such counsel ruling on evidentiary objections and other procedural issues raised during the hearing."

5 4 .

As defendant Ogden was well aware at the time he appointed Mr. Begue as "independent counsel", Mr. Begue had already "participated in the investigation or prosecution of the case" against Haygood.

5 5 .

Moreover, despite the limitation placed on Mr. Begue by statue, during the hearings pertaining to Dr. Haygood, Begue repeatedly disregarded this role and interjected himself into the hearing as an additional "prosecutor" by cross examining witnesses, providing supportive information to complaint counsel, providing and suggesting objections to complaint counsel and openly questioningly the testimony of Dr. Haygood. This impermissible confusion of the roles of the Committee as both adjudicators and prosecutor undermine whatever remaining integrity there were to these proceedings.

5 6 .

The Committee also heard the tainted expert testimony of Dr. Dies and the two unlicensed private investigators, whose testimony should never have been permitted.

5 7 .

Dr. Haygood was represented by world renowned periodontist, lecturer and author Dr. Raymond Yukna, who agreed with Dr. Haygood's professional opinions with respect to the professional treatment at issue in the case.

5 8 .

After hearing the testimony of Dr. Yukna, M. Thomas Arcenaux, prosecutor for the Board approached the Board Director, Barry Ogden, suggesting that the evidence might be insufficient for any conviction. Ogden responded that the Board was "in too far financially and boxed in politically" and the case had to be pursued.

5 9 .

A decision was rendered by the Board on November 8, 2010. By the time of the issuance of this decision, however, the Board had dismissed several charges included in the Complaint against Dr. Haygood. Notwithstanding this formal dismissal, the Board, in its zeal to make findings adverse to Dr. Haygood, found that Dr. Haygood committed the acts described in the dismissed charges. Thus, Dr. Haygood was found to have violated portions of the Dental Practice Act relating to charges that had been formally dismissed. These findings alone support the

strong inference of maliciousness on the part of all participants in these deliberations.

60.

As a result of the foregoing, Dr. Haygood and Haygood Dental Care, LLC have been damaged, incurring both financial loss, reputational loss and substantial general damages of embarrassment, humiliation, and worry. Dr. Haygood has been deprived of the opportunity to practice dentistry in his home town in the State of Louisiana, perhaps permanently as a result of these intentional and malicious acts.

61.

Plaintiffs further allege that the foregoing conduct constitute unfair and deceptive trade practice by Dr. Ross H. Dies and others acting in concert with him and that plaintiffs are entitled to an aware of attorneys fees, in addition to other relief.

62.

Plaintiffs seek a trial by jury on all issues herein.

WHEREFORE PLAINTIFFS Ryan Haygood, DDS and Haygood Dental Care, LLC pray that after due proceedings are had herein that plaintiffs be awarded such damages as they shall show themselves justly entitled, both general and special, and an award of attorneys fees, interest and such other relief as the court shall deem appropriate under the circumstances.

Respectfully submitted,
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