IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Chalmers Eugene Troutman, III, Plaintiff, vs. Leon J. Hendrix, Jr., J.J. Britton, M.D., Bill L. Amick, Thomas C. Lynch, Jr., Louis B. Lynn, Patrick H. McAbee, Leslie G. McCraw, E. Smyth McKissick, III, Thomas B. McTeer, Jr., Robert L. Peeler, William C. Smith, Jr., Joseph D. Swann, the Clemson University Board of Trustees, Clemson University, James F. Barker, Doris R. Helms and Clayton D. Steadman, Defendants.	Civil Action No. 3:08-449-MJP **OPINION AND ORDER**

This case is before the Court on remand from the United States Court of Appeals for the Fourth Circuit. Observing that it lacks jurisdiction over this court's order to the extent it denied appellants' motion to dismiss on § 1983 "person" grounds, the Court of Appeals granted Troutman's motion to dismiss the appeal in part. And, observing that it exercises jurisdiction over the Eleventh Amendment sovereign immunity issue, the Court of Appeals noted that "it does not appear that the district court determined whether Clemson University was entitled to sovereign immunity." Accordingly, the Court of Appeals denied Troutman's motion to dismiss Appellant's appeal of the Eleventh Amendment issue and remanded the matter to this court with instructions to decide the issue on the merits.

I

This action was commenced January 9, 2008, by the Plaintiff Chalmers Eugene Troutman, III, in the Court of Common Pleas for Richland County, South Carolina against the Trustees and administrators of Clemson University. Plaintiff, a former employee of the University, alleges *inter alia* that he was terminated from his job and defamed as a result of his "exercise of his Constitutional rights of freedom of speech and expression, guaranteed by the First Amendment of the United States Constitution, because he spoke out within the public institution about matters of public concern...." He alleges that this action arises under and is based upon 42 U.S.C. §§ 1983 and 1985, the First Amendment of the Constitution of the United States and the common law of South Carolina. In his initial complaint, the Plaintiff stated that he was NOT suing Clemson University and that the other named Defendants (the Trustees and University administrators) "were neither acting in (Clemson's) best interest nor on (Clemson') behalf." On February 8, 2008, the initial Defendants (which did not include Clemson University) removed the case to this Court and filed their motion to dismiss. That motion was denied. On April 9, 2008, the Plaintiff filed an amended complaint which again did not include Clemson University as a Defendant. On April 28, 2008, the initial Defendants filed their Answer to the Amended Complaint.

On June 27, 2008, the Plaintiff filed a Second Amended Complaint and, for the first time, added Clemson University as a party Defendant. In that Second Amended Complaint, the Plaintiff alleged that the other named Defendants acted on behalf of and in the best interest of Clemson University. In their Answer to the Second Amended Complaint, filed on July 15, 2008, the Defendants asserted *inter alia* the defense of Eleventh Amendment immunity on behalf of Clemson University. On July 16, 2008, the Defendants filed a second motion to dismiss, asserting that the

Eleventh Amendment immunity bars prosecution of this case against Clemson University (and the State) in Federal Court. The motion was denied. The Defendants then filed an interlocutory appeal to the United States Court of Appeals for the Fourth Circuit. As stated above, the Court of Appeals retained jurisdiction but remanded the issue of Eleventh Amendment sovereign immunity to this Court for decision on the merits.

II

Defendants argue that Clemson University, as an arm of the State of South Carolina, is not a "person" subject to suit under 42 U.S.C. § 1983, and that Clemson is protected from liability in this action pursuant to the doctrine of sovereign immunity under the Eleventh Amendment to the United States Constitution.

The Plaintiff contends that Clemson has waived its alleged sovereign immunity be removing the case to this Court from the state court. *Lapides v. Board of Regents of the Univ. System of Georgia*, 535 U.S. 613 (2002). Plaintiff argues that he did not commence his action in federal court, that instead, Clemson removed it to this court from the state court.[1] In *Lapides*, a professor of the Georgia University system commenced action in a Georgia State Court against the University system of Georgia and university officials asserting the right to relief under 42 U.S.C. § 1983 and state law claims. The Defendants removed the case to the United States District Court and thereafter

[1]Recognizing that the case was removed to this court by the original Defendants (before Clemson University was named a party in the Second Amended Complaint, Plaintiff points to a memorandum in which Clemson asserted, "the Board of Trustees is a body public and corporate, under the name and style of Clemson University. S. C. Code § 59-119-60. Thus, a suit against the Board of Trustees or any of its trustees or employees in their official capacities is a suit against Clemson University." (Doc. #58-2). Additionally, Clemson has asserted, "the Defendants position is...that there is no difference between the University as an entity and the Board of Trustees as an entity." (Doc. #76-2).

moved to dismiss, based on the Eleventh Amendment. The United States Supreme Court held that by removing the case to a federal court, without the consent of the Plaintiff, the Defendants waived any Eleventh Amendment immunity that may have existed. 535 U.S. at 624.

Clemson argues that *Lapides* does not afford the Plaintiff relief in this case because Clemson University was not a named party when the case was filed and removed to this court by the original Defendants. Clemson points to an assertion by the Plaintiff in the original complaint that "Clemson University is not named as a Defendant because the named Defendants were neither acting in its best interest nor on its behalf when they engaged in the acts or omissions alleged herein." Indeed, as emphasized by the Defendants, it was not until June 27, 2008, four months after the case was removed that Clemson University was added as a named Defendant. (Second Amended Complaint). In the Second Amended Complaint, the Plaintiff alleges (contrary to the allegations in the original complaint) that "at all times herein, the Board acted on behalf of Clemson University as the final policymaking authority to terminate Troutman."

This court concludes that Clemson University was not a party Defendant when the case was removed, the removal to this court did not constitute a clear and unmistakable waiver of Clemson University of its sovereign immunity.

III

The Eleventh Amendment to the United States Constitution provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

Eleventh Amendment immunity from suit extends to state agencies and other governmental entities that are viewed as "arms of the State." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993). In support of Eleventh Amendment immunity, the Supreme Court emphasized that federal court judgments shall not deplete the state treasury and that the "dignity" of the states be preserved. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994).

The United States Court of Appeals for the Fourth Circuit has applied a four-factor test to determine whether a specific governmental entity is an alter ego or arm of the state. *Ram Ditta v. Maryland Nat'l Capital Park and Planning Comm'n*, 822 F.2d 456, 457-58 (4th Cir. 1987). *See also*, *Md. Stadium Auth. v. Ellerbe Becket, Inc.*, 407 F.3d 255 (4th Cir. 2005). The four factors are:

(1) whether the state treasury will be responsible for paying any judgment that may be awarded;

(2) whether the state exercises a significant degree of control over the entity;

(3) whether the entity is involved in statewide versus local concerns; and

(4) how the entity is treated as a matter of state law.

Id. at 261.

United States appellate courts called upon to decide whether state sponsored universities are "arms of the state" have responded in the affirmative. While the analysis for each state university may be unique, the appellate courts have recognized that the state universities are alter egos of the state and thus, entitled to Eleventh Amendment immunity from suit in federal court. *Md. Stadium Auth v. Ellerbe Becket, Inc.*, 407 F.3d 255 (4th Cir. 2005); *Takle v. University of Wis. Hosp v. Clinics Auth.*, 402 F.3d 768 (7th Cir. 2005); *Univ. of S. Alabama v. American Tobacco Co.*, 168 F.3d 405 (11th Cir. 1999); *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487 (10th Cir. 1998); *Watson v.*

Univ. of Utah Med. Ctr., 75 F.3d 569 (10th Cir. 1996); *Laxey v. Lousiana Bd. of Trustees*, 22 F.3d 621 (5th Cir. 1994); *Hutsell v. Sayre*, 5 F.3d 996 (6th Cir. 1993), *cert. denied*, 510 U.S. 1119 (1994); *Kashani v. Purdue Univ.*, 813 F.2d 843 (7th Cir. 1987); *cert. denied,* 484 U.S. 846 (1987); *Harden v. Adams*, 760 F.2d 1158 (11th Cir.), *cert. denied,* 474 U.S. 1007 (1985); *Hall v. Medical College of* Ohio, 742 F.2d 299 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985); *Gay Student Svcs. v. Texas A&M Univ.*, 737 F.2d 1317 (5th Cir. 1984); *cert. denied,* 471 U.S. 1001 (1985); *Spaulding v. Univ. of Wash.*, 740 F.2d 686 (9th Cir.), *cert. denied,* 469 U.S. 1036 (1984); *Jagnandan v. Giles*, 538 F.2d 1166 (5th Cir. 1976) *cert. denied,* 432 U.S. 910 (1977); *Long v. Richardson*, 525 F.2d 74 (6th Cir. 1975); *Brennan v. Univ. of Kansas*, 451 F.2d 1287 (10th Cir. 1971).

Clemson argues that examination of the four *Ram Ditta* factors lead to the conclusion that Clemson University is an alter ego or arm of the State of South Carolina. Clemson points to the fact admitted by the Plaintiff that monetary funds of Clemson University are held by the State Treasurer. S.C. Code Ann. § 59-107-30. The State Treasurer controls the disbursement of such funds for the benefit of Clemson. Any change in tuition is subject to the direction and control of the State Legislature and the State Budget and Control Board. S.C. Code Ann. § 59-107-20. The state holds title to all real and personal property devised by the will of Thomas Clemson (S.C. Code Ann. § 59-119-10) and the State Treasurer invests the funds from the bequest as directed by the Governor, the Comptroller General and the Treasurer. S.C. Code Ann. § 59-119-100. Clemson University's ability to purchase or sell real property (other than the real property subject to the original bequest) is limited by state statute. S.C. Code Ann. § 59-119-70. Funds in Clemson University's endowment are held by the State Treasurer. S.C. Code Ann. § 59-153-20. Clemson argues that, therefore, any money judgment in this case will come from the State of South Carolina.

Clemson argues that the second *Ram Ditta* factor, that directs inquiry concerning whether the State exercises extensive control over the University, mandates a decision that Clemson is an arm of the State of South Carolina. Clemson argues that South Carolina's degree of control over Clemson University of extensive. For example, Clemson argues that the University's budget must be submitted each year to the South Carolina Commission on Higher Education. S.C. Code Ann. § 59-103-35. This budget must include all state funds, federal grants, tuition and fees. Id. The Commission then forwards the budget request to the Governor and the appropriate standing committees of the General Assembly for consideration of the general appropriations bill for the year. Id. The Commission on Higher Education makes recommendations to the Governor and the General Assembly concerning the policies, programs, curricula, facilities, administration and financing of Clemson and the other state-supported institutions of higher learning. S.C. Code Ann. § 59-103-60. Clemson must provide the Comptroller General of South Carolina details about their financial management and accounting system in a format required by the Controller General. S.C. Code Ann. § 59-101-185. The Commission requires Clemson and the other post-secondary education institutions to provide detailed reports each year for submission to the Governor and the General Assembly. S.C. Code Ann. § 59-101-350. The Commission of Higher Education has the authority to reduce, expand or consolidate any institution which does not meet specific standards of achievement. S.C. Code Ann. § 59-103-45. Clemson University must report each year to the General Assembly regarding financial condition, including all revenue and disbursements of money appropriated by the state. S.C. Code Ann. § 59-103-35. The Commission reviews and approves the mission statement of all state supported post-secondary educational institutions. S.C. Code Ann. § 59-103-45(6) and must review the admissions policies of each institution, including minimum

admission standards and the mix of in-state and out-of-state students. S.C. Code Ann. § 59-104-10. Clemson must also establish procedures and programs to measure student achievement and submit it to the Commission for review. S.C. Code Ann. § 59-104-660. The State also defines who is entitled to pay in-state tuition and who must pay out-of-state tuition. S. C. Code § 59-112-20. The Commission on Higher Education is charged with prescribing regulations for the enforcement of the rules. S. C. Code § 59-112-100. The State dictates free tuition for children of veterans, S. C. Code § 59-110-20 and children of firemen, law enforcement officers, and government employees disabled or killed in the line of duty, S. C. Code § 59-111-110. Thus, Clemson argues that the above stated facts under the second *Ram Ditta* factor support the Defendants' contention that Clemson University is an alter ego or arm of the State of South Carolina.

Clemson argues that the third *Ram Ditta* factor which requires the court to determine whether the University is involved in statewide versus local concerns supports a decision in its favor. Clemson argues that the activity of educating the youth of South Carolina is a statewide concern. The Board of Trustees is selected from across the state, and the University has offices in almost every county. S. C. Code § 46-7-10 et. seq.

Clemson argues that the fourth *Ram Ditta* factor which requires the court to discern how state law treats or addresses the entity mandates a decision in its favor. It is argued that Clemson is identified as one of ten designated state colleges or universities. S. C. Code §§ 59-101-10 and 59-107-10. Six of the thirteen Trustees are elected by the General Assembly. S. C. Code § 59-119-40. State law requires that each state college or university fly the state flag from a staff on one of its buildings. S. C. Code § 59-101-110. While authorizing the state colleges and universities to procure liability insurance "for the benefit and protection of employees who may be liable to third persons

who are injured or killed," all such actions must be brought directly against the individual insured by such policies and neither the State nor the particular institution shall be a party and nothing is to "be construed as a waiver of the State's general immunity from liability and suit." S. C. Code § 59-101-170. The state has long recognized that Clemson, as a state agency, is shielded from tort liability by provisions of the South Carolina Tort Claims Act. *See Hendricks v. Clemson Univ.*, 529 S.E.2d 293 (S.C. App. 2000). *rev'd on other grounds*, 578 S.E.2d 711 (S.C. 2003). Clemson University is also subject to the S.C. State Procurement Code. S. C. Code §§ 11-35-10 and 11-51-190. The State Department of Human Resources has general oversight over all human resource issues at Clemson. S. C. Code § 8-11-210, *et seq*. In particular, the State Department of Human Resources sets the salaries for all agency heads, including the President of Clemson University. S. C. Code § 8-11-160. All of Clemson employees are on the state's personnel database for purposes of compensation and benefits. S. C. Code § 8-11-230. Clemson employees have access to the grievance procedures mandated for all state employees. S. C. Code § 8-17-310 *et seq*. Clemson points to the fact that the Plaintiff filed a grievance related to his termination under this policy and pursued it all the way to the State Grievance Committee in Columbia. As state employees, Clemson employees enjoy the benefits of the state retirement plan, the state grievance procedure, the state classification system for compensation purposes and the state benefit plans. Clemson argues that these factors reflect the clear intention that South Carolina considers Clemson University an alter ego or arm of the State of South Carolina.

IV

The Plaintiff has asserted several challenges to the Defendants' contention that Clemson University is entitled to sovereign immunity and dismissal of this action against the University. All of the Plaintiff's challenges have been considered by the court, and they are each reviewed herein.

A

The Plaintiff contends that the failure to name Clemson University as a party in his initial complaint and in his First Amended Complaint was "a mistake concerning the proper party's identity." This contention must be rejected. In his original complaint, the Plaintiff stated that "Clemson University is not a named Defendant because the named Defendants were neither acting in the best interest nor on its behalf when they engaged in the acts or omissions alleged herein." Complaint, ¶ 19. In a hearing before the court on March 19, 2008, after removal, Plaintiff's counsel stated, "I want to be sure that Your Honor knows we have not sued Clemson University." Transcript, p. 125. In his Amended Complaint filed after the case was removed to federal court, the Plaintiff stated:

> Clemson University is not named as a Defendant. The named Defendants breached their fiduciary duties to Clemson University and to the State of South Carolina. At all times alleged herein the named Defendants were neither acting in the best interest nor on behalf of Clemson University and the State of South Carolina.

Amended Complaint, ¶ 20. Therefore, Clemson University was not a party to this litigation when it was removed to this court and it had no capacity to waive its Eleventh Amendment immunity.[2]

[2]In his Second Amended Complaint filed June 27, 2008, four months after the case had been removed to federal court, the Plaintiff added Clemson University as a Defendant and altered his factual allegations to assert, for the first time, that "the Board acted on behalf of Clemson University as the final policymaking authority to terminate Troutman." Second Amended Complaint, ¶ 20.

B

The Plaintiff contends that Clemson University is a municipality pursuant to S. C. Code § 59-119-310 and, therefore, it cannot be an alter ego of the State of South Carolina. This contention has been rejected by the United States Court of Appeals for the Fourth Circuit. See *Md. Stadium Auth. v. Ellerbe Becket, Inc.*, 407 F.3d 255 (4th Cir. 2005).

> public entities and political subdivisions such as municipalities are also not "citizens of a state" if they are an "arm or alter ego of the state."

Id. at 260. However, the political subdivision is characterized, whether as a board, a special purpose district, a county or a municipality, the question must be asked, "is it an arm or alter ego of the state?" Only by application of the four factor analysis set forth in *Ram Ditta* at 457-458 can the court make the necessary alter ego determination.

C

The Plaintiff cites and places reliance on *Hopkins v. Clemson Agric. College*, 221 U.S. 636 (1911) in which the court held that Clemson College was not such an agent of the state as to be immune to suit under the Eleventh Amendment, and acknowledged the "act of 1894 confer(s) municipal powers on Clemson." *Hopkins*, however, did not rest upon an analysis of Eleventh Amendment immunity. Indeed, the Eleventh Amendment could not have directed the result because Hopkins was commenced and tried in the Court of Common Pleas for Oconee County, South Carolina. The Eleventh Amendment bars monetary judgment against the state in a federal court.

Hopkins only entered the federal court system when the United States Supreme Court agreed to hear the appeal from the South Carolina Supreme Court. The Eleventh Amendment does not apply when the United States Supreme Court reviews cases decided by the supreme courts of the several states. *McKesson Corp. v. Div. of Alcoholic Beverages*, 496 U.S. 18, 27 (1990); *General Oil*

Co. v. Crain, 209 U.S. 211, 233 (1908), Harlan, Jr. concurring. A writ of error to review the final judgment of a state court, even when a state is a formal party (defendant) and is successful in the inferior court, is not a suit within the meaning of the Eleventh Amendment. *Cohens v. State of Virginia*, 6 Wheat 264, 412 5 L.Ed2d 257 (1821). The jurisdictional and substantive basis of the Supreme Court's decision in *Hopkins* was the Fourteenth Amendment's taking doctrine.

V

CONCLUSION

Upon consideration of all the arguments submitted by the parties, this court concludes that the Plaintiff's claims against Clemson University pursuant to 42 U.S.C. § 1983 should be and are hereby dismissed pursuant to the doctrine of Eleventh Amendment sovereign immunity.

s/Matthew J. Perry, Jr.
Senior United States District Judge

July 22, 2010

Columbia, South Carolina