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SC Court of Appeals

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STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Kershaw County
Court of Common Pleas

The Hon. R. Lawton McIntosh

Civil Action No. 2020-CP-28-0926
Appellate Case No. 2021-001430

Joanne Schwartz.....Appellant

v.

The Camden Hunt, Ltd., Susan Sensor, and Amy Cantey.....Respondents

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FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Plaintiff-Appellant, Joanne Schwartz ("Schwartz"), commenced this action on October 16, 2020, by filing a summons and complaint against Defendants/Respondents, The Camden Hunt, Ltd., ("the Hunt"), Susan Sensor ("Sensor"), and Amy Cantey ("Cantey") (R. p. 30-33) [Complaint]. Although she brought her suit pursuant to S.C. Code Ann. § 33-31-1430 (Grounds for Judicial Dissolution), she did not seek judicial dissolution but instead sought an order relieving directors Sensor and Cantey from any responsibility for the Hunt's hounds, kennels, and stables, relieving Sensor and Cantey from any financial responsibility as directors or purported directors of the Hunt, taxing and assessing allegedly improper expenditures to Sensor and Cantey and not the Hunt, and otherwise crafting the best way to protect the interest of the subscribers of the Hunt as a mutual benefit corporation. (R. pp. 30-33) [Complaint, ¶ 11].

Schwartz did not allege that subscribers had any ownership, managerial or operational rights in the Hunt (See Complaint generally, R. pp. 30-33), and she did not allege that only four

(4) days before she brought her suit, the Court of Common Pleas for the Fifth Judicial Circuit, R. Lawton McIntosh presiding, had granted the Hunt's Motion for Partial Summary Judgment (R. pp. 319-330), declaring that the Board of Directors of the Hunt was comprised of Sensor, Cantey, and Schwartz (to the exclusion of others suggested by Schwartz). (R. pp. 319-329) [Order Granting MPSJ, ¶ 2 p. 11]. And she did not allege that the day after the order was entered, the other members of the Board of Directors (Sensor and Cantey) announced a meeting for the following Tuesday, where the stated purpose of the meeting was to remove her as a director. (R. pp. 30-33) [Complaint generally].

The Hunt, Schwartz, and Cantey responded by moving to have the case dismissed for a number of reasons, including that S.C. Code § 33-31-1430 only authorizes a court to remove directors as part of a suit to dissolve a corporation, and Schwartz did not ask the court to dissolve the Hunt. (R. pp. 34-36 and R. pp. 49-51) [Hunt's Motion to Dismiss and Sensor & Cantey's Motion to Dismiss, ¶ 2]. The matter was referred to the Business Court, R. Lawton McIntosh presiding. (R. p. 1) [Case Assignment 11.3.20]

On May 19, 2021, the court held a hearing on the motions. By a Form 4 order entered June 2, 2021, the court denied the Hunt's motion to dismiss the claims against it, and no formal order was entered. (R. pp. 3-5) [Order Denying Claims Against the Hunt]. On June 7, 2021, a Form 4 order was entered dismissing Schwartz's claims against Sensor and Cantey on the grounds that Schwartz was no longer a director and therefore had no standing to bring this suit. (R. pp. 6-8) [Order Dismissing Sensor & Cantey].

On June 11, 2021, the Hunt filed a motion to reconsider the June 7, 2021 Form 4 order denying the Hunt's motion to dismiss the claims against it, stating that the basis for the dismissal of Schwartz's claims against Sensor and Cantey applied equally as well to her claims against the

Hunt. (R. pp. 89-90) [last ¶ of Motion 59e re Denial of MTD]. A formal order was entered as to the dismissal of Schwartz's claims against Sensor and Cantey on August 17, 2021. (R. p. 9). [Order Dismissing Sensor & Cantey]. On August 20, 2021, Schwartz filed a motion to reconsider the dismissal of the claims she had brought against Sensor and Cantey. (R. pp. 142-144) [Schwartz 59(e) Motion]. In neither motion did she request leave to amend to seek dissolution. The court heard arguments on both motions to reconsider on September 14, 2021, and entered a Form 4 order later that day denying Schwartz's motion to reconsider and dismissing the claims against the Hunt. (R. pp. 16-18) [Order Denying Schwartz 59(e) and Dismissing Claims Against the Hunt]. On November 8, 2021, the court entered a formal order denying Schwartz's motion to reconsider the dismissal of her claims against Sensor and Cantey and granting the Hunt's motion to dismiss the case with prejudice. (R. pp. 19-29) [Order Dismissing with Prejudice]. Schwartz filed and served her notice of appeal on December 7, 2021 [Notice of Appeal].

STANDARD OF REVIEW

Respondents agree with Appellant that the appellate court's standard of review for questions of law is *de novo*. *Delaney v. First Fin. of Charleston, Inc.*, 426 S.C. 607, 611, 829 S.E.2d 249, 250-51 (2019).

FACTS

This is the second of two lawsuits related to the Camden Hunt Ltd., a non-profit, mutual-benefit corporation engaged in foxhunting in Kershaw County. The controversy began to become acute in the fall of 2019, when Joanne Schwartz (Plaintiff/Appellant in this suit and a defendant in the first lawsuit) and others claimed to be directors of Respondent the Camden Hunt, Ltd. along with Defendant/Respondent Susan Sensor. (R. pp. 200-213) [Complaint in First Lawsuit, ¶ 19]. Schwartz and the others denied that Defendant/Respondent Amy Cantey was a director. (R. p. 204)

[*Id*. at ¶ 21]. At some point in February 2020, Schwartz and her confederates presumed to have taken control of the Hunt (R. pp. 200-213) [*Id*. at ¶ 25], and, using the Hunt's letterhead, sent a letter to subscribers of the Hunt claiming that they (with Sensor) constituted the board of directors of the Hunt and had adopted a new set of by-laws that changed the fundamental ownership and governance of the Hunt. (R. pp. 200-213) [*Id*. at ¶ 26]. They also announced a meeting of subscribers. (*Id.*) Subscribers are allowed to foxhunt with the Hunt but have no ownership interest in the Hunt and no role in the Hunt's governance. (R. pp. 267-290) [Articles of Incorporation and Bylaws].

The Hunt responded by commencing the First Lawsuit and seeking an injunction. The Hon. Alison Renee Lee entered a temporary injunction, concluding the Hunt had shown a likelihood of success on the merits (finding that "Defendants' interpretation of the documents and their subsequent actions appear to conflict with the language of the original Articles of Incorporation." (R. pp. 214-220) [Temporary Injunction p. 3].

Schwartz and her confederates answered the First Complaint and asserted "joined claims" against Sensor and Cantey, basically seeking (a) a declaratory judgment to the effect that they controlled the Hunt, (R. pp. 221-235) [Answer, Counterclaims and Joined Claims in First Lawsuit, ¶¶ 58-89], (b) a ruling that only they had the right to bring this lawsuit [*Id.* at ¶¶ 91-106], and an order relieving Sensor and Cantey of responsibility for the Hunt's assets because Sensor had discharged a firearm on school property during a hunt and that Sensor and Cantey had failed to act on allegations of hound mistreatment, had failed to properly maintain landowner and subscriber relationships, and misapplied or wasted Hunt assets. [*Id.* at ¶¶ 108–112]. They sought an order relieving Sensor and Cantey from responsibility for the hounds, relieving Sensor and Cantey from financial responsibility for the Hunt, taxing Sensor and Cantey for allegedly improper

expenditures, and otherwise crafting the best way to protect the interests of subscribers of the Hunt as a mutual benefit corporation. [*Id.* at ¶ 112].

Judge McIntosh dismissed those joined claims without prejudice, ruling that Schwartz and the others had "failed to state an adequate theory of recovery against Ms. Sensor and Ms. Cantey." (R. pp. 309-315). [Order dated 9/16/2020, p. 3].

Meanwhile, Schwartz and her confederates filed a motion to hold the Hunt in contempt of court for trying to raise money to pay its operating expenses, for renewing its contract with its primary employee, and for hiring other employees. (R. pp. 242-244) [Motion for Order of Contempt] and (R. pp. 258-259) [Affidavit of Lea Edwards, ¶¶ 3-6 (attached to Motion)]. Judge McIntosh denied the motion, finding that the Hunt needed to "conduct its daily business affairs consistent with the status quo as it existed before [Schwartz and others] began their questioned activities in December 2019." (R. pp. 304-308) [Order on Motion for Contempt, p. 2].

Judge McIntosh granted the Hunt's motion for partial summary judgment on October 12, 2020, finding that the true board of directors was comprised of Sensor, Cantey, and Schwartz (R. pp. 319-330) [Order Granting Pl.'s Motion for Partial Summary Judgment] and that the actions of Schwartz and her friends were "devoid of legal authority." [*Id.* at p. 8]. And he found as a matter of law that Schwartz's letter to subscribers and actions purportedly taken on behalf of the Hunt were also devoid of any legal authority and violated the rights of the lawful board of directors. *Id*

At a hearing described below, Judge McIntosh said from the bench, "When I ruled that all three of those people were the members and they were the people in charge of the corporation, subject to me being reversed, I understand, and I need to clarify, that injunction is no longer there." (R. p. 171, lines 4-8) [Transcript from hearing held May 19, 2021, p. 69]. He would enter his written order to that effect on July 2, 2021, writing, "By entering that order [declaring that the

Masters of the Hunt were the directors of the corporation and were entitled to govern it], it was the intention of the court to render the temporary injunction moot so the directors could proceed to govern the Hunt as before the injunction was entered." (R. pp. 374-375). [Order in First Lawsuit entered July 2, 2021].

The day after Judge McIntosh entered his order declaring Sensor, Cantey, and Schwartz the true directors of the Hunt, the Hunt sent Schwartz notice of a special meeting to be held ten days hence. The notice stated that the purpose of the meeting was to remove Schwartz as a Master of the Hunt. (R. p. 152, line 21 – p. 153, line 4) [Transcript from May 19, 2021, pp. 8-9].

> MR. CLEVELAND: That was in, I am going to say, October the 10th or October the 12th, sometime in there. And so the majority directors then sent a notice to Ms. Schwartz, which you had to do for a notice to appear, in ten days there was going to be a meeting of the directors for the purpose of naming new -- two new directors/Masters of the Hunt, and eliminating her position, eliminating her from the board because of this obvious conflict that we had -- they had.
>
> So, on October 16, before the 10 days had run, the defendants then filed a new lawsuit with this Court seeking to have Cantey and Sensor removed from the Board of Directors.

(R. p. 152, line 21 – p. 153, line 8). [Transcript from May 19, 2021, pp. 8-9].

With the meeting pending, on Friday, October 16, 2020, Schwartz brought the instant lawsuit, seeking relief only for the benefit of the Hunt.

Respondents filed a motion to dismiss, and at the hearing the following exchange occurred:

> THE COURT: Well, let me ask you this: Schwartz is off the board?
>
> MS. BLACK: She -- well, she -- there has been a vote taken to remove her. We do not believe that vote was taken in a proper context and in compliance with Your Honor's September ruling that the injunction was to continue.
>
> THE COURT: I looked at the bylaws and it says it is just two-thirds of the standing members agree. I don't see the problem. Why would it be a problem?

MS. BLACK: Well, our concern is that -- you recall that Judge Lee issued that injunction back in March of 2020 and it said that you can't take any corporate action, and that would include electing directors.

THE COURT: Let me say this right now.

MS. BLACK: Yes, sir.

THE COURT: When I change -- when I ruled that all three of those people were the members and they were the people in charge of the corporation, subject to me being reversed, I understand, and I need to clarify, that injunction is no longer there.

MS. BLACK: And that is fine, Your Honor. I don't disagree that is the appropriate course. We had had a conversation that, Hey we need to get that fixed and it just -- the Hunt didn't get that fixed.

THE COURT: Probably need to put that in an order somewhere.

MR. WOOD: I'll do that, Your Honor.

THE COURT: Okay. And here is the thing.

MS. BLACK: Yes, sir.

THE COURT: If there's a proper vote to get rid of Ms. Schwartz, then she doesn't have standing to bring this suit.

(R. p. 170, line 12 – p. 171, line 20) (Transcript, May 19, 2021, pp. 68-69]

As noted on page 2 above, Judge McIntosh ultimately dismissed this lawsuit for lack of standing and because Appellant brought this suit under the dissolution statute without seeking dissolution.

ARGUMENT

1. The trial court's order on the Hunt's Rule 59(e) motion properly addressed the standing issue raised *sua sponte* by the trial court.

Appellant argues that it was improper for the trial court to consider the issue of standing in the Hunt's Rule 59(e) motion to reconsider because the Hunt had not previously raised that issue. (R. pp. 119-135) [Memo].

The issue of standing was initiated by the Court *sua sponte* at the May 19, 2021 hearing, (R. p. 171, lines 18-20) [Transcript, May 19, 2021, p. 69], and as Appellant herself pointed out, the Court may raise standing *sua sponte*. (R. pp. 119-135) [See ¶ A, p. 3 of Memo].

However, in its June 2, 2021 Form 4 order denying the Hunt's motion to dismiss, the trial court did not address its own issue of standing. (R. pp. 3-5) [See generally the order]. The Hunt thereafter filed a Rule 59(e) motion bringing to the court's attention the issue of standing. (R. pp. 89-90) [The Hunt's 59(e) motion].

The purpose of a Rule 59(e) motion to reconsider is to ensure that an issue that was either brought up and not ruled upon, fully considered, or misunderstood is preserved for appellate review. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). "A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Id.* "The losing party must first try to convince the lower court it [] has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court has erred." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). This requirement to first convince the lower court it has ruled wrongly "arguably includes a duty to file a Rule 59(e) motion if necessary when the circuit court digresses from what the parties have argued and rules *sua sponte* on another issue." *Hughes v. Bank of Am. Nat'l Ass'n*, No. 2021-UP-354, 2021 S.C. App. Unpub. LEXIS 422 at *9 (Ct. App. Oct. 13, 2021) (citing *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004)).

Since the court raised the issue of standing at the May 19, 2021 hearing, and since it based its dismissal of Respondents Sensor and Cantey on that basis, Respondent the Hunt met the requirement that a Rule 59(e) motion not raise a new issue to the court.

We emphasize that neither Appellant nor the court was prejudiced because of the Hunt's failure to address the issue of standing in the first place. The court addressed it at the May 19 hearing as the parties discussed Sensor and Cantey's motion to dismiss. Appellant herself recognized that the arguments for both the directors and the Hunt were the same. (R. p. 199, lines 6-8) Transcript of Sept. 14, 2021, p. 31]. In short, this was a proper use of a Rule 59(e) motion. What a waste of judicial resources if the rule were as Appellant suggests!

Incidentally, at the urging of the undersigned, Judge McIntosh cited *Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, & Reg.,* 337 S.C. 476, 486-87, 523 S.E.2d 795, 800-01 (Ct. App. 1999), as authority that standing is a matter of subject-matter jurisdiction. (R. pp. 19-29) [Order at pg. 3]. We have since found *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013), where the Supreme Court held that when standing is not raised below, it will not be considered on appeal (thereby suggesting that standing and justiciability are not issues of subject-matter jurisdiction under South Carolina jurisprudence). Since the issue of standing was in fact considered below, and since both sides were given a chance to brief the issue, whether standing is a matter of subject-matter jurisdiction is immaterial to this case.

2. The Court properly treated Schwartz's lawsuit as a Director's Derivative Suit.

Appellant argues that a director's derivative action does not exist and that her claim should not be analyzed as such.

A derivative action is a suit that is brought for the benefit of the corporation and not for the benefit of the plaintiff. "An action seeking to remedy a loss to the corporation is generally a derivative one." *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001). In

particular, "[a]n action regarding the fiduciary obligation of a director is ordinarily enforceable through a derivative action." *Patterson v. Witter*, 425 S.C. 213, 231, 821 S.E.2d 677, 687 (2018).

One need only read the complaint to see that the relief Schwartz is seeking is ostensibly for the benefit of the Hunt and not for herself. She does not seek damages at all and instead only seeks removal of "Sensor and Cantey from any duties and responsibilities as directors or purported directors"; an order "relieving Sensor and Cantey from any responsibilities for the hounds, kennels, and stables"; an order "relieving Sensor and Cantey from any financial responsibilities" for the Hunt; an order requiring the "taxing and assessing improper expenditures to Sensor and Cantey"; and "otherwise crafting the best way to protect the interest of the subscribers" of the Hunt. (R. pp. 30-33) [Complaint ¶ 11].

Claims like that are the essence of a derivative claim. A fiduciary obligation of a director is enforced through a derivative action. *See Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 308, 728 S.E.2d 61, 65 (Ct. App. 2012). "The liability of directors for loss to a corporation due to their mismanagement is an asset of the corporation and any recovery on such a cause of action belongs solely to the corporation. The stockholder in an action of this kind is only a nominal plaintiff, the corporation being the real party in interest." *Johnson v. Baldwin*, 221 S.C. 141, 149, 69 S.E.2d 585, 588 (1952).

We would note that the Hunt has no shareholders and has no members. (R. pp. 267-290) [Articles of Incorporation & Bylaws] and Appellant's Brief, p. 12. It only has directors (called "Masters of the Hunt" here). *Id.* So a **director's** derivative suit is really the only mechanism to challenge actions of the directors.

Appellant has not shown that her claim was not an inherently derivative one.

If the court were to find no director's derivative suit, the alternative option is to accept Appellant's position that "there is simply no category of persons eligible to bring and maintain a derivative suit against [The Camden Hunt]." [Appellant's Brief at pg. 1]. Accepting the concept that "[a]n action seeking to remedy a loss to the corporation is generally a derivative one" under *Brown v. Stewart*, and accepting that here the only relief Appellant seeks is to remedy a loss to the corporation, then this court could affirm under Rule 220(c), SCACR on the basis that South Carolina simply does not provide a forum for a director of a private, non-profit, non-member club who feels the majority membership of the board has done the club wrong. There is nothing wrong with that so long as the minority director is only looking to remedy a loss to the club. And in this case, with Appellant no longer a director and never having been a member or stockholder (since the Hunt has neither), there is no one who can claim to be affected by actions of the board and no one the board is beholden to. It is the board's club, and they can do as they want. If a starter pistol is fired on school grounds during a hunt, if a hound is reported to have been mistreated, if an adjoining landowner is made unhappy, if a subscriber is insulted, or if dues are mis-spent, then people harmed by those actions can go to law enforcement, seek a civil remedy for harm to themselves, or can join a different club. And, as discussed in Section 4 below, if Appellant felt strongly enough about it, she could have tried to talk the Attorney General into bringing a suit to remove directors from the board of the Hunt.

3. The trial court properly ruled that Schwartz lost her statutory standing to continue her action when she was removed as a director of the Hunt.

Appellant argues the court erred in finding that she lost standing to sue when she was voted off the board, citing cases from other jurisdictions where courts determined that continuous directorship was not necessary to ensure standing to sue. This argument lacks merit as (1) the cases

to which Appellant cites are not analogous to the matter at hand and (2) they do not comport with established South Carolina case law.

When bringing a derivative suit for the benefit of a corporation, the person bringing the suit must maintain standing throughout the litigation. For stockholders, this means that they must maintain their status as a stockholder by not selling their stock. *Johnson v. Baldwin*, 221 S.C. 141, 149, 69 S.E.2d 585, 589 (1952). For the same reasons, a director must also maintain her status as a director to maintain her standing to sue. *Id*. at 150, 69 S.E.2d at 589.

In *Johnson*, one of the preliminary issues was whether the plaintiff lost standing to sue when she lost her status as a stockholder. *Id*. at 148-49, 69 S.E.2d at 588. In making this determination, the court extensively cited a New York case discussing a director's derivative suit. *Id.* at 150, 69 S.E.2d at 589. In that case, the director lost his status as a director and the court determined that he no longer had standing to sue. *Id*. (citing *Kehaya v. Axton*, 32 F. Supp. 266, 269 (S.D.N.Y. 1940)). While the court understood that a director could be ousted from the directorship and lose his standing to sue, it also determined that the cause of action could still be pursued, just with a different plaintiff. *Id*. at 150-51, 69 S.E.2d at 589 (citing *Kehaya* at 268-69 (S.D.N.Y. 1940)). If the cause of action warranted pursuit, another plaintiff with standing could step up to enforce the action. *Id*. Pointedly, the court concluded that if a director is ousted,

> he no longer represents the corporation, and the only role which he can thereafter assume is that of a kind of self-appointed *dominus litis*, without interest, present or potential, in his subject matter, which is an anomalous situation involving gratuitous inquisition into the business of another, and fraught…with the dangerous possibilities always inherent in irresponsibility.

Id. at 150, 69 S.E.2d at 589 (citing *Kehaya* at 268). Agreeing with the court in *Kehaya*, the South Carolina Supreme Court determined that a plaintiff "cannot prosecute an action as a member of a class to which she does not belong." *Johnson* at 151, 69 S.E.2d at 589.

The Hunt had three directors and no stockholders or members when Schwartz filed this lawsuit. Once Schwartz was ousted, what possible reason could she have for maintaining her suit?

It certainly wasn't for her personal benefit (since she was gone);

It was not for the benefit of subscribers (because their only rights in the Hunt were to foxhunt and socialize); and

It was not to have her financial interest in the Hunt returned to her (because she did not ask for that, nor could she).

We can only conclude that without a "dog in this hunt," her only reasons for wishing to continue to pursue her case were malevolent.

Was she trying to pressure herself back on the board?

Was she trying to starve the Hunt of its financial resources (lawsuits not being cheap) out of retribution or to help a competing hunt?

Was she so smitten by the Hunt's hounds that she could not bear to lose the right to visit them?

Was she bent on making a "gratuitous inquisition into the business of another"?

If so, and in any event, her continued pursuit of this lawsuit for the sole benefit of a corporation she no longer had an interest in was "fraught…with the dangerous possibilities always inherent in irresponsibility."

In terms of the law, Appellant first cites an Arizona case, *Workman v. Verde Wellness Ctr., Inc.*, 240 Ariz. 597, 382 P.3d 812 (Ct. App. 2016), because she suggests that the Arizona Model Nonprofit Corporation Act is substantially similar to the South Carolina Act upon which she bases her claim. In the Arizona case, a director filed a suit on behalf of the company claiming that the directors had acted in an "illegal, oppressive, or fraudulent" manner and had wasted corporate

assets. *Id*. at 600, 382 P.3d at 815. Hours after filing the suit, the directors convened a meeting in which they voted to remove Workman as director. *Id*. When it was pointed out by Workman that the meeting in which she was purportedly voted out was not properly instituted, the directors met once again to remove Workman as a director while the litigation was ongoing. *Id*. The Arizona court concluded that Workman was removed as a result of her initiation of the claims she brought against the company. In so concluding, the court determined that she did not lack standing to sue solely on the basis that she was removed as director solely in a retaliatory manner. *Id.* at 605, 382 P.3d at 820.

Appellant also cites *Tenney v. Rosenthal*, 6 N.Y.2d 204 (1959), and *Summers v. Colette*, 34 Cal. App. 5th 361, 246 Cal. Rptr. 3d 116 (2019), both of which are factually similar to the Arizona *Workman* case above. Appellant cites the California case, *Summers v. Colette*, extensively and argues that because that case focused on the language of the statute under which the causes of action were brought, it should apply here. 34 Cal. App. 5th 361, 246 Cal. Rptr. 3d 116 (2019). In *Summers*, the California court concluded that its statute governing nonprofit corporations did not contain language that required a director to maintain directorship through the duration of the suit. *Id*. at 370, 246 Cal. Rptr. 3d at 123-24. But why cite California law when South Carolina law (*Johnson*) is just fine?

And *Johnson* is not the last time the South Carolina Supreme Court has spoken on the issue. *See Wilson v. Gandis*, 430 S.C. 282, 844 S.E.2d 631 (2020); *Hite v. Thomas & Howard Co*., 305 S.C. 358, 361, 409 S.E.2d 340, 342 (1991), overruled on other grounds by *Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995). *See also Kreischer v. Kerrison Dry Goods Co.,* No. 97-1230, No. 97-1800, 1999 U.S. App. LEXIS 1097 (4th Cir. Jan. 26, 1999) (unpublished table decision).

Ms. Schwartz has not shown that the case at hand can be distinguished from these South Carolina cases.

In *Wilson v. Gandis*, the South Carolina Supreme Court found that two members of a corporation bringing counterclaims against another member for breach of fiduciary duty had no standing to sue in their individual capacities. 430 S.C. 282, 311, 844 S.E.2d 631, 647 (2020). The court concluded that the corporation "would have sustained any financial loss caused by Wilson's purported actions." *Id*. Therefore, "[a]ny loss suffered by [counterclaimants] would be derivative of the loss suffered" by the corporation and would not have been "separate and distinct from losses suffered" by the corporation. *Id*.

In contrast, the South Carolina Supreme Court concluded in *Hite v. Thomas & Howard Co.* that a shareholder could bring an action for breach of fiduciary duty and negligent mismanagement where the injury alleged was to the individual shareholder and not to the company itself. 305 S.C. 358, 361, 409 S.E.2d 340, 342 (1991) (overruled on other grounds by *Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995)). "A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation." *Id*. (citing *Ward v. Griffin*, 295 S.C. 219, 367 S.E.2d 703 (Ct. App. 1988)). Hite was not alleging "general diminution in the value of the corporate stock." *Id*. Instead Hite's alleged injury was the diminution in value on his individual stock, which he alleged was impacted by the actions of the corporation. *Id*. Therefore, the court determined the individual cause of action could be maintained. *Id*.

Kreischer v. Kerrison Dry Goods Co. also stands for the conclusion that "suits to recover assets or vindicate other rights of the corporation must be brought as derivative actions, not direct actions." No. 97-1230, No. 97-1800, 1999 U.S. App. LEXIS 1097 at *23 (4th Cir. Jan. 26, 1999) (unpublished table decision). Further, that court concluded that South Carolina has not adopted the

rule held by other states that a derivative action is not necessary "where there is a close corporation." *Id*. If a shareholder wishes to bring a direct suit, then the shareholder must particularize injury to themselves. *Id*.

Additionally, the courts in the cases Appellant cites – *Workman*, *Tenney*, and *Summers* – all concluded that the plaintiff director was removed as a director in retaliation for the filing of an action against the other directors. In so concluding, those courts looked at the timeline of events – the filing of the action, a subsequent meeting and vote to remove the plaintiff's designation as director – and other external factors to conclude that the director was removed in retaliation for bringing the lawsuit. That is not what we have here.

As discussed above, Schwartz filed this lawsuit on October 16, 2020, three days after she had been put on notice of a meeting scheduled for the following Tuesday. She was not voted off the board for bringing this lawsuit. Instead, she was voted off the board for claiming to have taken over the Hunt and for trying to have the Hunt held in contempt of court for raising money to feed its hounds and to keep paid staff on board to take care of them.

4. The trial court properly dismissed Schwartz's lawsuit because the Non-Profit Corporations Act, S.C. Code Ann. § 33-31-1430 does not allow the court to remove a director where Respondent has not prayed for dissolution.

Appellant argues that S.C. Code Ann. § 33-31-1430 ("Grounds for judicial dissolution") allows the court to remove a director although she does not seek dissolution.

South Carolina Code Ann. § 33-31-810 is the section in the Non-Profit Corporation Act that allows directors to be removed from office. But Appellant does not qualify as one entitled to seek the removal of a director (standing or not).

Under § 33-31-810, a court may remove a director from a non-profit corporation if removal is sought by

a) The corporation (yet Ms. Schwartz's lawsuit was not commenced by the Camden Hunt); or

b) Its members holding at least five percent of the voting power of any class to elect directors (yet The Camden Hunt does not have members); or

c) The Attorney General (yet this proceeding was not commenced by the Attorney General).

Since Appellant is none of those and cannot meet the terms of the statute directly on point, she had to find some other statute. The best she could do was turn to S.C. Code§ 33-31-1430 ("Grounds for judicial dissolution") and its clause that allows the court to consider other "relief which it deems proper in the circumstances."

But Appellant did not ask the court to dissolve the Hunt, and the dissolution statute's catchall-phrase is too much of a stretch.

"It is well-established that this Court will not construe a statute by concentrating on an isolated phrase." *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 583, 597, 757 S.E.2d 408, 416 (2014) (citing *Laurens Cnty. Sch. Dists. 55 & 56 v. Cox*, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992)). "The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose. In applying the rule of strict construction the courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent." *Laurens Cnty. Sch. Dists. 55 & 56 v. Cox*, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992). "A statute as a whole must receive practical, reasonable, and fair

interpretation consonant with the purpose, design, and policy of lawmakers." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606-07 (2006). "Moreover, statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 583, 597, 757 S.E.2d 408, 416 (2014) (citing *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000)). "Because we must presume that the General Assembly is familiar with existing legislation, statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative." *Id*. (citing *Hodges v. Rainey*, 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000)).

Appellant cannot isolate specific portions of a statute and use them to her benefit. The statute as a whole must be put into context to determine its meaning as determined by the General Assembly. Reading the statute as a whole and in the context of the full South Carolina Nonprofit Corporation Act, it is obvious that the General Assembly contemplated the removal of directors via a judicial proceeding to be commenced by certain specified entities.

Because Appellant is not the corporation itself, a member holding at least five percent of the voting power of any class to elect directors, or the Attorney General, and because Appellant does not want the Hunt dissolved, Judge McIntosh was correct to dismiss this lawsuit[1].

CONCLUSION

Judge McIntosh handled the issue of standing properly, and he properly concluded that the statute Appellant sued under did not apply. His orders should be affirmed.

[1] Appellant argues the lower court should have allowed her to amend rather than suffer dismissal with prejudice. She did not raise that until this appeal.

All of which is respectfully submitted.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Kershaw County
Court of Common Pleas

The Hon. R. Lawton McIntosh

Civil Action No. 2020-CP-28-0926
Appellate Case No. 2021-001430

Joanne Schwartz.....Appellant

v.

The Camden Hunt, Ltd., Susan Sensor, and Amy Cantey.....Respondents

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

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