THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Business Court Judge
Case No. 2020-CP-28-00926
Appellate Case No. 2021-001430

Joanne Schwartz,

Appellant,

v.

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

Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant Joanne Schwartz ("Schwartz") became a director of the South Carolina nonprofit mutual benefit corporation The Camden Hunt, Ltd. ("TCH") upon its incorporation in 2012, and was serving as a director on October 16, 2020, when she commenced the subject lawsuit against Respondents TCH, Susan Sensor, and Amy Cantey. Schwartz's Complaint sets forth a single

cause of action pursuant to S.C. Code Ann. § 33-31-1430. (R. 30-33.) On October 20, 2020, a meeting of the board of directors of TCH was held, and among other business conducted at that meeting, a vote was held to remove Schwartz as a director of TCH. *See* (R. 21.) TCH filed a motion to dismiss the Complaint on November 19, 2020. (R. 34-48.) Sensor and Cantey filed a motion to dismiss on November 23, 2020. (R. 49-63.) Neither motion to dismiss raised the defense or allegation that Schwartz was no longer a director nor did either motion challenge Schwartz's standing to bring or continue the lawsuit under S.C. Code Ann. § 33-31-1430. (R. 34-63.)

The motions to dismiss were scheduled for hearing on May 19, 2021.[1] On May 14, 2021, Respondents filed a memorandum in support of their motions to dismiss that did not mention standing. (R. 64-88.) At the hearing on May 19, 2021, the Court raised *sua sponte* the question of whether Schwartz had standing and discussed the issue with Schwartz's counsel. (R. 171-173.) Counsel for Schwartz emailed copies of authority supporting Schwartz's argument that Schwartz retained standing on May 20, 2021. (R. 332-373.) Respondents did not provide any contrary authority or argument. (R. 187-188.) On June 2, 2021, the Court issued a Form 4 Order denying TCH's motion to dismiss. (R. 3-5.) On June 7, 2021, the Court issued a Form 4 order granting Sensor and Cantey's motion to dismiss on the grounds that "Plaintiff is no longer a director and therefore has no standing" and directed counsel for TCH to draft a formal order. (R. 6-8.)

TCH filed a motion to reconsider the June 2, 2021 Form 4 order on June 11, 2021. (R. 89-90.) The formal order requested in the June 7, 2021 Form 4 order was entered on August 17, 2021. (R. 9-15.) Schwartz filed a motion to reconsider the August 17, 2021 order on August 20, 2021.

[1] The May 19, 2021 hearing encompassed pending motions in two related cases: the instant case as well as Case No. 2020-CP-28-00187, *The Camden Hunt, Ltd. v. Joanne Schwartz, Lea Edwards, Ned Towell, Nancy Tans, and Dan Floyd* (the "First Lawsuit"). Both cases were assigned to the Honorable R. Lawton McIntosh as Business Court judge. (R. 1-2; 238-239.) Consequently, certain records from the First Lawsuit are pertinent to the instant case and the issues raised therein.

(R. 142-144.) The two motions to reconsider came before the Court for hearing on September 14, 2021. By Form 4 order entered later that day, the Court granted TCH's motion to reconsider and denied Schwartz's motion to reconsider. (R. 16-18.) The Form 4 order directed counsel for TCH to prepare a formal order, which formal order was entered November 8, 2021. (R. 19-29.) Schwartz filed a notice of appeal on December 7, 2021.

FACTS

A. Schwartz was an undisputed director of TCH on October 16, 2020.

The Camden Hunt has existed as a foxhunting sporting and social organization in Kershaw County since the 1920s. Prior to 2020, Schwartz had been a subscriber to the Camden Hunt for more than four decades and began serving as a Master of the Hunt prior to 2012. (R. 30; 201.) A Master of the Hunt is a term of art in foxhunting and means one who operates the sporting activities of the hunt, maintains the kennels, works with the huntsman, and has final say over all matters in the field. (R. 230.) For most of its existence, the Camden Hunt operated as an unincorporated entity. However, in 2012, it was incorporated as the Camden Hunt, Ltd. (TCH) pursuant to the South Carolina Nonprofit Corporations Act and as laid out in its Articles of Incorporation and Bylaws. (R. 267-273.) Schwartz was named an initial director of TCH in its Articles (R. 269), and it is undisputed that she remained a director until October 20, 2020.

B. The issues raised in Schwartz's claim under § 33-31-1430 are part of a long-simmering corporate, operational, and financial dispute within TCH.

No later than 2019, an internal dispute had broken out among various named initial directors, Masters of the Hunt, officers, and other subscribers of TCH regarding a wide variety of corporate, operational, and financial problems that, in the view of Schwartz and others, were threatening to the existence and continuity of TCH. *See generally* (R. 200-213; 221-235.) Various complaints had arisen regarding verified allegations of hound mistreatment and the lack of actions

taken by TCH Masters of the Hunt Sue Sensor and Amy Cantey regarding such allegations, certain financial self-dealing and the use of TCH property and resources for personal gain by Sensor, deterioration of critical landowner relationships on which TCH depends, and instances of impaired judgment in the conduct of TCH's business and operations, such as the discharge by Sensor of a firearm on school property. (R. 233-234.) In addition to these grave operational and financial concerns, a dispute arose regarding the proper corporate governance of TCH. (R. 202-206; 228-231.) At its core, Sensor and Cantey asserted that the designation as a director of TCH was synonymous with designation as a Master of the Hunt. (R. 206.) Others (including Schwartz) asserted that directors and Masters of the Hunt were distinct and differentiated roles, with designation as one not dispositive of designation of the other. (R. 228-231.)

C. Schwartz brought identical claims against Respondents on May 22, 2020, which were dismissed on procedural grounds only on September 16, 2020.

On March 5, 2020, TCH filed suit against Schwartz and four other individuals in the First Lawsuit, asserting various causes of action, with the primary claim one for declaratory judgment as to the composition of TCH's board of directors. (R. 200-213; 312) (defining "the single legal issue in this case" as the board of directors' composition). An order granting a temporary injunction was issued in the First Lawsuit on March 13, 2020, which, among other items listed, prohibited TCH from taking "any corporate actions," including the election of directors, during the pendency of the injunction. (R. 218.)

On May 22, 2020, Schwartz and the other defendants to the First Lawsuit filed a responsive pleading to TCH's Complaint that included claims against TCH, Sensor, and Cantey. (R. 221-235.) The May 22, 2020 responsive pleading generally denied TCH's allegations and further asserted that Schwartz, Sensor, Dan Floyd, and Nancy Tans constituted the proper board of directors of TCH. (R. 221-228; 230.) In addition, the defendants to the First Lawsuit brought a

declaratory judgment claim with regard to the composition of TCH's board of directors (¶¶ 57-89), and Schwartz, Floyd, and Tans brought a claim pursuant to S.C. Code Ann. § 33-31-1430 in their capacity as alleged directors of TCH (¶¶ 107-112). (R. 227-231; 233-235.) On June 22, 2020, TCH filed a motion to strike certain allegations in the responsive pleading (including the paragraphs cited above) on the grounds that they were brought "against persons not parties to this lawsuit" and that the defendants were "attempting to interject immaterial, impertinent and scandalous issues into the purely legal issue" TCH had raised. (R. 236-237.) Sensor and Cantey filed a motion to dismiss on July 7, 2020, on the grounds that neither Sensor nor Cantey were proper parties and that Schwartz, Floyd, and Tans thus lacked standing to bring the S.C. Code Ann. § 33-31-1430 action against them. (R. 240-241.)

The Court scheduled a hearing on TCH's Motion to Strike and Sensor and Cantey's Motion to Dismiss for August 21, 2020, among various other motions considered at that time. On August 19, 2020, Schwartz and the other defendants in the First Action filed a Memorandum in Opposition to the Motion to Strike and Motion to Dismiss arguing that the provisions of the Declaratory Judgments Act compelled the inclusion of Sensor and Cantey as parties and that the South Carolian Rules of Civil Procedure thereafter authorized additional claims to be brought against them. (R. 297-299.) By Form 4 order of August 24, 2020, the Court granted TCH's Motion to Strike and Sensor and Cantey's Motion to Dismiss and further directed counsel for TCH, Sensor, and Cantey to prepare formal orders. (R. 301-303.)[2] A single formal order was entered on September 16, 2020, holding in pertinent part that Schwartz, Floyd, and Tans "failed to state any adequate theory of recovery against Ms. Sensor and Ms. Cantey" because "Ms. Sensor and Ms. Cantey are not

[2] The August 24, 2020 Form 4 order also ordered the temporary injunction to continue such that the election of directors by TCH remained enjoined. (R. 301.) The injunction was further ordered to continue "until further order of this case" by order entered September 15, 2020. (R. 307.)

parties to this action." (R. 311.) Any standing grounds were folded into the finding that Sensor and Cantey were not parties to the action. *Id.* Correspondingly, the formal order stated that because the allegations against Ms. Sensor and Ms. Cantey were not "relevant to the single issue in this case—whether the title of Masters of the Hunt is synonymous with members of the board of directors," they were not properly interjected into the First Lawsuit and granted TCH's motion to strike. (R. 312.) In sum, the Court dismissed the § 33-31-1430 claim on procedural grounds only.

On August 14, 2020, TCH filed a motion for partial summary judgment in the First Lawsuit on its declaratory judgment cause of action regarding the composition of the TCH board of directors. (R. 265-266.) That motion was heard on September 16, 2020, with a Form 4 Order entered September 22, 2020, ruling that the proper composition of the board of directors include Schwartz, but did not include Tans or Floyd. (R. 316-318.) The Form 4 order further instructed counsel for TCH to prepare a formal order, and such formal order was entered October 12, 2020. (R. 316; 319-330.)

D. Schwartz filed the subject lawsuit on October 16, 2020, in her capacity as a director; TCH purportedly removed her as a director four days later.

The subject lawsuit was filed on October 16, 2020, following the entry of the various orders in the First Lawsuit in September and earlier in October 2020, which gave clarifying structure to the § 33-31-1430 claim moving forward. The substantive allegations and requests for relief are virtually identical to those alleged on May 22, 2020, with regard to this cause of action. *Compare* (R. 31-33) *with* (R. 233-235.)[3]

[3] The Order states that Schwartz sought an "injunction" with regard to who could care for TCH's hounds. (R. 20.) She did not. (R. 30-33.)

On October 20, 2020, TCH held a meeting of its board of directors. *See* (R. 21.) Although no "further order of this case" had been entered following the September 15, 2020 Order explicitly continuing the injunction that prohibited TCH from taking corporate action, including electing directors (R. 307), TCH ignored Court authority and went forward with voting on the election of directors, which included electing new directors and removing Schwartz.[4]

STANDARD OF REVIEW

Although Respondents failed to articulate the particular authority under which they brought their respective motions to dismiss (R. 34; 49), the substance of the motions reveals that they sought dismissal under Rule 12(b)(6), SCRCP. "An appellate court reviews dismissal from a Rule 12(b)(6), SCRCP motion under the same standard employed by the trial court." *Delaney v. First Fin. of Charleston, Inc.*, 426 S.C. 607, 611, 829 S.E.2d 249, 250 (2019). When deciding a motion to dismiss for failure to state facts sufficient to constitute a cause of action under Rule 12(b)(6), SCRCP, the question before the Court is whether "in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, *the complaint states* any valid claim for relief." *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007) (emphasis added). In reviewing a complaint, a court "must presume all well pled facts to be true." *HHHunt Corp. v. Town of Lexington*, 389

[4] The Order erroneously states that "the parties have stipulated that Ms. Schwartz ceased being a director of the Camden Hunt four days after filing suit, on October 20, 2020," and that "Ms. Schwartz does not contend that her removal from the board was an illegal or ineffective removal that she did not acquiesce in." (R. 20-21.) This is wrong, and Schwartz objected on October 19, 2020, to director elections being held in violation of the Court's injunction continuation (although Schwartz agreed in theory that it would be appropriate to formally dissolve the injunction in the wake of the Court's recent orders in the First Lawsuit). (R. 170-171; 331.) TCH ignored Schwartz's objection. Although the Court ultimately ratified the October 20, 2020 meeting on May 19, 2021 (R. 171), Schwartz has never stipulated or conceded that the director elections taken at the October 20, 2020 meeting were proper or appropriate. Indeed, TCH made no attempt in the intervening seven months to seek "further order of this case" to formally end the explicit injunctive prohibition on its director elections held on October 20, 2020. (R. 307.)

S.C. 623, 632, 699 S.E.2d 699, 703 (Ct. App. 2010). Dismissal under Rule 12(b)(6) is improper where "the facts alleged and inferences reasonably deductible thereform would entitle the plaintiff to any relief on any theory of the case." *Sloan Constr. Co., Inc. v. Southco Grassing, Inc.*, 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008) (internal quotation omitted). Granting a motion to dismiss "is considered to be a drastic procedure." *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (Ct. App. 2010); *HHHunt*, 389 S.C. at 632, 699 S.E.2d at 703.

Although standing was not raised in Respondents' motions to dismiss, "[s]tanding to sue is a fundamental requirement in *instituting* an action." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999) (emphasis added). "Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation." *Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Under the plain meaning rule, it is not the province of the court to change the meaning of a clear and unambiguous statute. When the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010) (internal citations and quotations omitted). As a question of law, the appellate courts review the determination of statutory standing *de novo*. *See Delaney*, 426 S.C. at 611, 829

S.E.2d at 250-51; *see also Citizens for Quality Rural Living, Inc. v. Greenville County Planning Comm'n*, 426 S.C. 97, 102, 825 S.E.2d 721, 724 (Ct. App. 2019).

ARGUMENT

A. TCH's Rule 59(e) Motion raised new issues that could have been raised by TCH previously, but were not, and it was error for the Court to consider the arguments therein.

It is well-settled that "[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990). This is precisely what TCH did with its 59(e) Motion. TCH did not raise standing as a ground in its motion to dismiss. (R. 34-48.) Further, TCH did not argue in the May 19, 2021 hearing, the briefing it submitted in connection with that hearing, or in any following communications to the Court prior to the issuance of the June 2, 2021 Form 4 order that Schwartz lacked standing. (R. 64-69; 164-175; 187-188; 332-373.) While a court may raise standing *sua sponte*,[5] the June 2, 2021 order does not address standing. (R. 3-5.) TCH injected this issue *not addressed by the Court* in the June 2, 2021 order—the order governing its 59(e) motion—that it never raised or provided argument or input in any capacity whatsoever until it filed its 59(e) motion. (R. 89-118.) This is wholly improper and impermissible on a Rule 59(e) motion, TCH lacked the ability to bring its motion on this ground at all, and the Court erred in considering it.

The Order instead shifts the analysis to the entirety of the issues before the Court, including those properly raised on a *separate* Rule 59(e) motion that involves a different originating order. (R. 21-22.) However, South Carolina law focuses on whether or not the party itself raised the issue

[5] The Order erroneously states that Schwartz "argues that a case should not be dismissed *sua sponte* for lack of standing." (R. 21.) Schwartz has never so argued. *See* (R. 121.) This is a strawman argument advanced by Respondents to distract from the fact that *TCH* never properly raised the standing issue prior to filing its Rule 59(e) motion.

encompassed in the Rule 59(e) motion. *See, e.g. Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) ("[A] party cannot use a Rule 59(e) motion *to advance an issue the party could have raised* to the circuit court prior to judgment, *but did not*.") (emphasis added); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004) ("If a party is unsure *whether he properly raised* all issues and obtained a ruling, he must file a Rule 59(e) motion ….") (emphasis added). As TCH utterly failed to raise the issue of standing, TCH's Rule 59(e) motion is procedurally improper. It was thus error for the trial court to consider TCH's Rule 59(e) Motion.

B. The trial court erred in classifying a director's suit under S.C. Code Ann. § 33-31-1430 as a derivative action and thereafter analyzing standing under the derivative action standards.

The Court held that Schwartz's claim under S.C. Code Ann. § 33-31-1430 "is" a derivative action. (R. 22.) This is erroneous as a matter of law.

1. Directors cannot bring derivative actions under applicable South Carolina law.

The Order identified "the dispositive case on the issue of standing" for Schwartz as *Johnson v. Baldwin*, 221 S.C. 141, 69 S.E.2d 858 (1952). (R. 23.) The Order completely misreads and misapplies *Johnson* and, indeed, constructs an entirely novel nonprofit corporate claim in South Carolina: a "director's derivative suit." *Id.* No such thing exists in applicable South Carolina jurisprudence, and the Order cited no controlling authority showing that it does. Derivative suits are available to stockholders, shareholders, or members of certain corporate forms under South Carolina law—not directors. Rule 23(b)(1), SCRCP (describing a derivative action as "brought by one or more *shareholders or members* to enforce a right of a corporation") (emphasis added); S.C. Code Ann. § 33-31-630 (2006) (under the South Carolina Nonprofit Corporation Act, "[d]erivative suits may be *maintained* on behalf of South Carolina corporations

in federal and state court in accordance with the applicable rules of civil procedure) (emphasis added); S.C. Code Ann. § 33-4-700 (2006) (identical provision for for-profit corporations). Indeed, the Revised Model Nonprofit Corporation Act of 1987's section on derivative suits (which would allow a director to bring a derivative suit in that capacity)[6] was explicitly *not* adopted in South Carolina. S.C. Code Ann. § 33-31-630, Off. Cmt. To now try to construct a "director's derivative suit" when the General Assembly explicitly declined to do so is unwarranted and represents a fundamental misunderstanding of South Carolina nonprofit corporate law.[7]

Schwartz did not bring her action under § 33-31-630, the derivative suit section of the Nonprofit Corporation Act. Nor could she. Because TCH is a nonprofit corporation without members (as is allowed under S.C. Code Ann. § 33-31-603 (2006)) (R. 267), there is simply no category of persons eligible to bring and maintain a derivative suit against TCH in South Carolina. Thus, any application of a derivative suit against TCH is incongruous.

2. Schwartz did not bring a suit to enforce the rights of TCH nor did she bring a suit that TCH could bring itself.

Schwartz did not bring a suit against TCH to enforce a right of the corporation, which is the crux of a derivative suit. Rule 23(b)(1), SCRCP (a derivative suit can only be brought "to enforce a right of a corporation"). Instead, Schwartz brought a statutory cause of action under S.C. Code Ann. § 33-31-1430 requesting the Court of Common Pleas to order statutory-based, equitable relief with regard to TCH. There are three different categories of those who can bring such a

[6] The South Carolina Nonprofit Corporation Act of 1994 was "derived from the Revised Model Nonprofit Corporation Act adopted in 1987 …." S.C. Code Ann. § 33-31-101 (2006), S.C. Reporters' Comments. The Revised Model Nonprofit Corporation Act of 1987 would allow "any director" to bring "[a] proceeding … in the right of a domestic or foreign corporation." Rev. Model Nonprofit Corp. Act § 6.30(a)(ii) (1987).

[7] Further, the fact that derivative suits are handled in one section of the Nonprofit Corporation Act (§ 33-31-630) and dissolution claims are handled in another (§ 33-31-1430) demonstrates that it is inappropriate to conflate the two concepts.

statutory claim: (1) the South Carolina Attorney General (§ 1430(a)); (2) a certain number or percentage of members, "or … a director or … any person specified in the articles" (§ 1430(b)), and (3) creditors of the nonprofit corporation (§ 1430(c)). Indeed, the corporation itself is not empowered to bring a suit under § 33-31-1430, so there is no right of the corporation that could be enforced derivatively with a claim made pursuant to this statute. And unlike derivative actions, which typically seek monetary damages for causes of action such as breach of fiduciary duty, negligence, or waste, a claim under S.C. Code Ann. § 33-31-1430 can only result in the equitable dissolution or remaking of the nonprofit corporation. S.C. Code Ann. § 33-31-1430 and Off. Cmt.

The Order improperly focuses on a "personal benefit" or alleged harm to Schwartz in arriving at its conclusion that a suit brought by a director under § 33-31-4130 is a derivate suit. (R. 23.) But this is not the test for a derivative suit. Instead, a derivative suit must be one to enforce a right of the corporation. Rule 23, SCRCP. The cases the Order cites for the proposition that "[a]n action seeking to remedy a loss to the corporation is generally a derivative one" (R. 22) are distinguishing *shareholder* suits for fiduciary breaches as either direct or derivative. *See Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001) ("The fiduciary obligation of dominant or controlling stockholders or directors is ordinarily enforceable through a *stockholder*'s derivative action …. An action seeking to remedy a loss to the corporation is generally a derivative one. A *shareholder* may maintain an individual action only if his loss is separate and distinct from that of the corporation. A *shareholder*'s suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the *shareholder*.") (citations and quotations omitted) (emphases added); *Patterson v. Witter*, 425 S.C. 213, 231, 821 S.E.2d 677, 687 (2018) (quoting and citing *Brown* statements *supra*). In these cases, the shareholder or shareholder-equivalent plaintiffs had already crossed the threshold issue of being eligible to bring

a derivative claim for fiduciary breaches under South Carolina law. It then fell to the court to determine if the shareholder's claim was properly framed as a derivative case or a direct case (or sometimes some of both). This is an entirely different analysis than the analysis of a director's claim for equitable relief under § 33-31-1430.[8] Indeed, the analogous judicial dissolution section for a for-profit corporation (§ 33-14-300) has been held to be outside the derivative suit rules; in other words, a shareholder in a corporation can bring a claim for relief under this section without regard to the rules for or classification as a derivative claim.[9] *See Davis v. Hamm*, 300 S.C. 284, 292, 387 S.E.2d 676, 680 (Ct. App. 1989); *Kreischer v. Kerrison Dry Goods Co.*, 172 F.3d 863 (table); 1999 WL 30836, *1, 8 (4th Cir. Jan. 26, 1999) (applying *Davis* and finding that claims under S.C. Code Ann. § 33-14-300 were permitted to go forward as brought by individual shareholders regardless of the derivative nature of other causes of action, such as breach of fiduciary duty and fraud).

3. No South Carolina authority applies a continuous *directorship* rule for standing.

The *Johnson* case on which the Order relies did not involve a statute like § 33-31-1430, nor did it involve the rights of directors under South Carolina law. Instead, the holding in *Johnson* stands for the unremarkable proposition that if a stockholder, shareholder, or member seeks to file a derivative action, he or she must maintain that status for the duration of the suit. *Johnson*, 221 S.C. at 151, 69 S.E.2d at 589 ("The right of the plaintiff to continue to prosecute this action depends on her retaining her status *as a stockholder* and if she ceased to be a *stockholder*, the cause of

[8] To be sure, some of the misconduct at issue in a § 33-31-1430 claim may also support a breach of fiduciary duty claim, but Schwartz is not bringing a breach of fiduciary duty claim in this lawsuit.

[9] There are notable differences in who can bring a judicial dissolution claim in for-profit corporations (§ 33-14-300) and in non-profit corporations (§ 33-31-1430), but the overarching finding that such a claim is by its nature *not derivative* is fully consistent.

action abated as far as she is concerned.") (emphases added). This is because of the nature of the shareholder's derivative action: "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." *Id.* at 149, 69 S.E.2d at 585; *see also* Rule 23(b)(1), SCRCP ("[A] derivative action may not be *maintained* if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.") (emphasis added). The continuous ownership requirement of shareholders or members in derivative actions is undisputed[10]—and it also has nothing whatsoever to do with the standing issues in Schwartz's case. Indeed, there is no mention in *Johnson* of Johnson's status as a director—she was only a former shareholder. *Johnson*, 221 S.C. at 151, 69 S.E.2d at 589. Contrary to the Order, *Johnson* simply cannot be read to speak to the issue of whether a *director* of a South Carolina nonprofit corporation has standing to maintain a lawsuit if the director is removed or otherwise ousted during the pendency of the litigation.

[10] Courts have also inferred the "continuous ownership" requirement articulated in *Johnson* from the requirements of Rule 23.1(a), FRCP, which is substantively identical to Rule 23(b)(1), SCRCP. *See In re: SCANA Corp. Derivative Litig.*, C.A. No. 3:17-3166-MBS, 2019 WL 4162377, at *2, n.2 (D.S.C. Sept. 3, 2019). These courts have noted that the "continuous ownership requirement stems from the equitable nature of derivative ligation which allows a shareholder to step into the corporation's shoes and to seek in *its* rights the restitution *he could not demand in his own*." *Id.* (internal citations omitted) (first emphasis added). Here, however, Schwartz is *not* bringing a derivative action against TCH—she is bringing a statutory claim against TCH pursuant to § 33-31-1430(a)(2) in her capacity as a director that the corporation is not permitted to bring itself. She is *not* seeking restitution she "could not demand on [her] own," *In re: SCANA* at *2, n.2, but she is instead asserting a claim against TCH as she is specifically empowered to do pursuant to § 33-31-1430(a)(2).

The Order attempts to get around this fatal flaw in its analysis through citation to dicta from *Johnson*, which was quoting from a now-disfavored case from New York, *Kehaya v. Axton*, 32 F. Supp. 266 (S.D.N.Y. 1940). *See* (R. 23.)[11] Specifically, *Johnson* stated that *Kehaya* "held that where a director instituted an action against the other directors of a corporation for negligence and waste, he could not continue to maintain the action after he ceased to be a director." *Johnson*, 221 S.C. at 150, 69 S.E.2d at 589. *Johnson* further noted that *Kehaya* (a United States District Court case) disagreed with the opposite conclusions on this issue reached by intermediate appellate courts in New York state. *Id.* Indeed, *Kehaya* itself acknowledged that its holding was valid only so long as the Court of Appeals in New York did not so otherwise hold. *Kehaya*, 32 F. Supp. at 268. In 1959—19 years after *Kehaya* and seven years after *Johnson*—the Court of Appeals of New York did in fact issue its opinion in *Tenney v. Rosenthal*, 6 N.Y.2d 204 (N.Y. Ct. App. 1959), which effectively overruled *Kehaya*. *Tenney* held that with a director's derivative claim (which is something not available for a South Carolina nonprofit corporation and is no longer available in this form in New York either),[12] "the action, once properly initiated, may not be defeated by the circumstance that the plaintiff loses, or is ousted from, his directorship." *Tenney*, 6 N.Y.2d at 208.

[11] The Order quotes extensively from what it represents as the South Carolina Supreme Court's holding in *Johnson* and statements by Justice Oxner. (R. 23.) The Order fails to acknowledge that the quoted material is neither the South Carolina Supreme Court's holding nor Justice Oxner's own language. Instead, what the Order quotes (and represents as the binding language of the South Carolina Supreme Court) is the *Kehaya* opinion that is mere dicta, as the *Johnson* case did not involve the rights of directors.

[12] At the time *Kehaya* (1940) and *Tenney* (1959) were decided, New York allowed directors to bring derivative suits under the same framework as shareholders. *See, e.g. Tenney*, 6 N.Y.2d at 208 (noting that the derivative suit was properly brought by a director pursuant to Section 61 of the General Corporation Law of New York). However, two years after the *Tenney* decision, New York significantly revised its business corporation laws, passing the Business Corporation Law of 1961 as a "major revision" to its corporate laws. Stevens, "New York Business Corporation Law of 1961," 47 Cornell L.Q. 141 (1961). The Business Corporation Law "consolidate[d] into one law, simplifie[d], and modernize[d] most of the provision of the General Corporation Law and Stock Corporation Law affecting business corporations, omits some of these, and adds some new

Tenney continued that with regard to a director's derivative suit (which, again, is not available in South Carolina but was then available in New York), "[s]trong reasons of policy dictate that, once he properly initiates an action on behalf of the corporation to vindicate its rights, a director should be privileged to see it through to conclusion. Other directors, themselves charged with fraud, misconduct, or neglect, should not have the power to terminate the suit by effecting the ouster of the director-plaintiff. It is no answer to say that, if wrongs were committed, others are available to commence a new and appropriate action." *Id.* *Tenney* continued to elaborate on the important policy differences between a derivative suit initiated by a shareholder and a suit initiated by a director. These policy reasons are grounded in, among other things, the fiduciary and stewardship role that a director has that a shareholder does not (*id.* at 210-11) and that a shareholder who ceases to be a shareholder during the pendency of the case does so by "voluntary abandonment" whereas a director typically does not voluntarily abandon his or her directorship in the same way. *Id.* at 212. *Tenney* reasoned:

> For example, it may well be that a majority of the shareholders in a close corporation will vote against a director who properly insists that the corporation be managed for the benefit of all the shareholders, rather than only of the majority. Or, it may happen in a publicly held corporation that the proxies of quiescent shareholders will be voted against a director who has sought to expose wrongdoing by the same dominant directors who actually cast the votes. In such situations, it would hardly be argued that a director's loss of status implies a voluntary abandonment of the corporation's cause of action. ***If anything, the plaintiff's failure of re-election may be simply another aspect of the unhealthy corporate condition which he is intent upon correcting.***

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ones." *Id.* Sections 60 and 61 of the General Corporation Law, pursuant to which the director-plaintiff brought suit in *Tenney*, were "substantial[ly] re-enact[ed]" in § 720 of the Business Corporation Law. *Id.* Pursuant to § 720, a derivative action is properly brought by a shareholder, voting trust certificate holder, or the owner of a beneficial interest in the shares. N.Y. Bus. Corp. Law § 720 (2012). In addition, this same code section empowers a director to bring a statutory suit against directors or officers for corporate misconduct, but not as a derivative suit like shareholders can. *Id.*

Id. (emphasis added).

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The Order's holding that a director can only maintain an action under § 33-31-1430 if she is not removed as a director would be to read a continuing directorship requirement into South Carolina law when no such requirement is present. Despite the Order's representations to the contrary,[13] South Carolina jurisprudence simply does not support the concept of a "director's derivative suit" in the nonprofit corporation context, and it was error for the trial court to rule that such a suit exists, much less that a suit under § 33-31-1430 is a derivative action.

C. The trial court erred in holding that Schwartz lost statutory standing to continue her action under S.C. Code Ann. § 33-31-1430 upon her removal as a director of TCH.

Schwartz brought her statutory claim under S.C. Code Ann. § 33-31-1430, which provides that "[t]he court of common pleas may dissolve a corporation: … (2) … in a proceeding by fifty members or members holding five percent of the voting power, whichever is less, *or by a director* or any person specified in the articles …." S.C. Code Ann. § 33-31-1430(2) (emphasis added).

[13] The Order cites three cases for the proposition that *Johnson* has not been altered as it relates "to shareholder's or director's derivative suits." (R. 23-24.) However, none of the cited cases address director suits whatsoever, and there is no cited jurisprudence to support the Order's statement with regard to "director's derivative suits" (which do not exist). First, *Wilson v. Gandis*, 430 S.C. 282, 289, 844 S.E.2d 631, 635 (2020) involved a situation where the minority member of a limited liability company initiated an action against the majority members of the company. The majority members asserted counterclaims against the minority member, but the Supreme Court, citing to the longstanding rule that a shareholder must initiate a derivative suit if "the gravamen of his complaint is an injury to the corporation and not to the individual interest of the *shareholder*," held that the majority members were required to bring their claim derivatively on behalf of the company. *Id.* at 312, 844 S.E.2d at 647 (emphasis added). Second, in *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 409 S.E.2d 340 (1991), a minority shareholder brought a direct action alleging various causes of action in the aftermath of a share exchange that diminished his percentage ownership. The Supreme Court considered whether the shareholder should have brought his action in a derivative suit rather than a direct action, and cited *Johnson* simply for the proposition than an action by a shareholder seeking to remedy a loss to the corporation is generally a derivative one. *Id.* at 632, 409 S.E.2d at 342. Finally, in *Kreischer* (also discussed *supra*), shareholders (not directors) were involved. 1999 WL 30836, *1.

The Official Comment states that this section "specifies the people who can *seek* a court-ordered dissolution and the grounds for dissolution." *Id.* at Off. Cmt. (emphasis added). The Official Comment continues: "Subdivision (a)(2) allows fifty members or members who hold 5% of the voting power, whichever is less, *a director*, or any person specified in the corporation's articles *to bring* a proceeding for involuntary dissolution of the corporation." *Id.* at Off. Cmt. 2 (emphasis added).[14] Nothing in the clear and unambiguous text of the statute or the comments indicates that a director or other person permitted to seek relief or bring a lawsuit under this code section must retain that particular status for the suit to continue. Indeed, "[s]tanding to sue is a fundamental requirement to *instituting* an action." *Joytime Distribs.*, 338 S.C. at 639, 528 S.E.2d at 649 (emphasis added); *see also Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518 ("Standing, a fundamental prerequisite to *instituting* an action, may exist by statute, through the principles of constitutional standing, or through the public importance exception.") (emphasis added).

While § 33-31-1430 has not been judicially interpreted on standing in the appellate courts of South Carolina, the Arizona Court of Appeals has extensively examined this issue on substantively identical statutory language in Arizona's Nonprofit Corporation Act. In *Workman v. Verde Wellness Center, Inc.*, the Arizona Court of Appeals held that a director who initiates a judicial dissolution suit pursuant to his or her status as a director does *not* lose standing to maintain the suit if he or she is removed as a director after the suit is commenced. 382 P.3d 812 (Ariz. Ct. App. 2016). Other states are in accord with the general rule that directors bringing suit in their

[14] The Official Comments further clarify that complete dissolution is not the only remedy available to the Court in an action brought under this statute and is, indeed, not the preferred remedy if at all possible. Official Comment 5 states: "As dissolution is a remedy of the last resort, a court should consider reasonable alternatives. For example, if the directors are misapplying or wasting corporate assets, the court may give the directors an opportunity to resign or, if the requirements of section 8.10 have been met, may remove the offending directors." S.C. Code Ann. § 33-31-1430, Off. Cmt. 5.

capacity as directors do not lose standing upon removal from the board—albeit under different statutes or corporate actions from those at issue in *Workman* and this case. *See Summers v. Colette*, 34 Cal. App. 5th 361 (Cal. Ct. App. 2019); *see also Tenney*, 6 N.Y.2d at 204.

The *Workman* opinion is particularly applicable here, as it is legally and factually similar to Schwartz's situation. There, Workman, as a director of the defendant Verde Wellness Center, Inc. ("Verde"), filed an action seeking relief under A.R.S. § 10-11430(B)(2), (4) (2021), which is Arizona's version of the Model Nonprofit Corporation Act and is substantively identical to S.C. Code Ann. § 33-31-1430, pursuant to which Schwartz brought her lawsuit. Like Schwartz, Workman sought statutory relief on the grounds that Verde's directors were acting in a manner that was illegal, oppressive, or fraudulent and that the directors were wasting, misapplying, or diverting corporate assets for non-corporate purposes. *Workman*, 382 P.3d at 815. Shortly after Workman filed suit, Verde's board held a special meeting and removed her as a director. *Id.* Verde subsequently moved to dismiss Workman's complaint on the grounds that she no longer had standing to maintain her suit because she was no longer a director of Verde. *Id.*

The trial court granted Verde's motion, but the Arizona Court of Appeals reversed, analyzing the statutory framework and holding that the "[p]lain language of § 10-11430(B) shows the legislature's intent to grant individual directors standing to petition for judicial dissolution by virtue of their status as director," notwithstanding the fact that "nonprofit directors likely have only an indirect interest in the outcome of such litigation." *Id.* at 818, 819. Moreover, the Court noted that unlike a shareholder derivative action, "there is no requirement [in the statute] that a director of a nonprofit corporation '[f]airly and adequately represent[] the interests' of the corporation … by maintaining his or her status throughout the action." *Id.* at 819 (internal citations omitted). Because Workman's standing "came into question only after she initiated it, at the point when

Verde's board removed her as a director," the Court held that Verde's voluntary conduct could not "render the action moot" and concluded that "the trial court erred by granting Verde's motion on the basis Workman lacked standing after the board removed her as a director." *Id.* at 819-20.

The *Summers* decision also considered whether a director, who initiated a lawsuit against a nonprofit corporation and another director, lost standing to maintain the action after being removed as a director of the organization. In that case, plaintiff Summers filed an action against the nonprofit corporation for which she served as a director, Wildlife Waystation ("Wildlife"), and a fellow director, alleging self-dealing and other misconduct by the director. *Summers*, 34 Cal. App. 5th at 364. After Summers filed suit, Wildlife's board voted to remove Summers from the board of directors. *Id.* at 365. The Court noted that Summers brought her claims pursuant to three statutes, each of which provide that a director may bring an action, but "do not say whether, having brought the action, the plaintiff must continue to be a director to continue to have standing." *Id.* at 368. After scrutinizing the applicable statutory language, the Court distinguished director suits from member or shareholder derivative suits and concluded that the absence of language indicating that a suit may only be initiated "or maintained" by a director pointed "away from a continuous directorship requirement" in the same manner that the inclusion of language indicating that a shareholder or member derivative suit may only be instituted "or maintained" by a shareholder or member '"point[ed] to . . . a continuous stock ownership requirement." *Id.* at 368-70.

The *Summers* Court also noted that cases from other jurisdictions—particularly *Workman* and *Tenney*—similarly "decided against reading a continuous directorship requirement into statutes authorizing directors to bring actions ….." *Id.* at 372. Notably, the *Summers* Court cited the public policy considerations present in declining to establish a continuous directorship requirement, quoting *Tenney* and noting that once a director properly initiated an action, the

"director should be privileged to see it through to conclusion. Other directors, themselves charged with fraud, misconduct or neglect, should not have the power to terminate the suit by effecting the ouster of the director-plaintiff. It is no answer to say that, if wrongs were committed, others are available to commence a new and appropriate action.'" *Id.* at 373 (quoting *Tenney*, 160 N.E.2d at 210). As such, the *Summers* Court concluded that Summers had standing pursuant to the applicable statutes pursuant to which she brought her claims, and "her subsequent removal as a director did not deprive her of standing." *Id.* at 374. The Court specifically "decline[d] to read into these statues a continuous directorship requirement." *Id.*

The Order here grapples only with the *Workman* and *Tenney* decisions, but in so doing, it focuses on allegedly distinguishing factual and policy reasons and fails to address the critical statutory language found dispositive in *Workman*. (R. 24-25.) The Order held that the *Workman* court "inferred that [Workman] had been removed from her position on the board as a tactical maneuver and, therefore, expelling her from the board could not moot her claim" and "believed that [Workman] had been removed from the board solely because of her claims against the corporation." (R. 24-25.) The Order goes on to state that "[t]here is no allegation here that Ms. Schwartz was removed as a director because she brought this lawsuit." (R. 25.) The Order is incorrect on both its reading of these cases and Schwartz's claim.

First, the Order is incorrect that the *Workman* case turned on Workman's claims that her removal was retaliation for bringing suit. Although the *Workman* opinion discussed the likelihood of such retaliation, its holding—premised on the actual statutory language (which is substantively identical to South Carolina's) and the contrast with the "fair and adequate representation" standing requirement for a derivative claim—shows that the core of the *Workman* Court's reasoning focused on the statutory language and not the retaliation issue. *Workman*, 382 P.3d at 819. However, to

the extent retaliation is a factor to consider, the undisputed timeline of Schwartz's claim here shows that retaliation by Respondents would be "reasonable to infer." Schwartz first brought this claim on May 22, 2020, in Case No. 2020-CP-28-00187. (R. 233-235.) Following that claim's procedural dismissal in September 2020, Schwartz refiled it as a standalone claim in October 2020. (R. 30-33.) Her purported removal from the Board followed within days, with TCH so eager to remove Schwartz that they ignored a Court order and Schwartz's documented objections in the process. To be clear, Schwartz *does* maintain that her purported removal from the Board was done in retaliation for pursuing her claims beginning in May 2020.[15] (R. 124; 172-173; 194-195.) Thus, retaliation is present in this case, as well.

Second, the Order misreads the public policy concerns articulated in *Tenney* and disregards the policy reasons advanced by Schwartz. As discussed above (pp. 15-17), *Tenney* was primarily concerned with the misconduct of the alleged wrongdoers who had perpetrated the "unhealthy corporation condition" that the complaining director "is intent upon correcting." *Tenney*, 6 N.Y.2d at 212. *Tenney* refused to reward the bad actors who voted out the complaining director as a way of getting rid of a complaint about their own behavior. *Id.* The Order erroneously then states that these public policy concerns are not present in Schwartz's case. The record is to the contrary.

Schwartz has advocated that finding that Schwartz lost standing when she was removed from the board amounts to giving TCH's board of directors *carte blanche* to act without the statutory oversight imposed by the Nonprofit Corporation Act and its guardrails against director misconduct to the detriment of the corporation. (R. 132-134.) However, without members of TCH (and with status as a member or shareholder a prerequisite to a derivative claim under South

[15] To the extent that retaliation must be pled (although the Order cites no support for any such requirement), leave to amend would be appropriate. *See Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 180, 826 S.E.2d 585, 587 (2019).

Carolina law (*see supra* pp. 10-11)), a derivative claim under South Carolina law is unavailable with regard to misconduct by the directors of TCH. Accordingly, the *only* way TCH's board of directors can be held statutorily accountable in this factual scenario is through § 33-31-1430, including suits brought by an individual director seeking to bring misconduct and malfeasance to the court for equitable redress. Indeed, the claim for judicial dissolution belongs to the individual director (or others named in the statute) rather than to the corporation itself. *See* S.C. Code Ann. § 33-31-1430. To hold, then, that Schwartz lost standing once she was removed as a director will essentially guarantee that TCH's board of directors can act in the same oppressive and detrimental manner it has acted in thus far with the security of knowing there are no longer any directors who can challenge its actions and that there are no members who can step in and hold the board accountable for its actions derivatively.

Moreover, the Order's holding makes it clear that TCH can simply get rid of any lawsuits properly initiated by a director by removing that director during the pendency of the lawsuit. Here, TCH had known for months that Schwartz opposed the actions of Sensor and Cantey on behalf of TCH, as the parties had litigated the First Lawsuit since March 5, 2020, which itself was an outgrowth of Schwartz and others' good faith efforts to have many of the matters raised in Schwartz's claim under § 33-31-1430 as filed on May 22, 2020, and also on October 16, 2020, resolved by TCH internally. TCH was enjoined from taking corporate actions with regard to the composition of its board of directors beginning on March 13, 2020, and continuing until the fall of 2020, when TCH apparently understood itself to no longer be so enjoined. It shortly thereafter took corporate action to remove Schwartz as a director following months of knowledge of her claims and complaints regarding TCH and those acting for it. Thus, it is clear that TCH was well aware of the claims at issue and removed Schwartz as a director accordingly. *See* (R. 194-195.)

To hold, then, that TCH properly deprived Schwartz of her standing to maintain this action by removing her as a director would be contrary to the general rule that a "party cannot by its own voluntary conduct 'moot' a case a deprive a court of jurisdiction." *Workman,* 382 P.3d at 818-19 (citations omitted). Such a holding would leave TCH "free to return to [its] old ways" simply by virtue of removing the one director seeking to hold TCH's board accountable for its malfeasance. *Id.* at 819 (internal citations omitted). This pattern of conduct would result in TCH and certain of its directors' improper conduct never coming to light for redress.

D. The trial court erred in holding that Schwartz did not properly plead appropriate relief under S.C. Code Ann. § 33-31-1430.

The Order held that "Schwartz has not asked the court to dissolve the Camden Hunt, so this cause of action [under § 33-31-1430] fails." Order p. 9. The Order is incorrect, and Schwartz's cause of action was properly pled.

S.C. Code Ann. § 33-31-1430(a) permits a director to bring suit under that section if "the directors or those in control of the corporation" are, among other things, acting in any manner that is illegal, oppressive, or fraudulent to the corporation, or if they are misapplying or wasting corporate assets. The statute allows the court to grant various forms of relief that are appropriate under the circumstances, including removing the offending directors or individuals from their positions. S.C. Code Ann. § 33-31-1430 & Off. Cmt. By the plain language of the Complaint, Schwartz brought "this cause of action pursuant to S.C. Code Ann. § 33-31-1430 in her capacity as a director of TCH." (R. 31.) She thereafter listed the conduct of TCH, Sensor, and Cantey, which she alleged violated that code section and asked for the following relief: "an order from the Court relieving Sensor and Cantey from any responsibilities for the hounds, kennel, and stables of TCH and/or the Hunt going forward; relieving Sensor and Cantey from any financial responsibilities for TCH and/or the Hunt; relieving Sensor and Cantey from any duties and

responsibilities as directors or purported directors for TCH; taxing and assessing improper expenditures to Sensor and Cantey and not to TCH and/or the Hunt, *and otherwise crafting the best way to protect the interests of the subscribers of TCH as a mutual benefit corporation*." (R. 32-33) (emphasis added). She also requested "for such other and further relief as the Court deems just and proper." (R. 33.)

Schwartz's requests for the removal of Sensor and Cantey from positions of responsibility and leadership (including as directors) were specific requests based on Schwartz's opinion about the "reasonable alternatives to dissolution" that the statute requires the Court to consider. S.C. Code Ann. § 33-31-1430(b)(1). The Official Comments expand on this concept, explaining specifically that removal of directors is one form of relief contemplated by this statute if the Court determines that would be a "form of relief … proper in the circumstances." S.C. Code Ann. § 33-31-1430 & Off. Cmt. 5 ("As dissolution is a remedy of the last resort, a court should consider reasonable alternatives. For example, if the directors are misapplying or wasting corporate assets, the court may give the directors an opportunity to resign or, if the requirements of section 8.10 have been met, may remove the offending directors.").[16] Indeed, removal of directors or those in charge of a corporation in lieu of a complete dissolution is a common element of relief sought in judicial dissolution proceedings, as is other relief not resulting in formal judicial dissolution, such as a buyout. *See, e.g., Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 343 S.C. 587, 606-07, 541 S.E.2d 257, 268 (2001); *Ballard v. Roberson*, 399 S.C. 588, 595, 598, 733 S.E.2d 107, 110, 112

[16] While Schwartz does not fall into the categories of persons who can seek the removal of directors pursuant to S.C. Code Ann. § 33-31-810 (2006) and thus cannot bring an action for judicial removal under that particular code section, the conduct that is in violation of that code section can give rise to remedial action sought by a director under the judicial dissolution provisions pursuant to Official Comment 5 to S.C. Code Ann. § 33-31-1430. It is thus erroneous for the Order to hold that § 33-31-810 is wholly inapplicable to an analysis under § 33-31-1430. *See* (R. 28-29.)

(2012); *Mason v. Mason*, 412 S.C. 28, 50, 770 S.E.2d 405, 416 (Ct. App. 2015). By asking for specific relief contemplated under the judicial dissolution statute, as well as also asking the court to craft the best way to protect the appropriate interests (which could, of course, be complete dissolution should the court so find) and for relief that the court would find just and proper, Schwartz has properly asked for relief under this code section.[17]

CONCLUSION

For the reasons discussed above, the trial court's order dismissing Schwartz's claim with prejudice should be reversed, and Schwartz's claim under S.C. Code Ann. § 33-31-1430 should be allowed to proceed in full.

Respectfully submitted,

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[17] Even if the Court finds that the prayer for relief should be pled differently, leave to amend would be appropriate and warranted, and dismissal with prejudice (as happened here) is reversible error. *See Skydive*, 426 S.C. at 180, 826 S.E.2d at 587.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Business Court Judge
Case No. 2020-CP-28-00926
Appellate Case No. 2021-001430

Joanne Schwartz,

Appellant,

v.

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

Respondents

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Brief complies with Rule 211(b), SCACR.

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July 8, 2022

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