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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

Bentley Price, Circuit Court Judge

Appellate Case No. 2020-000804

John Doe, ... Appellant.

v.

Bishop of Charleston, a Corporation Sole, and The Bishop of the Diocese of Charleston, in his official capacity, ... Respondents.

PETITION FOR REHEARING

The appellant respectfully petitions the Court to rehear the case for the following reasons.

If the Maine Supreme Court is correct, this decision makes South Carolina the only state where immunity has been extended to a charity in a case of intentional tort. Citing with approval South Carolina's *Jeffcoat v. Caine* decision, the Maine Supreme Court noted:

> Of the remaining states that retain some form of charitable immunity, no state has explicitly applied the doctrine to intentional torts.

The court noted that "applying charitable immunity to intentional torts would set Maine so far outside the mainstream that it would put this State in a class by itself." *Picher v. Roman Catholic Bishop*, 974 A.2d 286, 295 (2009). *Accord: Hardwicke v. American Boychoir School,* 902 A.2d 900, 918 (N.J. 2006).[1]

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[1] Our research discloses no case in this State prior to the enactment of the [Charitable Immunity Act] that, under the common law, relieved a charity from liability for any tort but negligence. Moreover, we have found no other jurisdiction that provides charitable immunity for intentional torts. . . .

(continued...)

This Court's decision has placed South Carolina in that "class by itself."

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The Court overlooked the fact that our Supreme Court in *Jeffcoat v. Caine,* 261 S.C. 77, 198 S.E.2d 258 (1973), identified all previous expressions of immunity from "tort liability" as obiter dictum, not holding. The Supreme Court explained that in *Lindler*, the first case granting negligence immunity, the Court

> did not intend to fashion a rule of complete exemption from tort liability; for it was careful to point out that the question of whether a charity "would be liable for negligence in the selection of its servants without due care [was] not before the court for consideration."

Jeffcoat, 261 S.C. at 78, 198 S.E.2d at 259. The Court in *Jeffcoat* noted that immunity had never been granted except in negligence cases and that the use of the word "tort" in prior decisions could not and did not expand the holdings. The equation of "negligence" and "tort" was always obiter dictum.

When it first chose to grant negligence immunity, the Court warned against mistaking dictum for holding**:**

> Much confusion has arisen from the effort to apply language used in some of the . . . decisions to cases in which the facts were entirely different from those in which it was used.

Lindler, 81 S.E. at 513.

Our Supreme Court has often explained the difference between holding and dictum by quoting the words of the Great Chief Justice, as it did most recently three years ago**:**

> *See Ex parte Goodyear Tire & Rubber Co*., 248 S.C. 412, 418, 150 S.E.2d 525, 527 (1966) ("It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those

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[1](...continued)

> We are confident that if charitable immunity for intentional torts exists at all, it is rare . . . ."

902 A.2d at 918.

> expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision." (*quoting Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399, 5 L.Ed. 257 (1821))).

Preservation Society of Charleston v. S.C. Dept. of Health & Envtl. Control, 430 S.C. 200, 224, 845 S.E.2d 481, 494 (2020).

When it first extended immunity to a *respondeat superior* claim of liability for a servant's negligence, our Supreme Court expressly identified its holding**:**

> [I]t would be against public policy to hold a charitable institution responsible for the *negligence* of its servants, selected with due care.

Lindler v. Columbia Hosp., 98 S.C. 81, 81 S.E. 512, 513 (1914) (e.a.). The editors of West Publishing Company correctly identified the holding in *Lindler* when they assigned it key numbers all in the category of "Charities . . . —Liability for Negligence of Servants".

In the paragraph of the *Jeffcoat* opinion partially quoted by this Court, the Supreme Court explained that expressions of general tort liability in previous decisions had been obiter dictum. This Court omitted from its quotation of the Supreme Court's opinion the most important portion**:**

> [I]n *Peden* [*v. Furman Univ.*, 155 S.C. 1, 151 S.E. 907 (1930)], liability was placed upon the charity for trespass and the creation of a nuisance.

261 S.C.at 79, 198 S.E.2d at 260. This Court cited all the pre-*Jeffcoat* immunity decisions except for the only one on point. The *Peden* case was the only occasion prior to *Jeffcoat* where the Supreme Court was asked to extend immunity to a case of intentional tort.[2] It refused.

This Court mistakenly applied the rule that "the abrogation of immunity defenses is to applied prospectively only." The Supreme Court abrogated nothing in *Jeffcoat*. The

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[2] Trespass and private nuisance are intentional torts. *Snow v. City of Columbia,* 409 S.E.2d 797, 802 (S.C. App. 1991) (trespass); *Brading v. County of Georgetown,* 490 S.E.2d 4 (S.C. 1997) (nuisance); *Shockley v. Hoechst Celanese Corp.*, 996 F.2d 1212 (4th Cir. 1993) (nuisance).

whole point of the case was that immunity had never been extended in a case of intentional tort, "and we refuse to so *extend* the immunity doctrine." *Jeffcoat*, 261 S.C. at 80, 198 S.E.2d at 260 (e.a.). The briefs in *Jeffcoat,* available at our Law School Library, show that the appellant did not seek to abrogate immunity but rather argued that it had never been extended to a case of intentional tort, nor did the charity argue that immunity had ever been extended in such a case.

This Court stated that in *Jeffcoat* the Supreme Court "refused to overturn" its previous grant of immunity in negligence cases. The Court in *Jeffcoat* was asked to overturn nothing. Negligence immunity was not questioned or at issue in *Jeffcoat*.

From 1914 until 1981, when immunity was abolished, the Court never expanded the exemption past the case of a charity's liability for simple negligence. Three times it was asked to do so and three times it refused. *Peden, supra; Eiserhardt v. State A&M Soc.*, 235 S.C. 305, 111 S.E.2d 568 (1959); and *Jeffcoat.* No South Carolina charity was granted immunity from liability for anything but simple negligence at any time in the sixty-seven year period of that departure from normal rules of liability.

CONCLUSION

For these reasons the appellant petitions the Court to rehear the case and, upon rehearing, to reverse the decision of the circuit court.

Respectfully submitted,

Lawrence E. Richter, Jr.
The Richter Firm, LLC
622 Johnnie Dodds Blvd.
Mt. Pleasant, SC 29644
(843) 442-6000

David K. Haller
Haller Law Firm
604 Savannah Highway
Charleston, SC 29407
(843) 224-7860

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Attorneys for Petitioner.