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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable H. Steven DeBerry, IV

Appellate Case No. 2022-000133

South Carolina Human Affairs Commission, Appellant,

Yacht Cove Owners Association, Inc., and Maria Dehart,
Respondent.

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

The trial court erred in applying S.C. Code Ann. § 33-31-834 rather than allowing the action to proceed pursuant to the South Carolina Fair Housing Law because the South Carolina General Assembly did not adopt S.C. Code Ann. § 33-31-834 with the intent that it would apply to board members of a private homeowner's association.

The legislative history of S.C. Code Ann. § 33–31–834 (1994) belies Dehart's assertion that the South Carolina Nonprofit Corporation Act precludes a volunteer homeowner's association (HOA) board member from being named in a damages suit. (Br. of Resp. at 5). Though Dehart contends that the General Assembly's passage of the Nonprofit Corporation Act forbids the Commission from pursuing civil action against individual HOA board members, the General Assembly first enacted this immunity provision prior to the 1989 Fair Housing Law and with the intent to exclude HOA board members from its protection.

The immunity provision Dehart relies upon was passed by the General Assembly in 1987 and originally codified at S.C. Code Ann. § 33–31–180. In 1994, the General Assembly renumbered the preexisting S.C. Code Ann. § 33–31–180 (1987) to S.C. Code Ann. § 33–31–834 (1994) in order to bring the provision within the scheme of the revised Nonprofit Corporation Act. South Carolina Reporters' Comments to S.C. Code Ann. § 33–31–834; *compare* 1987 Act No. 192, Section 2 (amending Chapter 31 of Title 33 of the 1976 code to add § 33–31–180), *with* S.C. Code Ann. § 33–31–834. Though Dehart manifests that "the General Assembly has spoken regarding Appellant's 'policy' argument" through the passage of S.C. Code Ann. § 33–31–834, (Br. of Resp. at 5), the General Assembly cannot have enacted an immunity statute in 1987 with the intent of "forbidding" the Commission from enforcing the 1989 Fair Housing Law. *See* S.C. Code Ann. § 31–21–10, *et. seq.* (1989 Act No. 72).

There is no indication that the General Assembly intended to extend the immunity granted by S.C. Code Ann. § 33–31–834 to HOA board members *at all*. The Reporters'

Comments to the qualified immunity statute note it "provides a very broad grant of immunity to directors of certain 501(c)(3) organizations and other entities," but also instructs that "the directors of homeowner mutual benefit corporations are likely not protected by Section 33–31–834." S.C. House Journal, 1994 Reg. Sess. 4/12/1994 (S.C. Reporters' Comments to Section 33–31–202, "Items Added"). Elsewhere, the Reporters' Comments to this Act note that it immunizes "churches and other 'true' charities" from liability, but "not protected at all are country clubs, home-owner associations, and possibly civic clubs." S.C. House Journal, 1994 Reg. Sess. 4/12/1994 (S.C. Reporters' Comments to Section 33–31–204, "Liability of members of an association").

These Comments go on to explain that a homeowner director *may* be immunized by S.C. Code Ann. § 33–31–202(b), which only protects the director from monetary damages and does not eliminate or limit liability for intentional misconduct or a knowing violation of law. S.C. House Journal, 1994 Reg. Sess. 4/12/1994 (S.C. Reporters' Comments to Section 33–31–202, "Items Added"); *see* S.C. Code Ann. 33–31–202(b)(4). Notably, the Commission's complaint seeks relief beyond monetary damages, to include prospective injunctive relief. (Am. Compl. of Mar. 29, 2021 at 7). The Commission's complaint also alleges Dehart engaged in the intentional act of retaliation as defined by the South Carolina Fair Housing Law at S.C. Code Ann. § 31–21–80. (Br. Of App. at 12, *citing Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74, 125 S. Ct. 1497, 1504 (2005); *Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000)).

The constraints of the Nonprofit Corporation Act's qualified immunity provision crystallize upon further examination of its legislative history. Section 33–31–180 was enacted in the wake *Fitzer v. Greater Greenville S.C. Young Men's Christian Ass'n*, in which the South

Carolina Supreme Court abolished the charitable immunity doctrine. 277 S.C. 1, 4, 282 S.E.2d 230, 232 (1981). The immunity codified in S.C. Code Ann. § 33–31–180 (1987), later S.C. Code Ann. § 33–31–834 (1994), was then adopted upon the General Assembly's finding

> the services of not-for-profit boards are critical to the efficient conduct and management of **the public and charitable affairs** of the citizens of this State. Members of these not-for-profit boards must be permitted to operate without concern for the possibility of litigation arising from the discharge of their duties as policymakers.

1987 Act No. 192, Section 1 (emphasis added). Dehart's HOA board membership neither serves a charitable affair nor the public.

This statute was enacted with the additional intent to

> provide immunity from suit of directors, trustees, or members of governing bodies of electric cooperatives and not-for-profit corporations, organizations, and associations which are **exempt from federal income taxation either under the provisions of Section 501(c)(3)[1], (c)(6)[2], or (c)(12)[3]** of the Internal Revenue Code of 1986 and to provide exception to immunity.

1987 Act No. 192 (emphasis added); 1988 S.C. Op. Att'y Gen. 158 (1988). To erase any question as to the intended applicability of the immunity provision to members of a particular nonprofit organization, the statute explicitly states that the member's immunity from suit provided for therein "applies to the following: (1) electric cooperatives . . . and (2) not-for-profit corporations, associations, and organizations, as recognized in and exempted from taxation under

[1] Exempting "[c]orporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals . . . ." 26 U.S.C. § 501(c)(3).

[2] Exempting "[b]usiness leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues . . . not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual." 26 U.S.C. § 501(c)(6).

[3] Exempting "[b]enevolent life insurance associations of a purely local character, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations. . . ." U.S.C. § 501(c)(12).

Federal Income Tax Code Section 501(c)(3), (c)(6), or (c)(12)." *Id.*; *see also* S.C. Code Ann. § 33–31–834. Though the parties do not dispute that Yacht Cove Owners Association is a nonprofit corporation, the Complaint makes no allegations as to its federal tax status. Nor does Dehart offer which, if any, of these three exemptions applies to the HOA to warrant immunity pursuant to S.C. Code Ann. § 33–31–834.

The circuit court dismissed Dehart as a defendant on the basis that the claim alleged against her "clearly r[an] afoul of the immunity provided to" Dehart as the volunteer leader of her HOA, (Dec. 16, 2021 Or. at 3), but the General Assembly did not pass the Nonprofit Corporation Act's qualified immunity statute with an express intent to shield HOA board members like Dehart from liability for independent, retaliatory conduct violating the civil rights of her neighbor. Rather, the General Assembly intentionally and explicitly limited the immunity provision to cover only certain organizations managing charitable and public affairs, and Yacht Cove Owners' Association is not one of them. For the reasons stated, this Court should reverse the circuit court's order of December 16, 2021 and find the Commission's amended complaint states facts sufficient to constitute a cause of action against Dehart.

Respectfully submitted,

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s/ Jamie N. Smith
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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of May, 2022, in Columbia, South Carolina, I served a copy of the foregoing **Reply Brief of Appellant** on counsel for the Respondents by email as follows:

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