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.

INITIAL REPLY BRIEF OF APPELLANT

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Respondents the Camden Hunt, Ltd. ("TCH"), Susan Sensor ("Sensor"), and Amy Cantey ("Cantey") (collectively, the "Respondents") present several key factual misstatements and legally erroneous arguments in their Brief that warrant a reply. In addition, Respondents improperly speculate (with no citation to any record evidence whatsoever) about Appellant Joanne Schwartz's ("Schwartz") motivations in bringing the lawsuit she brought on October 16, 2020, which was itself an outgrowth of "acute" conflicts that Respondents have admitted occurred no later than "the fall of 2019." Respondents' Brief p. 3. Respondents further advance a public policy rationale for their legal position that is both highly alarming and singularly indicative of the toxic corporate culture that Schwartz has long-attempted to remedy. Respondents claim that it is wholly an internal matter as to whether it is appropriate for Sensor to discharge a firearm on school property, for Sensor and Cantey to sanction and tolerate documented instances of animal abuse, and for them to improperly use corporate assets for Sensor's personal financial benefit because the board "can do as they want." Respondents' Brief p. 11. The South Carolina Nonprofit Corporation Act (the "Act") requires more. To claim the benefits of being a nonprofit corporation under the Act, the corporation and those in charge of it must abide by the responsibilities it imposes, including being subject to the equitable judicial dissolution provisions of S.C. Code Ann. § 33-31-1430 when properly brought by a director, which it was here.

A. TCH had the responsibility to raise standing prior to filing a Rule 59(e) motion, and it was error for the trial court to consider the arguments in TCH's Rule 59(e) motion when TCH failed to properly raise standing itself.

South Carolina law is clear that it is incumbent on a party to raise issues on which it wants a ruling prior to filing a Rule 59(e) motion. *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). TCH does not dispute that *it* failed to raise the standing issue at any time before it filed its Rule 59(e) motion on June 11, 2021. Nor does TCH dispute that the June 2, 2021 Order to which its Rule 59(e) motion was directed does not mention standing in any way.

TCH tries to excuse its fatal failure by citing to a recent unpublished case, *Hughes v. Bank of America National Association*, No. 2021-UP-354 (S.C. Ct. App. Oct. 13, 2021).[1] The *Hughes* case does not help TCH. In that case, the Court of Appeals mentioned that the requirement to file a Rule 59(e) motion could "arguably" occur "when the circuit court digresses from what the parties have argued and rules *sua sponte* on another issue." *Hughes*, No. 2021-UP-354, at 6. But that is not what happened here. Here, the June 2, 2021 Order does not mention standing at all. (R. ___) [June 2, 2021 Form 4 Order]. Further, although the issue of standing was discussed by the trial court and counsel for Schwartz on the record on May 19, 2021, TCH did not raise the issue in any way, nor did it participate in the argument on that issue at all. (R. ___) [May 19, 2021 Tr. pp. 69-73]. TCH declined to provide any contrary authority when authority was requested by the Court and provided by Schwartz's counsel. (*See* R. ___) [May 20, 2021 email from E. Black to T. Jennings with attachments]. It is thus inaccurate to suggest that the trial court "digressed" from what was argued. TCH simply chose to not raise the issue and not even offer any argument on that issue whatsoever when *multiple* opportunities arose to contribute. By its silence at every stage

[1] The *Hughes* opinion notes in bold on its cover page that it "has no precedential value. It should not be cited or relied on as precedent in any proceeding except as provided by Rule 268(d)(2), SCACR." Rule 268(d)(2), SCACR only allows for citation of unpublished opinions "in proceedings in which they are directly involved." As this proceeding does not involve the *Hughes* case, Respondents have thus improperly cited *Hughes* as precedential authority to this Court.

until its Rule 59(e) motion, TCH thus waived its ability to advance the standing issue because TCH *could* have raised the issue prior to judgment but did not. *See Stevens & Wilkinson*, 409 S.C. at 567, 762 S.E.2d at 695. TCH is a party separate and distinct from Sensor and Cantey and cannot conflate its failure with the procedural posture of Sensor and Cantey, where the Order dealing with their separate motion to dismiss addressed standing. *See* (R. ___) [June 7, 2021 Form 4 Order]. In sum, TCH's Rule 59(e) motion was procedurally improper, and it was error for the trial court to consider it.

B. Schwartz's case is not a derivative suit, and Respondents have cited no authority allowing for a director's derivative suit under applicable South Carolina law.

Respondents have not cited a single case or statute that supports the availability of a *director's* derivative action against a South Carolina nonprofit corporation. Such a claim simply does not exist, and the entirety of Respondents' arguments crumble under this critical fact.

Respondents ignore that derivative claims for nonprofit corporations are governed by S.C. Code Ann. § 33-31-630 and that directors are not eligible to bring derivative suits under that code section. Indeed, by separating derivative relief (§ 33-31-630) from equitable judicial dissolution relief (§ 33-31-1430), the General Assembly intended for each to serve distinct roles. *See Amisub of S.C., Inc. v. S.C. Dep't of Health & Envlt. Control*, 407 S.C. 583, 597, 757 S.E.2d 48, 416 (2014) ("[S]tatutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative."); *Hudson ex rel Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 124-25, 754 S.E.2d 486, 492-93 (2014) ("[S]tatutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction."). Further, "[t]he canon of construction '*expressio unius est exclusion alterius*' or '*inclusio unius est exclusion alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.' When interpreting a law, courts must

presume a futile act was not intended and that the law intends to accomplish something." *Bruning v. SCDHEC*, 418 S.C. 537, 545-46, 795 S.E.2d 290, 295 (Ct. App. 2016) (quotations and citations omitted). By addressing the concepts of derivative claims and equitable judicial dissolution in different code sections, the General Assembly has given a clear directive that these concepts are not to be conflated, and applying the rules of and relief available for derivative actions to an equitable judicial dissolution claim violates the overall statutory scheme.

Instead, Respondents attempt to argue that the nature of the relief sought transforms the statutory cause of action for equitable judicial dissolution into a derivative action. This argument misunderstands both the relief sought by Schwartz and the very cases Respondents cite. First, Respondents argue over and over that Schwartz is seeking "to remedy a loss to the corporation," and this fact transforms her case into a derivative one. *See, e.g.*, Respondents' Initial Brief p. 10. That is not what Schwartz is doing. Schwartz is not asking for money damages for harm that would belong to the corporation. (R. ___) [Complaint; Prayer for Relief]. Instead, she is bringing Respondents' abuses of the corporate form to the Court for equitable redress. She is not asking for compensation to remedy a loss; instead, as a matter of public policy and good corporate governance, she is asking the Court to look into financial malfeasance, gross examples of impaired judgment, and documented instances of animal abuse and make an equitable determination about the best way to craft relief should the Court find that relief is warranted. If TCH wants to retain the benefits of a nonprofit corporation in South Carolina, it must abide by the statutory rules governing that status.[2]

[2] Respondents' public policy arguments on this point are alarming and indicative of the toxic corporate culture at TCH that Schwartz was working diligently to address. Respondents suggest that "they can do as they want" on all issues raised in Schwartz's Complaint (including financial malfeasance, gross examples of impaired judgment, and documented instances of animal abuse), and if anyone does not approve of their behavior, they can simply leave TCH. Respondents' Initial

Second, the four cases Respondents cite that allegedly make Schwartz's case a derivative case do no such thing. *See* Respondents' Initial Brief, pp. 9-11. Each case was brought by a shareholder or member (not a director). Each case involved claims for money damages for claims like breach of fiduciary duty, fraud, and negligence (not for non-monetary, equitable judicial relief). And, critically, each case involved the court's analysis of whether the losses alleged were individual losses or corporate losses, as shareholders/members (again, not directors) can only bring direct (not derivative) claims when the shareholder/member sustains an individual loss. These cases simply do not inform the analysis whatsoever for a director's claim for equitable relief. *See Brown v. Stewart*, 348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001); *Patterson v. Witter*, 425 S.C. 213, 821 S.E.2d 677 (2018); *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 728 S.E.2d 61 (Ct. App. 2012); *Johnson v. Baldwin*, 221 S.C. 141, 69 S.E.2d 585 (1952).

Both Respondents and the Trial Court erred in arguing and finding, respectively, that a director's claim for equitable judicial relief under S.C. Code Ann. § 33-31-1430 is a derivative claim. The Order should be reversed.

C. Schwartz did not lose statutory standing to continue her case under S.C. Code Ann. § 33-31-1430 when she was removed from the Board of Directors of TCH.

Respondents' argument on the alleged loss of standing is entirely premised on their argument that a director's claim under § 33-31-1430 is derivative, relying primarily (again) on *Johnson v. Baldwin*, 221 S.C. 141, 69 S.E.2d 585 (1952), a case decided decades before the South

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Brief p. 11. These arguments indicate a profound antagonism by the present Board of Directors at TCH for proper corporate governance under South Carolina law and for the fiduciary responsibilities inherent in nonprofit corporation status in South Carolina. This is precisely the situation that § 33-31-1430 was designed to address. Respondents further speculate with no record citation that the South Carolina Attorney General has not been apprised of the situation. Respondents' Initial Brief p. 11. Such speculation should not be part of an appellate brief.

Carolina Nonprofit Act was enacted.[3] As such a claim is clearly *not* derivative (*see supra* pp. 3-5), Respondents' arguments on the loss of standing are unsustainable.

Respondents admit that *Johnson* only involved a shareholder's case. *Id.* at 148, 69 S.E.2d at 588. Yet Respondents double down on their insistence that *dicta* in *Johnson* that discussed a now-disfavored case from a federal district court applying New York law, *Kehaya v. Axton*, 32 F. Supp. 266 (S.D.N.Y. 1940), must govern the issue before this Court. Respondents entirely omit and ignore that *Kehaya* was interpreting a New York statute that South Carolina has never had, that *Kehaya* was overruled in 1959, and that New York law was changed in 1961 to more closely align with past and present South Carolina law. *See* Appellant's Initial Brief pp. 16-18. As *Johnson* does not address the question of continued standing under § 33-31-1430 and its holding is confined to shareholder suits, *Johnson* is not "just fine" to inform the analysis of whether Schwartz maintained her statutory standing upon her removal from the Board of Directors. *See* Respondent's Initial Brief p. 14.

The case that *is* "just fine" to inform the Court's analysis here is *Workman v. Verde Wellness Center, Inc.*, 382 P.2d 812 (Ariz. Ct. App. 2016). Like South Carolina, Arizona has adopted the Model Nonprofit Corporation Act's judicial dissolution provision. *Compare* S.C. Code Ann. § 33-31-1430 *with* A.R.S. § 10-11430(B) (2021). South Carolina law is clear that when a South Carolina law is the same as or modeled off of another jurisdiction's law, other jurisdictions' decisions interpreting that law are persuasive to South Carolina courts, with the "judicial gloss interpreting that legislation" also imported into South Carolina. *State v. Whitner*,

[3] Respondents also cite a variety of inapplicable cases regarding shareholder derivative suits that, as explained above, have no bearing on the question before this Court and have been fully distinguished in Appellant's Initial Brief. *See* Appellant's Initial Brief p. 18; Respondents' Initial Brief pp. 14-15.

399 S.C. 547, 553, 732 S.E.2d 861, 864 (2012); *see also Pressley v. REA Constr. Co., Inc.*, 374 S.C. 283, 291, 648 S.E.2d 301, 304 (Ct. App. 2007). Unlike any case cited by Respondents, *Workman* is directly on point with virtually identical statutory language. In *Workman*, the Arizona court determined that Workman retained her statutory standing under A.R.S. § 10-11430(B) after her removal from the board of directors. *Workman*, 382 P.3d at 819-20. Workman was a director when the suit was instituted, but was quickly voted off the board shortly after filing her lawsuit. While *Workman* acknowledges that retaliation was likely a factor in Workman's removal from the board, the *Workman* holding is not grounded in this likelihood—instead, it is grounded in the statutory language that should also be dispositive here.[4] *See* Appellant's Initial Brief pp. 20-24.

Respondents further speculate without any record citation that retaliation did not occur in this case. Appellant's Initial Brief p. 16.[5] While that is ultimately a question of fact that would be subject to discovery in this case (which has not yet occurred), the record before the trial court was that Schwartz did maintain that her removal from the board of directors of TCH was retaliation for

[4] Nor are the *Tenney* or *Summers* decisions grounded in retaliation, as Respondents argue. Respondents' Initial Brief pp. 15-16. They, like *Workman*, are focused primarily on the applicable statutory language in those cases that do not support a loss of standing like in a shareholder's derivative action as well as key public policy reasons that do not reward "the unhealthy corporate condition" that the out-voted or retaliated-against director "is intent upon correcting." *Tenney v. Rosenthal*, 6 N.Y.2d 204, 212 (N.Y. Ct. App. 1959); *see also Summers v. Colette*, 34 Cal. App. 5th 361, 365, 368-70, 374 (Cal. Ct. App. 2019).

[5] Respondents invoke Schwartz (and others') Motion for Rule to Show Cause of August 6, 2020, in the Case No. 2020-CP-28-00187 as a reason for Schwartz's removal from the Board of Directors. Respondents' Initial Brief p. 16. There is no record evidence showing this reasoning, and Respondents cite none. If true, however, this would constitute *another* instance of retaliation by Respondents. Respondents also mischaracterize that motion, as, by the plain language of that motion, Schwartz and others understood written solicitations for funds by TCH and the entry into new employment contracts by TCH in the summer of 2020 as violating the then-intact injunction order, which prohibited TCH from "tak[ing] any corporate action such as … entering into any new contracts … or making solicitations to subscribers." (R. ___) [Aug. 6, 2020 Motion for Order of Contempt p. 1, 2, Ex. A thereto p. 5, Ex. C thereto and Exs. 1 and 2 thereto; Tr. of May 19, 2021, pp. 17-19].

bringing serious corporate issues to light for redress. (R. ___) [May 19, 2021 Tr. pp. 70-71; Aug. 20, 2021 Mem. In Opp. To TCH's Motion for Reconsideration p. 6; Sept. 14, 2021 Tr. pp. 26-27].

As discussed extensively in Appellant's Initial Brief (pp. 19-26), the law of standing in South Carolina, the statutory language of S.C. Code Ann. § 33-31-1430, and on-point case law from other jurisdictions demonstrates that Schwartz did not lose standing to continue her equitable judicial dissolution action when she was removed from the Board of Directors. Respondents have cited no applicable case or statute that holds otherwise. The Court's Order should be reversed.

D. Schwartz properly pled her claim under S.C. Code Ann. § 33-31-1430.

Respondents argue that Schwartz's request that the Court "otherwise craft[] the best way to protect the interests of the subscribers of TCH as a mutual benefit corporation" and "for such other and further relief as the Court deems just and proper" (R. ___) [Complaint, ¶ 11, Prayer for Relief], is "too much of a stretch" to adequately plead a claim under S.C. Code Ann. § 33-31-1430. Respondents' Initial Brief p. 17. But they utterly fail to explain why. Reading this entire statute makes it clear that a request for relief—any relief—is left to the equitable judgment of the trial court. S.C. Code Ann. § 33-31-1430. The statute and its comments give the trial judge a wide range of equitable remedies to consider, but caution that "[a]s dissolution is a remedy of the last resort, a court should consider reasonable alternatives." *Id.* & Off. Cmt. 5. Schwartz has done just that in her requests for relief and has adequately pled a claim for relief under this section.

Respondents also argue that Schwartz should not be allowed to argue that leave to amend to correct any pleading deficiency on this point would be appropriate. Respondents' Initial Brief p. 18. However, Respondents' Motions to Dismiss (which raised the pleading issue but not the standing issue) did not ask for dismissal with prejudice. (R. ____) [TCH Motion to Dismiss of Nov. 19, 2020; Motion to Dismiss of Sensor and Cantey of Nov. 23, 2020; Joint Mem. in Support of Motions to Dismiss of TCH, Sensor, and Cantey of May 14, 2021.] The issue of prejudice only

arose at the end of the Rule 59(e) process on the standing issue with standing, unlike the pleading issue, incapable of being remedied by an amended pleading under the trial court's reasoning. On the pleading issue raised by the Motions to Dismiss, prejudice was not an aspect of the dismissal requested and was thus not properly before the Court. As dismissal with prejudice was not requested in the motions brought by Respondents, there was nothing to indicate to Schwartz that she needed to affirmatively argue for leave to amend when prejudice was never raised on the pleading issue actually brought, briefed, and argued by Respondents.

CONCLUSION

For the reasons discussed here in and in Appellant's Initial Brief, 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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