

No. _____

IN THE SUPREME COURT OF TEXAS

LAINIE WHITMIRE

Petitioner

v.

NATIONAL CUTTING HORSE ASSOCIATION

Respondent

On Petition for Review
from the Second Court of Appeals
236-220623-06

PETITION FOR REVIEW OF LAINIE WHITMIRE

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STATEMENT OF THE CASE

This is a suit for damages and declaratory judgment. Lainie Whitmire (“Whitmire”) claims that the National Cutting Horse Association (the “NCHA”): 1) violated its own rules and principles of due process in a disciplinary proceeding against Whitmire; 2) breached an oral agreement in which Whitmire was promised reinstatement of her non-professional membership status if she accepted a six month membership suspension; and 3) misrepresented to Whitmire that her non-professional status would be restored following the agreed membership suspension.

Judge Tom Lowe in the 236th Judicial District Court of Tarrant County, Texas in the case styled as *Lainie Whitmire & Ray Whitmire v. National Cutting Horse Association*, Cause No. 236-220623-06 granted summary judgment in favor of the NCHA. The trial court’s summary judgment dismissed under the judicial non-intervention doctrine Whitmire’s claims pertaining to her membership status. The trial court granted summary judgment on certain fraud and misrepresentation claims that Whitmire based on misrepresentations of the NCHA’s general counsel even though the NCHA did not move for summary judgment on those claims. The trial court also granted summary judgment dismissing Whitmire’s breach of oral agreement claim.

Whitmire appealed the trial court’s summary judgment to the Second Court of Appeals. Chief Justice John Cayce, Justice Lee Ann Dauphinot and Justice Sue Walker participated in the Court of Appeals’ decision, which was authored by Justice Sue Walker. The Court of Appeals decision is reported at *Whitmire v. National Cutting Horse Association*, 2009 WL 2196126 (Tex.App. – Fort Worth, July 23, 2009). The

Court of Appeals affirmed summary judgment that Whitmire's membership-related claims were barred by the judicial non-intervention doctrine. The Court of Appeals also affirmed summary judgment on misrepresentation claims that were outside the scope of the NCHA's motion for summary judgment. The Court of Appeals reversed summary judgment dismissing Whitmire's breach of oral agreement claim, and remanded for further proceedings on that claim. The Court of Appeals denied the NCHA's motion for rehearing on that issue on October 1, 2009.

STATEMENT OF JURISDICTION

The Second Court of Appeals ruled that judicial intervention in a dispute between a private association and one of its members is not permitted unless the member shows "a wholesale deprivation of due process." While the Second Court of Appeals overlooks the fact that such a deprivation has occurred in this case, this standard for intervention ignores well-established precedent holding that a court should intervene when there is evidence that a private association has failed to abide by its rules. Thus, this Court has jurisdiction to hear this appeal because the Second Court of Appeals' decision in this case creates a conflict between the courts of appeals on an important point of law. TEX. GOV'T CODE § 22.001(a)(2); TEX. R. APP. PROC. 56.1(a)(2). Moreover, the decision by the Second Court of Appeals decision creates a gross double standard under which members of private associations must abide by the association's rules while the association is free to violate its members' rights in contravention of the association's own rules. This error of law by the Second Court of Appeals is of such importance to the jurisprudence of this state – which had previously been well-settled – that it requires

correction by this Court. TEX. GOV'T CODE § 22.001(a)(6); TEX. R. APP. PROC. 56.1(a)(5). Furthermore, the decision by the Second Court of Appeals involves an important question of state law that has not been, but should be, clearly resolved by the Supreme Court. TEX. R. APP. PROC. 56.1(a)(6). Finally, inasmuch as Whitmire has alleged and proven a violation of her due process rights, which a private association may not violate, this case involves constitutional issues which should be addressed and resolved by this Court. Tex. R. App. Proc. 56.1(a)(4).

ISSUES PRESENTED FOR REVIEW

1. Under the judicial non-intervention doctrine, is a private association immune from suit and liability for damages even if the summary judgment record demonstrates that the private association failed to comply with its own written rules and disciplinary procedures.
2. Does a private association's mere provision of notice and a hearing satisfy Texas due process requirements even if the private association: a) shifts its burden of proving a rule violation has occurred by requiring the accused to prove that a rule violation has not occurred; b) withholds material evidence from the member until during her final appeal hearing so that she does not have an opportunity to refute that evidence; c) denies the member another hearing to present affidavits refuting the manufactured evidence that had been withheld from her until during her final appeal hearing; and d) disciplines the member for showing and caring for horses and receiving prize money in competitions (which is not proscribed by the association's rule) when the hearing notice stated that she was charged with violating the association's rule against training horses astride for remuneration?
3. If a plaintiff asserts fraud and misrepresentation claims that are based on two distinct and independent alleged misrepresentations, is summary judgment on the entirety of the claims appropriate when the defendant expressly limits its motion for summary judgment to only one of the two alleged misrepresentations?

I. STATEMENT OF FACTS

A. Whitmire's Rumored Rule Violation and the NCHA Disciplinary Procedure Rules.

When Lainie Whitmire joined the NCHA in 2003, it was with the express understanding that any dispute regarding an alleged violation of the NCHA rules would be “resolved by the procedures provided in the rules.” [CR 2:174, 198]. When Whitmire won the amateur class at a major NCHA event in August 2004 [CR 2:249-250; CR 4:589], it was rumored that Whitmire, a housewife and former school teacher, was a professional horse trainer who competed as an amateur and non-professional in violation of NCHA rules. [CR 4:679-680]. As set forth herein, the NCHA conducted disciplinary proceedings regarding this alleged violation in a manner that was inconsistent with the NCHA rules, resulting in termination of Whitmire's amateur and non-professional status.

NCHA disciplinary proceedings are governed by NCHA Rules 37 and 38. Under Rule 37, a disciplinary proceeding to hear an alleged rule violation begins with the filing of a “complaint in writing to the NCHA Executive Director together with a cashier's check in the amount of \$50.00 made payable to the National Cutting Horse Association.” [CR 2:192]. “A complaint must be filed (postmarked, faxed or hand delivered) with the NCHA Executive Director within seven (7) days of the closing date of the show involved.” [Id.]. A written complaint that is filed with the NCHA is then referred to a Grievance Committee for investigation and consideration.” [Id.].

Under NCHA Rule 38, a member may be disciplined by the Grievance Committee “whenever it shall have been established by a preponderance of the evidence that such member . . . has violated any rule of the Association.” [CR 2:194]. A member must be

given the opportunity to be heard, to present evidence in her own behalf, and to hear and refute evidence offered against her. [Id.]. NCHA officials interpret that rule to require a member be given advance notice of the evidence to be presented against her so that she can address the evidence in refuting the complaint. [CR 4:598; CR 5:815, 894-95].

B. Whitmire's Lawsuit Complaining of the NCHA's Violation of its Rules and the NCHA's Motion for Summary Judgment Claiming Compliance With its Rules.

Whitmire alleges that the NCHA violated the foregoing disciplinary rules in its dealings with her. [CR 1:75-108]. The NCHA also ignored the plain language of its rules in disciplining Whitmire for competing in violation of the rule that a non-professional not train "horses astride in any equine discipline for direct or indirect remuneration." [CR 4:608-609]. The NCHA sought summary judgment on Whitmire's claims pertaining to the improper suspension of her non-professional status under the judicial non-intervention doctrine on the grounds that "the summary judgment evidence establishes that the NCHA acted in accordance with its rules" in its discipline of Whitmire. [CR 2:155]. The summary judgment evidence relied on by the NCHA was the Affidavit of Jeff Hooper. [CR 2:173-385]. Hooper claimed that the NCHA complied with NCHA Rules 37 and 38 by receiving a written complaint and empanelling a Grievance Committee to review the complaint and conduct an investigation in accordance with the NCHA rules. [CR 2:174-176]. Hooper also cited his November 1, 2004 letter to Whitmire in which he claimed that the NCHA had received a complaint that Whitmire "trained barrel horses for clients and received remuneration for your training." [CR 2:202]. Accordingly, Hooper advised Whitmire that the NCHA would

conduct a hearing on November 15, 2007 concerning the alleged rule violation. [Id.]. Hooper then alleges subsequent appeal proceedings that supposedly were conducted in compliance with NCHA Rule 38. [Cr 2:176-179].

C. The Evidence Contradicted the NCHA's Alleged Compliance With its Rules.

1. There Was Not a Written Complaint as Required Under NCHA Rule 37.

Contradicting his affidavit testimony, Hooper testified in his deposition that no complaint had been filed against Whitmire as prescribed by NCHA rules. (CR 4:619). Similarly, the Chair of the Grievance Committee and another member of the committee both testified that they had no knowledge of a complaint pertaining to Whitmire. [CR 4:680, 752]. Moreover, the transcript from the Grievance Committee hearing contains the admission from the NCHA's counsel, Eldridge Goins, that there never was a complaint against Whitmire and the Grievance Committee was not acting in accordance with Rule 37 as alleged in Hooper's summary judgment affidavit. [CR 2:245-246].

Q. All right. Because we've never learned anyone that's made the allegations against you, we've not seen a formal complaint, have we?

A. No, sir.

Q. The rules provide that a formal complaint will be filed pursuant to Rule 37, doesn't it? Have you ever seen a formal complaint?

MR. GOINS: **This isn't a 37 proceeding**, so, you know, your questions are irrelevant related to what rule's being applied. Ms. James told you we're looking at her qualifications to be a non-professional contestant.

MR. GOINS: If you want to take your time and ours, I think you're going to be treading on a lot of impatience, because **there's not any Rule 37 complaint here.**

* * *

MR. BREWSTER: Fair enough. You don't have to be confrontational. I'm simply asking her - -

MR. GOINS: Confrontational? You don't need to make speeches about something that's not an issue. **This is not a Rule 37 hearing.**

[Id.] (emphasis added).

2. The NCHA Improperly Placed the Burden of Proof on Whitmire.

NCHA Rule 38 specifies that an alleged rule violation must be "established by a preponderance of the evidence" before a member may be disciplined. The NCHA violated that rule by requiring that Whitmire affirmatively prove she had not violated the NCHA prohibition of training horses astride for direct and indirect remuneration. Hooper, the Grievance Committee Chair, and a member of the Grievance Committee all confirmed that Whitmire was required to prove that she had not trained horses astride for remuneration. [CR 4:620, 651-653, 711, 764, 766].

3. Whitmire Proved She Had Not Trained Horses Astride for Remuneration, but Whitmire Was Punished for Conduct Not Proscribed by NCHA Rules.

Whitmire presented testimony and a polygraph report at the November 15, 2004 Grievance Committee hearing to disprove the rumor that she was a professional horse trainer. [CR 2:241-244]. Whitmire testified that she never had trained someone else's horse or received remuneration for training someone's horse. [Id.]. Whitmire also provided a polygraph report confirming that she had never trained horses for remuneration. [Id.]. A professional NCHA trainer who trained Whitmire and her horses testified that Whitmire had never been a professional horse trainer. [CR 2:261-267].

At the November 15, 2004 Grievance Committee hearing, the NCHA produced no witnesses to testify that Whitmire had trained horses astride for remuneration. [Id. at

207-273]. Thus, the sworn testimony from two witnesses and the polygraph examiner's report proving that Whitmire had never trained horses astride for remuneration were undisputed. Nevertheless, the Grievance Committee concluded that Whitmire's amateur and non-professional status should be revoked. [CR 2:205-206]. Without any evidence that Whitmire had trained horses astride for remuneration, the committee supported its decision by redefining "training" and "remuneration" to compensate for the lack of evidence that Whitmire had trained horses astride for remuneration. [Id.].

Lainie Whitmire rode horses which did not belong to her in barrel racing competition and has provided extended term care of those horses sufficient to constitute training for the purpose of competing in barrel horse competition for premium monies representing direct or indirect remuneration.

[CR 2:205].

However, the NCHA rules make a distinction between training a horse and competing on a horse, and several NCHA officials acknowledged that distinction. [CR 3:743-744;CR 4:609;CR 5:966-967]. Moreover, nothing in the NCHA rules indicates that long-term care of horses (presumably feeding, cleaning stalls, shoeing, etc.) constitutes training horses *astride*. With respect to Whitmire's winning premium money in competitions, NCHA Rule 9.1.B states that "[p]remium money won shall not be considered remuneration" [CR 4:613].

D. The NCHA Misrepresented that Whitmire Would Have Her Non-Professional Status Reinstated if She Accepted a Six-Month Membership Suspension and Abandoned Further Appeals.

Following the Grievance Committee's revocation of Whitmire's amateur and non-professional status, Whitmire sought an appellate hearing with the NCHA at which

Whitmire stated she would provide “unequivocal sworn testimony” proving she had never been a professional horse trainer and that she would submit to an additional polygraph examination by an examiner of the NCHA’s choosing. [CR 3:555]. Prior to that hearing, the NCHA, acting through its counsel Eldridge Goins, represented to Whitmire that if she would abandon her appeal and accept a six-month suspension of her membership, Whitmire’s non-professional status would be reinstated after the six-month suspension. [CR 3:521-524, 543-544, 565].

When Whitmire applied for reinstatement of her non-professional status after the six-month suspension, her application was denied without a hearing. [CR 2:301; CR 3:572-573]. In fact, the NCHA initially stated that her application would not be processed “until the Association believes that your membership will be pursued in accordance with the clearly published rules of the Association.” [CR 3:575]. An NCHA committee eventually considered Whitmire’s application for reinstatement, but Whitmire was not allowed to attend that hearing to hear and refute any evidence presented against her. [CR 2:308-311]. The committee rejected the application for reinstatement and recommended suspension of Whitmire’s lifetime membership for making false statements in her application. [Id. at 311].

When Whitmire appealed that ruling, she requested access to the evidence that supposedly supported the committee’s finding that she had lied on her application for reinstatement, but that request was rejected. [CR 2:366]. At the appeal hearing on August 21, 2006, the NCHA presented documents which it contended were evidence that Whitmire had been paid to train horses. [CR 2:315-374]. Having been denied access to

those materials, Whitmire could not refute them at that hearing. It was only during the course of her subsequent lawsuit against the NCHA that she was able to obtain affidavits from the individuals who had provided the supposedly incriminating documents in which they clarified that Whitmire had not been paid to train horses as the NCHA incorrectly insinuated from the documents. [CR 7:1220-1226]. When Whitmire obtained these important affidavits, she repeatedly requested another audience before the NCHA to present this evidence. [CR 7:1233-1234, 1236-1237, 1239-1240, 1243, 1245-1246]. However, those requests were denied, thus denying Whitmire her right under NCHA rules to refute the evidence against her. [CR 7:1235].

E. The Disposition of Whitmire's Claims.

Whitmire asserted claims for breach of contract, fraud, negligent misrepresentation and sought relief in the form of a declaratory judgment pertaining to the NCHA's revocation of her non-professional status in violation of the NCHA's own rules. On all those claims, the NCHA moved for summary judgment on the grounds that it had complied with its own rules as set forth in Jeff Hooper's summary judgment affidavit. The NCHA conceptualized the judicial non-intervention doctrine as follows:

Plaintiffs have no grounds to complain of the substance of the NCHA rules or the consequences associated with violating those rules. Plaintiffs can only complain if the NCHA takes actions that are contrary to its own rules.

[CR 2:162]. Whitmire confined her response to showing that the NCHA had taken actions that were contrary to its own rules. Despite the genuine issues of material fact regarding the NCHA's adherence to its rules, the trial court granted summary judgment. The Court of Appeals declined to intervene because the NCHA's rule violations

supposedly did not involve “a wholesale deprivation of due process or the opportunity to be heard in violation of some civil or property right.” [Memorandum Opinion, p. 14].

Because the judicial non-intervention doctrine did not apply to the claims based on Goins’ misrepresentations, the NCHA filed a supplemental motion for summary judgment addressing Goins’ representation that Whitmire’s non-professional status would be reinstated after her six month suspension. That motion was limited to the breach of contract claim, but did not seek summary judgment on the alternative fraud and negligent misrepresentation claims. [CR 1:96-101; CR 3:387-95]. Moreover, in its original summary judgment motion regarding the rule violation claims, the NCHA sought summary judgment only on that portion of Whitmire’s fraud and negligent misrepresentation claims.

Plaintiff’s fraud and negligent misrepresentation claims . . . are based, *in part*, on the following allegations:

“The NCHA made a material representation to Lainie Whitmire that if she paid her membership dues and abided by the NCHA rules, she would be granted her Non-Professional status and NCHA membership.”

This portion of Plaintiff’s fraud claims is no more than a restatement of Plaintiff’s breach of contract claim² and should be dismissed as a matter of law. Further, for the reasons stated above, any such claim is barred by the judicial non-intervention doctrine and must be dismissed.

[CR 2:167-68] (emphasis added and citations omitted). Although the NCHA did not seek summary judgment on the fraud and negligent misrepresentation claims based on Goins’ representations, the trial court granted summary judgment dismissing all aspects of the fraud and negligent misrepresentation claims. The Court of Appeals affirmed the

² The breach of contract claim referenced was the breach of contract claim based on the NCHA’s rule violations addressed earlier in the NCHA’s original motion for summary judgment.

summary judgment, claiming that “[t]he NCHA’s motion for summary judgment put Whitmire on notice and provided her with adequate information to oppose its assertion that her fraud and negligent misrepresentation claims were simply restatements of her breach of oral contract claim.” [Memorandum Opinion, p. 28].

II. SUMMARY OF THE ARGUMENT

The judicial non-intervention doctrine protects a private association from judicial intervention as long as there are not allegations or evidence that the private association failed to abide by its own rules. However, by its holding in this case, the Second Court of Appeals indicates that the NCHA’s multiple rule violations and fraudulent representations cannot be challenged so long as Whitmire did not suffer a “wholesale deprivation of due process.” Permitting judicial intervention only upon a wholesale deprivation of due process is inconsistent with Texas jurisprudence regarding the judicial non-intervention doctrine. The Second Court’s standard for intervention creates a gross double standard under which members of a private association are bound to abide by the association’s rules, but the association is freed from any corresponding obligation to likewise abide by its own rules. Because Texas law has never recognized this double standard, this Court should reject the application of that double standard in this case and reverse the decision of the Second Court of Appeals.

In the unlikely event that this Court were to uphold the lower court’s new standard governing judicial non-intervention, reversal is still warranted because Whitmire suffered a wholesale deprivation of due process. First, the NCHA denied Whitmire due process by reversing the burden of proof prescribed in its rules and requiring Whitmire to prove

that she had not violated NCHA rules by training horses astride for remuneration. Second, Whitmire was given inadequate notice of the violation she was alleged to have committed because the Grievance Committee redefined what constitutes training horses astride for remuneration after Whitmire appeared at the original disciplinary proceeding and proved that she had never trained horses for remuneration. Third, the NCHA denied Whitmire due process by withholding evidence to be presented against her and then denying her an opportunity to refute the evidence that had been withheld.

The record is clear that the NCHA had limited its motion on Whitmire's fraud and negligent misrepresentation claims to the rule violation claims that were the subject of the NCHA's judicial non-intervention defense. Thus, the Court of Appeals erred in finding that the NCHA's summary judgment motion provided Whitmire notice and adequate information that the motion applied to the claims based on Goins' misrepresentations.

III. ARGUMENT

A. The Second Court of Appeals Applied the Wrong Standard for Intervention.

No Texas appellate court has applied the "wholesale deprivation of due process" standard for judicial intervention that the Second Court of Appeals applied in this case.

Instead, long-standing judicial non-intervention law has been summarized as follows:

The law is well-settled in Texas that a court will not intervene in the internal management and disciplinary processes of a private club unless the club violates its own rules and procedures. The reason for this is that club members impliedly agree to abide by the rules of the club when they join it.

Lawrence v. Ridgewood Country Club, 635 S.W.2d 665, 666-67 (Tex.App. – Waco 1982 writ ref'd n.r.e.) (citations omitted). Thus, while a member's agreement to abide by a

private association's rules will not permit the member to challenge in court the wisdom, fairness or reasonableness of the association's rules, no Texas court has ever held that a member cannot seek redress when a private association violates its own rules to the detriment of a member who has herself agreed to abide by those same rules.

Rather, several courts have based their decision not to intervene on the fact that the private association was not alleged or shown to have violated its own rules. For instance, the Fort Worth Court of Appeals stated that it would not review a private association's actions because there was no allegation or proof that the actions were contrary to the association's bylaws. *T.E. Harden v. Colonial Country Club*, 634 S.W.2d 56, 59-60 (Tex.App. – Fort Worth 1982, writ ref'd n.r.e.). The El Paso Court of Appeals also held that intervention was not appropriate absent allegations or proof that a private association's actions were contrary to its bylaws. *See Juarez v. Texas Association of Sporting Officials El Paso Chapter*, 172 S.W.3d 274, 279-80 (Tex.App. – El Paso 2005, no pet.). Consistent with this approach, a federal district court declined to intervene because the plaintiff's complaint did not allege, and the evidence did not show, that the private association violated its own procedures in terminating a member's membership. *Campbell v. American Psychological Association*, 68 F.Supp.2d 768, 779 (W.D. Texas 1999).

The NCHA recognized that the threshold standard for intervention is whether or not it has complied with its own rules when it sought summary judgment on the grounds that "the NCHA acted in accordance with its rules." [CR 2:155]. The NCHA further stated: "Plaintiffs can only complain if the NCHA takes actions that are contrary to its

own rules.” [Id. at 162]. Whitmire agrees with this articulation of the standard for judicial intervention because it is consistent with abundant “well-settled” law in Texas described by the Waco Court of Appeals in *Lawrence*. 635 S.W.2d at 666-67. Had the Second Court of Appeals applied this well-settled law instead of a double standard under which Whitmire must abide by NCHA rules while the NCHA is allowed to violate its own rules, reversal of the trial court’s summary judgment would have been mandatory because there is substantial evidence as set forth herein that the NCHA violated its disciplinary and substantive rules when it revoked Whitmire’s amateur and non-professional status. Therefore, the Court should reverse the judgment of the Second Court of Appeals affirming the trial court’s summary judgment in favor of the NCHA.

B. The NCHA Violated Due Process.

As set forth above, Texas courts have articulated a minimum requirement that a private association comply with its own rules in order to avoid judicial intervention. In addition to that most basic requirement, a private association’s actions may not be arbitrary, capricious, fraudulent or illegal. *Harden*, 634 S.W.2d at 60. Furthermore, a private association also³ must afford its members due process. *See e.g., Hatley v. American Quarter Horse Association*, 552 F.2d 646, 656 (5th Cir. 1977). Due process concerns are not satisfied merely by showing that notice and a hearing were provided as the Second Court’s decision suggests. For instance, under federal and state constitutional

³ Whether a private association provided due process is only one question that Texas courts must evaluate in determining whether to intervene. First, as precedent indicates, a court must determine whether the private association is alleged or proven to have violated its own rules. Even if the private association has complied with its rules, its actions must not be arbitrary, capricious, illegal or against public policy. Finally, the association in certain circumstances must afford due process to its members. The Second Court of Appeals’ decision wrongly focused exclusively on this final requirement as if it were the only standard for intervention under Texas law.

law, an attempt to shift the burden of proof to the accused violates due process. *Adams v. State*, No. 2-05-379-CR, 2007 WL 495190 at *17 (Tex.App. – Fort Worth February 15, 2007, pet. ref'd) (citing *Francis v. Franklin*, 471 U.S. 307, 312-15, 105 S.Ct. 1965, 1970-71, 85 L.Ed.2d 344 (1985); *Brown v. State*, 122 S.W.3d 794, 799 (Tex.Crim.App.2003), cert. denied, 541 U.S. 938 (2004)). Furthermore, if a member is granted a hearing without sufficient time to prepare a defense, due process is denied, and the association's action is null and void. *Masonic Grand Chapter of Order of Eastern Star v. Sweatt*, 329 S.W.2d 334, 335-37 (Tex.Civ.App. – Fort Worth 1959, writ ref'd n.r.e).

The record establishes numerous fact issues regarding the multi-faceted exception to the judicial non-intervention doctrine. First, Whitmire proved that the NCHA violated its rules by initiating a disciplinary proceeding without a written complaint as required under NCHA Rule 37. By thus proving the falsity of the NCHA's November 1, 2004 notice letter and the NCHA's summary judgment affidavit, Whitmire not only proved a violation of the NCHA's rules, but also satisfied the fraudulent actions exception to the judicial non-intervention doctrine. *Harden*, 634 S.W.2d at 60. Second, the NCHA violated due process by convicting Whitmire for an offense which was not stated in the NCHA's November 1, 2004 notice letter. Whereas that letter charged Whitmire with training horses astride for remuneration, she was disciplined for showing and caring for horses (which is not training astride) and receiving prize money (which is not remuneration under NCHA rules). The Grievance Committee's finding in this regard also supports intervention on the grounds that a private association may not substitute legislation for interpretation in a disciplinary proceeding. *Dickey v. Club Corp. of*

America, 12 S.W.3d 172, 176 (Tex.App- Dallas 2000, pet. denied). Third, the NCHA violated its rules and due process by shifting the burden of proof to Whitmire during the hearings held on the revocation of her non-professional status. *Hatley*, 552 F.2d at 656; *see also Francis*, 471 U.S. at 312-15 (shifting burden of proof violates federal due process); *Brown*, 122 S.W.3d at 799 (shifting burden of proof violates due process under Texas Constitution). Fourth, the NCHA violated due process by not allowing Whitmire to participate in the April 2006 hearing in which it determined that Whitmire had violated NCHA rules and lied on her reinstatement application. *Hatley*, 552 F.2d at 656. Fifth, by withholding materials it intended to present against her at Whitmire's appeal hearing, the NCHA violated its rules and fundamental norms of due process by not allowing Whitmire adequate opportunity to refute the evidence against her. *Sweatt*, 329 S.W.2d at 335-37 (holding that expulsion of member was null and void for failure to provide adequate time to prepare and present defense in violation of due process). The NCHA then compounded that violation by denying Whitmire a hearing to present evidence that she obtained after her appeal hearing that refuted the evidence that had been withheld until that hearing. *Hatley*, 552 F.2d at 656.

C. The Decision Below Should Be Reversed Because Summary Judgment Can Only Be Granted on Claims on Which the Movant Sought Summary Judgment.

A trial court may only grant summary judgment on the grounds expressly stated in the motion. *McConnell v. Southside Ind. School Dist.*, 858 S.W.2d 337, 341 (Tex. 1993). The summary judgment on Whitmire's fraud and negligent misrepresentation claims arising out of Goins's assurances that the NCHA would reinstate Whitmire's non-

professional status following the agreed six month suspension should be reversed because the NCHA did not seek summary judgment on those claims. The NCHA's summary judgment motion acknowledged the obvious fact that there were separate and independent bases to Whitmire's fraud and misrepresentation claims because the NCHA addressed Whitmire's claims "in part" and sought summary judgment on "this portion" of Whitmire's claims pertaining to misrepresentations in the NCHA's membership rules. Although the NCHA referenced Whitmire's claims only "in part," the Second Court held without explanation that the NCHA's motion provided Whitmire notice that the NCHA sought summary judgment on the entirety of Whitmire's fraud and negligent misrepresentation claims. However, the cases relied on by the Second Court provide no support for its ruling because those cases⁴ involved situations in which the summary judgment movants expressly stated that limitations barred the plaintiff's claims in their entirety or precluded the plaintiff from recovering any damages. [Memorandum Opinion, pp. 27-28]. Because Texas law does not permit summary judgment on the entirety of a plaintiff's claims when the defendant expressly limits its summary judgment to a "portion" of those claims, the decision below should be reversed.

IV. PRAYER FOR RELIEF

Petitioner Lainie Whitmire respectfully requests that this Court reverse the judgment of the Second Court of Appeals affirming, in part, the trial court's summary judgment in favor of the NCHA. Whitmire further requests such other and further relief, both special and general, at law or in equity, to which she may be justly entitled.

⁴⁴ *Fiengo v. Gen. Motors Corp.*, 225 S.W.3d 858 (Tex.App. – Dallas 2007, no pet.); *Schiller v. Lewis*, No. 05-07-00209-CV, 2008 WL 3318884 at *3 (Tex.App. – Dallas August 12, 2008, no pet).

Respectfully submitted,

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CERTIFICATE OF SERVICE

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