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IN THE STATE OF SOUTH CAROLINA
In the Court of Common Pleas

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 2012-CP-43-2030

Appellate Case No. 2016-000774

Win Myat.....Appellant,

v.

Tuomey Healthcare System.....Respondent.

MOTION FOR APPELLATE COURT TO ALLOW CITATIONS
TO UNDERLYING TRIAL AND APPELLATE DOCUMENTS IN LAZERSON

Tuomey hereby moves, pursuant to Appellate Court Rule 240, to cite Trial Court Orders and other underlying Appellate Court documents filed in the South Carolina Supreme Court library for the decisions of Lazerson v. Hilton Head Hospital, 312 SC 211, 439 SE2d 836 (1994). The arguments raised by Appellant Myat are virtually identical to issues raised and ruled upon by the South Carolina Supreme Court in Lazerson. These documents to which Tuomey seeks to cite are not properly identified in Record on Appeal as factual documents, but rather are underlying documents which shed light on the Supreme Court decision in Lazerson. Tuomey submits that Appellant Myat's arguments, in essence, seek to overturn the reasoning of Lazerson and that the documents listed below are critical to efficiently addressing the legal precedence of

Lazerson. Tuomey seeks authority to cite the following documents that were retrieved from the S.C. Supreme Court library (microfilm). By copy of this motion, the following documents are being provided to the Appellate Court and opposing counsel. The documents are as follows:

1. Hilton Head Health Services Corporation IRS letter;
2. Hilton Head Hospital Center IRS letter;
3. Hospital Association Amicus;
4. Motion for Reconsideration and Motion to Declare a Statute Unconstitutional (Zimmerman v. Bujenovic, etal);
5. Trial Lawyers Amicus;
6. Order (Zimmerman v. Bujenovic, etal) dated 6/15/92;
7. Order (Zimmerman v. Bujenovic, etal) dated 8/8/92;
8. Order (Bennett v. Bujenovic, etal)dated 12/30/91; and
9. Corporations, 2000 South Carolina Laws Act 336 (S.B. 732).

RESPECTFULLY SUBMITTED,
LEE, ERTER, WILSON, HOLLER & SMITH, LLC

By: _____

DAVID C. HOLLER
Federal ID: 5608
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126 North Main Street
Post Office Box 580
Sumter, South Carolina 29151
(803) 778-2471

January 27, 2017

Internal Revenue Service
District Director

Department of the Treasury

Date:
DEC 9 1985

Our Letter Dated:
February 22, 1984

Person to Contact:
M. Isaacs/bz

Contact Telephone Number:
(404) 331-4516

Employer Identification Number:
57-0757036

File Folder Number:
580034385

Hilton Head Health Services Corporation
PO Box 1117
Hilton Head Island, SC 29925

Dear Taxpayer:

This modifies our letter of the above date in which we stated that you would be treated as an organization which is not a private foundation until the expiration of your advance ruling period.

Based on the information you submitted, we have determined that you are not a private foundation within the meaning of section 509(a) of the Internal Revenue Code, because you are an organization of the type described in section 509(a)(2). Your exempt status under section 501(c)(3) of the code is still in effect.

Grantors and contributors may rely on this determination until the Internal Revenue Service publishes notice to the contrary. However, a grantor or a contributor may not rely on this determination if he or she was in part responsible for, or was aware of, the act or failure to act that resulted in your loss of section 509(a)(2) status, or acquired knowledge that the Internal Revenue Service had given notice that you would be removed from classification as a section 509(a)(2) organization.

Because this letter could help resolve any questions about your private foundation status, please keep it in your permanent records.

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely yours,

Michael J. Murphy

District Director

COPY

275 Peachtree St., N.E., Atlanta, Ga. 30043

Letter 1050 (DO) (7-77)

000321

Internal Revenue Service
Washington, DC 20224

Date: MAR 26 1974

In reply refer to: T:MS:EO:R:1-2

EIN 57 0563434

The Hilton Head Hospital Center
P. O. Box 5928
Hilton Head, South Carolina 29925

COPY

Gentlemen:

We have considered your application for exemption from Federal income tax under section 501(c)(3) of the Internal Revenue Code.

The information submitted indicates that you were incorporated under the nonprofit statutes of the State of South Carolina on August 22, 1973. Your purposes are to provide hospital care, promote health and operate in a manner so as to further charitable goals.

You will operate to the extent of your financial ability for those not able to pay for the services rendered and not exclusively for those who are able and expected to pay. You will not refuse to accept patients in need of hospital care who cannot pay for such services. You will accept Medicare and Medicaid patients.

You intend to operate an emergency room facility open on a 24-hour a day basis for the purpose of providing emergency care to all members of the community, whether or not able to pay for such service.

Your medical staff will be open to all qualified physicians in the area, consistent with the size and the nature of the facilities. The staff will include both permanent staff of full-time doctors and a courtesy staff for those using the hospital on a part-time basis.

Your Board of Trustees intends to invest any surplus funds in (1) the construction or purchase of new

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COPY

The Hilton Head Hospital Center

facilities and equipment and (2) to provide medical and emergency care to those unable to pay for such care.

In your letter of March 14, 1974, you state that you will comply with all existing requirements of the order entered in Eastern Kentucky Welfare Rights Organization, et al. v. George P. Shultz, et al., —F. Supp.— (USDC DC, January 29, 1974), and with any other compliance requirements which may be subsequently imposed under that order. The order is currently on appeal to the Court of Appeals for the District of Columbia Circuit. This ruling is therefore conditioned on your complying with any modification of that order on appellate review thereof.

Based on information supplied, and assuming your operations will be as stated in your application for exemption, we have determined you are exempt from Federal income tax under section 501(c)(3) of the Internal Revenue Code.

This ruling is further based on the understanding that you will conspicuously post, in appropriate public areas, notice, the form and contents of which are to be developed by the Internal Revenue Service subject to approval by the United States District Court for the District of Columbia, pursuant to the order entered in Eastern Kentucky Welfare Rights Organization, et al. v. George P. Shultz, et al., —F. Supp.— (USDC DC, January 29, 1974).

We have further determined you are not a private foundation within the meaning of section 509(a) of the Code, because you are an organization described in sections 509(a)(1) and 170(b)(1)(A)(iii).

You are not liable for social security (FICA) taxes unless you file a waiver of exemption certificate as provided in the Federal Insurance Contributions Act. You are not liable for the taxes imposed under the Federal Unemployment Tax Act (FUTA).

Since you are not a private foundation, you are not subject to the excise taxes under Chapter 42 of the Code. However, you are not automatically exempt from other Federal excise taxes.

The Hilton Head Hospital Center

Donors may deduct contributions to you as provided in section 170 of the Code. Bequests, legacies, devises, transfers, or gifts to you for your use are deductible for Federal estate and gift tax purposes if they meet the applicable provisions of sections 2055, 2106, and 2522 of the Code.

If your purposes, character, or method of operation is changed, you must let your key District Director know so he can consider the effect of the change on your exempt status. Also, you must inform him of all changes in your name or address.

You are required to file Form 990, Return of Organization Exempt From Income Tax. You are required to file Form 990 only if your gross receipts each year are normally more than $5,000. The return must be filed by the 15th day of the fifth month after the end of your annual accounting period which ends June 30. The law imposes a penalty of $10 a day, up to a maximum of $5,000, for failure to file the return on time.

You are not required to file Federal income tax returns unless you are subject to the tax on unrelated business income under section 511 of the Code. If you are subject to this tax, you must file an income tax return on Form 990-T. In this letter we are not determining whether any of your present or proposed activities are unrelated trade or business as defined in section 513 of the Code.

Please use your employer identification number on all returns you file and in all correspondence with the Internal Revenue Service.

We are informing your key District Director, Atlanta of this action. Because this letter could help resolve any questions about your exempt status and your foundation status, please keep it in your permanent records.

CONCLUSION

For the foregoing reasons, the Association urges this Court to reverse the court below.

CALLISON TIGHE ROBINSON
& ANASTASION

By: _____

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ATTORNEYS FOR SOUTH CAROLINA
HOSPITAL ASSOCIATION

SC-HOSP.STT

effect to the former alone. Gillespie v. Blackwell, et al., 164 S.C. 115, 122, 161 S.E. 869, 872 (1931); Stone v. Traynham, 278 S.C. 407, 297 S.E.2d 420 (1982).

Here, we are not even dealing with the same statute. Section § 33-55-200(a) merely provides a definition for a term used in § 33-55-210 and the constitutionality of the latter section has already been upheld by this Court. Nothing requires that the limitation of liability for charitable institutions be struck down as a result of the legislature's alleged failure to constitutionally define that which is a charitable organization.

The Association is convinced that § 33-55-200(a) is a legitimate, rational and constitutional exercise of legislative power and therefore urges this Court to reverse the court below. However, if this Court finds to the contrary, than nothing prevents this Court from severing the definition of a charitable organization from the limitation of liability for such an organization that this Court has already found to be constitutional.

costs in this country will reach the $1 trillion mark. Id.

The burden on federal tax revenues resulting from this astronomical increase in health care costs is becoming overwhelming. For fiscal year 1992, federal medicaid costs rose 29% to $67.8 billion. Id. at A10. Of course, states share the cost of medicaid and South Carolina's share for fiscal 1993 was $224,939,411.00. 1992 Appropriation Act, Act No. 501, § 38A.

The sweeping decision of the court below will only add to the already nearly overwhelming cost of health care in this State and unnecessarily so.

The court below posed itself the following question after finding that § 33-55-200(a) was unconstitutional, "does the whole limitation [§ 33-55-210] pass away, or is it still within the province of the judge and jury to have to make a determination based upon whether or not in fact the [Appellants are] charitable organization(s)?" The court below concluded that the "whole limitation" must "pass away." Record on Appeal at 000019. This was clearly error.

When one part of a statute is unconstitutional, while another part is not, the latter may be sustained if: (1) the constitutional part of the statute is capable of being severed; (2) striking out the unconstitutional portion of the statute will not frustrate its legislative purpose; and (3) it is not necessary to insert words or terms to separate the constitutional part from the unconstitutional part and to give

these, thirty-four (34) are charitable organizations under the statutory scheme held to be unconstitutional by the lower court.

The sweeping change of the law pronounced by the court below would affect all members of Association. The member hospitals considered to be charitable organizations under § 33-55-200(a) would be directly affected by the removal of the damages "cap," while all member hospitals would be affected by the increased cost of operation of all hospitals resulting from the loss of the damages "cap" to the charitable hospitals.

While it is difficult to quantify the cost of litigation to charitable hospitals, there can be no doubt that (1) such costs exist and affect the operation of all charitable hospitals and other health care providers; and (2) health care costs generally have skyrocketed.

In 1992, 13.4% of the gross national product of this country was spent in health care costs. Peterson, J., Grading America: A in Wealth, D in Leisure, The State, April 14, 1993, at 6A. This amounts to a total outlay of some $838.5 billion. Pear, R., Health-Care Costs Up Sharply Again, Posing New Threat, N.Y. Times, January 5, 1993 at A1. It is projected that this amount will increase some 12% this year for a total outlay in 1993 of an estimated $939.9 billion. Id.

The cost of health care is expected to continue to rise between 12% and 15% over the next five (5) years. If this projection is accurate, then as early as 1994, health care

Fortunately, this Court and the United States Supreme Court have given clear guidance as to how the Respondents' claim must be evaluated.

First, it is clear that the Respondents assertion that § 33-55-200(a) violates "due process" is a claim of a denial of substantive due process. Equally clear is that upon application of the appropriate constitutional test, § 33-55-200(a) is constitutional. Accordingly, the lower court's decision should be reversed.

II.

The lower court erred in concluding that because the definition of a charitable organization contained in S.C. Code Ann. § 33-55-200(a) (Law Co-op 1990) was unconstitutional, the partial immunity from tort liability afforded charitable organizations under S.C. Code Ann. § 33-55-210 (Law Co-op 1990) was also unconstitutional.

In concluding that § 33-55-200(a) was unconstitutional, the court below decided that the entire scheme of partial immunity from tort liability for charitable orgainizations established by § 33-55-210 was equally unconstitutional.

This Court has already held that § 33-55-210 serves the legitimate legislative purpose of encouraging the formation of charitable organizations, promoting charitable donations and preserving the resources of charities. Doe, supra.

The Association is a non-profit organization, organized and existing pursuant to the laws of the State of South Carolina, and is composed of both public and private hospitals operating in the State of South Carolina. The Association has ninety-six (96) member hospitals across the state, and of

Other states, seeing the logic and rationality of defining charitable organizations as those exempt from taxation under the IRC, have enacted legislation similar to § 33-55-200(a). See e.g. Md. Code Ann. Cts. & Jud. Pro. § 5-309.2(a)(2) (Michie 1989); Miss. Code Ann. § 95-9-1 (Law Co-op 1992); Mo. Ann. Stat. § 537.117 (Vernon Supp. 1992); N.M. Stat. Ann. § 57-22-3 (Michie 1992); N.Y. Civ. Prac. L. & R. 71-y (McKinney 1992); N.C. Gen. Stat. § 1-539.11 (Michie 1992); N.D. Cent. Code § 32-03-44 (Supp. 1991); R.I. Gen. Laws § 5-53-3 (Michie 1987); S.D. Codified Laws Ann. § 47-23-28 (Michie 1991); Tex. Civ. Prac. & Rem § 84.003 (West Supp. 1993); Utah Code Ann. § 78-19-1(3) (Michie 1992); Vt. State Ann. tit. § 12-5781 (Supp. 1993); and Va. Code Ann. § 8.01-220.1 (Michie 1992). Each of these statutes from sister states refers to a section of the IRC as a definition of a charitable organization. Each creates a legislative classification which is as rational and thus as permissible as that created by § 33-55-200(a).

6. Conclusion.

The lower court erred when it declared that § 33-55-200(a) violated the strictures of due process. The lower court appears to have fallen prey to Benjamin Cardoza's observation that courts, "bred in the common law tradition, view statutes with a distrust which we may deplore but not deny." B. W. Cardozo, The Paradoxes of Legal Science (University Press, 1928) at page 9.

the operation of the statute those multiple employer self-insured health plans which, among other things, are associated with an organization exempt from taxation under IRC § 501(c)(6). Section 8-11-92(3), which is part of a statute which allows payroll deductions to be made from the salaries of State employees for donations to non-profit charitable organizations, defines charitable organizations as, among other things, those which are tax exempt in accordance with IRC § 501(c)(3). Finally, § 8-13-1300(5) of the Ethics in Government Act, defines a charitable organization as that which is described in IRC § 170(c).

Each of these code sections creates an "irrebuttable presumption", just like § 33-55-200(a), that a charitable organization is one that is tax exempt or otherwise defined by the IRC. Each is a rational and efficient mechanism for the legislature to use in creating, as it must, classifications to promote and accomplish legitimate legislative purposes.[5]

5. Other states have adopted similar definitions of charitable organizations.

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[5] Statutes other than ones dealing with charitable organizations create similar rational, yet "irrebuttable" presumptions. For example, virtually all professional licensing statutes create the irrebuttable presumption that only those graduates of "accredited" schools are competent to practice their professions in this State. See e.g. § 40-9-40 (chiropractors); § 40-15-140, (dentists); § 40-19-100, (embalmers/funeral directors); 40-21-180 (engineers); § 40-21-190 (engineers in training); § 40-21-200 (land surveyors); § 40-23-90 (environmental systems operators), § 40-28-110, (landscape architects); § 40-33-530, (nurses); § 40-35-30, (nursing home administrators); § 40-37-90, (optometrists), § 40-43-50 (pharmacists); and South Carolina Supreme Court Rule 402(c) (lawyers).

conclusive of its character, kind or purpose, and (2) the organization's true nature might be shown from the manner in which it conducted its business as well as from its articles of incorporation. Eisenhardt, supra.

Further, the corporate statutory definition did not provide any additional guidance. Section 33-55-20(1), defines a charitable organization as one which is or holds itself out to be benevolent, educational, philanthropic, humane, patriot, or eleemosynary.

In enacting § 33-55-200(a), the South Carolina legislature made the rational decision to look to a body of law and regulation which contains an exhaustive analysis of what is and is not a charitable organization. By adopting the definitional scheme under attack, the Legislature simply changed the common law to provide a specific, definitive and rational basis for bestowing § 33-55-210's limited immunity from tort liability upon particular charitable organizations.

4. Section 33-55-200(a) is only one example of the rational classifications made almost daily by the Legislature.

As pointed out in Vlandis, an "irrebuttable presumption" is nothing more than a legislatively created classification. Vlandis, 412 U.S., 462 (Burger, C.J., dissenting).

As Chief Justice Burger further pointed out, there are thousands of state statutes which create classifications which, while not perfect, do not violate due process. Id.

The South Carolina Code is no exception. For example, § 38-41-20, which is part of a statute which deals with "multiple employer self-insured health plans", exempts from

formation, donations and resources we wish to encourage and preserve. Organizations which meet the rigorous tests set forth in the IRC and its Regulations are those upon which the Legislature clearly wished to bestow limited tort immunity. Thus § 33-55-200(a) is rationally related to its purpose and therefore is constitutional.

2. Section 33-55-200(a) provides far better guidance and certainty about what is a charitable organization than did the common law.

Prior to the enactment of § 33-55-200(a), the issue of whether or not an organization was "charitable", and thus entitled to the protection of the doctrine of charitable immunity, was one of fact. Eisenhardt v. State Agricultural and Mechanical Society of South Carolina, 235 S.C. 305, 111 S.E.2d 568 (1959).

However, prior case law in this State provided little guidance as to what was a "charitable institution."

One class of organization was definitely not charitable.[3] On the other hand, few organizations were definitely charitable.[4] Prior to the enactment of § 33-55-200(a), the only general guidance the common law gave litigants regarding what was or was not a charitable institution was the general pronouncement that (1) the charter of a corporation was not

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[3] Electrical cooperatives were not charitable organizations. Bush v. Aiken Electric Cooperative, Inc., 226 S.C. 443, 85 S.E.2d 716 (1955).

[4] The Boy Scouts of America and Columbia Hospital of Richland County were charitable. Terry v. Boy Scouts of America, 471 F.Supp. 28 (D.S.C. 1978), aff'd 598 F.2d 616 (4th Cir. 1979), and Linler v. Columbia Hospital of Richland County, 98 S.C. 25, 81 S.E. 512 (1914).

organization truly is charitable in accordance with §§ 501(c)(3) and 501(d).

For example, § 1.501(c)(3)-1 provides that in order for an organization to be exempt under § 501(c)(3), it must meet both the "organizational" and "operational" tests set forth therein.

The "organizational" test says that the exemption-seeking entity must have articles of organization which limit the purposes of the organization to one or more exempt purposes and do not expressly empower the organization to engage in activities which, in themselves, are not in furtherance of one or more exempt purposes. The Regulation then continues at some length further defining the "organizational" test and detailing with great specificity what will and will not meet the "organizational test."

Similarly, the "operational" test begins with the statement that an organization will be regarded as "operated exclusively" for one or more exempt purposes only if it engages primarily in activities which accomplish an exempt purpose. Thereafter, the Regulation proceeds to detail, again with great specificity, those activities which will and will not meet the organizational test.

The legitimate legislative purpose of § 33-55-210 is to encourage the formation of charitable organizations, to promote charitable donations and to preserve the resources of charitable organizations. Therefore, the purpose of § 33-55-200(a) must be to define those charitable organizations whose

b. S.C. Code Ann. § 33-55-200(a) (Law Co-op 1990) satisfies the requirements of substantive due process since it is rationally related to a permissible legislative objective.

1. Even a cursory examination of the Internal Revenue Code sections referred to in § 33-55-200(a) will reveal the rational relationship of that statute to its legislative purpose.

As this Court has said, the clear and legitimate legislative intent of § 33-55-210 is to encourage the formation of charitable organizations, to promote charitable donations and to preserve the resources of charitable organizations. Doe, supra. The question, therefore, is whether or not § 33-55-200(a)'s definition of a charitable organization is rationally related this legislative purpose.

Section 33-55-200(a) refers to two subsections of the Internal Revenue Code (IRC). Section 501(c)(3) of the IRC lists as "exempt" organizations "corporations and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, ... "

Section 501(d), of the IRC defines as exempt organizations "religious or apostolic associations or corporations, if such associations or corporations have a common treasury or community treasury . . . ."

These IRC definitions are further refined by Treasury Regulations § 1.501(c)(3)-1 and § 105.1(d)-1.

These Treasury Regulations provide exhaustive tests and analysis for the determination of whether or not an

In support of their position, Respondents cite Vlandis v. Kline, 412 U.S. 441 (1973), for the proposition that a statute which creates an "irrebuttable presumption"[2] denies due process. As pointed out in then Mr. Justice Rehnquist's dissent, the Court's holding in Vlandis "relies heavily on notions of substantive due process...." 412 U.S., 463.

Here, the offending statute defines all "§ 501(c)(3) and (d)" organizations as charitable. It is this "presumption" or more precisely "classification," of which the Respondents complain. Thus, the issue raised by the Respondents is one of substantive, not procedural, due process.

4. The appropriate test to be applied to the Respondents' substantive due process claim is whether the offending statute is rationally related to a legitimate legislative purpose.

Concluding that that of which the Respondents complain is a denial of substantive rather than procedural due process, the next question is; What test is to be applied to § 33-55-200(a), to determine its constitutionality?

That test is whether or not the statute is rationally related to what is concededly a legitimate legislative purpose, Doe supra, Hamilton v. Board of Trustees of Oconee County, 282 S.C. 519, 319 S.E.2d 717 (Ct. App. 1984), and State v. Kizer, 288 S.C. 441, 343 S.E.2d 292 (1986).

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[2] In Vlandis the "irrebuttable presumption" struck down was a statute which provided that anyone who did not have a "legal address" in Connecticut one year prior to matriculating to a Connecticut institution of higher learning would, forever after, be considered a nonresident and thus be subject to higher tuition.

arbitrary reasons, no matter what the process or procedure utilized to effect the deprivation. Anco, Inc. v. South Carolina Health and Human Services Finance Commission, 300 S.C. 432, 388 S.E.2d 780 (1989).

An examination of the Respondents arguement reveals that their true complaint is one of substantive due process. They assert that they have been deprived of the opportunity to litigate the issue of the charitable nature of organizations which are exempt from federal taxation. They do not, nor can they, complain regarding the process by which the legislature enacted the offending statute.[1] What they complain about is their inability to litigate an additional issue, that being whether or not the Appellants are charities under the former common law of this State.

Respondents have not been denied notice, a reasonable opportunity to be heard, or a fair hearing before a lawfully constituted and impartial tribunal. They have access to all of these in this case. What they assert they have been denied is the opportunity, because of an act of the South Carolina legislature, to put before a jury the issue of whether or not the Appellants would have been considered charitable organizations under the common law of this State as it existed prior to the enactment of § 33-55-200 (a).

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[1] The elements of procedural due process do not apply to legislative acts. Richardson v. Town of Eastover, 922 F.2d 1152 (4th Cir. 1991).

210. See Brief of Respondent at page 5. Indeed, Respondents could only challenge this cap by asking this Court to overrule Doe v. American Red Cross Blood Services, 297 S.C. 430, 377 S.E.2d 323 (1989).

2. What the Respondents do contend.

The Respondents assert that § 33-55-200(a) denies them "due process" by creating an "irrebuttable presumption" that certain organizations which are exempt from federal taxation are charitable and thus partially immune from tort liability. The Respondents contend that this violates both the U.S. Const. amend. V and XIV, and S.C. Const. art. I, § 3.

3. The "due process" allegedly denied the Respondents is substantive, not procedural, due process.

This Court applies the same standard for analyzing claims under the state constitution as federal courts do in analyzing claims under the United States Constitution. South Carolina Public Service Authority v. Citizens and Southern National Bank of South Carolina, 300 S.C. 142, 386 S.E.2d 775 (1989).

Procedural due process is nothing more than the process by which decisions affecting the life, liberty or property of people are made. Procedural due process is made up of three elements: (1) notice; (2) a reasonable opportunity to be heard; and (3) a fair hearing before a lawfully constituted and impartial tribunal. South Carolina Department of Health and Environmental Control v. Armstrong, 293 S.C. 202, 359 S.E.2d 302 (Ct. App. 1987).

Substantive due process, on the other hand, protects a person from being deprived of life, liberty or property for

STATEMENT OF FACTS

S.C. Code Ann. § 33-55-210 (1990), provides a "cap" of $200,000.00 for tort damages recoverable against a "charitable organization." Section 33-55-200(a) defines a "charitable organization" as one which is exempt from federal taxation under either 26 U.S.C. § 501(c)(3) or § 501(d)(1988).

The court below ruled that the definition of "charitable organization" contained in § 33-55-200(a) denied the Respondents "due process" by foreclosing them from litigating the issue of whether or not the Appellants were "charitable organizations" within the meaning of the prior common law of this State. The court went on to hold that since § 33-55-200(a) denied the Respondents due process, the partial immunity from tort liability afforded charitable organizations by § 33-55-210 is unconstitutional.

On February 17, 1993, this Court granted the South Carolina Hospital Association's (Association) Motion for Leave to File an Amicus Curiæ Brief.

ARGUMENT AND CITATION OF AUTHORITIES

I.

The trial court erred in ruling that S.C. Code Ann. § 33-55-200(a) (Law Co-op 1990), violated the due process clauses of the United States and South Carolina Constitutions.

a. The issue presented by the lower court's holding is one of substantive, rather than procedural, due process.

1. What the Respondents do not challenge.

The Respondents do not challenge the constitutionality of the damages cap afforded charitable organizations by § 33-55-

STATEMENT OF ISSUES ON APPEAL

I.

The trial court erred in ruling that S.C. Code Ann. §§ 33-55-200(a) (Law Co-op 1990), violated the due process clauses of the United States and South Carolina Constitutions.

a. The issue presented by the lower court's holding is one of substantive, rather than procedural, due process.

b. S.C. Code Ann. § 33-55-200(a) (Law Co-op 1990) satisfies the requirements of substantive due process since it is rationally related to a permissible legislative objective.

II.

The trial court erred in concluding that because the definition of a charitable organization contained in S.C. Code Ann. § 33-55-200(a) (Law Co-op 1990) was unconstitutional, the partial immunity from tort liability afforded charitable organizations under S.C. Code Ann. § 33-55-210 (Law Co-op 1990) was also unconstitutional.

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4-28-93

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM BEAUFORT COUNTY

COURT OF COMMON PLEAS

Thomas Kemmerlin, Jr., Special Circuit Court Judge

Sharon Bennett Zimmerman, as Personal Representative of the Estate of Laura Jean Bennett, Deceased,

Respondents,

v.

Steven Bujanovic, M.D., Philip Michael, M.D., The Hilton Head Hospital, Hilton Head Health Services Corporation, and Coastal Emergency Services of Columbia, Inc.,

OF WHOM: Hilton Head Hospital, Inc. and Hilton Head Health Services Corporation are

Appellants.

Case #91-CP-07-1580

Suzanne Lazereon,

Respondent,

v.

Hilton Head Hospital, Inc., Hospital Corporation of America, Inc., James Nigriny, M.D., Michael A. Platt, M.D., Harold Hunter, M.D., Paul Hermans, M.D., B. Robert Trotter, M.D., Christopher Jansen, M.D., Hoffman-LaRoche, Inc., d/b/a Roche Laboratories, Coastal Emergency Services, Inc., Thomas Charles Heditz, Jr., Robert MacKay Lee and Linda Rose Teary Schmalz,

OF WHOM: Hilton Head Hospital, Inc. is

Appellant.

Case #89-CP-07-1699

AMICUS CURIAE BRIEF OF THE
SOUTH CAROLINA HOSPITAL ASSOCIATION

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ATTORNEYS FOR SOUTH CAROLINA HOSPITAL ASSOCIATION

STATE OF SOUTH CAROLINA)) COUNTY OF BEAUFORT)	COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT CASE NO. 91-CP-07-1580
SHARON BENNETT ZIMMERMAN, as Personal Representative of the Estate of LAURA JEAN BENNETT, Deceased, Plaintiff, vs. STEVEN BUJENOVIC, M.D., PHILIP NICOL, M.D., THE HILTON HEAD HOSPITAL, HILTON HEAD HEALTH SERVICES CORPORATION, and COASTAL EMERGENCY SERVICES OF COLUMBIA, INC., Defendants.	MOTION FOR RECONSIDERATION AND MOTION TO DECLARE A STATUTE UNCONSTITUTIONAL

TO: COUNSEL FOR THE DEFENDANTS ABOVE NAMED AND JOSEPH BARKER, ESQ., COUNSEL FOR THE DEFENDANTS HILTON HEAD HOSPITAL AND HILTON HEAD HEALTH SERVICES CORPORATION

PLEASE TAKE NOTICE THAT the Plaintiff will move before the Honorable Thomas E. Kemmerlin, Jr., within ten days from the date hereof, or as soon thereafter as counsel may be heard, upon the following Motions:

(1) Reconsideration by the Honorable Thomas E. Kemmerlin, Jr. of his Order dated June 15, 1992, granting Defendant Hilton Head Hospital's Motion to Limit Liability to $200,000.

(2) Review and determination as to whether S.C. Code Ann. § 33-55-210, and specifically the definitional provisions of a "charitable organization" under S.C. Code Ann. § 33-55-200(a), is unconstitutional as being violative of the Fifth and Fourteenth Amendments of the U.S. Constitution and Article 1, Section 3 of the South Carolina Constitution.

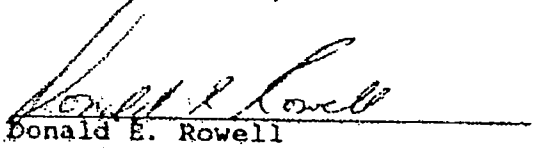
The grounds for these Motions are as follows:

1. Plaintiff would ask for clarification as to whether the Order of June 15, 1992 limits only actual damages against Defendant Hilton Head Hospital to $200,000 or limits total damages against Defendant Hospital to $200,000;

2. The Court did not address in its Order the constitutionality of S.C. Code Ann. § 33-55-200(a).

These Motions are based on the grounds set forth in Plaintiff's Memorandum in support of Motion For Reconsideration and Memorandum in support of Motion to Declare Statute Unconstitutional dated June 23, 1992, all of which are attached hereto and incorporated herein by reference. Please be present to oppose said Motion if you are so minded.

McNAIR LAW FIRM, P.A.



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June 23, 1992

Charleston, South Carolina

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
Thomas Kemmerlin, Jr., Special Circuit Court Judge

Sharon Bennett Zimmerman, as Personal Representative of the Estate of Laura Jean Bennett, Deceased . . . . . Respondents,

vs.

Steven Bujenovic, M.D., Philip Nichol, M.D., The Hilton Head Hospital, Hilton Head Health Services Corporation, and Coastal Emergency Services of Columbia, Inc.,

OF WHOM:

Hilton Head Hospital, Inc. and Hilton Head Health Services Corporation are . . . . . Appellants.

Case No.: 91-CP-07-1580

Suzanne Lazerson . . . . . Respondent,

vs.

Hilton Head Hospital, Inc., Hospital Corporation of America, Inc., James Nigriny, M.D., Michael A. Platt, M.D., Harold Hunter, M.D., Paul Hommann, M.D., B. Robert Trotter, M.D., Christopher Jansen, M.D., Hoffman-LaRoche, Inc., d/b/a Roche Laboratories, Coastal Emergency Services, Inc., Thomas Charles Meditz,Jr., Robert MacKay Lee and Linda Rene Yeary Schnelle,

OF WHOM:

Hilton Head Hospital, Inc. is . . . . . Appellant.

Case No.: 89-CP-07-1699

AMICUS CURIAE BRIEF OF THE SOUTH CAROLINA TRIAL LAWYERS ASSOCIATION

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN RULING THAT S.C. CODE ANN. §§ 33-55-200, et seq. (1990), VIOLATED THE DUE PROCESS CLAUSES OF BOTH THE UNITED STATES AND SOUTH CAROLINA CONSTITUTIONS?

2. DOES THE EQUAL PROTECTION CLAUSE OF BOTH THE UNITED STATES AND SOUTH CAROLINA CONSTITUTIONS PROVIDE AN ADDITIONAL SUSTAINING GROUND FOR THE FINDING OF THE TRIAL COURT THAT S.C. CODE ANN. §§ 33-55-200, et seq. (1990) ARE UNCONSTITUTIONAL?

STATEMENT OF THE CASE

This case arises out of Hilton Head Hospital's appeal of an Order issued by The Honorable Thomas E. Kemmerlin, Jr. dated October 8, 1992 in which he held that S.C. Code Ann. §§ 33-55-200(a) et seq. were unconstitutional on the ground that it violated plaintiffs' rights to procedural due process under both the State and Federal Constitutions.

On October 14, 1993, The South Carolina Trial Lawyers Association ("SCTLA") filed its Motion for Leave to File an Amicus Curiae Brief in Support of Respondent Suzanne Lazerson. The SCTLA, inter alia, requested permission to brief issues related to the Constitutional deficiency of the statute upon equal protection grounds as well as procedural due process.

Appellant filed objections to SCTLA's Motion to file an Amicus Brief on October 15, 1993, and raised only the objection that the appeal should not be delayed. No objection was raised to SCTLA's request to brief the issue of Equal Protection. The Motion to be allowed to file an Amicus Curiae Brief was granted by the South Carolina Supreme Court on October 21, 1993.

STATEMENT OF THE FACTS

The Lazerson case involves claims that Ms. Lazerson suffered injuries as a result of tortious actions or inactions attributable to Appellant, Hilton Head Hospital, Inc. which are alleged to be in excess of $200,000.

Hilton Head Hospital alleged by Affidavit that it was granted tax exempt status by the Internal Revenue Service as a charitable organization under 26 U.S.C. § 501(c)(3). Due to its § 501(c)(3) classification, Hilton Head Hospital enjoys limited liability in tort actions only under S.C. Code Ann. § 33-55-210. The limitation on liability of charitable organizations is set by the statute at $200,000. The limitation does not apply to breaches of implied or express warranty, breach of contract, or statutorily created causes of action.

This appeal derives from the Order of The Honorable Thomas Kemmerlin, Jr. dated October 8, 1992 in which S.C. Code Ann. § 33-55-200, et seq. was found to be a deprivation of Respondents' constitutionally protected rights to due process.

ARGUMENT

I. THIS TRIAL COURT PROPERLY RULED THAT S.C. CODE ANN. §§ 33-55-200, et seq. (1990) VIOLATED THE DUE PROCESS CLAUSES OF THE UNITED STATES, AND SOUTH CAROLINA CONSTITUTIONS BECAUSE THE DEFINITION OF "CHARITABLE ORGANIZATION" CREATED BY THE LEGISLATURE CREATES AN IRREBUTTABLE PRESUMPTION WHICH DENIES RESPONDENT THE RIGHT TO A HEARING ON THE ISSUE OF WHETHER APPELLANTS ARE IN FACT CHARITABLE ORGANIZATIONS.

A. Introduction.

The briefs of the Appellant, Respondents, and Amicus Curiae, The South Carolina Hospital Association ("SCHA"), all discuss the question of whether or not a plaintiff's right to challenge a defendant's Internal Revenue Service grant of 501(c)(3) status is protected by the constitutionally guaranteed right of procedural due process. The Final Brief of Respondent Sharon Bennett Zimmerman, fully addresses the harm of an irrebuttable presumption, and well explains why plaintiffs, under the statutory scheme of S.C. Code Ann. §§ 33-55-200, et seq. are denied a reasonable notice and opportunity to be heard on whether their antagonists should have protections from liability. Those arguments will not be repeated herein (but are incorporated by reference), rather, this section of this Brief will address the mechanics of obtaining 501(c)(3) status by an organization, the ease of obtaining such status, and will provide examples to the Court of instances where 501(c)(3) status was improperly obtained by an organization. Finally, the public purpose to be served by granting plaintiffs their procedural due process to attack 501(c)(3) status will be discussed.

B. Plaintiff Recognizes Valid Grounds To Protect The Assets Of Truly Charitable Organizations.

The procedural history of this action is inextricably interwoven with the procedural history of Sharon Bennett Zimmerman v. Steven Bujenovic, M.D., et al., and although that action has now been settled, the Orders issued by the Special Circuit Court Judge in that action, have relevance to the present action. Judge Kemmerlin had a great deal of difficulty in reaching his ultimate decision in these cases as is evidenced by his various Orders, and most importantly by a footnote to his Order of June 15, 1992 in which he had reversed himself and determined that the limitation on liability was valid and enforceable. In footnote 1 to this Order, he stated as follows:

> My heart is not in this decision. I still agree with Emerson when he says in his essay "Self-Reliance" that one ' . . . must not be hindered by the name of goodness, but must explore if it be goodness.' (R.O.A p. 28).

There are many good reasons for conveying a tax exempt status to organizations who serve charitable, religious, educational and certain other purposes, and such exemptions have been present since the earliest days of federal income tax law. See e.g., Act of October 3, 1913, c. 16, II, G, 38 Stat. 172; Trinidad v. Sagrada Orden, 263 U.S. 578, 581, 44 S.Ct. 204, 68 L.Ed. 458 (1924); and St. Louis Trust Co. v. United States, 374 F.2d 427, 432 (8th Cir. 1967).

In numerous circumstances, the Government, and indeed the public, is compensated for the loss of tax revenues caused by the exemption, by its (Government's) relief from the financial burden which would otherwise have to be met by the appropriation of public

funds to accomplish the same, or a similar general welfare purpose. No good citizen doubts the merits of granting tax exempt status to organizations who truly promote "goodness" for the betterment of the community, and who are pure of heart in their pursuit of such laudable goals. Respondent Lazerson, in this action, merely seeks the right to "explore it if be goodness" that Hilton Head Hospital, Inc. enjoy not only a tax exempt status granted almost two decades ago, but that it also enjoy a limitation on damages, when it has in fact been negligent and caused serious injury to a citizen of the State of South Carolina.[1]

C. "Exhaustive Tests" And "Heavy Burdens" On Organizations Are Only Factors If The Right to Charitable Status Is Challenged And Are Not Hurdles To Overcome In Order To Be Granted Such Status.

The Amicus Curiae Brief of SCHA spends a great deal of effort in Section I b.1., pp. 6-8, to reference the "exhaustive tests" imposed upon an organization in order to be charitable under § 501(c)(3) and (d). Examples are cited by SCHA with reference to Treasury Regulation § 1.501(c)(3)-1 and Treasury Regulation § 105.1(d)-1. The Appellant's Brief assumes (without citation of authorities) a "strong showing" must be made to the IRS to receive 501(c)(3) status and that the IRS audits 501(c)(3)'s on some basis to assure continued compliance (again, without citation to any authority). Appellant's Final Reply Brief, p. 6.

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[1]For purposes of arguments in this appeal, the Court should assume that the Appellant has in fact been negligent, and that the Plaintiff/Respondent has suffered damages in excess of $200,000, which would be fully collectible against a non-charitable defendant. In this light, the statute will receive its most careful scrutiny by the Court.

What is painstakingly not stated in either of those briefs, is the ease with which one is initially granted charitable status. In the case of § 501(c)(3), the "exhaustive" test is met by simply filing a form 1023 with the IRS. An organization simply needs one individual willing to certify and represent in a Form which mimics the language of the statute itself, that the organization is entitled to the status of a charitable organization. The ease of fraudulently obtaining this status is clearly found in Freedom Church of Revelations v. United States of America, 588 F. Supp. 693 (D.S.C. 1984).

In the Freedom Church case, a fraudulent scheme was granted 501(c)(3) status by the Internal Revenue Service with the mere filing of a Form 1023. Id. at 693. The fraud in that case revolved around a scheme to organize on paper a religious organization which in fact merely served to provide anyone applying to it with a certificate that they were a minister of the Freedom Church of Revelations such that they could claim their personal residences as parsonages, and use other tax exemptions. The "exhaustive test[s]" and "heavy burden" referenced in SCHA's Brief, are exhaustive tests and heavy burdens which only come into play when the charitable organization is challenged. They are not tests which are exhaustively applied at the time an application is filed (in the form of Form 1023) so as to obtain charitable status.

The denial of procedural due process to plaintiffs seeking to recover from 501(c)(3) and (d) organizations in South Carolina rests in the faulty irrebuttable presumption created by the

statute's blanket of immunity for anyone who has ever been granted 501(c)(3) or (d) status, and has not been audited by the IRS. This is virtually 99% of all organizations which have ever sought 501(c)(3) status. Plaintiffs should be allowed to require organizations who have caused them injuries in excess of $200,000 to demonstrate that they can meet with the "exhaustive tests" described by SCHA in its brief and they are not sham organizations such as the Freedom Church of Revelations.

Under Appellant's theory and § 33-55-200 et seq., a person injured by the negligence of a false minister in a false parsonage of the First Church of Revelations would be deprived a full recovery even if the IRS were in a fight to revoke 501 (c)(3) status at the time of the plaintiff's trial.

A businesses ability to maintain 501(c)(3) status is fragile and precarious. A businesses failure to satisfy just one of the statutory requirements for tax exempt status causes the complete loss of the exemption. Section 501(c)(3); see also, Harding Hospital, Inc. v. United States of America, 505 F.2d 1068 (6th Cir. 1974).

D. The Recognized Trend Of Increased Competition In The Sale Of Medical Services Is Indicative That Many Hospitals Who Were Qualified For 501(c)(3) In Prior Years, Are No Longer Qualified For Such Status And Maintain Such Status Only Because They Have Not Been Audited.

Some historical perspective on the creation of Governmental protections for charitable and certain other organizations is relevant to an understanding of a plaintiff's present need for an ability to challenge tax exempt status for health care

organizations. This Court noted in Pitzer v. Greater Greenville, South Carolina Young Men's Christian Association, that the early grant of charitable immunity in the common law was essentially premised upon the lack of the availability of insurance to protect these institutions from the verdicts which might be rendered against them for their negligence. This need for immunity from law suits fell when insurance became readily available.

Economic incentives are often utilized by Government to provide its citizens with basic needs. These economic incentives range from tax incentives for certain expenditures such as hiring the veterans who are about to be released from the Armed Forces, to low interest loans for the construction of perceived needed facilities or renovations of historic structures. In the 1950's, federal funds were made available for construction of county hospitals which were built throughout the United States, including the State of South Carolina. As the 50's gave way to the 1980's, many of these county-owned hospitals, which had had their costs of construction funded by federal dollars, found themselves without adequate county coffer resources, to maintain the funding necessary to update the facilities and purchase the diagnostic hardware necessary to keep pace in the hospital world that had evolved over a thirty year period of time. The county governments had neither the funds to run these hospitals in the red nor the expertise to run them profitably.

Conglomerates such as National Medical Enterprises, Inc., through its subsidiary N.M.E. Hospitals, Inc., began purchasing

these, in many instances, declining facilities, modernized them and went into competition for health care dollars with charitable and non-charitable institutions. Cf., Steuer & Latham, P.A. v. National Medical Enterprises, Inc., 672 F. Supp. 1489 (D.S.C. 1987) (discussing, in part, that the geographic market in which Cherokee Memorial Hospital competes must include at least the hospitals in Spartanburg, S.C. and that "a properly defined market should include the three nearby North Carolina hospitals (Crowley Memorial (Boiling Springs, N.C.), Kings Mountain Memorial Hospital (Kings Mountain, N.C.) and Cleveland Memorial Hospital (Shelby, N.C.), id. at 1514), aff'd. 846 F.2d 70 (4th Cir. 1988); Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 104 S.Ct. 1551, 80 L.Ed.2d 1 (1984) (referencing competition among hospitals generally).

It cannot be disputed by the Respondents that so long as they maintain a charitable organization status, they hold a commercial advantage over those hospitals in the State of South Carolina who do not hold a charitable status. Their insurance costs will be less because their exposure to liability is less. A hospital providing out-patient services on its premises, which are the same services as those offered by private physicians who do not hold the hospital's charitable status, are again placed at a commercial advantage over the private physician because their exposure to liability, and therefore their cost of insurance, is less. These commercial advantages should not be trivialized, minimized or ignored by the Court.

Physicians who have lost exclusive rights to provide certain services to patients or other physicians "in-house", or who have had their membership in a group who provides such services terminated, have brought suits to argue that they have lost economic benefits from such relationships. See e.g., Steuer, supra, and, Collins v. Associated Pathologists, Ltd., 1987-1 Trade Cas. (CCH) ¶ 67, 603 at 60, 609 (C.D. Ill. Feb. 11, 1987) [available on WESTLAW, DCT database]. In short, the practice of medicine has become highly commercial and competitive. Medicine in the 1980's and 1990's, is a marketplace of fierce competition between hospitals for patients and health care dollars.

This competition is discussed in David W. Ball's article, "Charitable Hospitals' Tax Exempt Status At Risk," for South Carolina Lawyer, No. 25 (1992). Competition, which was already on the rise, increased as a result of Medicare's change of its reimbursement method for hospitals in 1983. The new payment system, discussed in the Ball article, has forced hospitals "to admit more patients and release them more quickly. Because hospitals receive most of their patients as referrals from private practice physicians, hospitals have sought to establish stronger physician relationships to insure a greater physician referral stream. Hospitals have entered into joint ventures and other arrangements with physicians to 'bond' the physicians to the hospitals." Id. at 25. (R.O.A. at 448).

E. The IRS In Releasing GCM 39862 Evidences The Arbitrariness And False Reliance Of Relying Upon 501(c)(3) As A Measure That Health Care Organizations Are Truly Charitable.

The Internal Revenue Service has itself determined to give cozy hospital-physician exclusive relationships a more careful scrutiny. The release of its General Counsel Memorandum 39862 (December 1991) ("GCM") has put health care organizations on notice that many of the common practices present today in hospital-physician relationships will threaten their tax exempt status.

GCM 39862 is most noteworthy for the reversal of the Internal Revenue Service's prior favorable treatment of relationships between hospitals and physicians. In three examples (private letter rulings) cited in the Ball article as having been granted favorable rulings by the IRS prior to GCM 39862, the present General Counsel Memorandum finds each of the transactions to jeopardize a hospital's tax exempt status because they allow "private inurement, confirm more than incidental benefits on private interest, and may well violate the Federal Anti-Kickback Law (42 U.S.C. § 1320(a)-(7)(b)).[2]

Each of the three private letter ruling examples involve the sale of a revenue stream from the hospital to a hospital-physician

[2]The South Carolina Legislature recognized significant abuse by health care providers and physician's referral of business to entities in which they hold an interest in H.3566, entitled A BILL TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING CHAPTER 113 TO TITLE 44 SO AS TO ENACT THE PROVIDER SELF-REFERRAL ACT; TO PROHIBIT HEALTH CARE PROVIDERS FROM REFERRING PATIENTS TO FACILITIES AND SERVICES IN WHICH THE PROVIDER HAS A FINANCIAL INTEREST UNLESS CERTAIN CONDITIONS ARE MET; TO PROVIDE PENALTIES; TO DIRECT THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL TO GATHER DATA AND TO REPORT TO THE GENERAL ASSEMBLY

joint venture business enterprise. More specifically, each of the private letter ruling examples had an element of a hospital seeking to increase its "bonds" to a physician or physician group by either the sale of, or a sharing of income streams, for typical hospital services.

In one example, the net revenue streams of the out-patient surgical program and gastroenterology laboratory was sold to a private physicians so as to offer a financial incentive to the physicians to increase their usage of the hospital's facilities. According to Ball, "The IRS concluded that the sale of the revenue streams was indistinguishable from paying dividends on stock. The IRS looked at what the hospital received in return for the benefit conferred on physician-investors. The conclusion that is central to the holding is stated:

> here, there appears to be little accomplished that directly furthers the hospitals' charitable purposes of promoting health. No expansion of health care resources result; no new provider is created. No improvement in treatment modalities or reduction in costs is foreseeable.

The IRS concluded that a sale of all or part of a hospital's revenue stream to its medical staff physicians per se results in private inurement. It is clear after GCM 39862 that any tax exempt hospital that carves out a portion of its services and sells or gives that portion to physicians will have placed its tax exempt status in jeopardy by violating the private inurement requirement." Id. at 26. (R.O.A. at 448).

The concept of hospital funds inuring to the benefit of private physicians and thus precluding 501(c)(3) status is neither novel, nor new. In Harding Hospital, Inc. v. United States of America, 505 F.2d 1068 (6th Cir. 1974), the Sixth Circuit Court of Appeals affirmed a District Court finding that Harding Hospital, Inc., which had been granted 501(c)(3) status by the IRS in 1962, was properly denied that status by the IRS in late 1968 because of the private benefits derived by the physician association associated with the hospital. See also Sonora Community Hospital v. Commissioner, 46 T.C. 519 (1966), aff'd., 397 F.2d 814 (9th Cir. 1968); Maynard Hospital, Inc. v. Commissioner, 52 T.C. 1006 (1969).

When businesses elect to have charitable status, they are not necessarily required to present the IRS with any hard evidence that they are in fact charitable, rather they merely file a form which mimics the language of the statute asserting that they are entitled to charitable status. There is no evidence in this Record cited by any party that corroborates a claim that all, or even most, 501(c)(3) organization are tested or challenged by any IRS procedure to guarantee they are entitled to the status when it is granted.

In many instances, organizations which have claimed by the filing of the form, charitable status, and have been granted the status without review, have later been found to not qualify for the status. See e.g., Harding Hospital, Inc. v. United States of America, 505 F.2d 1068 (6th Cir. 1974); Stevens Bros. Foundation, Inc. v. Commissioner of Internal Revenue, 324 F.2d 633 (8th Cir.

1963); Freedom Church of Revelation v. United States of America, 588 F. Supp. 693 (D.S.C. 1984); Lowry Hospital Association v. Commissioner of Internal Revenue, 66 T.C. 850 (1976); and Sonora Community Hospital v. Commissioner of Internal Revenue, 46 T.C. 519 (1966). Also organizations which were initially entitled to the charitable status, through later changes in their manner of doing business may be found to no longer be entitled to the charitable status. Lowry Hospital Association v. Commissioner Revenue Service, supra, at 850; Stevens Bros. Foundation, Inc., 39 T.C. 93 (1962), aff'd. 324 F.2d 633 (8th Cir. 1963), cert. denied, 376 U.S. 969 (1964).

Our known facts regarding Hilton Head Hospital, Inc. which would jeopardize their 501(C)(3) status are limited, because no discovery was allowed in this case. However, the Record does contain factual allegations that the operations of Hilton Head Hospital "have inured to the benefit of private individuals." These facts are as follows: 1) Hilton Head Hospital has hired Hospital Corporation of America, a profit corporation, to manage the hospital for them; and 2) Hilton Head Hospital has contracted with Coastal Medical Emergency Services, another profit corporation, to staff its Emergency Room. (R.O.A. at 535).

The foregoing indicates that were injured plaintiffs to be allowed a reasonable opportunity to be heard and to argue whether or not a particular health care institution which had injured them was entitled to tax exempt status, the result would, in some instances, almost assuredly result in full compensation to the

injured plaintiff upon the determination that the entity was no longer entitled to 501(c)(3) status, and indeed, may never have been entitled to such status had a proper inquiry been made when the application for the status was initially filed.

F. The Public Policy Interests Of Allowing Full Compensation For Injured Persons, Punishment Of Wrongdoers, And Collecting Taxes Which Have Been Negligently, Falsely Or Fraudulently Withheld Are Best Served By Allowing Inquiry Into An Organization's Right To Protection From Liability Based On A Grant Of 501(c)(3) And (d) Status.

The Appellants and SCHA painstakingly avoid any reference to the benefits to be derived by allowing plaintiffs to attack a defendant's claim to 501(c)(3) status. Those benefits would not only include a full recovery by an injured plaintiff for their injuries, but would also result in the tax evader being "found out" and thereafter paying taxes which were rightfully due to the South Carolina State Treasury as well as the Internal Revenue Service. All citizens of both this State and the United States would, to some degree, benefit from such actions by a plaintiff, who in those circumstances, would operate as a private attorney general. When this Court properly upholds the ruling of Judge Kemmerlin, the Legislature, should it decide to re-visit this issue, can easily set out parameters to identify in a constitutional manner, formulas to be met by charitable organizations, so as to enjoy the protection of a cap on damages awards.

It cannot reasonably be argued that the Legislature intended to provide a shield from liability to a hospital such as that in Harding Hospital, Inc., supra, which was not in fact entitled to a charitable status. However, all of Appellant's arguments are to

the effect that a Harding Hospital could injure a South Carolina plaintiff beyond $200,000 in actual damages and not be called upon the fully compensate the injured party if the status were revoked by the IRS after the plaintiff's case had ended. The foregoing clearly demonstrates that hospitals such as Harding Hospital, are in fact granted charitable status under 501(c)(3), when they were never entitled to such status. A plaintiff is denied procedural due process when he or she is not allowed to challenge a Harding Hospital's status as 501(c)(3).

The foregoing demonstrates the arbitrariness and false reliance in choosing 501(c)(3) status as a yardstick for the creation of an irrebuttable presumption to protect charitable organizations.

II. EQUAL PROTECTION.

In Doe v. American Red Cross Blood Services, 297 S.C. 430, 377 S.E.2d 323 (1989), this Court found that § 33-55-210 did not violate equal protection. The Court properly recognized that an equal protection analysis requires that three factors be considered. Of these three factors, the Court's consideration of equal treatment of class members in the Doe case should be reconsidered. The Court held in Doe that

> Equal protection also requires that the members are treated alike under similar circumstances and conditions. . . .
>
> We find that although the impact of a $200,000 damage judgment may vary according to the size of the charitable organization, varying impact does not violate the equal protection clause. (Citation omitted). Moreover, we find that potential plaintiffs are not treated

> disparately because the same monetary cap applies equally to the entire class of plaintiffs.

The Court's analysis of equal treatment in the Doe case is flawed because it fails to carefully consider and identify the persons who are members of the class. It is respectfully asserted that the classification is misidentified or "under-analyzed" by the Court. There is in fact an unequal treatment of the larger class of plaintiffs which includes all persons injured by actions or inactions of charitable organizations because those whose injuries are inflicted tortiously are treated differently than those who are injured by breaches of warranty or contract.

Legislatures are free to create classifications of persons for special treatment under a statutory scheme. However, "In order for a classification to meet the requirements of Constitutionality, it must include or embrace all persons who naturally belong to the class." 16 A. Am Jur. 2d, Const. Law, § 757, P.849, (and cases cited therein). Although the Legislature does not have to address all aspects of a perceived "evil" its power cannot be arbitrarily exercised and distinctions must have some reasonable basis. International Harvester Company v. Missouri, 234 U.S. 199, 58 L.Ed. 1276, 34 S.Ct. 859 (1914). The Constitution prohibits unequal burdens being placed on persons who are similarly situated and are not in fact treated the same. See generally, 16 A. Am. Jur. 2d, Const. Law, § 786. Imposition of burdens, pp. 924-926.

Examples may best show the similarities of the circumstances of the class of persons who have been injured by a charitable

organization, but yet who are treated differently under the statutory scheme of S.C. Code § 33-55-200, et seq.

> Example 1: A patient contracts with a hospital for the receipt of hospital services and is admitted to the hospital. During the course of their admittance, the hospital breaches its contract, does not provide services contracted for, and causes damage and injury to the patient in excess of $200,000. This plaintiff is entitled to a full recovery for its damages under applicable contract law because § 33-55-200, et seq. does not prohibit or limit the damages available under a contract theory.

> Example 2: A patient referred to in Example 1 above, is visited by a spouse who is injured during the time of the visit by a hospital employee who has been negligent. The injury is in excess of $200,000. This visiting spouse, merely by her designation as a visitor with no contractual relationship to the hospital, is unable to fully compensated for her injury.

The law recognizes many instances where a set of facts will constitute both a cause of action for a breach of contract, and a cause of action for negligence. In such a circumstance, S.C. Code Ann. § 33-55-200 et seq. places a limitation on the actual damages of the person injured negligently, but does not similarly protect the assets of the charitable organization, the ostensible purpose of the statutory scheme under Doe, from suit under the breach of contract cause of action.

Other examples of disparate treatment of the class of persons who have been injured by charitable organizations are easy to imagine. For example, hospitals routinely sell goods to their patients including medications, food and, in some instances, clothing. The hospital gift shop sells toys for children and

delivers flowers to rooms. Injuries caused by these activities, in many instances, may constitute causes of action for breach of an implied or express warranty regarding the sale of a good. In those instances, the plaintiff harmed is not precluded from a recovery of damages in excess of $200,000. The same hospital gift shop which has sold a toy which causes injury in excess of $200,000, is not protected from that liability under the breach of warranty theory, however, the same gift shop does have a limited liability in the circumstance where the same employee who sold the good which injured plaintiff under breach of warranty theory, injures a visitor in the gift shop due to negligence. There is no rational basis for distinguishing between those persons who sue to recover their injuries which were negligently caused, and those persons who sue for their injuries which were caused by breaches of contract or breaches of warranties.

The issue identified above related to an improper analysis of the class of plaintiffs was not addressed in Doe, most likely because the issue was not raised in that action. (The Opinion makes no reference to the issue being raised). The disparate and unequal treatment of persons in the same class, that class being persons injured by charitable organizations, fails the test of equal protection, and should be corrected now.

CONCLUSION

For the foregoing reasons, S.C. Code Ann. §§ 33-55-200(a) and § 33-55-210 should be declared unconstitutional, and the decision of Judge Kemmerlin affirmed.

Respectfully submitted,

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October 27, 1993

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	CIVIL ACTION NO.: 91-CP-07-1580

SHARON BENNETT ZIMMERMAN, as Personal Representative of the Estate of LAURA JEAN BENNETT, Deceased,

Plaintiff,

v.

STEVEN BUJENOVIC, M.D., PHILIP NICHOL, M.D., THE HILTON HEAD HOSPITAL, HILTON HEAD HEALTH SERVICES CORPORATION and COASTAL EMERGENCY SERVICES OF COLUMBIA,

Defendants.

ORDER

On August 29, 1991, the Defendants Hilton Head Hospital and Hilton Head Health Services Corporation (hereinafter referred to as the Defendants) moved for an Order reducing the prayer of the Plaintiff's Complaint against them to $200,000.00 actual damages. The Motion was based upon the grounds that the Defendants are charitable organizations within the definition set forth in Section 33-55-200, 1976 Code of Laws of South Carolina, as amended, in that the Defendants are corporations which are exempt from taxation pursuant to Section 501(c)(3) of Title 26 of the United States Code and as such, they are entitled to the benefits of Section 33-55-210(A) which limits the liability of charitable organizations in tort actions to a maximum of $200,000 actual damages.

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The Motion was supported by:

1. The Affidavit of William L. Bethea, Jr., a Member of the Board of Directors of the Defendant Hilton Head Hospital, indicating that the Hilton Head Hospital is exempt from taxation pursuant to Rule 501(c)(3) of Title 26 of the United States Code;

2. Correspondence from Michael J. Murphy, District Director, Internal Revenue Service, confirming the exempt status of the Defendant Hilton Head Health Services Corporation pursuant to Section 501(c)(3) of the Internal Revenue Code; and

3. A copy of the case of George Thomas Wood, M.D. v. Hilton Head Hospital, Inc., 356 S.E.2d 841, in which the State Supreme Court noted that Hilton Head Hospital is a private institution and is tax exempt.

The Plaintiff submitted a brief arguing that the Motion of the Defendants was premature in that the Plaintiff had not had an opportunity to conduct discovery on the charitable immunity status of the Defendants in order to determine if there were facts which would deprive the Defendants of their status as charitable organizations and, therefore, of their right to the protection of Section 33-55-210. On December 20, 1991, I issued an Order permitting the Plaintiff to conduct discovery on that issue with leave being given to the Defendants to renew their motion to limit liability when discovery was completed. A copy of that Order is attached hereto.

Now, the Defendants have moved to have me reconsider my December 20, 1991 Order. I have done so and I am convinced that I was in error and "reverse" and "overrule" my previous Order.

The South Carolina Legislature, by enacting §33-55-200(a) provided the courts of this state with a clear, unambiguous definition of entities that qualify as "charitable organizations" for purposes of limiting the liability exposure in actions such as the one at hand. This definition is as follows:

> (a) 'Charitable Organization' means an organization, institution, association, society or corporation which is exempt from taxation pursuant to Section 501(c)(3) or 501(d) of Title 26 of the United States Code as amended, or Section 12-7-330 of the Code of Laws of South Carolina, 1976. S. C. Code Ann. §33-55-200(a).

In conjunction with its enactment of §33-55-200, the South Carolina legislature also established §33-55-210 which provides in pertinent part the following:

> (A) Any person sustaining an injury or dying by reason of the tortious act of commission or omission of an employee of a charitable organization . . . may only recover in any action brought against the charitable organization for the actual damages he may sustain in an amount not exceeding $200,000.

In adopting these two (2) code sections, the Legislature could have provided any definition it deemed appropriate for purposes of imposing limits on liability. The Legislature chose to use the 501(c)(3) status given to organizations pursuant to the Internal Revenue Code of Title 26 of the United States Code. The result is that South Carolina Courts must rely upon the Internal Revenue Service's determination of which organizations qualify for 501(c)(3) tax exempt status. What the South Carolina Legislature has done is to permit those organizations which qualify for 501(c)(3) tax-exempt

status under the Internal Revenue Code as determined by the Internal Revenue Service [hereafter "IRS"], (an administrative agency of the United States Government charged with the responsibility of enforcing the guidelines and regulations of the Internal Revenue Code), to receive the benefit of limited liability exposure for the tortious conduct of their employees. The South Carolina Legislature, not the IRS or the federal government, provided this limitation on liability for 501(c)(3) organizations. The Legislature simply chose to take the easy way out by using the IRS's determination of 501(c)(3) tax-exempt status as its requirement for such a privilege. Obviously, the South Carolina Legislature had enough faith in the determination process and regulations imposed by the IRS on those orgnizations granting ~~granted~~ initial and continuing 501(c)(3) status, to rely upon the IRS's Rulings for purposes of its own statute, §33-55-210(A) limiting liability in negligence actions. As long as the statute is constitutional I cannot take it upon myself to say that the Legislature used the wrong guidemark and thereby make my own independent determination of an organization's right to the limitation of liability permitted under S. C. Code Ann. §33-55-210(A). To do so would be to totally disregard the clear, unambiguous wording of the statute. However, this is exactly what I earlier did.

I apologize to all parties for the time and expense I have caused them based upon my former erroneous ruling. Looking back, trying to analyze how I fell into error, I can

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only conclude that I did so because I thought and still think that the Legislature has done a foolish thing in abrogating what would otherwise be a South Carolina Court's determination and allocating the vital decision to be made by a Washington appointed tax collector. In my opinion the statute will protect many organizations as charitable which in fact are not. In deed, the very vigor of the Defendants' objections to inquiry in this action, although I rule with them because they are legally correct as I now see it, suggests the possibility of skeletons in closets. But, after all, just a few years ago a charitable institution - if indeed it was one - could not be sued at all in a situation like the one here, so the Legislature can allow the suit on any terms including what I believe to be the foolish ones here imposed.

The Plaintiffs again call my attention to Laughlin v. Parkinson, ____ S.C. _____, 403 S.E.2d 120 (1991). That case is not valid authority because Section 44-7-50 Code of Laws of South Carolina, as amended, is the statute that was applicable ~~in~~ there. Section 44-7-50 was enacted in the wake of Brown v. Anderson County Hospital, 268 S.C. 479, 234 S.E.2d 873 in 1977 to confer limited liability (up to $100,000.00) on "charitable hospitals or medical facilities" or other medical facilities operated or funded by the State. Unlike Section 33-55-200, Section 44-7-50 contained no definition for "charitable hospitals or medical facilities", nor did it specifically state as 33-55-210 does, that charitable hospitals

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or medical facilities which meet the prescribed definition would be entitiled to limited liability. Instead, Section 44-7-50, specifically states that it is simply modifying the doctrines of charitable and sovereign immunity as they related to hospital and other medical facilities in the State.

Section 44-7-50 did not change the old well-established rule that the status of a defendant as a charitable organization is a factual issue to be litigated like any other. This was once true, of course, if the particular defendant was possessed of a corporate charter as a charitable or eleemosynary corporation.

> The charitable character of a corporation depended upon the facts and the existence of a charitable charter was not conclusive. Eisenhardt v. State Agricultural and Mechnical Society of South Carolina, 235 S.C. 305, 111 S.E.2d 568.

But Sections 33-55-200(a) and 33-55-210 do change the old well-established rule. Therefore, my Order of December 20, 1991 is set aside and I grant the Defendants' Motion to Limit liability to $200,000, which, of course stops any further inquiry in this case in this Court into whether the fact the Defendants are charitable organizations.[1]

Thomas Kemmerlin, Jr., Master In Equity and Special Circuit Judge For Beaufort Common Pleas

Beaufort, S. C.

June 15, 1992.

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[1] My heart is not in this decision. I still agree with Emerson when he says in his essay "Self-Reliance", that one ". . . must not be hindered by the name of goodness, but must explore if it be goodness."

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT)
) CIVIL ACTION NO.: 91-CP-07-1580

SHARON BENNETT ZIMMERMAN, as Personal Representative of the Estate of Laura Jean Bennett, Deceased,

Plaintiff,

v.

STEVEN BUJENOVIC, M.D., PHILIP NICOL, M.D., THE HILTON HEAD HOSPITAL, and HILTON HEAD HEALTH SERVICES CORPORATION, and COASTAL EMERGENCY SERVICES OF COLUMBIA, INC.,

Defendants.

ORDER

The Defendants Hilton Head Health Services Corporation, Inc. and Hilton Head Hospital, Inc. moved for an Order reducing the prayer of the Complaint against them to $200,000 pursuant to Section 33-55-210, South Carolina Code of Laws, 1976. Such Code Section provides that a "charitable organization" as that term is defined in Section 33-55-200(a) Code of Laws of South Carolina, 1976, can only be sued for an amount not in excess of $200,000. The term "charitable organization" is defined in Section 33-55-200(a) as one exempt from taxation pursuant to Section 501(c)(3) or 501(d) of Title 26 of the United States Code. The Defendants Hilton Head Hospital and Hilton Head Health Services Corporation apparently

have the required tax exempt status, so that, nothing more appearing, it is obvious that the statutes block a Plaintiff from a recovery of more than $200,000 from each of them.

This motion was met by the Plaintiff's assertion that, if they were allowed to continue discovery, they could likely show that the Defendants were in fact not charitable orgarizations. By Order of December 20, 1991, I denied the Defendants' motions. A copy of that Order is attached hereto and incorporated by reference to the extent that it helps explain the course of this litigation.

Thereafter, upon motion of the Defendants to reconsider my December 20, 1991, Order I again heard arguments and "reversed" the December 20, 1991 Order by an Order dated June 15, 1992. A copy of that Order is also attached hereto and incorporated by reference to the extent that it helps explain the course of this litigation. In this Order I took the simplistic view[1] that the Legislature can give and therefore it can take away. After all, the abolishment of charitable immunity was not upon Constitutional grounds. See Fitzer v. Greater Greenville, S.C. Young Men's Christian Association, 277 S.C. 1, 282 S.E.2d 230 (1981). It was simply, that the time had come to abolish charitable immunity because charitable organizations could now share the risk of a large verdict by means of insurance whereas at the time the Doctrine of Charitable Immunity arose, insurance not being available,

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[1] And perhaps the correct view; I'm not certain.

one large verdict could wipe out a charitable organization and thereby deprive thousands of the benefits of its charitable care. The abolishment of charitable immunity could have been accomplished by legislative enactment as well as by a Court decision.

I concluded:

> As long as the statute is constitutional I cannot take it upon myself to say that the Legislature used the wrong guidemark and thereby make my own independent determination of an organization's right to the limitation of liability permitted under S. C. Code Ann. §§33-55-210(A) and 33-55-200(a), [Emphasis Added].[2]

Leaving open the constitutional hole, not surprisingly, the Plaintiffs seek to drive their claims through it by a motion to have me reconsider upon the grounds that the limitations contained in the Code Sections considered are unconstitutional.

The statutes under consideration create an irrebuttable presumption of charitable status. The Plaintiffs had no input in that determination, i.e., they have never had an opportunity to point out to the IRS or to anyone that the Defendants cloaked with immunity status are in fact not charitable by even the IRS definition.

Due process is nothing but fairness. The concept is so simple and basic that even the United States Supreme Court speaks of it in playground terms of "fair play." At the time the South Carolina Supreme Court handed down Fitzer, supra, it created a "fair play" playing field. A plaintiff

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[2] Order of June 15, 1992.

could sue and recover if he proved negligence, regardless of whether the Defendant was or was not a charitable organization. A fair set of referees was in place, the judges and juries of the State of Sotuh Carolina, awaiting the game. But the Legislature created a pre-game super referee in the form of the statutes under consideration which take away even before the game starts the right to play on the fair field. The Legislature has taken something away from a citizen without his chance to be heard. This is a denial of due process. To allow a statute to conclude without an opportunity for one to challenge the presumption that it is a charitable organization is a violation of the Plaintiff's due process rights. Due process requires that persons be given notice and an opportunity to be heard before being deprived of their rights. See Amstar Corporation v. S/S Alexandros T., 431 F. Supp. 328 (d. Md. 1977), aff'd, 664 F. 2d 904 (4th Cir. 1981). Statutes such as Section 33-55-200(a) and 33-55-210 which presume facts not necessarily true and create presumptions which deny an opportunity to rebut do not afford due process. See N.L.R.B. v. Heyman, 541 F. 2d 796 (9th Cir. 1976).

I do not question the Legislature's right to put limitations upon recovery against charitable organizations, but the determination of what is and what is not a charitable organization must be a fair one, not one pre-determined by that super referee, the IRS.

Having determined that the statute is Unconstitutional for the reason set forth above, does the whole limitation pass away, or is it still within the province of judge and jury to have to make the determination based upon whether or not in fact the Defendant organization is a charitable organization? I find the former. So there need be no discovery on the issue. The case need only be tried without the limitation. Upon appeal of the verdict in excess of $200,000, the Appellate Court can, if it agrees with me, uphold the verdict or, if it disagrees with me reduce the verdict.

AND IT IS SO ORDERED.

Thomas Kemmerlin, Jr., Master
In Equity and Special Circuit
Judge for Beaufort Common Pleas

Beaufort, South Carolina

October 5, 1992.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	CASE NUMBER: 89-CP-07-1699
RICHARD L. BENNETT, III, as Personal Representative of the Estate of LAURA JEAN BENNETT, Deceased,	)	
Plaintiff,	)	
v.	)	ORDER
STEVEN BUZENOVIC, M.D., PHILIP NICOL, M.D., THE HILTON HEAD HOSPITAL, and HILTON HEAD HEALTH SERVICES CORPORATION,	)	
Defendants.	)	

The defendants Hilton Head Health Services Corporation, Inc. and Hilton Head Hospital, Inc. have moved for an Order reducing the prayer of the Complaint against them to $200,000 pursuant to Section 33-55-210, South Carolina Code of Laws, 1976,. The grounds are stated in the motion as follows:

> These motions are based on the grounds that Hilton Head Health Service, Inc., a charitable organization", is exempt from taxation pursuant to Section 501 (c)(3) of Title 26 of the United States Code, that Hilton Head Hospital, Inc., a "charitable organization" is exempt from taxation pursuant to Section 501 (c)(3) of Title 26 of the United States Code and accordingly, both are "charitable organizations" as that term is defined in S.C. Code Ann. §33-55-200(a) and as used in Section 33-55-210.

Attached to motion in support thereof are the affidavit of William L. Bethea, Jr., a director of Hilton Head Hospital and letters from the IRS confirming the 501(c)(3) status

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of both moving defendants.

The Plaintiff's position is summed up in the Plaintiff's letter-brief of December 11, 1991:

> With regard to Rutledge Young's Motion to limit liability of Hilton Head Hospital and Hilton Head Health Services Corporation, please find enclosed copies of the following cases, statutes and discovery documents in support of my position that a ruling in the Hospital's favor at this time is premature due to the fact that I have not been able to receive responses to my discovery requests, nor have I had an opportunity to depose the appropriate officer at Hilton Head Hospital with regards to the charitable immunity status of Hilton Head Hospital . . .

I suspect that I or some other judge will eventually grant the motions now before me, but the Plaintiff is entitled to tilt with windmills. There may really be a giant disguised as a windmill. After all, discovery might reveal that there is a conspiracy to conceal the fact that the defendants each make several million dollars a year which is split among the doctors who participate and prescribe and agree not to report the gains as income or discovery might reveal some other scenario which would deprive the moving defendants of their status as charitable organizations.

The case of Laughridge, etc. vs. Parkinson, et al. (Opinion No. 23368, filed April 1, 1991 by the South Carolina Supreme Court) suggests that status as a charitable organization is a factual issue to be litigated like other issues, and is not something fait accompli merely upon a motion to so state, as the moving Defendants would have me rule.

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I therefore deny the Motion at this time with leave to the moving Defendants to renew the Motion when discovery is completed.

Thomas Kemmerlin, Jr., Master
In Equity and Special Circuit
Judge for Beaufort Common
Pleas

Beaufort, South Carolina

December 5th, 1991.

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2000 South Carolina Laws Act 336 (S.B. 732)

SOUTH CAROLINA 2000 SESSION LAWS
REGULAR SESSION

Additions and deletions are not identified in this document.
Vetoed provisions within tabular material are not displayed.

Act 336
S.B. No. 732
CORPORATIONS

AN ACT TO AMEND CHAPTER 56, TITLE 33, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE SOLICITATION OF CHARITABLE FUNDS ACT, SO AS TO REVISE THE CONTENT BY, INTER ALIA, ADDING CERTAIN DISCLOSURE REQUIREMENTS, DEFINITIONS OF AFFECTED SOLICITORS, CRIMINAL AND OTHER PENALTIES FOR VIOLATIONS, AND TECHNICAL CHANGES.

Be it enacted by the General Assembly of the State of South Carolina:

Solicitation of charitable funds

SECTION 1. Chapter 56, Title 33 of the 1976 Code is amended to read:

CHAPTER 56
Solicitation of Charitable Funds

<< SC ST § 33–56–10 >>

Section 33–56–10. This chapter may be cited as the "South Carolina Solicitation of Charitable Funds Act".

<< SC ST § 33–56–20 >>

Section 33–56–20. As used in this chapter, unless a different meaning is required by the context:

(1)(a) "Charitable organization" means a person, as defined in item (7):

(i) determined by the Internal Revenue Service to be a tax exempt organization pursuant to Section 501(c)(3) of the Internal Revenue Code;

(ii) that is or holds itself out to be established for any benevolent, social welfare, scientific, educational, environmental, philanthropic, humane, patriotic, public health, civic, or other eleemosynary purpose, or for the benefit of law enforcement personnel, firefighters, or other persons who protect the public safety; or

(iii) that employs a charitable appeal as the basis of solicitation or an appeal that suggests that there is a charitable purpose to a solicitation, or that solicits or obtains contributions solicited from the public for a charitable purpose.

(b) This definition does not include:

(i) a bona fide religious organization or group affiliated with and forming an integral part of the religious organization where no part of the net income inures to the direct benefit of an individual and its conduct is supported primarily by government grants or contracts, funds solicited from its own membership, congregation, or previous donors, or fees charged for services rendered in furtherance of its tax-exempt purpose; or

(ii) a candidate for national, state, or local office or a political party or other group required to file information with the Federal Election Commission or State Election Commission.

(2) "Charitable purpose" means a purpose described in Section 501(c)(3) of the Internal Revenue Code or a benevolent, social welfare, scientific, educational, environmental, philanthropic, humane, patriotic, public health, civic, or other eleemosynary objective, including an objective of an organization of law enforcement personnel, firefighters, or other persons who protect

the public safety if a stated purpose of the solicitations includes a benefit to a person outside the actual service membership of the organization.

(3) "Commercial co-venturer" means a person that regularly and primarily engages in trade or commerce for profit that, for the benefit of a charitable organization, may raise funds by advertising that the purchase or use of goods, services, entertainment, or other thing of value benefits the charitable organization, if it is offered at a price comparable to similar goods or services in the market.

(4) "Contribution" means the promise, grant, or pledge of money, credit, assistance, or property of any kind or value. It does not include bona fide fees, dues, or assessments paid by members of an organization if membership is not conferred solely as consideration for making a contribution in response to a solicitation, and that membership does not bestow only a right to vote.

(5) "Educational institution" means an organization organized and operated exclusively for educational purposes, which usually maintains a regular faculty and curriculum and usually has a regularly enrolled body of pupils or students in attendance at the place where educational activities are regularly conducted. The term "educational institution" also includes the following persons, entities, or institutions if their fundraising activities are not conducted by professional solicitors as defined by this chapter:

(a) an educational institution that is an eleemosynary junior or senior college in South Carolina whose major campus and headquarters are located within this State and which is accredited by the Southern Association of Colleges and Secondary Schools; and

(b) a person or an entity performing sanctioned fundraising activities on behalf of the educational institutions referenced in subitem (a) above, its foundations, or related or affiliated funds.

(6) "Parent organization" means that part of a charitable organization which coordinates, supervises, or exercises control over policy, fundraising, and expenditures, or assists or advises one or more chapters, branches, or affiliates in this State.

(7) "Person" means an individual, an organization, a trust, a foundation, a group, an association, a partnership, a corporation, a society, or a combination of them.

(8) "Professional fundraising counsel" means a person that for compensation plans, conducts, manages, prepares materials for, advises, or acts as a consultant, directly or indirectly, in connection with soliciting contributions for or on behalf of a charitable organization, but that actually does not solicit contributions as a part of these services. A bona fide salaried officer or employee of a charitable organization maintaining a permanent establishment within this State, or the bona fide salaried officer or employee of a parent organization certified as tax exempt, is not a professional fundraising counsel.

(9) "Professional solicitor" means a person that, for monetary consideration, solicits contributions for or on behalf of a charitable organization, either personally or through its agents, servants, or employees who are specially employed by or for a charitable organization and who are engaged in the solicitation of contributions under the direction of that person. "Professional solicitor" also means a person that plans, conducts, manages, carries on, advises, or acts as a consultant to a charitable organization in connection with the solicitation of contributions but does not qualify as "professional fundraising counsel" within the meaning of this chapter. A bona fide salaried officer, unpaid director, a bona fide employee of a charitable organization, or a part-time student employee of an educational institution is not a professional solicitor. A paid director or employee is not a professional solicitor unless his salary or other compensation is paid as a commission computed on the basis of funds actually raised or to be raised.

(10) "Solicit" and "solicitation" means to request and the request for money, credit, property, financial assistance, or other thing of value, or a portion of it, to be used for a charitable purpose or to benefit a charitable organization. A solicitation takes place whether or not the person making the request receives a contribution.

<< SC ST § 33–56–30 >>

Section 33–56–30. (A) Except as otherwise provided in this chapter, a charitable organization which intends to solicit contributions within this State or have contributions solicited on its behalf must file a registration statement with the Secretary of State, on forms prescribed by the Secretary of State, by July first of each year but in all cases prior to solicitation. The registration forms and other documents prescribed by the Secretary of State must be (i) signed by the chief executive officer and chief financial officer of the charitable organization, (ii) certified as true, and (iii) filed, along with a fee of fifty dollars.

(B) The statements must contain:

(1) the name of the organization;

(2) the purpose for which it was organized;

(3) the principal address of the organization and the address of offices in this State. If the organization does not maintain an office, the name and address of the person having custody of its financial records;

(4) the names and addresses of the chief executive officer, chief financial officer, directors, trustees, officers, and board members;

(5) the names and addresses of chapters, branches, or affiliates in this State; (6) the place and date the organization was legally established and the form of its organization;

(7) whether the organization intends to use a professional fundraising counsel, professional solicitor, or commercial co-venturer or hire individuals to solicit and, if so, their names and contact information;

(8) a copy of any determination letter recognizing the charitable organization's tax-exempt status from the Internal Revenue Service and any changes, amendments, or revocations to that letter unless those documents have been previously filed with the Secretary of State;

(9) the general purpose for which the solicited contributions are to be used;

(10) whether the organization is authorized by another local, state, or federal governmental authority to solicit contributions and, if so, a list of each;

(11) whether the organization is or has been the subject of a legal or administrative action concerning a charitable solicitation, fundraising campaign, or campaign with a commercial co-venturer by another local, state, or federal governmental authority including, but not limited to, registration or license revocation or denial, fines, injunctions, or suspensions, and an explanation of all actions;

(12) whether any of the organization's officers, directors, trustees, or board members have been the subject of a criminal conviction, including guilty or nolo contendere pleas, involving any charitable solicitations act, fraud, dishonesty, or false statement in a jurisdiction within the United States and, if so, a description and date of any such conviction;

(13) the charitable organization's Federal Employer's Identification Number (EIN);

(14) the name and address of the registered agent of the charitable organization, if incorporated;

(15) an annual financial report for the immediately preceding fiscal year filed on forms prescribed by the Secretary of State or on the Internal Revenue Service Form 990, 990EZ, or 990PF, unless that report already has been filed with the Secretary of State;

(16) a statement as to the relationship of any of the charitable organization's officers, directors, trustees, or board members by blood, marriage, or adoption to:

(a) each other; or

(b) a director or an officer of a professional fundraising counsel or professional solicitor under contract with the charitable organization.

If so, the names and addresses of the related parties.

<< SC ST § 33–56–40 >>

Section 33–56–40. The Children's Trust Fund of South Carolina as established by Section 20–7–5010 is required to register with the Secretary of State but is not required to pay the annual registration fee provided for in Section 33–56–30.

<< SC ST § 33–56–50 >>

Section 33–56–50. (A) The following are not required to file registration statements with the Secretary of State if their fundraising activities are not conducted by professional solicitors, professional fundraising counsel, or commercial co-venturers:

(1) an educational institution which solicits contributions from only its students and their families, alumni, faculty, friends, and other constituencies, trustees, corporations, foundations, and individuals who are interested in and supportive of the programs of the institution;

(2) a person requesting contributions for the relief of an individual specified by name at the time of the solicitation when all of the contributions collected, without deductions of any kind, are turned over to the named beneficiary for his use, as long as the person soliciting the contributions is not a named beneficiary;

(3) a charitable organization which (a) does not intend to solicit or receive contributions from the public in excess of five thousand dollars during a calendar year, or (b)(i) does not intend to solicit or receive contributions from the public in excess of twenty thousand dollars in a calendar year and (ii) has received a letter of tax exemption from the Internal Revenue Service, if all functions, including fundraising activities, of the organization exempted pursuant to this item are conducted by persons who are compensated no more than five hundred dollars in a year for their services and no part of their assets or income inures to the benefit of or is paid to an officer or a member. If the contributions raised from the public, whether or not the contributions are actually received by a charitable organization during any calendar year, are in excess of these amounts, within thirty days after the date the contributions exceed these amounts, the organization must register with and report to the Secretary of State as required by this chapter;

(4) an organization which solicits exclusively from its membership, including a utility cooperative;

(5) a veterans' organization which has a congressional charter; and

(6) the State, its political subdivisions, and an agency or a department of the State which are subject to the disclosure provisions of the Freedom of Information Act.

(B) A charitable organization claiming to be exempt from the registration provisions of this chapter and which solicits charitable contributions must submit annually to the Secretary of State, on forms prescribed by the Secretary of State, the name, address, and purpose of the organization and a statement setting forth the reason for the claim for exemption. If appropriate, the Secretary of State or his appropriate division shall issue a letter of exemption which may be exhibited to the public. A filing fee is not required of an exempt organization.

<< SC ST § 33–56–55 >>

Section 33–56–55. The provisions of this chapter do not apply to a parent-teacher association affiliated with a school or to a local chamber of commerce. Reporting of fundraising activities or other reporting pursuant to this chapter is not required of a parent-teacher association or a local chamber of commerce whether or not they would be considered exempt organizations under Section 33–56–50, if none of the fundraising activities are conducted by professional solicitors.

<< SC ST § 33–56–60 >>

Section 33–56–60. (A) A charitable organization soliciting funds in this State, whether individually or collectively with other organizations, and not exempt pursuant to Section 33–56–50, shall file in the office of the Secretary of State an annual report of its financial activities, on forms prescribed by the Secretary of State or on Internal Revenue Service Form 990, 990EZ, or 990PF, certified to be true by the organization's chief executive officer and chief financial officer. The report must cover the preceding fiscal year and must be filed within four and one-half months of the close of the organization's fiscal year unless a written extension has been granted by the Secretary of State. To receive an extension, the organization must file with the Secretary of State a copy of the extension request submitted to the Internal Revenue Service.

(B) The annual financial report must include:

(1) specific and itemized support and revenue statements disclosing direct public support from solicitation, indirect public support, government grants, program service revenue, and other revenue. The report must disclose the amount of direct public support received from direct mail solicitation, telephone solicitation, commercial co-venturers, door-to-door solicitations, telethons, and all other itemized sources;

(2) specific and itemized expense statements disclosing program services, public information expenditures, fundraising costs, payments to affiliates, management costs, and salaries paid; and

(3) balance sheet disclosures containing total assets and liabilities.

(C) If a charitable organization is required or elects to file a completed Internal Revenue Service Form 990, 990EZ, or 990PF, the organization may file the form with the Secretary of State instead of the report required by subsection (A); however, the form may exclude the information which the Internal Revenue Service would not release pursuant to a Freedom of Information request.

(D) An organization which fails to file a timely annual financial report required by this section may be enjoined from further solicitation of funds in this State in an action brought by the Secretary of State and is ineligible to renew its registration as a charitable organization until the required financial statements are filed with the Secretary of State. An organization which fails to

file a timely annual financial report required by this section may be assessed by the Secretary of State administrative fines of ten dollars for each day of noncompliance for each delinquent report not to exceed two thousand dollars for each separate violation.

<< SC ST § 33–56–70 >>

Section 33–56–70. (A) A contract or agreement between any professional fundraising counsel, professional solicitor, or commercial co-venturer and a charitable organization must be in writing and filed, along with a Notice of Solicitation form, with the Secretary of State at least ten days before the professional fundraising counsel, professional solicitor, or commercial co-venturer begins any solicitation activity or any other activity contemplated by the contract or agreement in this State. Solicitations or services pursuant to a contract may not begin in this State until the contract has been filed with the Secretary of State and until both the charitable organization and the professional solicitor or professional fundraising counsel are registered properly with the Secretary of State.

(B) A contract filed pursuant to this section must disclose the following, if applicable:

(1) legal name and alias name, address, and registration number, if any, of the professional solicitor, professional fundraising counsel, or commercial co-venturer;

(2) legal name, address, and registration number of the charitable organization;

(3) name and residence address of each person directing or supervising the contract solicitation services;

(4) description of the event or campaign;

(5) date the solicitation or campaign commences;

(6) date the solicitation or campaign terminates;

(7) statement of the guaranteed minimum percentage of gross receipts to be remitted or retained by the charitable organization, excluding the amount which the charitable organization must pay for fundraising costs;

(8) statement of the percentage of gross receipts with which the professional solicitor, professional fundraising counsel, or commercial co-venturer is compensated, including the amount the professional solicitor, professional fundraising counsel, or commercial co-venturer must be reimbursed as payment for fundraising costs; and

(9) if applicable, the maximum dollar amount that will benefit the charitable organization.

(C) Every Notice of Solicitation form filed pursuant to this section must disclose:

(1) legal name and alias name, address, and registration number of the professional solicitor, professional fundraising counsel, or commercial co-venturer;

(2) legal name, address, and registration number of the charitable organization;

(3) date the solicitation activity commences and terminates;

(4) name and residence address of phone room directors for any solicitation activities;

(5) location, including physical address, and telephone numbers from which the solicitation activity, including telephone solicitations, is conducted;

(6) description of all solicitation activity; and

(7) the terms of remuneration for the campaign or event pursuant to the contract.

(D) Within ninety days after a solicitation campaign has been completed, or within ninety days after the anniversary of a solicitation campaign lasting more than one year, the professional solicitor must file with the Secretary of State a joint financial report for the campaign, including gross revenue, an itemization of expenses, and the amount paid to the sponsor. This joint financial report must be completed on the form prescribed by the Secretary of State, signed by both an authorized official of the professional solicitor and an authorized official of the charitable organization, and certified to be true.

(E) A professional fundraising counsel, professional solicitor, or commercial co-venturer failing to comply with this section is ineligible to renew its registration or continue solicitation activities or campaigns until the required information is filed and is liable for an administrative fine not to exceed ten dollars for each day of noncompliance, with a maximum fine of two thousand dollars for each separate violation.

<< SC ST § 33–56–80 >>

Section 33–56–80. Registration statements and applications, reports, professional fundraising counsel contracts, professional solicitor contracts, or commercial co-venturer contracts, and all other documents and information required to be filed pursuant

to this chapter or by the Secretary of State are public records in the office of the Secretary of State and are open to the general public for inspection at a time and under conditions as the Secretary of State may prescribe. The Secretary of State shall publish and make available to the public and to persons subject to this chapter explanatory information concerning this chapter, the duties imposed by this chapter, and the means for enforcing this chapter.

<< SC ST § 33–56–90 >>

Section 33–56–90. (A) Upon oral or written request of the solicited party, a professional solicitor must disclose its status as a "professional" solicitor. The professional solicitor also must disclose the registered true name of the professional fundraising organization for which it works and the registered true name, location, and purpose of the charitable organizations for which it is soliciting. Upon oral or written request of the solicited party, a professional solicitor also must disclose the percentage of gross receipts with which the professional solicitor is compensated including the amount the professional solicitor must be reimbursed as payment for fundraising costs. The professional solicitor also must disclose the guaranteed minimum percentage of gross receipts to be remitted or retained by the charitable organization excluding the amount which the charitable organization must pay for fundraising costs.

(B) Upon oral or written request by the solicited party, the professional solicitor must deliver to the solicited party within fifteen business days of the request a:

(1) financial statement of the charitable organization disclosing assets, liabilities, fund balances, revenue, and expenses for the preceding fiscal year. This financial statement must be the most recently submitted annual financial report pursuant to Section 33–56–60; and

(2) copy of the professional solicitor's or charitable organization's current registration certification from the Secretary of State.

(C) A professional solicitor that fails to comply with the provisions of this section is liable for an administrative fine not to exceed two thousand dollars for each separate violation.

(D) An offense committed in violation of this section is considered to have been committed at the place where the solicitation either was initiated or was received.

<< SC ST § 33–56–100 >>

Section 33–56–100. In accordance with the regulations promulgated by the Secretary of State, a charitable organization, professional solicitor, professional fundraising counsel, or commercial co-venturer subject to the provisions of this chapter must keep the true fiscal records as to its activities in this State. The records must be retained for at least three years after the end of the period of registration to which they relate.

<< SC ST § 33–56–110 >>

Section 33–56–110. (A) A person may not act as a professional fundraising counsel or professional solicitor for a charitable organization subject to the provisions of this chapter without first having registered with the Secretary of State. Registration includes filing of a complete application and filing fee. An application for registration must be in writing under oath or affirmation in the form prescribed by the Secretary of State. The application for registration by a professional fundraising counsel or professional solicitor must be signed by its chief executive officer and chief financial officer, certified as true, and accompanied by an annual fee of fifty dollars.

(B) The application for a professional fundraising counsel or professional solicitor must include the:

(1) legal name of the applicant;

(2) principal address of the applicant and address of officers and directors of the applicant;

(3) list of employees, whether full time, part time, or contract, and their job titles;

(4) form of the applicant's business;

(5) names, addresses, and titles of all current principal officers, directors, individual owners, or partners, and those for the preceding three years;

(6) list of the full names and addresses of each state in which an applicant is registered currently as a professional fundraising counsel or professional solicitor;

(7) list of charitable organizations with which an applicant contracted in this State for the previous three years;

(8) registration fee of fifty dollars;

(9) statement as to whether the applicant, or its directors, principal officers, individual owners, or partners is or has been the subject of a legal or administrative action, including an injunction, concerning a charitable solicitation, fundraising campaign, or campaign with a commercial co-venturer by another local, state, or federal governmental authority including, but not limited to, registration or license revocation or denial, fines, injunctions, suspensions, or voluntary agreement to discontinue any charitable solicitation activity and, if so, a written explanation of those actions;

(10) statement as to whether the applicant, or its directors, principal officers, individual owners, or partners has been the subject of a criminal conviction, including guilty or nolo contendere pleas, involving any charitable solicitations act, fraud, dishonesty, or false statement in a jurisdiction within the United States and, if so, a description and date of any such conviction;

(11) applicant's Federal EIN if incorporated or Social Security number if acting as a sole proprietor;

(12) list of individuals who serve as couriers or employees to personally collect contributed funds from solicited parties, as applicable; and

(13) statement as to the relationship of any of the officers, directors, trustees, or board members of a professional fundraising counsel or professional solicitor to:

(a) each other; or

(b) a director, officer, agent, or employee of a charitable organization under contract with the professional fundraising counsel or solicitor.

(C) At the time of application, a professional solicitor must file with and have approved by the Secretary of State a surety bond, and a list of all professional solicitors operating under the bond. The applicant or its employer must be the principal obligor in the sum of fifteen thousand dollars, with one or more sureties that are satisfactory to the Secretary of State and whose liability in the aggregate as the sureties at least equals that sum, and must maintain the bond in effect so long as a registration is in effect. A deposit of cash in the amount of fifteen thousand dollars may be accepted instead of the bond. The bond shall run to the State of South Carolina for the use of the Secretary of State or his appropriate division and a person who has cause of action against the obligor of the bond for losses resulting from malfeasance, nonfeasance, or misfeasance in the conduct of solicitation activities or any violation of this chapter. A partnership or corporation which is a professional solicitor may file a consolidated bond on behalf of all its members, officers, and employees.

(D) Each registration is valid throughout the State for one year and may be renewed for additional one-year periods upon written application under oath in the form prescribed by the Secretary of State and upon payment of the fee prescribed in this chapter.

(E) A professional solicitor or professional fundraising counsel that fails to comply with the provisions of this section is liable for an administrative fine of ten dollars for each day of noncompliance, not to exceed two thousand dollars for each separate violation.

(F) A professional solicitor or professional fundraising counsel that has been convicted of or pled guilty or nolo contendere to a crime involving charitable solicitation activities or a felony involving fraud, dishonesty, or false statement in a jurisdiction within the United States in the past five years may be ineligible for registration as a professional solicitor or professional fundraising counsel in the State of South Carolina.

<< SC ST § 33–56–120 >>

Section 33–56–120. (A) In connection with the solicitation of contributions for or the sale of goods or services, a person shall not misrepresent or mislead, knowingly and wilfully, a person by any manner, means, practice, or device.

(B) A charitable organization, professional fundraising counsel, or professional solicitor shall not use or exploit the fact of registration so as to lead the public to believe that the registration in any way constitutes an endorsement or approval by the State. However, the use of the following statement is not considered a prohibited exploitation: "Registered with the Secretary of State as required by law". Registration does not imply endorsement of a public solicitation for contributions.

(C) In connection with the solicitation of contributions or the sale of goods or services for charitable purposes, a person shall not represent to or mislead a person by any manner, means, practice, or device to believe that another person sponsors or endorses the solicitation of contributions, sale of goods or services for charitable purposes, or approves of the charitable purposes or a charitable organization connected with it when the other person has not given written consent to the use of his name for these purposes. A member of the board of directors or trustees of a charitable organization or another person who

has agreed either to serve or to participate in a voluntary capacity in the campaign is considered to have given his consent to the use of his name in the campaign.

(D) A person shall not make any representation that he is soliciting contributions for or on behalf of a charitable organization or shall not use or display any emblem, device, or printed matter belonging to or associated with a charitable organization for the purpose of soliciting or inducing contributions from the public without first being authorized to do so by the charitable organization.

(E) For the purpose of soliciting contributions from a person in this State, a person shall not use the name of another person except that of an officer, a director, or a trustee of the charitable organization by or for which contributions are solicited, without the written consent of the other person. A person is considered to have used the name of another person for the purpose of soliciting contributions if the latter person's name is listed on any stationery, advertisement, brochure, or correspondence in or by which a contribution is solicited by or on behalf of a charitable organization or if his name is listed or referred to in connection with a request for a contribution as one who has contributed to, sponsored, or endorsed the charitable organization or its activities.

(F) Nothing contained in subsection (E) prevents the publication of names of contributors, without their written consent, in an annual or other periodic report issued by a charitable organization for the purpose of reporting on its operations and affairs to its membership or for the purpose of reporting contributions to contributors.

<< SC ST § 33–56–130 >>

Section 33–56–130. If a charitable organization, professional fundraising counsel, professional solicitor, or commercial co-venturer soliciting contributions from people in this State and having a principal place of business outside the State, or organized under and by virtue of the laws of a foreign state, is subject to the provisions of this chapter and does not otherwise appoint a registered agent for service of process, that charitable organization, professional fundraising counsel, professional solicitor, or commercial co-venturer is considered to have appointed irrevocably the Secretary of State as an agent upon whom may be served summons, subpoena, subpoena duces tecum, or other process directed to the charitable organization, professional fundraising counsel, professional solicitor, or commercial co-venturer or a partner, principal officer, or director of it in any action or proceeding brought pursuant to this chapter. Service of process is made by delivering to and leaving with the Secretary of State, or with any person designated to receive service at the office of the Secretary of State, duplicate copies of the process, notice, or demand. The service is sufficient service if notice of the service and a copy of the process are sent by the Secretary of State to the charitable organization, professional fundraising counsel, professional solicitor, or commercial co-venturer, by registered or certified mail with return receipt requested, at the address provided for in the registration form required to be filed with the Secretary of State pursuant to this chapter or, in default of the filing of the form, at the last address known to the Secretary of State. Service of process is complete ten days after the receipt by the Secretary of State of a return receipt purporting to be signed by the addressee or a person qualified to receive the registered or certified mail, in accordance with the accepted practices of the United States Postal Service or, if acceptance was refused by the addressee, ten days after the return to the Secretary of State of the original envelope bearing a notation by the postal authorities that receipt of it was refused.

<< SC ST § 33–56–140 >>

Section 33–56–140. (A) Upon his own motion or upon complaint of any person, the Secretary of State may investigate any charitable organization, professional fundraising counsel, professional solicitor, or commercial co-venturer to determine if it has violated the provisions of this chapter or has filed an application, or other information required by this chapter, which contains false or misleading statements. The Secretary of State may subpoena or audit persons and require the production of books, papers, and other documents to aid in the investigation of alleged violations of this chapter.

(B) If a charitable organization, professional fundraising counsel, professional solicitor, or commercial co-venturer fails to file a registration application, statement, report, or other information required to be filed with the Secretary of State by this chapter, or otherwise violates the provisions of this chapter, the Secretary of State must notify the delinquent charitable organization, professional fundraising counsel, professional solicitor, or commercial co-venturer of this fact by mailing a notice by registered or certified mail, with return receipt requested, to its last known address. If the required registration application, statement, annual report, assurance of voluntary compliance, or other information is not filed, or if the other existing violation

is not discontinued, within fifteen days after the formal notification or receipt of the notice, the Secretary of State may assess an administrative fine not to exceed two thousand dollars for each separate violation against the charitable organization, professional fundraising counsel, professional solicitor, or commercial co-venturer.

(C) In addition to other actions authorized by law, the Secretary of State, if he has reason to believe that one or more of the following acts or violations listed below has occurred or may occur, may bring an action to enjoin the charitable organization, professional fundraising counsel, professional solicitor, commercial co-venturer, or other person from continuing the act or violation, or doing any other acts in furtherance of it, and for other relief as the court considers appropriate:

(1) a person knowingly and wilfully operates in violation of the provisions of this chapter;

(2) a person knowingly and wilfully makes a false statement in any registration application, statement, report, or other information required to be filed by this chapter;

(3) a person fails to file a registration statement, annual financial report, or other document required to be filed by this chapter;

(4) a person is using in the solicitation or collection of contributions any device, scheme, or artifice to defraud or to obtain money or property by means of false pretense, representation, or promise;

(5) the officers or representatives of a charitable organization, professional fundraising counsel, professional solicitor, or commercial co-venturer refuse or fail, after notice, to produce records of the organization; or

(6) the funds raised by solicitation activities are not devoted to the charitable purposes of the charitable organization.

(D) Any registration application, statement, report, or other information required to be filed with the Secretary of State pursuant to this chapter by a charitable organization, professional fundraising counsel, professional solicitor, or commercial co-venturer which contains false or misleading statements may be rejected by the Secretary of State and returned to the submitting party without being filed.

(E) A person that is assessed an administrative fine or enjoined from any solicitation activity for any violation of this chapter, or that is denied registration has thirty days from receipt of certified notice from the Secretary of State to pay the fine or request an evidentiary hearing before an administrative law judge. A person who fails to remit fines or request a hearing after the required notice is given and after thirty days from the date of receipt of certified notice has elapsed may be enjoined from engaging in further charitable solicitation activities in this State and may have its registration suspended pending final resolution. A person may appeal an adverse ruling from an evidentiary hearing to the circuit court. An appeal to the circuit court is governed by the standard of review provided in the Administrative Procedures Act and case law interpreting that provision.

(F) The Secretary of State may exercise the authority granted in this section against a person that operates under the guise or pretense of being an organization exempted by the provisions of Section 33–56–40 or 33–56–50 but is not in fact an organization entitled to the exemption.

<< SC ST § 33–56–145 >>

Section 33–56–145. (A) A person that knowingly and wilfully violates a provision of this chapter with the intent to deceive or defraud an individual or a charitable organization is guilty of a misdemeanor and, upon conviction for a first offense, must be fined not more than five thousand dollars or imprisoned not more than one year, or both. For a second offense or subsequent offense, a person is guilty of a felony and, upon conviction, must be fined not more than ten thousand dollars or imprisoned not more than five years, or both.

(B) A person that knowingly and wilfully gives false or misleading information to the Secretary of State in a registration, filing statement, or report required by this chapter is guilty of a misdemeanor and, upon conviction for a first offense, must be fined not more than two thousand dollars or imprisoned not more than one year, or both. For a second offense or subsequent offense, a person is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than five years, or both.

(C) A person that is convicted or pleads guilty or nolo contendere pursuant to subsection (A) or (B) forfeits the bond described in Section 33–56–110 to the Secretary of State and is prohibited from serving as a professional solicitor or fundraising counsel in this State for a minimum of five years from the date of the conviction.

(D) A violation of this chapter involving a solicitation is considered to be committed at the place where the solicitation was either initiated or was received.

<< SC ST § 33–56–150 >>

Section 33–56–150. There is created in the office of the Secretary of State a Division of Public Charities which, under the direction and control of the Secretary of State, shall perform the duties imposed upon it by the provisions of this chapter. The executive and administrative head of the division is the Director of Public Charities designated by the Secretary of State.

<< SC ST § 33–56–160 >>

Section 33–56–160. The first two hundred thousand dollars in administrative fine revenue received pursuant to this chapter in a fiscal year may be retained by the Secretary of State to offset the expenses of enforcing this chapter. All administrative fines collected pursuant to this chapter in excess of two hundred thousand dollars in a fiscal year must be transmitted to the State Treasurer and deposited in the state general fund. All fees collected pursuant to this chapter must be transmitted to the State Treasurer and deposited in a fund separate and distinct from the state general fund and used by the Secretary of State for the purpose of administering the provisions of this chapter.

<< SC ST § 33–56–170 >>

Section 33–56–170. For purposes of Section 33–56–180:

(1) "Charitable organization" means any organization, institution, association, society, or corporation which is exempt from taxation pursuant to Section 501(c)(3) or 501(d) of Title 26 of the United States Code, as amended.

(2) "Employee" means an agent, servant, employee, or officer of a charitable organization.

<< SC ST § 33–56–180 >>

Section 33–56–180. (A) A person sustaining an injury or dying by reason of the tortious act of commission or omission of an employee of a charitable organization, when the employee is acting within the scope of his employment, may recover in an action brought against the charitable organization only the actual damages he sustains in an amount not exceeding the limitations on liability imposed in the South Carolina Tort Claims Act in Chapter 78 of Title 15. An action against the charitable organization pursuant to this section constitutes a complete bar to any recovery by the claimant, by reason of the same subject matter, against the employee of the charitable organization whose act or omission gave rise to the claim unless it is alleged and proved in the action that the employee acted in a reckless, wilful, or grossly negligent manner, and the employee must be joined properly as a party defendant. A judgment against an employee of a charitable organization may not be returned unless a specific finding is made that the employee acted in a reckless, wilful, or grossly negligent manner. If the charitable organization for which the employee was acting cannot be determined at the time the action is instituted, the plaintiff may name as a party defendant the employee, and the entity for which the employee was acting must be added or substituted as party defendant when it reasonably can be determined.

(B) If the actual damages from the injury or death giving rise to the action arose from the use or operation of a motor vehicle and exceed two hundred fifty thousand dollars, this section does not prevent the injured person from recovering benefits pursuant to Section 38–77–160 but in an amount not to exceed the limits of the uninsured or underinsured coverage.

<< SC ST § 33–56–190 >>

Section 33–56–190. The Secretary of State may enter into agreements with the appropriate authority of another state for the purpose of exchanging information with respect to charitable organizations, professional fundraising counsel, professional solicitors, and commercial co-venturers.

<< SC ST § 33–56–200 >>

Section 33–56–200. The provisions of this chapter are severable. The unconstitutionality of one section or clause does not affect the constitutionality of the entire chapter.

Time effective

SECTION 2. This act takes effect upon approval by the Governor.
Ratified the 31st day of May, 2000.

Approved the 6th day of June, 2000.

SC LEGIS 336 (2000)

End of Document

IN THE STATE OF SOUTH CAROLINA
In the Court of Common Pleas

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 2012-CP-43-2030

Appellate Case No. 2016-000774

Win Myat.....Appellant,

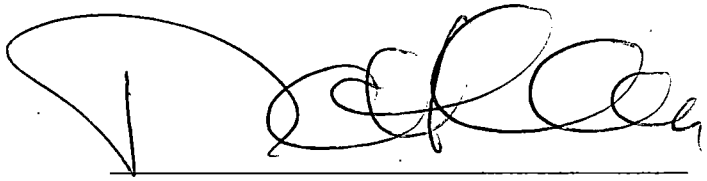
v.

Tuomey Healthcare System.....Respondent.

PROOF OF SERVICE

I hereby certify that I have served ***Respondent's Motion for Appellate Court to Allow Citations to Underlying Trial and Appellate Documents in Lazerson*** by depositing a copy of same in the United States Mail, postage prepaid, on January 27, 2017, addressed to his attorneys of record, William R. Padget and Francis M. Hinson, IV, as follows:

William R. Padget, Esquire
Francis M. Hinson, IV, Esquire
Finkel Law Firm, LLC
P. O. Box 1799
Columbia, SC 29202



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January 27, 2017

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January 27, 2017

Honorable Jenny Abbot Kitchings
Clerk, SC Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: Win Myat v. Tuomey Healthcare System
Appellate Case #: 2016-000774

Dear Ms. Kitchings:

Enclosed please find Respondent's Motion for Appellant Court to Allow Citations to Underlying Trial and Appellate Documents in Lazerson along with our Proof of Service and our firm check in the amount of $25.00.

By copy of this letter to William R. Padget and Francis M. Hinson, IV, Attorneys for Appellant, I am serving them with a copy of this Motion.

Please accept this with my kindest regards.

Yours very truly,

LEE, ERTER, WILSON,
HOLLER & SMITH, LLC

David Holler

David C. Holler

DCH:jsm
enclosure

cc: William R. Padget, Esquire
Francis M. Hinson, IV, Esquire

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Honorable Jenny Abbot Kitchings
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