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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

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.

**APPELLANT’S RETURN TO RESPONDENT’S MOTION TO
ALLOW CITATIONS TO UNDERLYING TRIAL AND APPELLATE
DOCUMENTS IN LAZERSON**

Appellant Win Myat submits this return in opposition to Respondent’s Motion to Allow Citations to the Underlying Trial and Appellate Documents in Lazerson. Respondent seeks to expand the record on appeal to include amicus briefs and trial court order that are unrelated to the gravamen of the matter currently on appeal and would only serve to cloud and confuse the narrowly-tailored questions at issue in the present matter.

In Lazerson v. Hilton Head Hospital, 312 S.C. 211, 439 S.E.2d 836 (1994), the South Carolina Supreme Court took up the issue of whether the protections of the Solicitation of Charitable Funds Act (“SCFA”) violated fundamental principles of due process. Specifically, the Court explicitly framed the narrow issue as “[w]hether §§ 33-

55-200(a) and -210 violate due process.” Applying classic rational basis analysis and upholding the constitutionality of the statute, the Court held that “tax exempt status *under the Internal Revenue Code* to be an objective criterion that bears a close nexus with the underlying legislative policy to preserve the resources of charitable organizations.” *Id.* 439 S.E.2d at 838 (emphasis added). In the present case, Appellant does not challenge and has never challenged the constitutionality of the SCFA, but rather, as part of third issue on appeal, contends that the trial court erred in concluding that Tuomey remains qualified for the protections of SCFA because it is not entitled to those protections under the Internal Revenue Code.¹

The general rule is that the Court of Appeals’ review is limited to the record on appeal. Rule 210(h), SCACR. The Lazerson Trial Court Orders and Appellate Court Documents that Tuomey seeks to cite to are not included in the record on appeal and should not be included in the record on appeal because those documents “w[ere] not presented to the lower court or tribunal.” Rule 210(c), SCACR. While an appellate court may take notice of the contents of the appellate record in another, unrelated case, that record is not binding precedent. *See Shores v. Weaver*, 315 S.C. 347, 433 S.E.2d 913 (1993); *Stanley Smith & Sons, Inc. v. Dumas*, 315 S.C. 30, 431 S.E.2d 595 (1993).² As it relates to the Trial Court Orders Tuomey seeks to cite, the South Carolina Supreme Court

¹ Namely that in applying the criterion of the Internal Revenue Code, which is adopted and incorporated into the statutory definition of the SCFA (S.C. Code § 33-56-170), Tuomey is simply not entitled to those protections due to its egregious conduct.

² Appellant must note that other courts have explicitly refused to allow reference to other proceedings. *See Hillsborough County Bd. of County Commrs. v. Pub. Employees Rel. Commn.*, 424 S.2d 132, 134 (Fla. Dist. App. 1st 1982) (stating that “an appellate court may not take judicial notice of the record in a separate proceeding”); *Weintraub v. Weintraub*, 756 S.2d 1092, 1092 (Fla. Dist. App. 3d 1092) (denying motion to take judicial notice of the record in an unrelated case).

has established that “[t]rial or inferior court decisions are *not precedents binding other courts, including appellate courts* or other judges of the same trial court.” Ford v. Beaufort County Assessor, 398 S.C. 508, 515 n.3, 730 S.E.2d 335, 339 n.3 (Ct. App. 2012) (emphasis added).

Respondent Tuomey makes the unfounded claim and conclusory statement that “[t]he arguments raised by Appellant Myat are virtually identical to issues raised and ruled on by the South Carolina Supreme Court in Lazerson.” However, Respondent’s broad brush characterization of Appellant’s issues on appeal is inaccurate. After examination of the documents Respondent Tuomey seeks to reference,³ it is clear that these two cases have only a tangential relationship, in that they both deal with the SCFA, the relationship ends there.

In Lazerson, the appellant claimed that S.C. Code Ann. § 33-55-200(a) and § 33-55-210 violated their substantive due process rights and was, therefore, unconstitutional under both the United States and South Carolina Constitutions. *See Lazerson*, 312 S.C. at 211, 439 S.E.2d at 836. However, in the present case, Appellant makes no constitutional challenge to those statutes. Rather, the issues in the case at bar include: (1) whether the trial court erred in permitting the Respondent Tuomey to belatedly amend its answer to assert a new affirmative defense; (2) whether the Trial Court erred in allowing the Respondent Tuomey to reopen its case and offer new evidence never previously disclosed in support of its charitable affirmative defense after the defense had rested and after

³ Appellant would also note that only a few select portions of the Lazerson record were cherry-picked for reference by Respondent. Appellant’s Motion seeks to reference primarily amicus briefs and other trial court orders. Notably absent from the Motion were the primary litigants’ briefs, framing the issues of that case – namely the constitutionality of the SCFA.

Appellant had moved for directed verdict on the charitable defense; and (3) whether the trial court erred in concluding that the Respondent Tuomey was qualified to receive the protections of the SCFA, specifically S.C. Code Ann. § 33-56-170 & 180. The constitutionality of the SCFA is not disputed.

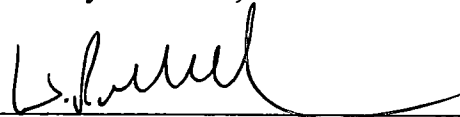
Nonetheless, Shores and Stanley Smith & Sons, Inc., indicate that the appellate court may, in its discretion, examine or take judicial notice of the Appellate Court Documents that Tuomey seeks to reference. While the Court may, in its discretion, allow Tuomey to cite to the Trial Court Orders, it should be explicitly noted that those amicus briefs and trial court orders are not binding precedent on the case at bar.

Put simply, our appellate courts have never ruled on the third issue presented for review in this case by Appellant – the application of the SCFA and Internal Revenue Code to Tuomey’s egregious conduct as a purported “charitable organization.”

For these reasons Appellant respectfully requests the Court deny Respondent’s Motion, or, if granted, give the inapposite holding in Lazerson its limited application in the case at bar.

February 10, 2017

Respectfully submitted,



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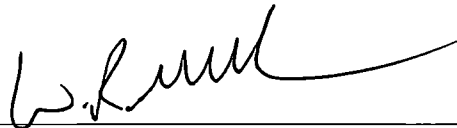
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PROOF OF SERVICE

I certify that I have served the Appellant's Return to Respondent's Motion to Allow Citations to Underlying Trial and Appellate Documents in Lazerson, by depositing a copy of it in the United States Mail, first-class postage pre-paid on February 10, 2017, addressed to their attorney of record, David C. Holler, Esquire, Post Office Box 580, Sumter, South Carolina 29151.

February 10, 2017



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