THE STATE OF SOUTH CAROLINA
In The 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 FINAL BRIEF

William R. Padget (SC Bar No. 72579)
Francis "Brink" Hinson (SC Bar No. 74917)

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STATEMENT OF ISSUES ON APPEAL

WHETHER THE TRIAL COURT ERRED IN APPLYING THE CHARITABLE CAP, THEREBY REDUCING THE JURY'S VERDICT OF $2,500,000.00 TO $300,000.00, AND, IF SO, FOR ANY ONE OF THE FOLLOWING ISSUES, THE JURY'S VERDICT SHOULD BE REINSTATED:

I. WHETHER THE TRIAL COURT ERRED IN PERMITTING THE RESPONDENT TO BELATEDLY AMEND ITS ANSWER TO ASSERT A NEW AFFIRMATIVE DEFENSE, *I.E.* THE PROTECTIONS OF THE SOLICITATION OF CHARITABLE FUNDS ACT, ON THE FIRST DAY OF THE SCHEDULED DATE CERTAIN TRIAL, AFTER NEARLY THREE YEARS OF LITIGATION, AND WHERE APPELLANT WAS SUBSTANTIALLY PREJUDICED BY THE TARDY AMENDMENT.

II. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE RESPONDENT 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 PLAINTIFF HAD MOVED FOR DIRECTED VERDICT ON THE CHARITABLE DEFENSE AND WHERE APPELLANT WAS SUBSTANTIALLY PREJUDICED.

III. WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT THE RESPONDENT TUOMEY WAS QUALIFIED TO RECEIVE THE PROTECTIONS OF THE SOLICITATION OF CHARITABLE FUNDS ACT, S.C. CODE ANN. § 33-56-170 &180.

STATEMENT OF THE CASE

In July of 2011, Appellant Win Myat ("Appellant" or "Dr. Myat") was seriously injured when he fell as a result of a liquid on the floor of a hallway at Tuomey Hospital in Sumter, South Carolina. Dr. Myat initiated this premises liability action by the filing of a summons and complaint on October 15, 2012.[1] Appellant filed an amended complaint on November 5, 2012, to properly identify the Defendant as Tuomey Regional Medical Center (hereinafter "Respondent" or "Tuomey").[2] Respondent filed its answer on January 16, 2013, asserting the following defenses: (1) general denial; (2) statutory employee defense under the Worker's Compensation Act; (3) comparative negligence; and (4) unavoidable accident.[3] Respondent Tuomey did not plead the affirmative defense of the Solicitation of Charitable Funds Act, specifically S.C. Code Ann. § 33-56-170 and S.C. Code Ann. § 33-56-180 (hereinafter "the SCFA"), as a defense. For several years thereafter, the parties participated in discovery and entered into several scheduling orders setting forth deadlines for the conduct of discovery, disclosure of witnesses, the filing of motions, and to conduct mediation. On November 2, 2014, the parties entered into an Amended Consent Scheduling Order, which held that all motions were to be filed on or before February 15, 2015.[4] On April 30, 2015, the parties entered into a Consent Order setting the case for date certain trial beginning on Monday, August 24, 2015.[5]

On Friday, August 21, 2015, more than half a year after all motions were ordered to have been filed, and just one business day before trial was to set begin, Tuomey filed a Motion to Amend Its Answer to assert the protections of the SCFA.[6] On the Friday that the Motion to

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[1] See R. pp. 0024-0025; Complaint.
[2] See R. p. 0032, line 5; Amended Complaint.
[3] See R. pp. 0038-0040; Answer.
[4] See R. p. 0001, lines 8-11; Scheduling Order dated November 2, 2014.
[5] See R. p. 0003; Order Setting Date Certain Trial dated April 30, 2015.
[6] See R. pp. 0041-0043; Respondent's Motion to Amend dated August 21, 2015.

Amend was filed, but prior to the filing of the motion, Respondent's counsel initiated a phone call to the trial judge and Appellant's counsel seeking leave to amend, and during the call the trial judge indicated a willingness to allow the amendment over Appellant's objection. Appellant's counsel requested that a motion be filed and a hearing conducted on the record in accordance with the rules.[7] The Motion to Amend was heard by the trial court the following business day (Monday, August 24, 2015), and, over Appellant's objection and claims of legal prejudice, the trial court gave leave to Tuomey to make a last-minute amendment to its pleading. On August 24, 2016, Respondent Tuomey filed its Amended Answer, now asserting the protections of the SCFA, more specifically the damages cap.[8] Due to a scheduling conflict with a defense witness, the trial of the case began the following week, starting on Monday, August 30, 2015.

The premises liability case was tried to verdict over the course of three days. On the third day of trial, after opting to focus solely on its liability defenses, the Respondent rested its case having put up zero evidence of its charitable status to support its newly plead affirmative defense.[9] Appellant moved for a directed verdict on the charitable defense, reciting to the trial court, and to the Respondent, all that Tuomey was required, but had failed, to prove.[10] Having heard Appellant's recitation of Tuomey's deficiencies, thereafter, the Respondent sought to reopen the evidence to put up testimony of its charitable status, proffering the testimony of witnesses who were not previously disclosed and documents that were not previously

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[7] R. p 0996; Transcript of August 24, 2015 Motion Hearing p. 2 (Respondent's counsel referencing Friday call). R. p. 1729, ¶ 12; Affidavit of David Holler ¶ 12 (referencing call to trial judge on Friday afternoon). The Motion was filed at 4:14 pm, this call was at around 12:30pm.

[8] R. p. 1892; Amended Answer dated August 24, 2015.

[9] R. p. 1529; Trial Transcript p. 485.

[10] R. p. 1531; Trial Transcript p. 487.

produced.[11] The trial court opted to hold the matter in abeyance and to proceed with closing arguments and the jury charge. Both parties completed their closing arguments and the jury was charged on the law. During the deliberations, Tuomey again sought leave to have the court reopen its case.[12] The court and both parties then received word that the jury had reached a verdict. Just before publishing the verdict, presumably with knowledge of the result and without further argument, the trial court granted Respondent Tuomey's motion to reopen its case and to put up additional facts in support of the recently pled affirmative defense.[13] The jury found in favor of Appellant and awarded $2,500,000.00 in damages against the Respondent. The trial court gave the parties ten days to file post-trial motions.

On September 4, 2015, Appellant served a motion to reconsider the granting of leave to Respondent to Amend Its Answer.[14] On September 10, 2015, Appellant served a motion to reconsider the reopening of the defense case.[15] On September 9, 2015, Appellant served a Reply to the newly filed Amended Answer, specifically denying that Respondent Tuomey was entitled to the protections of the SCFA because Tuomey was no longer a "charitable organization" as defined in S.C. Code § 33-56-180. Appellant specifically sought declaratory judgment that Respondent Tuomey was not entitled to the protections of limited liability under the SCFA.[16]

Respondent Tuomey filed its Post-Trial Motions for JNOV and for a new trial on September 14, 2015.[17] The trial court conducted a hearing on all post-trial motions on March 8,

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[11] R. p. 1533; Trial Transcript p. 489.

[12] R. p. 1606; Trial Transcript p. 562.

[13] R. p. 1612; Trial Transcript p. 568.

[14] R. pp. 0044-0048; Motion to Reconsider Granting of Leave to Amend.

[15] R. pp. 0052-0055; Motion to Reconsider Reopening of Defense Case.

[16] See R. pp. 0049-0051; Reply pp. 1-3.

[17] See R. pp. 0056-0082; Respondent's Post-Trial Motions.

2016. On April 7, 2016, the trial court entered an order denying Respondent's motion for JNOV and for a new trial, but reduced the judgment to $300,000.00, finding that Tuomey had met its burden of proving the affirmative defense and had shown that the organization qualified for the protections of the SCFA. The Order also denied Appellant's motion to reconsider the granting of the amendment and denied Appellant's motion to reconsider the decision to permit Respondent to reopen its case.[18]

On April 14, 2016, Appellant filed his notice of appeal of the trial court's April 7, 2016 Order. This appeal followed. Respondent took no cross appeal.

FACTS

Dr. Win Myat and His Fall

In July of 2011, prior to the fall and injury giving rise to this action, Appellant Win Myat, M.D, was a thirty-nine year old infectious disease specialist practicing medicine in Sumter, South Carolina. He had immigrated to the United States from Burma and worked his way through college and medical school, completing an internal medicine residency and a fellowship in infectious diseases. He first began practicing medicine in Florence, South Carolina, and subsequently brought his infectious disease expertise to the medical community in Sumter, South Carolina, which, at the time, had no infectious disease specialist.[19] In Sumter, Dr. Myat served three professional roles: (1) he was employed by his private medical practice, Palmetto Infectious Disease; (2) he was employed by Respondent Tuomey as the Medical Director of Infectious Disease; (3) and he was employed by the Sumter Family Health Center, a clinic in Sumter that treats HIV patients.[20] His efforts at his three jobs produced substantial income.[21] At

[18] R. pp. 0005-0021; Order dated April 7, 2016.

[19] R. pp. 1265-1274; Trial Transcript at pp. 220-229.

[20] R. pp. 1274-1275; Trial Transcript pp. 229-230.

the time he suffered the fall giving rise to this case, Dr. Myat was working in his capacity as a physician for his private medical practice.[22] While rounding on patients at approximately 5:30 AM on July 6, 2011, Dr. Myat slipped on a puddle of liquid near the nurse's station of Unit 3 South at the Respondent hospital. He suffered a fractured patella and ruptured patella tendon.[23] His injuries left him with a severe and painful limp and unable to continue his medical practice.[24] Dr. Myat filed this case against Respondent alleging that employees of Respondent Hospital created the dangerous condition that caused his fall.[25]

Tuomey's Charitable Status, the Drakeford Case, Its Reporting to the IRS, and Its Winding Down of Its Affairs

At the time of the filing of this case, Respondent Tuomey operated a 300 bed hospital in Sumter, South Carolina. As has been well publicized and established by United States ex rel. Drakeford v. Tuomey Healthcare Sys., Inc., 976 F. Supp. 2d 776, 784 (D.S.C. 2013) aff'd., 792 F.3d 364 (4th Cir. 2015) (hereinafter "Drakeford" or "the Drakeford case"), the Respondent has spent the last decade in litigation with the federal government. [26] In Drakeford, Tuomey was found to have violated the Stark Law (anti-kickback laws) and the False Claims Act (antifraud laws) due to its improper and illegal contracts and arrangements with physicians employed by

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[21] R. p. 1318; Trial Transcript p. 273 (Appellant's income averaged $47,024 per month in the 3 years prior to his fall).

[22] R. p. 1286; Trial Transcript p. 241.

[23] R. p. 1291; Trial Transcript p. 246.

[24] R. p. 1309; Trial Transcript p. 264 (description of limp). R. pp. 1312-1313; Trial Transcript pp. 267-68 (unable to continue work).

[25] *See generally* R. pp. 0032-0037; Amended Complaint.

[26] *See* R. pp. 0337-0338; Tuomey Rule 30(b)(6) Transcript at pp. 25-26 (confirming that Respondent is same entity as defendant in Drakeford case). The entirety of the Tuomey Rule 30(b)(6) transcript was submitted to the trial court for review at the March 8, 2016 hearing. *See* R. p. 1657; March 8, 2016 Hearing Transcript p. 32.

the hospital.[27] The District Court entered a judgment against Tuomey that, including penalties and fines, totaled $237,454,195.00. That judgment has been affirmed by the Fourth Circuit Court of Appeals.

More specifically, in October of 2005, Michael Drakeford, M.D., filed a *qui tam* action against Tuomey. Dr. Drakeford and the United States of America alleged that the compensation packages that Respondent paid some of its key physicians were in excess of the fair market value for their services and were thus in violation of the anti-kickback provisions of the Stark Law and antifraud laws of the False Claims Act.[28] On March 29, 2010, a federal jury returned a verdict in favor of the United States, finding that Tuomey had violated the Stark Law but had not violated the False Claims Act.[29] The District Court granted a new trial on the issue of the FCA and issued an order finding that: (1) pursuant to the jury verdict, Tuomey violated the Stark Law; and (2) Tuomey submitted claims in violation of the Stark Law, and the United States paid those improper claims to Tuomey in the amount of $44,888,651.00. The Court concluded that the United States was entitled to judgment in its favor as to its equitable claims in that amount.

Tuomey appealed that Order, and, in 2012, the Fourth Circuit Court of Appeals remanded the case to District Court instructing:

> [T]he jury must determine on remand whether the contracts took into account the volume or value of referrals. If it so finds, the jury must further determine whether Tuomey could bear its burden of proof with respect to the indirect compensation arrangement exception. Finally, if the jury finds that the contracts created a financial relationship—as defined by the Stark Law—between Tuomey and the physicians, it must determine

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[27] Specifically, the government claimed and proved that "payment[s] were unlawful under the Stark Law, 42 U.S.C. § 1395m, and thus violative of the False Claims Act (FCA), 31 U.S.C. §§ 3729 et seq." U.S. ex rel. Drakeford v. Tuomey, 976 F. Supp. 2d 776, 780 (D.S.C. 2013) aff'd., 792 F.3d 364 (4th Cir. 2015).

[28] Specifically, the United States contended that 14 employment contracts with certain physicians were improper and violated federal law.

[29] R. pp. 1731-1732; March 2010 Drakeford Jury Verdict Form.

> the number and value of claims Tuomey presented to Medicare for payment of facility fees resulting from the facility component referrals made by the physicians, and for which it received payment.

United States ex rel. Drakeford v. Tuomey Healthcare Sys., Inc., 675 F.3d 394, 405 (4th Cir. 2012).

The case proceeded to trial a second time, and, in May of 2013, the jury returned a verdict that Tuomey had violated both the Stark Law and the False Claims Act. The jury found that Tuomey had submitted 21,730 patient claims in violation of the False Claims Act, and that the value of these claims totaled $39,313,065.00. Applying statutory penalties for the antifraud violations, in October of 2013, the District Court issued a judgment against Tuomey, under the False Claims Act, in the amount of $237,454,195.00.[30] Tuomey appealed but was unsuccessful, and on July 2015, the Fourth Circuit Court of Appeals issued an order affirming the District Court's decision and the nearly quarter of a billion dollar judgment against Tuomey.[31]

During this time period, Respondent Tuomey's reporting of the findings in the Drakeford case to the Internal Revenue Service was less than forthright. Since the time the Drakeford litigation began, Tuomey's sole means of communication with the IRS has been through its annual Form 990 filings.[32] Tuomey' Form 990 filings[33] for 2010, 2011, 2012, and 2013 evidence Tuomey's shameful withholding of information from the IRS and outright deception as to the findings in the Drakeford case.

For example, Tuomey's 2010 Form 990 Filing (which, as a result of extensions, was not

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[30] See R. pp. 0694-0709; Tuomey 30(b)(6) Depo Transcript, Ex.8 (Drakeford District Court Order).
[31] See R. pp. 0710-0737; Tuomey 30(b)(6) Depo Transcript, Ex. 9 (Drakeford 4th Circuit Opinion).
[32] R. p. 1675; March 8, 2016 Hearing Transcript p. 50. R. pp. 0321-0322; Tuomey Rule 30(b)(6) Depo Transcript pp. 9-10.
[33] R. pp. 0374-0680; Tuomey Rule 30(b)(6) Depo Transcript, Ex. 2, 3, 4, 5.

provided to the IRS until August 14, 2012, a time which was after the first federal jury had specifically found that Tuomey had violated the Stark Law) was disingenuous. In this disclosure to the IRS, buried on page 86 of 94 Tuomey represented the following:

> The System is currently a defendant in a civil suit brought by a physician on its medical staff under the qui tam provisions of the federal False Claims Act ("FCA"). The suit alleges that the System violated the FCA as a result of part-time employment contracts between the System and certain other physicians on its medical staff The United States Government intervened in the suit After a three week trial in federal court, the jury rendered a verdict that the System did not violate the FCA However, subsequent to that verdict, the court granted judgment for the Government on its equitable restitution claims in the amount of $44,888,651. The court also granted the Government a new trial on its FCA claims. The System has appealed the trial court's equitable judgment to the Fourth Circuit Court of Appeals. The trial court stayed its judgment pending appeal but required the System to place $49,384,687 into escrow pending appeal. The trial court also stayed its new trial order pending the outcome of the appeal On January 20, 2012 Tuomey presented its oral arguments to support its appeal before a three judge panel of the Fourth Circuit Court of Appeals.[34]

This disclosure wholly omits that the *qui tam* lawsuit alleged that Tuomey violated the Stark Law's anti-kickback provisions and that the federal jury had specifically found the hospital to be in violation of the Stark Law.[35] Omission of such key facts is tantamount to fraud. Tuomey's statement to the IRS is a dishonest mischaracterization of the jury's finding, portraying the verdict as some sort of innocuous equitable restitution matter and gives absolutely no indication that Tuomey was found to have violated federal anti-kickback laws. Tuomey admits it failed to disclose the adverse jury verdict to the Internal Revenue Service.[36]

Compared to its 2010 Form 990, Tuomey's disclosure to the IRS in its Form 990 for 2011 (which, due to extensions, was not filed until 2012) was equally as deceptive and devoid of critically important information regarding the 2010 Drakeford jury findings:

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[34] R. pp. 0376; Tuomey Rule 30(b)(6) Depo Transcript, Ex. 2, Form 990 for 2010, p. 86.
[35] See R. p. 1731; 2010 Drakeford Jury Verdict Form p. 1
[36] R. pp. 0327-0328; Tuomey Rule 30(b)(6) Transcript pp. 15-16.

> The System is currently a defendant in a civil suit brought by a physician on its medical staff under the qui tam provisions of the federal False Claims Act ("FCA"). The suit alleges that the System violated the FCA as a result of part-time employment contracts between the System and certain other physicians on its medical staff The United States Government intervened in the suit. After a three week trial in federal court, the jury rendered a verdict that the System did not violate the FCA. However, subsequent to that verdict, the court granted judgment for the Government on its equitable restitution claims in the amount of $44,888,651. The court also granted the Government a new trial on its FCA claims based on a perceived error made by the court during the trial. The System appealed the trial court's equitable judgment to the Fourth Circuit Court of Appeals On March 20, 2012, the Fourth Circuit Court of Appeals reversed the trial court's equitable judgment. The $44,888,651 plus interest was returned to Tuomey The case was remanded to federal district court in Columbia, SC for a retrial on all issues The case is set for retrial for April 16, 2013. It is expected to be a four to five week trial.
>
> Although the results of the litigation are not finalized, the System has included an estimated obligation of $1,790,000 in other long-term liabilities as of September 30, 2012 and 2011 As a result of the appeal and possible new trial, there is at least a reasonable possibility that the recorded estimate will change by a material amount in the near term.[37]

Once again, Tuomey failed to even so much as mention the jury's important findings regarding the Stark Law violation. Further, after having had a judgment of more than $44 million rendered against it, and for which a new trial had been granted, Tuomey wrote to the IRS saying that less $1.8 million had been set aside to address the long-term liability. In short, Tuomey grossly mischaracterized the Drakeford case, going to great efforts to conceal the significance and nature of the case and of the findings against the hospital.

This deceptive mischaracterization continued in Tuomey's 2012 filing with IRS (which, due to extensions, was not filed until 2013):

> The System is a defendant in a qui tam lawsuit filed against it by a physician on its medical staff on behalf of the United States Government in the United States District Court for the District of South Carolina. The Government subsequently intervened in this suit. The Government

[37] R. p. 0870; March 7, 2016, Memorandum in Opposition to Post-Trial Motions, Ex. F, Form 990 for 2011, p. 83.

> contends that certain part-time employment contracts between the System and physicians on its medical staff that were in effect from 2005-2010 violated the so-called Stark Law (42 USC §1395nn), and thus resulted in the System filing claims for reimbursement from Medicare and other federal health care programs in violation of the False Claims Act. In the first trial in this matter in 2010, a jury rendered a verdict that the System did not violate the False Claims Act.
>
> ***Subsequent to the jury verdict in favor of the System***, the Court awarded the Government a judgment on its equitable claims in the amount of $44,888,651, plus pre judgment interest of $4,040,134, with post-judgment interest of $5,123 per day. The Court also granted the Government a new trial on its False Claims Act claims. In 2012, the Fourth Circuit Court of Appeals reversed the trial court's judgment and the money paid by the System into escrow was refunded to the System, with interest.
>
> [....]
>
> Although the results of the litigation are not finalized, the System has included an estimated obligation of $1,790,000 in other long-term liabilities as of September 30, 2013 and 2012. As a result of the appeal and possible new trial, there is at least a reasonable possibility that the recorded estimate will change by a material amount in the near term.[38]

The hospital's statement continued to flagrantly omit the material fact that the 2010 jury had found Tuomey guilty of Stark Law violations and even stated, "[s]ubsequent to the jury verdict in favor of the System [...]," falsely claiming that Tuomey had been victorious in the 2010 trial.

In Tuomey's 2013 filing with IRS (which, due to extensions, was not filed until 2014), Tuomey finally admitted to the IRS that the 2010 jury found the hospital guilty of having violated the Stark Law: "In the first trial in this matter in 2010, a jury rendered a verdict that the System violated the Stark Law but did not violate the False Claims Act."[39] After discussing the 2013 jury verdict, the Defendant again made certain to emphasize the appeal and made light of the findings, telling the IRS that Tuomey "has included an estimated obligation of $1,790,000"

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[38] R. pp. 0613-0614; Tuomey 30(b)(6) Transcript, Ex. 4, Form 990 for 2012, pp. 83-84 (emphasis added).

[39] R. p. 0968; March 7, 2016, Memorandum in Opposition to Post-Trial Motions, Ex. G, Form 990 for 2013, p. 89.

for the Drakeford matter.

On July 2, 2015, the Fourth Circuit Court of Appeals issued its order affirming the District Court's decision and the nearly quarter of a billion dollar judgment against Tuomey. By its own admission, Tuomey has never informed the IRS about the final outcome of the Drakeford litigation.[40] Despite its lack of candor (if not outright deception) to the IRS, Tuomey seeks to have our courts defer solely to the IRS determination of its tax status in evaluating the Respondent's qualification to receive the limited liability protections of the Solicitation of Charitable Funds Act.

During this time period as the Drakeford litigation and appeals progressed, Tuomey was paying its CEO, Jay Cox, the following compensation per its 990 filings:

2010 $840,622
2011 $1,011,073 (including $161,003 performance bonus)
2012 $991,462 (including $173,050 performance bonus)
2013 $1,485,190 [41]

The CEO's country club dues were also part of his compensation package.[42]

Tuomey sold the hospital and virtually all of its assets to Palmetto Health, effective January 1, 2016, and Palmetto Health Tuomey is now operating the hospital in Sumter. The affairs of the Respondent entity ended or otherwise are winding down;[43] it has no employees, and, as of January 1, 2016, it is no longer providing any medical services to the Sumter community.[44] This shut down of the Respondent entity was due, in large part, to the $237

[40] R. pp. 0364-0365; Tuomey Rule 30(b)(6) Transcript., pp. 52-53. *See also* R. pp. 1677-1678; March 8, 2016 Hearing Transcript pp. 52-53.
[41] R. pp. 1687-1693; March 8, 2016 Hearing Transcript pp. 62-68.
[42] *E.g.* R. pp. 0664-0665; Tuomey 30(b)(6) Transcript Ex. 5, Form 990 for 2013 pp. 40-41.
[43] R. p. 1652; March 8, 2016 Hearing Transcript p. 27.
[44] R. pp. 1658-1659; March 8, 2016 Hearing Transcript pp. 33-34.

million judgment owed to the federal government.[45] Virtually all of Respondent's assets were sold to Palmetto Health, and all that remains of the Respondent entity is for its counsel to complete winding down its affairs and a $2,200,000.00 contingent liability fund for certain creditor claims.[46]

ARGUMENT

I. THE TRIAL COURT ERRED IN PERMITTING THE RESPONDENT TO BELATEDLY AMEND ITS ANSWER TO ASSERT A NEW AFFIRMATIVE DEFENSE, *I.E.* THE PROTECTIONS OF THE SOLICITATION OF CHARITABLE FUNDS ACT, ON THE FIRST DAY OF THE SCHEDULED DATE CERTAIN TRIAL AFTER NEARLY THREE YEARS OF LITIGATION AND WHERE APPELLANT WAS SUBSTANTIALLY PREJUDICED BY THE TARDY AMENDMENT.

Rule 15(a) of the South Carolina Rules of Civil Procedure provides:

> **Amendments.** A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise **a party may amend his pleading only** by leave of court or by written consent of the adverse party; and leave shall be freely given **when justice so requires and does not prejudice any other party**....

(emphasis added). Rule 15, SCRCP, provides that "leave [to amend pleadings] shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP; *see also* Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 218, 493 S.E.2d 826, 835 (1997).

"The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." Pool v. Pool, 329 S.C. 324, 328-9, 494 S.E.2d 820, 823 (1998). The decision whether to grant leave to amend is within the sound discretion of the trial judge. Soil & Material Eng'rs, Inc. v. Folly Assoc., 293 S.C. 498, 501, 361 S.E.2d 779, 781

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[45] R. pp. 1685-1687; March 8, 2016 Hearing Transcript pp. 60-62.

[46] R. p. 1693; March 8, 2016 Hearing Transcript p. 68. Notably, Respondent maintained $300,000 of insurance and the contingent fund is $2,200,000, presumably set aside for payment of this liability to Appellant.

(Ct.App.1987). However, when a late amendment would cause prejudice to the opposing party, the trial court should either deny the amendment or grant a continuance to allow the time reasonably necessary to prepare for the new issue. Armstrong v. Collins, 366 S.C. 204, 232, 621 S.E.2d 368, 382 (Ct. App. 2005).[47]

If affirmatively pled as a defense and proven at trial, the SCFA may serve to limit a party's recovery:

> 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.

S.C. Code Ann. § 33-56-180(A). The section references the South Carolina Tort Claims Act as to the limitations of actual damages recoverable. The Tort Claims Act, more specifically S.C. Code Ann. § 15-78-120, sets this limit is $300,000 for a single occurrence. The SCFA provides for an exception to the liability cap and allows claimants to pursue gross negligence claims against individual employee defendants.

[47] As described below, a continuance would not cure the prejudice suffered by Appellant.

South Carolina law is well settled that, in order to qualify for the protections of the charitable cap, a party must specifically plead the protections of the SCFA as an affirmative defense. James v. Lister, 331. S.C. 277, 500 S.E. 2d 198 (Ct. App. 1998). In James, this Court addressed a defendant's failure to timely plead the SCFA. The Court expressly held that the limit on recovery for charitable organizations is an affirmative defense that must be pled or it is waived in accordance with Rule 8(c), SCRCP. In James, the Court affirmed the trial court's decision to deny the defendant's motion to amend its answer to add the affirmative defense of the charitable immunity cap. The Court held that because invoking the protection of the cap would "trigger alternative remedies for the injured plaintiff," the defense is an affirmative defense. Specifically, the James court held that because the defendant did not affirmatively plead the cap, the plaintiff elected not to name the defendant's employee and attempt to prove gross negligence, which would have allowed the plaintiff an opportunity to recover beyond the limits of the cap. Id. at 283, 500 S.E.2d at 201. Therefore, defendant's failure to raise such an affirmative defense created a substantial prejudice to the plaintiff's rights. Id. at 283, 500 S.E.2d at 201.

In the present case, the prejudice suffered by Appellant is identical to that suffered in James. At the time Respondent Tuomey sought to invoke the defense, discovery had long since closed and witnesses' memories had faded. Even more importantly, at the time Respondent sought to amend its answer to plead the protections of the SCFA, the statutes of limitation had run against the potential individual defendants that Appellant could have pursued in order to avoid the harsh application of the cap. By the trial court permitting such a late amendment, the Appellant was prejudiced in three principle ways.

First, just as in James v. Lister, Appellant did not have the opportunity to name an individual employee or prepare, in discovery, a gross negligence case to utilize the statutory

exception against an individual defendant. Had the cap been timely pled, Appellant would have had the opportunity and incentive to discover/identify the employee(s) who created the dangerous condition that caused his fall. This opportunity to identify such an employee would have allowed Appellant to name the responsible employee(s) individually and prove his/her gross negligence, thereby allowing Dr. Myat an opportunity to recover beyond the limits of the cap. Given that, by the time Respondent sought to invoke the SCFA defense, the statute of limitations had long since run on any claim against an individual, Appellant lost the opportunity to assert those claims. As provided by James v. Lister, this constitutes substantial legal prejudice that required the denial of the amendment by the trial court.[48]

Second, in part because no SCFA cap was pled as a defense, Appellant lost the opportunity to meaningfully evaluate alternative remedies, including a potential worker's compensation claim. Respondent Tuomey asserted a statutory employee defense, and, had Dr. Myat chosen to pursue his potential Worker's Compensation claim, this would have bolstered his argument in support of receiving benefits.[49] Given the nature of Appellant's injuries and substantial earnings history, these worker's compensation benefits may have exceeded the SCFA

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[48] To the extent Respondent maintains that discussions were had with Appellant's prior counsel about the cap, a casual conversation between lawyers about putative defenses, does not equate to properly pleading the defense. Amendments to add parties and development of discovery plans are founded in the issues framed by the pleadings, not off the record communications between counsel of defenses not plead. Further, as to any discussion at mediation, those occurred long after the Appellant suffered legal prejudice (i.e. lost the opportunities to pursue other remedies) and are absolutely privileged and not to be submitted by the parties or relied upon by courts under the applicable rules governing mediation. See Rule 8(a), South Carolina Alternative Dispute Resolution Rules (2016). Respondent's counsel's Affidavit desperately filed in support of the Motion to Amend ignores the commands of the ADR rules.

[49] Dr. Myat served in three professional roles. He was employed by his private practice (Palmetto Infectious Disease), employed by Respondent Tuomey as the Director of Infectious Disease, and he was employed by the HIV Clinic in Sumter. At the time of his rounds when he suffered the fall giving rise to this case he was working in his capacity for his medical practice. R. pp. 1274-1275; Trial Transcript pp. 229-230.

cap. It is well established that worker's compensation and tort remedies against the same defendant are mutually exclusive. In reliance upon Respondent's Answer that did not assert a cap, Appellant pursued his tort claim, believing there to be no damage limitation on his potential recovery. At the time the Court permitted Tuomey's late Amendment to its Answer, the statute of limitations for any worker's compensation claim had long since run. Put simply, Appellant lost his opportunity to make an informed decision about which remedy was best to pursue.

Additionally, Appellant's spouse did not bring a loss of consortium claim relating to the injuries sustained by her husband. Pursing a loss of consortium claim is a common strategy utilized by plaintiffs when facing statutory caps. The statute of limitations has now run on these alternative claims, which could have been asserted by the Myat family and that could have been asserted in the face of the charitable cap defense.

When this prejudice is weighed against the neglect of the Respondent's failure to timely plead the SCFA defense, it weighs in favor of denying the amendment. At the time this case was filed, Respondent had every opportunity to claim the protections of the SCFA in its Answer, as required by Rule 8, SCRCP.[50] But, because the defense was not pled, Appellant had no reason or incentive to pursue certain alternative remedies or seek the particular types of discovery discussed above. Not only was Appellant prejudiced by the eleventh hour amendment, but Respondent was granted a windfall from its failure to plead an affirmative defense.

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[50] Notably, five days after entering the April 7, 2016 Order, which is the subject of this appeal, this same trial judge entered an order in another case denying the plaintiff (also represented by the Undersigned's firm) leave to amend at the 12(b)(6) stage. In denying the motion to amend, which was sought in part because plaintiff's initial counsel had poorly drafted the pleadings, this same trial judge stated that "the Court is not aware of any legal authority or any equitable principle supporting the idea that plaintiffs in a civil suit should be entitled to a second bite at the apple simply because they are not satisfied with the performance of their own legal counsel." Palm v. Altantic Pools and Water Features, Inc., 2014-CP-43-000643 (April 12, 2016 Order). In this case, Respondent's counsel was afforded several bites of the proverbial apple to plead and later to prove the SCFA defense.

Permitting affirmative defenses to be added at the last minute encourages late amendments and promotes parties to wait until the eve of trial to add SCFA affirmative defenses in order to gain a tactical advantage.[51] As regrettable as it may be that Respondent Tuomey did not plead its only effective defense in this case, this oversight was solely its own doing, and should not be permitted to prejudice Appellant.[52] Because of this prejudice, following the exact rationale utilized by this Court in James v. Lister, it is inescapable that the trial court erred in granting leave to Respondent to amend its answer to assert the SCFA cap after nearly three years of litigation and on the eve of trial, and where Appellant lost the opportunity to evaluate and pursue alternative remedies.

II. THE TRIAL COURT ERRED IN ALLOWING THE RESPONDENT 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 PLAINTIFF HAD MOVED FOR DIRECTED VERDICT ON THE CHARITABLE DEFENSE AND WHERE APPELLANT WAS SUBSTANTIALLY PREJUDICED.

On the eve of the date certain trial, Respondent was granted leave to amend its answer by the trial court. After nearly three years of litigation, and even after the filing of the Amended

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[51] For example, corporate defendants claiming SCFA protections may opt to not plead the cap to protect individual employees from being named in suits for gross negligence where plaintiffs seek to avoid the application of the cap, only later to seek amendment once the statute of limitations has expired against the individual employees.

[52] In Hill v. Dotts, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001), this court reflected on a party's failure to file a responsive pleading:

> It is always a matter of regret that a party should not have his day in court. However, where the [party] was duly served with the summons and complaint it was his duty to answer the complaint. Therefore, he must suffer the consequences of his failure to answer.

Here, while it may be regrettable that Tuomey failed to timely assert its SCFA defense, it must suffer the consequences of its failure to timely plead this defense.

Answer, Respondent had disclosed no evidence and disclosed no witnesses in support of its SCFA defense.[53]

At trial, Respondent Tuomey chose to focus solely on its liability defenses and presented no evidence that it qualified for the protections of the SCFA, *i.e.* it never put forth any evidence that Respondent's operations qualified it to be a tax exempt entity under federal tax law.[54] After the Respondent rested its case, Appellant moved for a directed verdict and argued that Respondent had not met its burden of proving the affirmative defense and, in fact, had offered zero evidence to prove that it qualified as a tax-exempt charitable organization under the applicable statute.[55] In moving for the directed verdict on the affirmative defense, Appellant's counsel provided a roadmap of what must be proven under S.C. Code 33-56-170 and Section 501(c)(3) of Title 26 of the United States Code, *as amended*, to prove up the defense.[56] Having no valid rebuttal for this failure to present the requisite evidence for the defense, and now armed with a roadmap of what must be proven under the governing statutes, Respondent moved to reopen its case. A little over an hour later, Respondent brought new, never disclosed, documents

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[53] This lack of disclosure of any evidence in support of its SCFA defense is truly telling about the merit of the disclosure of the SCFA defense and weighs strongly against Respondent's claims that Appellant was on notice of the defense prior to suffering the legal prejudice as detailed in section I. To litigators focusing on the burden of proof, no witnesses, and no documents equates to no defense.

[54] See S.C. Code§ 33-56-170 (2015) (defining a charitable organization entitled to the statutory protections as "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.").

[55] R. p. 1529; Trial Transcript p. 485 ("Mr. Holler: The defense rests."); After which Appellant's counsel specifically inquires whether the defense has presented all the facts in support of its defenses and called all its witnesses, which was specifically confirmed by the trial court. R. pp. 1530-1531; Trial Transcript at pp. 486-87.

[56] R. pp. 1530-1531; Trial Transcript pp. 486-87.

and a new witness,[57] also never previously identified/disclosed, into the courtroom. Upon receiving word of the jury's verdict, without further argument, the Court granted Respondent's motion to reopen its case, and gave the parties ten days to file post-trial motions.[58]

"The decision whether to reopen a record for additional evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion." Brenco v. South Carolina Dep't. of Transp., 377 S.C. 124, 127, 659 S.E.2d 167, 169 (2008), *citing* Wright v. Strickland, 306 S.C. 187, 188,410 S.E.2d 596,597 (Ct. App. 1991). It is an abuse of discretion to reopen a case where reopening will prejudice the non-moving party. *See* Perry v. Smalls, 308 S.C. 259, 262, 417 S.E.2d 611, 613 (Ct. App. 1992) (because there was no prejudice to the opposing party, it was not error to reopen the case). "A failure to exercise discretion amounts to an abuse of that discretion. When a trial judge is vested with discretion but his ruling reveals no discretion was in fact exercised, an error of law has occurred." CEL Prod., LLC v. Rozelle, 357 S.C. 125, 130, 591 S.E.2d 643, 645 (Ct. App. 2004).

"The gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party. Essentially, the rights of discovery articulated by the rules give the attorney the means to prepare for trial. Discovery is the quintessence of preparation for trial and, when discovery rights are trampled, prejudice must be presumed. Unless the party who has failed to submit to discovery can show lack of prejudice, reversal is mandated." Scott v. Greenville Hous. Auth., 353 S.C. 639, 652, 579 S.E.2d 151, 158

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[57] Respondent sought to call Debra Mixon, a Tuomey employee, not previously disclosed as a witness, to testify as to Respondent's alleged tax status. See R. pp. 1743-1747; Respondent's Answers to Interrogatories dated September 10, 2014, and R. pp. 1748-1751; Respondent's Supplemental Answers to Interrogatories dated October 2, 2014, which were the only witness disclosures provided by Respondent prior to trial.

[58] R. p. 1612; Trial Transcript p. 568. Respondent filed and served its Post-Trial Motions on September 14, 2016 (seemingly outside the time period directed by the trial court).

(Ct. App. 2003)(citations omitted); Downey v. Dixon, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987).

When the party could have offered the same evidence in discovery and at trial, it is an abuse of discretion to allow the case to be reopened for new evidence to be admitted. *See* Brenco v. South Carolina Dept. of Transp., 377 S.C. 124 (S.C. 2008) (where moving party was aware of its evidentiary burden and chose to pursue other theories it was proper to refuse reopening of evidence for a redo); Spinx Oil Co., Inc. v. Fed. Mut. Ins. Co., 310 S.C. 477, 482, 427 S.E.2d 649, 651 (1993)[59] (finding that because the moving party could have provided same evidence during trial, the trial judge may properly decline to reopen the record).[60]

Courts should not permit a party to reopen its case if it gives one party a tactical advantage. In State v. Wright, 416 S.C. 353, 785 S.E.2d 479 (Ct. App. 2016), a criminal defendant opted not to take the stand in his own defense, but following a charge conference, changed his mind after learning that the trial court would not charge self-defense. The Defendant then sought to reopen his case and the court refused the criminal defendant's request to reopen the evidence so as to allow defendant to take the stand in support of his claim of self-defense. The court found that it would give the defendant a tactical advantage to testify after learning the roadmap of testimony required to prove his self-defense claim during the charge conference. The court noted:

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[59] O*verruled on other grounds* in Joe Harden Builders, Inc. v. Aetna Cas. and Sur. Co., 326 S.C. 231,486 S.E.2d 89 (1997).

[60] Compare those cases where a ministerial defect in the evidence was allowed to be corrected by reopening case and both parties had been on notice of the evidence for a substantial period of time. *Cf.* State v. Wren, 470 S.E.2d 111 (Ct. App. 1996)(allowing record to be reopened to correct ministerial defect of admitting drug evidence into record after substantial testimony of the drugs during State's case) and State v. Humphrey, 274 S.E. 2d 918 (S.C. 1981) (allowing record to be reopened to establish value of the property stolen to prove element of larceny charge where substantial evidence had been presented about property taken in case in chief).

> that after hearing its ruling on the charges, Wright knew which supporting evidence was missing, had it "all mapped out," and would be able to fit his testimony into the required parameters and tell the jury he "was afraid to death." The trial court refused to reopen the record to allow Wright to testify.

Id., 416 S.C. at 373, 785 S.E.2d at 489.

In the present case, at any point in discovery, Respondent could have properly disclosed documents and witnesses it intended to put forth relating to its alleged charitable status, but it failed to do so until after Appellant's counsel had moved for directed verdict on the SCFA defense. To this very issue, following its motion to reopen the case, one of the documents that Respondent sought to proffer was a 1991 letter from the IRS. The witness and these documents were available to be disclosed by Respondent Tuomey weeks, months and even years earlier.[61] None of the evidence that Respondent offered was newly acquired or previously unavailable. At the very least, Respondent could have disclosed such documents and witnesses at the time it moved to amend its answer; however, Respondent did not do so. Only after the defense had rested and after Appellant's counsel provided a roadmap of what Respondent must prove for its charitable defense did Respondent move to reopen the case to present evidence that it failed to disclose and failed to present at trial. Permitting this tactical advantage to Respondent at trial constitutes an abuse of discretion by the trial court. *See* Brenco 659 S.E.2d at 169; Wright 785 S.E.2d at 489. Tuomey's decision to focus solely on its liability defenses was a choice of its own making. The trial court's willingness to allow Respondent to reopen the case to allow

[61] The fact that no witness and no document had ever been produced to establish its SCFA defense calls into question Respondent's claims of informal discussions of the cap with Appellant's prior counsel. In either case, Appellant maintains that a casual discussion between lawyers about case does not amount to proper disclosure of the Rule 8 affirmative defense. To hold otherwise renders the pleadings and discovery responses meaningless and means that counsel have no right to rely on the opposing party's pleadings or discovery responses to frame the issues and analyze the expected testimony and evidence.

Respondent a second bite at the apple to correct its material evidentiary and discovery failures to prove its SCFA defense constitutes manifest prejudice to the Appellant's rights.[62]

III. THE TRIAL COURT ERRED IN CONCLUDING THAT THE RESPONDENT HOSPITAL WAS QUALIFIED TO RECEIVE THE PROTECTIONS OF THE SOLICITATION OF CHARITABLE FUNDS ACT, S.C. CODE ANN. § 33-56-170 &180.

Respondent Tuomey is not entitled to the protections under the Solicitation of Charitable Funds Act because it has not conducted itself as "charitable organization." As has been well publicized and established by United States ex rel. Drakeford v. Tuomey Healthcare Sys., Inc., 976 F. Supp. 2d 776, 784 (D.S.C. 2013) aff'd, 792 F.3d 364 (4th Cir. 2015) (hereinafter "Drakeford" or "the Drakeford case"), the Respondent has not conducted itself as required of a charitable entity seeking the protections of the Act. In Drakeford, Defendant Tuomey[63] was found to have violated the Stark Law (anti-kickback laws) and the False Claims Act (antifraud laws) due to improper and illegal contracts and arrangements with physicians employed by the hospital.[64] The District Court entered a judgment against Tuomey that, including penalties and fines, totaled $237,454,195.00. This judgment has been affirmed by the Fourth Circuit Court of Appeals. Moreover, Tuomey has not been forthright in its reporting to the IRS of the findings in the Drakeford case. Lastly, Tuomey has failed to show that it operates solely to provide a "community benefit" in order to qualify for Section 501(c)(3) status.

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[62] Given the trial court's grant of leave to amend previously, this the proverbial third bite at the apple afforded to Respondent.

[63] See R. pp. 0337-0338; Tuomey Rule 30(b)(6) Transcript at pp. 25-26 (confirming that Respondent is same entity as defendant in Drakeford case).

[64] Specifically, the government claimed and proved that "payment[s] were unlawful under the Stark Law, 42 U.S.C. § 1395m, and thus violative of the False Claims Act (FCA), 31 U.S.C. §§ 3729 *et seq.*" U.S. ex rel. Drakeford v. Tuomey, 976 F. Supp. 2d 776, 780 (D.S.C. 2013) aff'd, 792 F.3d 364 (4th Cir. 2015).

A. THE SOLICITATION OF CHARITABLE FUNDS ACT

1. *Strict Interpretation/Construction Required*

Prior to the adoption of the SCFA, under the common law there was no liability cap that could be sought by "charitable institutions."[65] Thus, because the limitation of liability that Respondent seeks is in derogation of the common law, the statute must be strictly construed. Major v. National Indemnity, 267 S.C. 517, 229 S.E.2d 849 (S.C. 1976), *see also* Doe v. Marion, 361 S.C. 463, 605 S.E.2d 556 (Ct. App. 2004) ("A rule of statutory construction is that any legislation which is in derogation of common law must be strictly construed and not extended in application beyond clear legislative intent."). Because the SCFA protection is in derogation of the common law, the determination of whether to apply a cap to the jury's verdict, the statute should be strictly construed against Respondent and in favor of the Appellant.

Our courts have held that "a statute is not to be construed in derogation of common law rights if another interpretation is reasonable." Doe at 473, 605 S.E.2d at 561 (*citing* Hoogenboom v. City of Beaufort, 315 S.C. 306, 318 n. 5, 433 S.E.2d 875, 884 n. 5 (Ct. App. 1992)). Thus, if the statute can reasonably be construed in a manner that would not be in derogation of Appellant's common law right to have the jury's verdict entered without limitation, the Court should construe the statute strictly in applying it to this case.

2. *Language of the SCFA*

The SCFA caps the tort liability of qualifying "charitable organizations" at the same liability limits imposed by the South Carolina Tort Claims Act. S.C. Code Ann. § 33-56-180(A). The Tort Claims Act, more specifically S.C. Code Ann. § 15-78-120, sets this limit at $300,000 for a single occurrence of liability. The relevant portion of the SCFA, the section stating what

[65] By the early 1980's charitable immunity had been completely abrogated by the Supreme Court in Fitzer v. Greater Greenville South Carolina Young Men's Christian Ass'n, 277 S.C. 1, 282 S.E.2d 230 (1981).

organizations can claim the protection of a cap on liability, gives no deference to whether or not the IRS has previously made a determination regarding entity's tax-exempt status. The language of the statute preserves the Court's historic role in reviewing the activities of the organization claiming charitable status. The distinction in the statutory language, compared to other parts of the SCFA, is of the utmost importance.

The governing section of the SCFA defines "charitable organization" as:

> [A]ny 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.

S.C. Code Ann. § 33-56-170 (emphasis added). This section mandates that the cap can be claimed by an organization only if the organization is entitled to be "exempt from taxation pursuant to Section 501(c)(3) or 501(d) of [the United States Tax Code]," and gives no deference as to whether the organization has been previously been designated by the IRS as a 501(c)(3) or 501(d) entity. This provision incorporates the Tax Code and governing law and does not provide that the liability protection is in any way impacted by whether or not the IRS has determined the organization to have tax exempt status. Notably, other sections of the SCFA do, specifically, give deference to a determination by the IRS. By way of example, S.C. Code Ann. § 33-56-20 provides:

> 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;

As shown above, the Legislature used alternate language and an entirely different definition in the Code section governing when the cap can be asserted, as S.C. Code § 33-56-170 discusses organizations that should be exempt from taxation pursuant to the tax code and does

not discuss organizations that have been determined by the IRS to be exempt. This difference in the statutory language is critically important.

When interpreting a statutory term, a court must read the statute as a whole, and sections that are part of the same statutory scheme must be construed together. Hughes v. West Carolina Reg. Sewer Auth., 386 S.C. 641, 647, 689 S.E.2d 638, 641 (Ct. App. 2009). Our courts also apply the canon of construction *expressio unius est exclusion alerius*, which provides that "to express or include one thing implies the exclusion of another, or of the alternative." Riverwoods, LLC v. County of Charleston, 349 S.C. 378, 384, 563 S.E.2d 651, 655 (2002); Hughes, 386 S.C. at 647, 689 S.E.2d at 642; State v. Leopard, 349 S.C. 467, 473, 563 S.E.2d 342, 345 (Ct. App. 2002).

In Hughes, the Court of Appeals reviewed the trial court's interpretation of the term "motor truck" as being synonymous with "truck" under the South Carolina motor vehicle code. 386 S.C. at 647, 689 S.E.2d at 642. The Court of Appeals disagreed with the trial court's interpretation, finding that when the statute is read as a whole and the term "motor truck" is examined in context with other sections, the term is not synonymous with "truck." Id. "As the legislature specifically defines the term truck and clearly employs the term truck in other sections of the statute, the *maxim expressio unius est exclusion alerius* suggests motor truck and truck are not synonymous." Id. at 648, 689 S.E.2d at 642. Importantly, the Court noted that if the legislature had intended that particular section to encompass trucks, then the drafters would not have elected to employ a different term ("motor truck") instead. Id. The addition of the adjective "motor" ahead of the term "truck" signified that the class of vehicles covered in the statute was narrower than merely a truck. Id.

Similarly, in this case, the Legislature's choice of different language in the SCFA is

significant. As explained in Hughes, *supra*, statutory provisions must be read as they relate to the statutory scheme as a whole. The Legislature's decision to use different language in defining a "charitable organization" under section 33-56-170 (when compared to section 33-56-20) signifies legislative intent that the sections have distinct applications. Had the Legislature intended the two definitions to be synonymous, the drafters would have employed the same language in the respective provisions. More specifically, if the Legislature intended for the definition of a charitable organization under section 33-56-170 to be solely determined by the IRS, then the drafters simply would have used the same language they chose to use in section 33-56-20, or simply not have included the alternate definition under section 33-56-170. However, instead, section 33-56-170 makes no mention of, or even a reference to, a determination by the IRS being of any importance in determining whether an institution qualifies to receive a limitation on liability.

By using different operative language in section 33-56-170, the Legislature has signaled that "charitable organization" is not synonymous with the definition found in section 33-56-20. Accordingly, in construing the provisions of section 33-56-170, the Court should find that qualifying as a "charitable organization" eligible for protections of a cap on its liability is not wholly or directly dependent on whether the organization has received an IRS determination of tax-exempt status. Rather, the proper inquiry is whether the entity meets the provisional requirements of an organization that is exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code.[66] Thus, whether a party has or has not been previously determined by

[66] To this point, Appellant submits that, by the wording of the statute, the Legislature intended that entity's actual qualifications to be exempt from taxation pursuant to Section 501(c)(3) or 501(d) of Tax Code is what is the determination of eligibility for the liability cap hinges upon. Thus, an entity could have never applied for 501(c)(3) status, but, if it properly pled the protections of the SCFA and proved that, by its purpose/behavior, it was qualified to exempt

the IRS to be a Section 501(c)(3) or 501(d) entity is not dispositive as to whether or not it is entitled to the protections of the Solicitations of Charitable Funds Act.

Further, the operative timeframe for the analysis is addressed by the statute. In the present case, the trial court erred in evaluating the charitable status solely on the day of Appellant's fall and resulting injury (July 6, 2011).[67] This was plain error because the operative timeframe under the SCFA is at the time of recovery.[68] The operative language reads that "[a] person sustaining an injury [...] ***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." S.C. Code Ann. § 33-56-180(A)(emphasis added). The operative language is at the time of "recovery." Thus, Respondent's conduct over the past ten years is quite relevant to determination of its charitable status. The trial court's arbitrary decision to focus the inquiry on the date of injury was plain error. To the extent the April 7, 2016 Order addressed the inquiry as of March 8, 2016, the trial court ignored and did not address the substantial evidence of Tuomey's wrongdoing that occurred prior to March 8, 2016 in its decision.

3. The Qualification for the Protections of the Solicitation of Charitable Funds Act under S.C. Code § 33-56-170 is a legal determination that must be made by our Courts

As explained above, the SCFA defines "charitable organization" as "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." S.C. Code Ann. § 33-56-170 (2015). Respondent urged the trial court to defer to the Secretary of the Treasury to make

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from taxation pursuant to the Tax Code, then the statute would allow the entity to receive the protections of the SCFA.

[67] See R. p. 0020; Order dated April 7, 2016, at p. 16.

[68] Appellant contends this means the date of entry of judgment.

the determination as to whether Tuomey qualifies and continues to qualify for the protections of S.C. Code § 33-56-170. Tuomey presented tax assessment cases from the federal courts to urge the trial court to conclude that only the Treasury Secretary has the sole authority to revoke or rescind its tax exempt status. This may be true in tax assessment matters that arise under federal law, but this is not a tax assessment case. Here, by reference and incorporation of Section 501(c)(3) of Title 26 of the U.S. Code, the state statute requires the Court to conduct an analysis to determine whether the entity qualifies for the protections of the Solicitation of Charitable Funds Act. The language of the statute itself belies the argument that the United States Treasury Secretary makes the determination. The plain language of the statute dictates that the qualification for the protections of the SCFA is a legal determination that must be made by our courts. The statutory language preserves the historic role of the trial court in making this determination.[69]

4. Qualification for 501(c)(3)(3) Status

Section 501(c)(3) of Title 26 of the United States Code provides that, in order to qualify and keep tax exempt status, an organization must not permit any part of its net earnings to "inure[] to the benefit of any private shareholder or individual [....]" 26 USCA § 501(c)(3). In its entirety, the relevant portion of Section 501(c)(3) defines an exempt organization as:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual...

[69] *See e.g.* Eiserhardt v. State Agr. & Mech. Soc. of S.C., 235 S.C. 305, 309, 111 S.E.2d 568, 570 (1959) (highlighting the Court's historic role of examining charitable operations to determine whether qualified for charitable immunity protections).

Further, IRS Publications further explain this principle:

> No part of an organization's net earnings may inure to the benefit of an insider. An insider is a person who has a personal or private interest in the activities of the organization such as an officer, director, ***or a key employee***. This means that an organization is prohibited from allowing its income or assets to accrue to insiders. An example of prohibited inurement would include payment of unreasonable compensation to an insider. Any amount of inurement may be grounds for loss of tax-exempt status.

IRS Pub. 4421, *Compliance Guide for 501(c)(3) Public Charities*, p. 4 (Rev. July 2014) (emphasis added); *see also*, IRS Pub. 557, *Tax-Exempt Status for Your Organization* (Rev. Feb. 2015).

In addition to approval by the IRS, to qualify as a § 501(c)(3) nonprofit, a corporation: (1) must have a charitable purpose; (2) cannot permit any of its earnings or assets to inure to the benefit of a private individual; (3) cannot engage in substantial lobbying activities; and (4) cannot participate in political campaigns. Martin McWilliams, Jr., et al, *Sculpting a Nonprofit: Part II*, SOUTH CAROLINA LAWYER, March/April 1996. Failure to comply with any of these elements, which comprise the "operational test," will result in the organization losing its eligibility for tax exempt status. Church of Scientology of California v. Comm'r, 823 F.2d 1310, 1315 (9th Cir. 1987). If an organization does not demonstrate that it is operated exclusively for exempt purposes, then it is not eligible for § 501(c)(3) status. 26 C.F.R. § 1.501(c)(3)-1(a).

Courts addressing the issue have held that an organization's Section 501(c)(3) status should be revoked or denied, pursuant to the Tax Code, "if even a small part of its income inures" to the benefit of a private shareholder or individual. *See* Orange County Agr. Soc., Inc. v. C.I.R., 893 F.2d 529, 534 (2nd Cir. 1990); Church of Scientology of California, 823 F.2d at 1316. A "private shareholder or individual" is defined broadly as "having a personal and private interest in the activities of the organization." Presbyterian and Reformed Publishing Co. v.

Comm'r, 743 F.2d 148, 153 (3rd Cir. 1984). The payment of excessive salaries or the "unaccounted for diversions of an organization's resources 'by one who has complete and unfettered control can constitute inurement.'" Arlie Foundation v. United States of America, 826 F.Supp. 537, 550 (D.D.C. 1993) (*quoting* Church of Scientology of California, 823 F.2d at 1316). Likewise, earnings are found to inure to an individual in instances where a limited number of individuals "reap commercial benefits from the operation of the instrumentality, though they do not do so by direct acquisition or payment over to them of its earnings." Harding Hospital v. United States, 505 F.2d 1068, 1072 (6th Cir. 1974).

The Drakeford case conclusively established Tuomey guilty of paying certain physicians "in excess of the fair market value for their services" in violation of the provisions of the Stark Laws and False Claims Act, and such excess payments are akin to allowing part of Tuomey's net earnings to inure to the benefit of private individuals. Thus, these findings are established by the doctrine of collateral estoppel, particularly issue preclusion, as is well recognized by our courts. *See e.g.* Carolina Renewal, Inc. v. South Carolina Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) ("collateral estoppel, also known as issue preclusion, prevents a party from re-litigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same"). Further, as discussed below, due to Tuomey's failure to properly disclose the details of the case, the IRS has never even been made aware of Drakeford's ultimate outcome and has misrepresented key aspects of the 2010 jury verdict to the IRS.

Because of its wrongdoing, Respondent Tuomey does not meet and/or no longer meets the qualifications set forth in 26 USCA § 501(c)(3) to remain tax exempt, and thus is not entitled to the protections of S.C. Code § 33-56-170 & 180. Congress created a tax-exempt category

under Section 501(c)(3) as a means to assist charitable organizations – such as the Red Cross, Soup Kitchens, American Lung Association, and animal shelters – that were providing benefits to the communities throughout the United States. It did not intend to offer this benefit to organizations that operate outside the law and in such an unscrupulous manner that a nearly quarter billion dollar judgment is levied against them by the federal government while, at the same time, awarding large raises to the CEO. Similarly, the South Carolina Legislature did not intend for the SCFA to be used to protect unscrupulous entities with unqualified limitations on liability.

B. TUOMEY NO LONGER QUALIFIES TO RECEIVE TAX EXEMPT STATUS

1. Drakeford disqualifies Tuomey from the protections of the SCFA

The Stark Law and False Claims Act embody important federal policies to prevent illegal referral fees and to prevent fraud upon the taxpayers by those entities that submit claims to the federal government. Summarizing the Government's claims against Tuomey in the Drakeford case, the District Court wrote: "[a]ccording to the Government, the compensation packages paid physicians 31% above and beyond their total net collections as independent contractors, and thus in excess of the fair market value for their services." Drakeford, 976 F. Supp. 2d at 781. The federal jury found for the Government and against Tuomey. Summarizing the jury's finding, the District Court's Order states: "[o]n May 8, 2013, the jury returned a verdict finding that Tuomey had violated the Stark Law, that Tuomey had violated the FCA, that 21,730 claims were submitted in violation of the FCA, and that the value of the claims submitted in violation of the FCA equals $39,313,065.00." Id. at 783.

For having overpaid key employees/physicians in violation of both anti-kickback and antifraud laws law, Tuomey no longer qualifies to receive tax-exempt treatment by the IRS (and

therefore does not qualify to receive the limitations of liability under the SCFA). However, this matter has never been adjudicated by the Internal Revenue Service, for, as described below, Tuomey has not properly reported its violations of the Stark Laws and the False Claims Act to the IRS.

2. *Tuomey's Failure to Properly Report Drakeford to the IRS*

By failing to properly report the Drakeford violations to the Internal Revenue Service, Respondent Tuomey does not qualify to receive a limitation of liability under the SCFA. It is axiomatic that the tax collection in the United States is done through a self-assessment and self-reporting system by the taxpayers. *See* 26 USCA § 6201(a)(1) ("The Secretary shall assess all taxes **determined by the taxpayer** [....]"). While Tuomey may have documentation showing that, back in 1922, the IRS granted the hospital exemption from federal income tax under section 501(c)(3) of the Internal Revenue Code, Tuomey offered nothing to prove that its behavior since that time qualifies the organization to be "exempt from taxation pursuant to Section 501(c)(3)." In fact, Tuomey failed to accurately report important court decisions of its illegal conduct that should disqualify the organization from receiving an exemption from taxation.

In a system of self-reporting, Tuomey has failed to inform the IRS of the Fourth Circuit's final decision on the matter finding Tuomey guilty of Stark Law and False Claims Act violations and a $237 million judgment. Failure to report the outcome of these violations, offenses which should have resulted in Tuomey having its 501(c)(3) status revoked by the IRS,[70] should result in

[70] Tuomey's assets, including the hospital, have recently been purchased by Palmetto Health, and the remaining entity is winding down its affairs. Due to this purchase, there is likely no forthcoming inquiry, by the IRS, as to Tuomey's proper classification as a 501(c)(3) entity. This lack of investigation emphasizes why the Legislature intended the courts to be tasked with performing an analysis as to whether an organization should be "exempt from taxation pursuant to Section 501(c)(3)" and why a "determin[ation] by the Internal Revenue Service" is not the language used in the operative section of the SCFA. Simply put, our courts will be the only

Tuomey being found, by South Carolina's courts, not to qualify to receive a limitation of liability under the SCFA.

3. *Unclean Hands and Public Policy*

Because of Tuomey's actions, it comes into court with unclean hands, and, as such, must not be allowed to avail itself to the protections offered by the SCFA. With regard to other, analogous statutory protections, our courts have denied parties the right to avail themselves of such protections where they have "unclean hands." *See* In re Lafferty, 469 B.R. 235, 245 (Bankr. D.S.C. 2012) ("This maxim illustrates the principle that the court will not grant relief to a party who has engaged in wrongful, illegal, or unethical acts."). In Lafferty, the bankruptcy court denied the debtors their statutory homestead exemption protections because the debtors sought to avoid a judicial lien through fraudulent and unethical conduct. 469 B.R. at 246. The court further explained, "The purpose of the unclean hands doctrine is to prevent a court from aiding or abetting a party in the commission of a fraud or other misconduct." Id. at 245-46.

It is a "well-established principle that the Congressional intent in providing tax deductions and exemptions is not construed to be applicable to activities that are either illegal or contrary to public policy." Green v. Connally, 330 F. Supp. 1150, 1161 (D.D.C.) aff'd sub nom.; Coit v. Green, 404 U.S. 997, 92 S. Ct. 564, 30 L. Ed. 2d 550 (1971); *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 598, 103 S. Ct. 2017, 2031-32, 76 L. Ed. 2d 157 (U.S.S.C. 1983) (refusing to permit a racially discriminatory school from claiming benefit of tax exempt status). "Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." Muschany v. United States, 324 U.S. 49, 66, 65 S. Ct. 442, 451, 89 L. Ed. 744 (1945). Federal statutory law is a proper source of

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adjudicative body to determine whether the Tuomey is entitled to the protections of this state statute.

declarations of public policy.

As a matter of public policy, just as articulated in Green and Bob Jones, *supra*, Tuomey must not be afforded the protections of tax exempt status conferred by S.C. Code § 33-56-170 & 180, due to the illegal conduct committed by it, as has been established by the Drakeford case. Further, by its Form 990 filings and misleading/improper communications with the Internal Revenue Service, Tuomey has failed to properly report its violations to the very body that governs "tax exempt" entities. Its failure to properly report the outcome in Drakeford amounts to unclean hands by Tuomey and must disqualify the organization from the protections of the SCFA.

4. *No True "Community Benefit"*

Hospitals seeking Section 501(c)(3) status are subject to the "community benefit standard." St. David's Healthcare System v. United States of America, 349 F.3d 232, 235 (5th Cir. 2003); *see also* IHC Health Plans, Inc. v. C.I.R., 325 F.3d 1188, 1198 (10th Cir. 2003) ("Thus, the existence of some incidental community benefit is insufficient. Rather, the magnitude of the community benefit conferred must be sufficient to give rise to a strong inference that the organization operates *primarily for the purpose of benefitting the community*."). Under the community benefit test, a hospital will be eligible for exempt status if it: (1) provides an emergency room open to all persons, regardless of their ability to pay; (2) is willing to hire any qualified physician; (3) is run by an independent board of trustees composed of representatives of the community; and (4) uses all excess revenues to improve facilities, provide educational services, and/or conduct medical research. St. David's Healthcare System, 349 F.3d at 235. The existence or absence of one factor is not decisive either way, and eligibility must be looked at based on the totality of the circumstances. Id. at 236. If more than an

"insubstantial" amount of a hospital's activities are not for exempt purposes, then it is not deemed as being operated exclusively for exempt purposes and is not eligible for § 501(c)(3) status. Id. at 237.

Other courts have denied charitable protections to hospitals classified as Section 501(c)(3) organizations when those hospitals did not act in accordance with their charitable purposes. In Univ. of Virginia Health Serv. Found. v. Morris ex rel Morris, 275 Va. 319, 657 S.E.2d 512 (2008) the Supreme Court of Virginia denied a health care provider the protections of charitable immunity against medical malpractice suits. Despite the health care provider's status as a § 501(c)(3) corporation based on a 1980 IRS ruling, the court found that the organization did not operate itself with a charitable purpose so as to entitle it to receive charitable immunity. In arriving at this decision, the court considered factors including the manner in which the organization aggressively pursued legal action and collections; ratio of revenue to the cost of charitable work; and physician salaries and incentive payments. Id. at 336-39, 657 S.E.2d at 520-22. After weighing those factors, the court was forced to conclude "it is clear that the manner in which [the defendant] actually conducts its affairs is not in accord with the charitable purpose stated in its Articles of Incorporation. [The defendant] operates like a profitable commercial business with extensive revenue and assets." Id. at 340, 657 S.E.2d at 522.

Prior to the adoption of the SCFA, our courts routinely examined the character and manner of operations of "charitable" entities to determine if they were, in fact, entitled to immunity. *See e.g.* Eiserhardt v. State Agr. & Mech. Soc. of S.C., 235 S.C. 305, 309, 111 S.E.2d 568, 570 (1959) ("It is generally held that even if an institution be chartered as a charitable or eleemosynary corporation, this fact is not conclusive of its character, kind or purpose. In a tort action against such corporation its true nature may be shown from the manner in which it

conducts its business as well as from its articles of incorporation, and on the trial of the case any competent evidence may be offered with respect to the actualities of its operations."). As has been established in the Drakeford case, and has been well publicized, Tuomey has not behaved like a charitable corporation, and is not entitled to the SCFA protections.

Moreover, in the face of nearly a quarter billion dollar judgment against the organization for violations of federal law, Tuomey gave it's CEO two six figure performance bonuses, and nearly 50% pay increase, raising Mr. Cox's salary from $991,462 in 2012 to $1,485,190 in 2013 (in addition to his country club dues).[71] As has been conclusively established by Drakeford, Tuomey has paid certain of its physicians in "excess of the fair market value" for their services, and giving a nearly half million dollar raise to the chief executive officer, in face of such blunders, is yet another example of Tuomey paying key employees in excess of what they should earn. This is the precise inurement of benefits to key employees that is a disqualifying event under Section 501(c)(3).

Tuomey's operation of the hospital was similarly not "charitable." Further, only after requiring patients to sign a guaranty of financial responsibility when seeking treatment, after billing the patient, seeking to collect with internal collection efforts, thereafter sending accounts to collection for 120 days, Tuomey writes off nonpayment of that bad debt.[72] This is not the behavior of a truly charitable organization, but is identical to that of for-profit corporations in the business of medicine, as hospital's routinely write off the cost of services provided to indigent patients.[73] In the instant case, the burden is on Tuomey to prove the affirmative defense that it

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[71] See R. pp. 0664; Tuomey 30(b)(6) Transcript, Ex. 5, Form 990 for 2013 pp. 40-41.

[72] See R. p. 0562; Tuomey 30(b)(6) Transcript, Ex. 4, Form 990 for 2012 p. 33.

[73] Federal law independently requires all hospitals to provide care to patients seeking emergency medical treatment, doing so does not equate to charitable status. See 42 U.S. Code § 1395dd (The Emergency Medical Treatment and Labor Act (EMTALA)).

qualifies for the protections of the SCFA,that the organization operates *primarily* for the purpose of benefitting the Sumter community. To the contrary, the evidence indicated that Tuomey acts no differently than any other profitable commercial business with extensive revenue and assets, overpaying certain physicians and paying extraordinary bonuses to its CEO.

Moreover, the trial court did not even consider that Tuomey was no longer serving the community because it was no longer operating the Sumter hospital. In its 990 filings, Tuomey states that its charitable purpose is:

> Tuomey Healthcare Systems is a 301 bed acute care facility located in Sumter, South Carolina. Tuomey was established as a non-profit acute care hospital to advance or support the provisions of healthcare services within the Sumter community. Tuomey's main objective is the promotion of health for all residents of Sumter and its outlying areas. [74]

However, Tuomey has now sold the hospital and virtually all of its assets to Palmetto Health, effective January 1, 2016, and is no longer providing the "community benefit" it claims. By its own admission, Tuomey concedes that the affairs of Tuomey are winding down,[75] it has no employees, and is no longer providing any medical services in Sumter as of January 1, 2016.[76] Tuomey simply is no longer fulfilling its stated charitable purpose. Thus, Tuomey has failed to carry is burden of proving a community benefit for the purposes of Section 501(c)(3) status, and thus does not qualify for the protections of the SCFA.

The trial court erred in concluding to the contrary. The only evidence submitted, that Tuomey still meets the definition of a charitable entity, was the self-serving statement by its corporate representative, the same attorney was hired to wind down the affairs.[77] In fact, the trial court order did not even address the effect of the Drakeford case, Tuomey's improper reporting

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[74] See R. p. 0626; Tuomey 30(b)(6) Transcript, Ex. 5, Form 990 for 2013 at p. 4.

[75] R. p. 1652; March 8, 2016 Hearing Transcript. p. 27.

[76] R. pp. 1658-1659; March 8, 2016 Hearing Transcript pp. 33-34.

[77] R. pp. 1647-1653; March 8, 2016 Hearing Transcript pp. 22-28.

to the IRS, the overpayment of key employees, and Tuomey admission that it no longer serves a community benefit. The trial court blindly ignored the reality that Tuomey was forced to sell off its assets and wind down its affairs after having been found guilty of anti-kickback and anti-fraud laws and ordered to pay the federal government $237,000,000, after having lost the Drakeford case.

In the case at hand, the legislative intent behind the SCFA is patent—to preserve the resources of true charitable organizations and the benefits they confer on the community. Protections under the SCFA are premised on an organization's eligibility as a Section 501(c)(3) under federal law. Thus, if an organization is acting in a manner inconsistent with its stated charitable purposes that would invalidate its Section 501(c)(3) status, it must not be permitted to avail itself of the protections of the SCFA. Unless operating exclusively for Section 501(c)(3) purposes, there is no longer a charitable purpose entitling that organization to the protections of the SCFA. Stated alternatively, if an organization operates outside of its Section 501(c)(3) status, then it is also operating outside the protections of the SCFA.

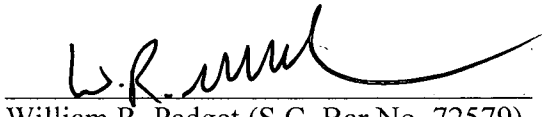
Furthermore, an organization that has been found guilty of violating federal antifraud and anti-kickback laws cannot be acting in accordance with any claimed charitable purpose. Public policy should operate to prevent an organization from participating in illegal activities, yet still retain its charitable protections that were designed specifically to preserve the resources of those charitable organizations that truly serve the community. An organization that engages in substantial illegal behavior, is fined hundreds of millions of dollars by the federal government, while at the same time awarding its CEO tremendous raises, is not operating for the purpose of benefitting the public. Because illegal and fraudulent behavior is harmful to the public and should always be discouraged by the courts, it necessarily follows that such an organization

cannot avail itself of statutory protections reserved for those organizations that serve the public interest. Therefore, due to its actual conduct over the past ten years which is inconsistent with Section 501(c)(3) status, particularly its established illegal behavior, Respondent must not be afforded the protections of the SCFA.

CONCLUSION

In sum, the trial court bent over backwards to grant Respondent Tuomey leave to plead its SCFA defense on the eve of trial that resulted in substantial prejudice to Appellant. Then, after Tuomey failed to put up *any* evidence of the affirmative defense at trial, and after Appellant, in its motion for a directed verdict, provided a roadmap of all that Respondent had failed to prove, the trial court granted Respondent leave to reopen its case and have yet another opportunity to put up evidence that it qualified for the protections of limited liability under the SCFA. Further, the trial court committed plain error in finding that Tuomey remains qualified for the protections of the SCFA liability cap, blindly ignoring Tuomey's wrongdoing (the Drakeford decision and its underlying facts), as well as the other evidence that Tuomey has unclean hands and is not operating as a charitable entity. For all of these reasons, or importantly, for any one of these reasons, Appellant respectfully requests reversal of the trial court order and reinstatement of the jury verdict in its full amount.

Respectfully submitted,



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