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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

RECEIVED
APR 18 2019
SC Court of Appeals

Case No. 2012-CP-43-2030

Appellate Case No.: 2016-000774

Win Myat.....Appellant,

v.

Tuomey Healthcare System.....Respondent.

APPELLANT’S PETITION FOR REHEARING

Appellant Win Myat submits this Petition for Rehearing in accordance with Rule 221 of the South Carolina Appellate Court Rules. On April 3, 2019, the Court issued an Opinion affirming the trial court’s decision to apply the \$300,000 cap from the Solicitation of Charitable Funds Act (“SCFA”) and thereby reduce Appellant’s \$2,500,000 jury verdict. In doing so, this Court overlooked or misapprehended the following arguments asserted by the Appellant.

I. THE UNTIMELY MOTION TO AMEND

First, in affirming the decision to permit Respondent’s untimely amendment to the pleadings to affirmatively assert the SCFA defense on the first day of the scheduled date-certain trial, this Court overlooked the substantial prejudice to Appellant because he lost

the ability to make claims against the individual employees who created the dangerous condition that caused his injury. Appellant's fall occurred on July 6, 2011, and he timely filed a complaint on October 15, 2012, and although Respondent answered shortly thereafter, Respondent did not move to Amend the answer, to assert the SCFA defense, until August 21, 2015 (the Motion was heard on August 24, 2015, which was scheduled to be the first day of the date-certain trial). By that time, the statute of limitations applicable to Appellant's potential claims against individual employees had expired more than a year prior. Contrary to the suggestion in the Opinion, the specific date and mode of trial is not what resulted in the prejudice to Appellant, but the prejudice related to how Respondent's unexplained failure to plead the affirmative defense during the three years of litigation resulted in the statute of limitations expiring on alternative remedies that otherwise would have been available. Essentially, this Court holds that Appellant should have evaluated and pursued alternative remedies years before the SCFA defense was ever plead.¹

This Court's Opinion is in direct contravention to the well-reasoned holding of James v. Lister, 331 S.C. 277, 500 S.E. 2d 198 (Ct. App. 1998). In James, this 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

¹ The contrast between the obligations of counsel in this scenario is stark. The Court's holding requires Appellant's counsel to anticipate (years in advance) defenses not yet plead, evaluate and pursue alternative remedies triggered by those anticipated putative defenses, conduct discovery and amend pleadings to pursue additional defendants based upon those anticipated putative defenses. The Opinion suggests the concomitant duty of Respondent's counsel is, after three years of litigation, to simply to file Motion to Amend to assert the SCFA defense the day before trial, and supports that there is no duty to identify witnesses or documents in support of the SCFA affirmative defense before trial, or even prior to the defense resting.

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 the affirmative defense created a substantial prejudice to the plaintiff's rights. Id. at 283, 500 S.E.2d at 201. Because it is the timing relating to the expiration of the statute of limitations applicable to alternative remedies, and not the timing of trial, which caused the particular legal prejudice suffered by the Appellant, the distinction that Respondent moved to amend before trial is a distinction without a difference. The Court's Opinion suggests that, to prevent prejudice, Appellant should have moved to amend his complaint or requested a continuance to conduct additional discovery before trial. However, these actions would not have served to revive claims against individual employees that had become time barred by the statute of limitations during the extensive time that elapsed before Respondent sought to plead the affirmative defense at issue. The only remedy available to prevent this type of prejudice to the Appellant was a denial of the untimely motion to amend the pleading.

Moreover, the two-year statute of limitations on Appellant's potential worker's compensation claim and three-year statute of limitations on the loss of consortium claim had also expired by the time Respondent made mention of its potential SCFA defense, let alone actually pleaded the affirmative defense. The time to pursue those alternative remedies had also long passed, which is what makes Respondent's late amendment to its answer so prejudicial.

The Court suggests that, because Appellant's pleadings stated that Respondent

was an eleemosynary corporation, therefore Appellant knew of Respondent's "charitable" status. However, these terms are different and separate and distinct legal classifications. The registration with the South Carolina Secretary of State's Office as "eleemosynary" is not synonymous with acting in accordance with Section 501(c)(3) of Title 26 of the United States Code, and being afforded the protections set forth in S.C Code Ann. § 33-56-170 & 180. *See e.g. Eiserhardt v. State Agr. & Mech. Soc. of S.C.*, 235 S.C. 305, 309, 111 S.E.2d 568, 570 (1959) ("even if an institution be chartered as a charitable or eleemosynary corporation, this fact is not conclusive of its character, kind or purpose.")² Appellant's recitation of the corporate registration with the Secretary of State's Office in his pleading does not equate to knowledge of Respondent's qualifications to receive the affirmative defenses provided in the SCFA.

The Court further relies heavily on Respondent's counsel's Affidavit, which recites conversations between counsel about its SCFA defense. However, a conversation between attorneys about a putative defense does not amount to pleading a legal defense. Surely a party's attorney mentioning a cause of action that does not appear in a complaint does not toll the statute of limitations or otherwise equate to the claim having been brought. So too it is axiomatic that conversations between lawyers about putative defenses do not equate to the pleading of those defenses. Our Rules of Civil Procedure require defenses to be made in writing by way of an answer and served upon the adverse party,³ and mentioning potential defenses in conversation is no substitute for formally

² Moreover, once Respondent actually pleaded the affirmative defense, Appellant timely filed a Reply challenging the Respondent's qualifications of those protections.

³ See Rules 5, 7, 8, and 12, SCRCPP (2015), which all contemplate that pleadings shall be in writing and served upon the adverse party.

pleading them. Litigants have the right to rely upon the pleadings to determine the issues framed by those filings. *See e.g. Crocker v. Crocker*, 281 S.C. 154, 158, 314 S.E.2d 343, 346 (Ct. App. 1984) (holding it was error for court to go beyond the scope of the pleadings and grant relief on a theory which was not pleaded). It is paramount that a “judgment or decree, whether in law or equity, must accord with and be warranted by the pleadings [....] If it is not supported by the theory of action on which the pleadings were framed, it is fatally defective.” *Id.* Respondent’s argument that its counsel mentioned the potential SCFA defense in several conversations late in the litigation does not equate to properly pleading a defense that triggered a duty for a claimant to evaluate and pursue alternative remedies. This rationale would render the issues framed by the pleadings absolutely meaningless and eviscerate counsel’s right to rely on those pleadings, the Rules of Civil Procedure, and the prior holdings of this Court when advising clients of their options and rights in litigation.⁴

II. THE TACTICAL ADVANTAGE OF PERMITTING LEAVE TO REOPEN THE DEFENSE CASE AFTER RESTING

Second, the Court erred in affirming the decision of the trial court to reopen its case and put up new evidence and new witnesses (never previously disclosed) after Appellant had moved for directed verdict on the SCFA defense. 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*, in order to properly prove up the defense.⁵

⁴ *I.e. James v. Lister*, 331 S.C. 277, 500 S.E. 2d 198 (Ct. App. 1998) (holding the SCFA defense must be timely plead).

⁵ R. pp. 1530-1531; Trial Transcript pp. 486-87.

Our case law provides that trial courts should not permit a party to reopen its case if doing so would give 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, changed his mind following a charge conference and 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 Wright court found that allowing the evidence to be reopened 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's Opinion overlooks the tactical advantage provided to Respondent to prove up its SCFA defense. 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 and, in so doing, provided a detailed recount of what Respondent had failed to show. The witness and documents that Respondent would later present had been available to be disclosed by Respondent weeks, months and even years earlier. 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 needed to prove for its charitable defense did Respondent move to reopen the case. As set forth in State v. Wright, *supra*, permitting this plain

tactical advantage to Respondent constitutes manifest prejudice to Appellant's rights.

The trial court's decision to allow additional discovery and conduct a subsequent hearing does not mitigate the prejudice Appellant suffered as a result of his counsel essentially advising the Respondent of its evidentiary obligations by way of the timely and proper directed verdict motion. This prejudice is underscored by the reality that immediately following the directed verdict motion (after a lunch break at trial), the Respondent came back to court with new witnesses and documents (that had never been previously identified or disclosed) to prove up its charitable status.

III. QUALIFICATION FOR THE SCFA DEFENSE

Third, in affirming the trial court's decision that Respondent qualifies for the SCFA defense, the Court misapprehended or overlooked the key differences in the operative statutory language and the substantial evidence that Tuomey is not entitled to the SCFA defense. As an initial matter, it appears the Court only applied one of many rules of statutory construction in reaching the decision that the SCFA "intends for any organization that is tax exempt by the IRS pursuant to Section 501(c)(3) to be a charitable organization." Diverging from the trial court's rationale, the Opinion seemingly does not consider the intent of the Legislature in choosing the different operative language in the SCFA. Focusing solely on the principal to read the statute as a whole, the equally applicable principle of "*expressio unius est exclusion alerius*"⁶ was seemingly overlooked by the Court when reconciling the differences in the statutory language. The implications of deferring solely to the determination of the SCFA defense to the IRS

⁶ Meaning the expression of one thing implies the exclusion of another or its alternative See Hughes v. W. Carolina Reg'l Sewer Auth., 386 S.C. 641, 647, 689 S.E.2d 638, 641 (Ct. App. 2010).

cannot be understated.⁷ The latest data indicates that that the IRS examination rate for charitable entities was 0.81 percent in 2011, and declined to 0.71 percent in 2013. Only 7 of every 1,000 charitable entities are examined by the IRS for 501(c)(3) compliance. Setting precedent that the IRS stands as the sole arbiter of the SCFA defense presents dangerous implications and invites fraud and abuse of the SCFA protections for all types of organizations and businesses. If our courts are not empowered to review whether a defendant has actually operated in a charitable manner, and in light of the reality of the IRS only reviews a small fraction of applications for 501(c)(3) compliance, in essence, there is no mechanism for review. The result is that unscrupulous entities with no charitable purpose will be allowed to effectively hide behind the SCFA protections.

Further, the Court overlooked substantial evidence that Respondent Tuomey is not entitled to the protections under the SCFA 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”), Respondent has not conducted itself in the manner required of a charitable entity seeking the protections of the SCFA. The District Court entered a judgment against

⁷ In situations where 501(c)(3) status has been conferred, so long as annual Form 990 filings are provided, the IRS rarely independently launches an inquiry into an organization’s qualifications to continue to receive tax exempt treatment. *See* U.S. Government Accountability Office Report on Tax-Exempt Organizations, December 2014 at p. 2, available at: <http://www.gao.gov/assets/670/667595.pdf> (detailing that the IRS examination rate for charitable entities was 0.81 percent in 2011, and declined to 0.71 percent in 2013). As such, when a party challenges a defendant’s qualifications to receive the protections of the SCFA, it is paramount that our courts have the ability to analyze an entity’s behavior and determine whether it should receive the benefit of the SCFA cap by determining if the entity meets the criteria set forth under Title 26, Section 501(c)(3) of the U.S. Code, as contemplated by S.C. Code § 33-56-170.

Tuomey that, including penalties and fines, totaled \$237,454,195.00. This judgment has been affirmed by Fourth Circuit and the Drakeford opinion expressly addresses the enormity of the frauds committed by Respondent, stating that “while the penalty is certainly severe, it is meant to reflect the sheer breadth of the fraud Tuomey perpetrated upon the federal government.” U.S. ex rel. Drakeford v. Tuomey, 792 F.3d 364, 389 (4th Cir. 2015). The federal court’s finding of a massive fraud, juxtaposed with the state court’s finding that Respondent qualifies as a Section 501(c)(3) charitable entity entitled to the protections of the SCFA, cannot be rationally reconciled.

The Court overlooks and does not address that Respondent has been less than forthright in its reporting to the IRS as to nature, issues, and findings of the Drakeford case. With a tax system that is based on self-reporting, Respondent’s practically unchecked ability to mislead the IRS about its fraudulent activities demonstrates the importance and need for our courts to make a determination as to whether a defendant is truly behaving in accordance with the principles set forth in 501(c)(3) and if a defendant’s actions are of the nature that our legislature intended to bestow a limit on tort liability.

Lastly, the Opinion does not address the argument that Tuomey has failed to show that it operates solely to provide a “community benefit” in order to qualify for Section 501(c)(3) status. By its own admission, Tuomey concedes that the affairs of Tuomey are winding down,⁸ it has no employees, and is no longer providing any medical services in Sumter as of January 1, 2016.⁹ The Opinion overlooks and does not address the reality

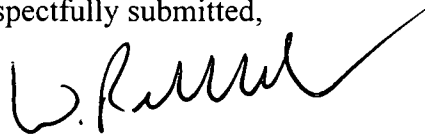
⁸ R. p. 1652; March 8, 2016 Hearing Transcript, p. 27.

⁹ R. pp. 1658-1659; March 8, 2016 Hearing Transcript, pp. 33-34.

that Tuomey is no longer fulfilling its stated charitable purpose.¹⁰ Thus, Tuomey has failed to carry its 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.

For these reasons, Appellant respectfully requests the Court grant his Petition for Rehearing and reconsider its April 3, 2019 Opinion.

Respectfully submitted,



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April 18, 2019

¹⁰ With regard to the timing of the analysis, 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” or at the time of entry of judgment. Thus, conducting the analysis solely at the time of the injury is in direct contravention to the statute.

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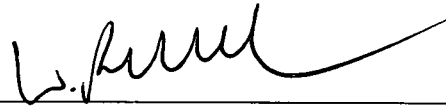
I certify that I have served the *Appellant's Petition for Rehearing* on the following counsel of record by depositing a copy of it in the United States Mail, postage prepaid, on April 18, 2019:

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Reply to Columbia Office

April 18, 2019

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
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SC Court of Appeals

RE: *Win Myat v. Tuomey Regional Medical Center*
Appeal Case No.: 2016-000774

Dear Ms. Kitchings:

Enclosed for filing please find the Appellant's Petition for Rehearing along with the Proof of Service in regard to the above-named matter.

Should you have any questions, please feel free to contact me. With kind regards, I remain

Sincerely,

William R. Padget

WRP/kjt

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