Original

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

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 2012-CP-43-2030

Appellate Case No. 2016-000774

Win Myat.....Appellant,

v.

Tuomey Healthcare System.....Respondent.

RESPONDENT'S RETURN TO PETITION FOR REHEARING

Respondent Tuomey submits the following return to Appellant Myat's Petition for Rehearing dated April 18, 2019.

I. Judge Cothran properly allowed amendment of Tuomey's answer

The Court of Appeals correctly determined Myat demonstrated no prejudice from Tuomey's amended answer asserting the charitable cap under *South Carolina Code* § 33-56-180. Myat offers a myopic argument that he relied upon Tuomey's answer to forego other alternative remedies fails because:

* Myat did not testify (or offer testimony by affidavit) that he was unaware of the charitable cap;

* Myat's counsel did not represent to the trial court that he was unaware of the charitable cap;

* Both the complaint and amended complaint conceded Tuomey is a charitable entity;

* Myat's counsel served initial discovery requests on Tuomey on July 3, 2014. See ROA p 1008; ROA pp 1016-1018. Tuomey responded as follows:

> Coverage for Tuomey and its employees is provided by Continental Insurance Company through policy numbers ... with limits of coverage sufficient to meet Tuomey's limits of liability as set forth in the South Carolina Solicitation of Charitable Funds Act (Section 33-56-180, S.C. Code Ann.).

* Prior to Myat's discovery deposition, counsel for both parties "had numerous conversations about the $300,000 statutory limitation of Plaintiff's claim." ROA p. 1728.

* Following Myat's May 9, 2014 deposition, counsel for both parties discussed for "nearly two hours" ... "the statutory cap of $300,000 and the fact that no physician has taken [Myat] out of work." ROA p. 1728, ¶ 5. "[Counsel] extensively discussed the need for further medical or psychiatric intervention in an attempt to return [Myat] to work." Id.

* On February 18, 2015, the case was mediated and the statutory cap was discussed extensively, as it was also Myat's opening demand at mediation. ROA p. 1729, ¶ 10.

* On August 21, 2015, the trial court held a telephone conference with the parties, and Myat's counsel agreed that he was not aware the charitable cap had not been pled as a defense until sometime after the February 2015 mediation. ROA p. 998, line 13-16.

* Neither Myat nor his counsel disagreed that they were unaware Tuomey had not included the charitable cap defense in its Answer at the motion to amend hearing before the trial judge. ROA p 1729, ¶12.

* Myat actually knew Tuomey was a charitable entity when he drafted his complaint. See Complaint.

* Myat actually knew of the statutory cap when Tuomey answered the complaint[1] based upon conversations with opposing counsel. ROA p 1729, ¶ 2.

* Myat actually knew in writing that Tuomey asserted the statutory cap on damages on September 10, 2014 when he received discovery responses.[2] ROA p 1729.

* Myat argues he detrimentally relied upon Tuomey's answer, yet offers no evidence whatsoever THAT HE RELIED UPON Tuomey's answer.

* Myat failed to identity any witness, including himself. Myat failed to offer any witness(es) or evidence necessary to refute Tuomey's evidence that he was aware of the charitable cap.

* Myat failed to offer any evidence to refute Tuomey's evidence he had actual knowledge of the charitable cap.

* Myat did not explain to Judge Cothran why his wife did not assert a loss of consortium claim.

* Myat did not move to amend his complaint to add a gross negligence claim; nor did Myat argue his putative amended complaint would relate back to the original complaint for limitations purposes.

* Myat did not request a continuance to conduct additional discovery before proceeding to trial.

Myat cannot seek to reverse Judge Cothran based upon evidence (or more specifically a suggestion) he failed to offer to the trial court at the hearing. Myat offered absolutely no evidence whatsoever that he detrimentally relied upon Tuomey's original answer.

In support of his position, Myat relies upon *James v Lister*, 331 S.C. 277, 500 S.E.2d 198 (Ct. App. 1998). However, in *James* it was clearly established that "The Jameses had no notice that another party was necessary and that they would be required to prove a greater degree of

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[1]Myat's argument that defense counsel's affidavit "desperately ... ignores the commands of the ADR rules" is addressed below. Myat brief, p. 15, note 48.

[2]Myat did not initiate discovery until July 3, 2014, nearly 3 years after his fall. ROA p 1008; ROA pp 1016-1018.

negligence in order to recover damages in excess of $200,000." *James v Lister*, 331 S.C. 277, 500 S.E.2d 198 (Ct. App. 1998).

* Myat knew of the statutory cap; In *James*, the Jameses had no notice of the statutory cap;

* Tuomey amended its Answer before trial; In *James*, the Conway hospital did not move to amend until after post-motions;

* Myat did not request additional time to conduct discovery or amend his pleadings; In *James*, the "failure to raise its charitable status as an affirmative defense affected both the parties to the action and the manner in which the case was tried to the jury, including what issues were or were not presented to them for resolution." 331 S.C. at 282, 500 S.E.2d at 201.

* The *James* court held that the charitable cap was an affirmative defense, just as the statutory cap of the Tort Claims Act is an affirmative defense. The *James* court's reasoning was appropriately modified in the later case of *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 607 S.E.2d 711 (App. 2005)("Liability cap articulated within the Tort Claims Act is not an affirmative defense, and the failure to plead the specific limitation on the amount of recovery allowed under the Act is not a waiver of the cap.").

* In *Parker,* the "trial judge committed reversible error in denying the Sewer District's request for a reduction in the jury's verdict to conform to the monetary statutory cap set forth in the Tort Claims Act." 362 S.C. at 285, 607 S.E.2d at 716. The *Parker* court noted:

> There is absolutely no verbiage articulated within the South Carolina Tort Claims Act, sections 15-78-10 to-200 of the South Carolina Code, mandating that a governmental entity plead the monetary statutory cap included within section 15-78-120. The Tort Claims Act is imbued with public policy considerations limiting and qualifying liability of governmental entities. We conclude that the monetary statutory cap is self-executing and the court is required to apply the monetary statutory cap to any jury verdict exceeding $300,000.

362 S.C. at 285, 607 S.E.2d at 716. As in *Parker*, Myat pled that Tuomey was a charitable organization. Because Parker actually knew of the tort claims cap, it was not an affirmative defense. Tuomey submits the reasoning of *Parker* applies here. As in *Parker*, Myat knew of the charitable cap throughout the litigation.

The logic of *Parker* suggests that Tuomey's charitable cap in this case is similarly not an affirmative defense by virtue of Myat's actual knowledge.

The trial court properly considered Tuomey counsel's affidavit because:

* Offers of compromise are not admissible to prove liability. See Rule 408,

* Rule 408 "does not [however] require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations."

* ADR Rule 8 provides: Communications during a mediation settlement conference shall be confidential. ... This rule does not prohibit: (1) Disclosures as may be stipulated by all parties; ... (5) Any disclosures required by law or a professional code of ethics.

* Myat and his counsel were ethically limited from contradicting Tuomey counsel's evidence that Myat knew of the statutory cap if their statements were not true. Rule 3.4(e), Rule 407, *SCACR*.

* Myat failed to object to Tuomey's evidence under Ethics Rule 3.7(a), Rule 407, *SCACR* ("Lawyer as a witness").

* In the absence of Myat offering any contrary or "contested" evidence, Tuomey counsel's affidavit essentially "relate[d] to an uncontested issue" and therefore was properly considered under Ethics Rule 3.7(a).

In the absence of any evidence of detrimental reliance, Judge Cothran properly allowed Tuomey's amended answer. Myat curiously laments that Tuomey's original answer somehow tolls his statute of limitations for alternative remedies. Myat is wrong because:

* Myat's alternative remedies of any type accrue from the date Myat knew or should have known he had an alternative remedy available.

* Tuomey's original answer to his complaint plays no role in Myat's statutes of limitation.

* The statute of limitations begins to run when a cause of action ought to have reasonably been discovered. *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996). In *Dean*, the supreme court stated:

> The statute runs from the date the injured party either knows or should have known by the exercise

> of reasonable diligence that a cause of action arises from the wrongful conduct. We have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist. Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial.

Id. at 363–64, 468 S.E.2d at 647 (citations omitted).

* "The date on which discovery of the cause of action should have been made is an objective, rather than a subjective, question." *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 355–57, 559 S.E.2d 327, 336 (Ct. App. 2001). "Reasonable diligence is intrinsically tied to the issue of notice." Id. In *Joubert v. South Carolina Department of Social Services*, the court explained, "We have interpreted the 'exercise of reasonable diligence' to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist." 341 S.C. 176, 191, 534 S.E.2d 1, 8 (Ct.App.2000) (quoting *Dean*, 321 S.C. at 364, 468 S.E.2d at 647).

* Myat's factually unsubstantiated claim that he 'relied' upon Tuomey's initial answer is, at best, subjective and does not state a basis to support his contention he did not explore his alternative remedies.

II. Judge Cothran properly allowed Tuomey to reopen its case, and Myat demonstrated no prejudice.

Judge Cothran properly allowed Tuomey to reopen its case and present evidence of its 501c3 status. Myat failed to show any prejudice whatsoever. Myat failed to show any 'tactical disadvantage.'

* Reopening evidence at trial is "a matter ... left to the sound discretion of the trial judge; and a refusal to re-open a case may be an abuse of discretion where the party has acted in good faith, and where no prejudice would result to the other

party." *Chapman v. Associated Transport,* 218 S.C. 554, 63 S.E.2d 465 (1951);

* "A motion to reopen the evidentiary record and to allow additional evidence is addressed to the sound discretion of the trial judge. His ruling will not be reversed absent an abuse of discretion. A trial is a search for the truth; concomitantly, liberality is the linchpin of the rule." *State v. Wren*, 470 S.E.2d 111 (S.C. Ct. App. 1996);

* Myat was allowed to conduct discovery on the issues of Tuomey's 501c3 status and the charitable cap.

* Myat conceded that the application of the charitable cap was not a jury issue.

* After extensive discovery, Myat was afforded a hearing to present testimony and evidence on the issue of charitable immunity.

* Myat suffered no prejudice as a result inasmuch as he was afforded full discovery on the issues of Tuomey's 501c3 status and the charitable cap.

The trial court's decision to allow Tuomey to reopen its case in chief should be affirmed.

III. Judge Cothran properly determined Tuomey was a 501c3 and entitled to the charitable cap, and thereby reduced the verdict to $300,000.

* Myat failed to offer any evidence Tuomey was <u>not</u> a 501c3 entity;

* *United States v Drakeford v Tuomey Healthcare Sys., Inc.*, 976 F. Supp. 2d 776, (D.S.C. 2013 aff'd 792 F.3d 364 (4th Cir. 2015) does not properly address the I.R.S.' definition of charitable entity and was properly not considered by Judge Cothran.

* Judge Cothran should have taken judicial notice of Tuomey's 501c3 status and the application of the charitable cap. Rule 201(d), SCRCP;

* Rule 201(d) allows "the court may take judicial notice at any stage of the proceeding."

* The South Carolina legislature chose the Internal Revenue Services' 501c3 status as an objective, fair, and bright line test of charitable status for protection under the charitable cap.

* Similarly, the use of the I.R.S.'s 501c3 status avoids costly and unnecessary

ancillary litigation on the issue of charitable status.

* A party's 501c3 status is [and should be] routinely resolved without discovery or evidentiary challenge.

* Myat does not have a Seventh Amendment right to a (jury) trial on the issue of charitable immunity under *South Carolina Code* § 33-56-170 and 180.

* Tuomey's 501c3 status, as established by the Internal Revenue Service, is self authenticating under Rule 902 (1), (5), SOUTH CAROLINA EVID. RULES, fits squarely within the hearsay exception of Rule 803(8), SOUTH CAROLINA EVID. RULES, and is public information widely available to the public, including Myat, at all times before and since the date of his injury.

* Myatt does NOT have the right to litigate Tuomey's 501c3 status. See *Lazerson v Hilton Head Hospital*, 312 S.C. 211, 212, 439 S.E.2d 836, 837 (1994) ("The trial judge found Lazerson was deprived of the right to litigate whether Hospital qualified as a charitable organization and these statutes therefore violated due process. We disagree.").[3] See also *Brown v Roper Hospital*, 2008 WL 8833549 [2007-CP-10-3428] (S.C. Cir. Ct. 2008)(Judge John C. Few's finding "there is an irrebuttable presumption that Roper qualifies as a "charitable organization " under *S.C. Code Ann.* § 33-56-170(a)." citing *Lazerson*).

* Under *Lazerson*, if Tuomey complies with the Internal Revenue Services' 501c3 status requirements, there is an irrebuttable presumption that the protections of *South Carolina Code* § 33-56-180 apply. It is of this fact that Tuomey seeks judicial notice of its 501c3 status under Rule 201.

* Tuomey's 501c3 status should be recognized under the 'Uniform Judicial Notice of Foreign Law Act.' The Uniform Judicial Notice of Foreign Law Act provides:

* "Judicial notice is taken of the public acts of Congress, and federal statutes need not be pleaded in the state courts." *Santee Mills v. Query*, 122 S.C. 158, 115 S.E. 202 (1922)(tax dispute case). "Judicial notice' takes the place of proof. It simply means that the court will admit into evidence and consider, without proof of the facts, matters of common and general knowledge. [citations omitted] 'The test is whether sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof.' [citation omitted]" *Moss v. Aetna Life Ins. Co*, 267 S.C. 370, 228 S.E.2d 108 (1976).

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[3] *Lazerson* necessarily eviscerates Myat's argument that the language differences between 33-56-170 and 33-56-20 should be interpreted as an invitation for the state court to litigation whether a charity is entitled to immunity. *Lazerson* holds Myat has no right to challenge Tuomey's 501c3 status.

* South Carolina district courts also routinely take judicial notice of governmental records. See Judge J. Michele Childs in *Coleman v Kolb*, 2015 WL 4878846 (D.S.C. Aug. 14, 2015) writes:

> "Under Federal Rule of Evidence 201(b), "The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Postings on government websites are inherently authentic or self-authenticating. See *Williams v. Long*, 585 F.Supp.2d 679, 686–89, 688 n. 4 (D. Md. 2008)."

* Judge Henry M Herlong, Jr., in *Mance v Cartledge*, 2015 WL 4168056, FN 1 (D.S.C. July 9, 2015) writes:

> The Court may take judicial notice of factual information located in postings on government web sites. See *Tisdale v. South Carolina Highway Patrol*, C/ANo. 0:09–1009–IIFF–PJG, 2009 WL 1491409, *1 n. 1 (D.S.C. May 27, 2009), aff'd 347 F. App'x 965 (4th Cir. Aug.27, 2009); *In re Katrina Canal Breaches Consolidated Litigation*, No. 05–1182, 2008 WL 4185869 at * 2 (E.D.La. September 8, 2008) [noting that courts may take judicial notice of governmental websites including other courts' records]; *Williams v. Long*, 585 F.Supp.2d 679, 687–88 (D.Md. 2008) [noting that some courts have found postings on government web sites as inherently authentic or self-authenticating].

* Judge Richard Gergel in *Cole v Montgomery*, 2015 WL 2341721 (D.S.C. 2015) cites: *In Re Katrina Canal Breaches Consol. Litig.*, 533 F.Supp.2d 615, 631–33 & nn. 14–15 (E.D.La.2008) (collecting cases indicating that federal courts may take judicial notice of governmental websites, including court records);

* Tuomey's 501c3 status, as established by the Internal Revenue Service, and publically available through government websites, may be taken at any stage of the proceedings. SOUTH CAROLINA EVID. RULE 201. Evidentiary rule governing judicial notice allows a court to take judicial notice at any stage in a proceeding; therefore, a court may take judicial notice at the summary judgment stage. *Ochana v. Flores*, 199 F.Supp.2d 817, affirmed 347 F.3d 266 (N.D. Ill. 2002); Judicial notice may be taken at any stage of proceeding, including on appeal, as long as it is not unfair to party to do so and does not undermine trial court's fact-finding authority. *In re Indian Palms Associates, Ltd.*, 61 F.3d 197 (3rd Cir. (N.J.) 1995); Where adequate information is available for taking of judicial notice, an appellate court should use such information. *U.S. v. Gonzalez*, 442 F.2d 698, certiorari denied 92 S.Ct. 146, 404 U.S. 845, 30 L.Ed.2d 81. (2nd Cir. (N.Y.) 1970).

* The Charitable Funds Act provides an immunity for charitable organizations as defined in Section 170, which provides:
For purposes of Section 33-56-180:

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

* The Secretary of the Treasury has exclusive jurisdiction to challenge Tuomey's 501c3 status. See 26 U.S.C.A. § 7428 (entitled "Declaratory judgments relating to status and classification of organizations under section 501(c)(3), etc.") provides, *inter alia*:

> (a) Creation of remedy.--In a case of actual controversy involving--
> (1) a determination by the Secretary--
> (A) with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c)(3) which is exempt from tax under section 501(a)....
> (2) a failure by the Secretary to make a determination with respect to an issue referred to in paragraph (1), upon the filing of an appropriate pleading, the United States Tax Court, the United States Court of Federal Claims, or the district court of the United States for the District of Columbia may make a declaration with respect to such initial qualification or continuing qualification or with respect to such initial classification or continuing classification....
> (b) Limitations.--
> (1) Petitioner.--A pleading may be filed under this section only by the organization the qualification or classification of which is at issue.

Judge Cothran acted within his discretion to allow Tuomey's amended answer to assert the charitable cap. Tuomey's discovery responses and affidavit of counsel clearly established Myat had actual knowledge of the statutory cap during the litigation. Myat offered no evidence to the trial judge that he did not know of the charitable cap. Myat offered no evidence that he detrimentally relied upon Tuomey's original answer. Myat failed at the hearing and on appeal to show any prejudice from the amendment and Judge Cothran should be affirmed.

Judge Cothran properly allowed Tuomey to re-open its case in chief on the issue of 501c3 status and the charitable cap. Myat was allowed ample discovery prior to a hearing on those issues. Myat has failed to show any prejudice as a result of reopening of the evidence. Accordingly, the trial court's decision to reopen the evidence should be affirmed.

After an evidentiary hearing on 501c3 status and the charitable cap, the trial court properly determined Tuomey was entitled to the charitable cap. As additional sustaining grounds, Tuomey submits the trial court should take judicial notice of its 501c3 and charitable cap status, that its status is self-authenticating under the statutes and rules of South Carolina. Tuomey submits that Myat does not have a right (or jurisdictional standing) to challenge its 501c3 status. Finally, Tuomey submits that the South Carolina legislature chose the I.R.S. 501c3 status as an objective, fair, and bright line test of charitable status for protection, thus avoiding costly and unnecessary ancillary litigation on the issue of charitable status. The trial court appropriately reduced the verdict to $300,000 pursuant to the charitable cap.

Respectfully submitted,

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July 1, 2019

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

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 2012-CP-43-2030

Appellate Case No. 2016-000774

Win Myat.....Appellant,

v.

Tuomey Healthcare System.....Respondent.

CERTIFICATE OF SERVICE

I, the undersigned, an employee of the Sumter County law firm of Lee, Erter, Wilson, Holler & Smith, LLC, attorneys for the Respondent, do hereby certify that I have this 1st day of July, 2019, served one copy of the foregoing ***Respondent's Return to Appellant's Motion for Rehearing*** by personally depositing the same in the U. S. Postal Service addressed to:

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July 1, 2019

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July 1, 2019

Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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

Dear Ms. Kitchings:

Enclosed please find an original and six copies of Respondent's Return to Petition for Rehearing along with a Certificate of Service.

By copy of this letter to opposing counsel, I am serving them with our Return.

Please accept this with my kindest regards.

Yours very truly,

LEE, ERTER, WILSON,
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David Holler

David C. Holler

DCH/jsm
enclosures

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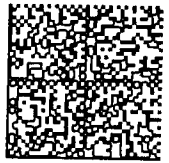

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