THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No 5636 (S.C. Ct. App. filed April 3, 2019

Win Myat..... Petitioner,

v.

Tuomey Healthcare System..... Respondent.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Win Myat, Appellant,

v.

Tuomey Regional Medical Center, Respondent.

Appellate Case No. 2016-000774

Appeal From Sumter County
R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 5636
Heard February 12, 2019 – Filed April 3, 2019

AFFIRMED

William R. Padget and Francis M. Hinson, IV, of Finkel Law Firm, LLC, of Columbia, for Appellant.

David Cornwell Holler, of Lee, Erter, Wilson, Holler & Smith, LLC, of Sumter, for Respondent.

SHORT, J.: In this premises liability action resulting from injuries suffered by Dr. Win Myat while working at Tuomey Regional Medical Center (Hospital), Myat appeals, arguing the trial court erred in (1) permitting Hospital to amend its answer to assert a new affirmative defense; (2) allowing Hospital to reopen its case and offer new evidence in support of its charitable affirmative defense; and (3)

concluding Hospital was qualified to receive the protections of the South Carolina Solicitation of Charitable Funds Act (the Act)[1]. We affirm.

FACTS

On July 6, 2011, Myat fell while walking through Hospital as a result of liquid on the floor. Myat suffered a broken patella and torn tendon. Myat was employed by Hospital as the Medical Director of Infectious Disease and also worked at Hospital as a physician for his private medical practice. Myat claimed his injuries left him with severe pain, which rendered him unable to continue his medical practice.

Myat filed a personal injury action against Hospital on October 15, 2012. Myat amended his complaint on November 5, 2012. Hospital filed its answer on January 16, 2013. On August 21, 2015, Hospital moved to amend its answer to assert the protections of the Act. Myat's initial and amended complaints asserted, and Hospital's answer conceded, that Hospital was an eleemosynary corporation.[2] On August 24, 2015, the trial court granted Hospital's motion to amend its answer to assert the Act as a defense.

The case was tried before a jury August 31 to September 2, 2015. At the close of Hospital's case, Myat moved for a directed verdict on Hospital's failure to offer evidence of its Section 501(c)(3) of Title 26 of the United States Code[3] tax status and the application of the Act's limitation on liability.[4] Hospital moved to reopen its case and requested the court take judicial notice of its 501(c)(3) tax status and the Act's charitable cap. Hospital also offered to present evidence of its tax status. The court took the issue under advisement and continued with the presentation of evidence and testimony to the jury. The parties agreed Hospital's tax status and the application of the Act were not questions of fact for the jury.

Prior to receiving the jury's verdict, the trial court granted Hospital's motion to reopen its case on the issues of its 501(c)(3) tax status and the application of the

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[1] S.C. Code Ann. §§ 33-56-10 to -200 (2006 & Supp. 2018).

[2] Black's Law Dictionary defines eleemosynary as: "Of, relating to, or assisted by charity; not-for-profit." Black's Law Dictionary 538 (7th ed. 1999). The Dictionary further defines an eleemosynary corporation as: "A nonprofit corporation that is dedicated to benevolent purposes and thus entitled to special tax status under the Internal Revenue Code." Black's Law Dictionary at 341.

[3] 26 U.S.C.A. § 501(c)(3) (2011).

[4] S.C. Code Ann. § 33-56-180(A) (2006).

Act. The court also allowed Myat to conduct discovery prior to a hearing on Hospital's tax status and the Act. The jury returned a verdict for $2.5 million in actual damages for Myat.

On March 8, 2016, the trial court held a hearing on Hospital's tax status and the application of the Act. On April 7, 2016, the court filed its order reducing the verdict to $300,000 pursuant to the Act's liability cap, entering judgment, and denying Myat's outstanding motions. This appeal follows.

LAW/ANALYSIS

I. Motion to Amend

Myat argues the trial court erred in permitting Hospital to amend its answer to assert a new affirmative defense of the Act. We disagree.

Rule 15(a), SCRCP, provides:

> 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.

"Motions to amend pleadings to conform to proof may be made upon motion of any party at any time, even after judgment, and are within the sound discretion of the trial judge." *Ball v. Canadian Am. Exp. Co.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994) (citing Rule 15(b), SCRCP). "Ordinarily, amendments to conform to proof should be liberally allowed." *Id.* "However, if late amendment of the pleadings would cause prejudice to the opposing party, the court should either deny the amendment or grant a continuance reasonably necessary to allow the opposing party to meet the amendment." *Id.* "Prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action." *Id.* "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, 328-29, 494 S.E.2d 820, 823 (1998). "It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice." *Pruitt v. Bowers*, 330 S.C. 483, 489, 499 S.E.2d 250, 253 (Ct. App. 1998). "The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997).

The case was set for trial to begin on August 24, 2015. Hospital filed its motion to amend on August 21, 2015, and a hearing on the motion was held on August 24, 2015. Hospital filed an amended answer on August 24, 2015, asserting the Act as a defense, and specifically, the limit on recoverable damages. Myat argues the amendment prejudices him because the Act limits his damages to $300,000 for a single occurrence. S.C. Code Ann. §§ 33-56-180(A) (2006) & 15-78-120(a)(1) (2005).

Section 33-56-180(A) provides:

> 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, [willful], 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, [willful], 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.

Section 15-78-120(a)(1) provides "no person shall recover in any action or claim brought hereunder a sum exceeding three hundred thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved."

In *James v. Lister*, 331 S.C. 277, 282-85, 500 S.E.2d 198, 201-03 (Ct. App. 1998), this court determined the statutory limit on recovery from charitable organizations was an affirmative defense the defendant hospital was required to plead prior to trial in a medical malpractice action because although the charitable status was not a jury issue, invocation of that protection triggered alternative remedies for the plaintiff patient. Thus, the hospital's failure to raise its charitable status as an affirmative defense affected the parties involved in the case and the way the case was tried to the jury. *Id.* at 282, 500 S.E.2d at 201. As a result, the court held the hospital was not entitled to amend its answer to assert the limit on recovery from charitable organizations because the amendment would prejudice the plaintiff patient, as he had no notice that another party was necessary and the plaintiff would be required to prove a greater degree of negligence to recover damages in excess of the statutory limit. *Id.* at 285-86, 500 S.E.2d at 203.

Myat asserts he has suffered the same prejudice as in *James* because Hospital sought to invoke the defense after discovery had closed and witnesses' memories had faded. Further, the statute of limitations had run against potential individual defendants, i.e., the employee(s) that created the dangerous condition that Myat could have pursued to avoid the statutory cap. Moreover, Myat asserts he lost the opportunity to evaluate alternative remedies, including a potential worker's compensation claim and loss of consortium claim, because Hospital did not plead the statutory cap as a defense.

Hospital argues this case is different from *James* because in *James*, the hospital did not seek to amend its answer and raise the statutory cap until its post-trial motions, giving the Jameses no opportunity to conduct additional discovery before trial. *Id.* at 281, 500 S.E.2d at 200. Here, Hospital amended its answer prior to trial, and Myat was aware of the statutory cap during discovery. Also, Myat had an opportunity to seek additional discovery but failed to make a request prior to trial.

Myat's initial and amended complaints asserted, and Hospital's answer conceded, that Hospital was an eleemosynary corporation. Additionally, at the August 24, 2015 motion to amend hearing, Hospital's counsel's affidavit on the issue of Myat's knowledge of the charitable cap was the only evidence submitted to the court. The affidavit stated counsel for both parties had numerous conversations about the $300,000 statutory cap. Counsel's affidavit stated he moved to amend Hospital's answer to assert the statutory cap as soon as he realized he had failed to assert it. No other affidavits, testimony, or evidence was offered to the trial court to refute Myat's knowledge of the statutory cap. Further, Myat did not move to amend his complaint to add a gross negligence claim or request a continuance to conduct additional discovery before trial.

The trial court held Myat had not satisfied his burden of establishing prejudice. In contrast, the court found Myat's complaints coupled with the affidavit of Hospital's counsel showed that Myat was on notice of the statutory cap and had ample opportunity to attempt to refute it.

We find the trial court did not err in allowing Hospital to amend its answer because there was no prejudice to Myat. Myat knew Hospital was a charitable entity and should have known the statutory cap would apply. He further had notice before trial that the statutory cap was pled and had an opportunity to refute it.

II. New Evidence

Myat argues the trial court erred in allowing Hospital to reopen its case and offer new evidence in support of its charitable affirmative defense. We disagree.

"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. S.C. Dep't of Transp.*, 377 S.C. 124, 127, 659 S.E.2d 167, 169 (2008). "The trial judge is endowed with considerable latitude and discretion in allowing a party to reopen a case." *Id.*

Myat asserts that even after filing an amended answer, Hospital had not disclosed any evidence or witnesses in support of its defense of the Act. Further, Myat asserts Hospital did not present any evidence at trial that it qualified for the protections of the Act. After Myat moved for a directed verdict, arguing Hospital had not met its burden of proving it qualified as a tax-exempt charitable organization under South Carolina Code § 33-56-170 (2006), Hospital moved to

reopen its case to introduce new documents and a new witness. The court granted Hospital's motion and gave the parties ten days to file post-trial motions. A hearing on the motion was held on March 8, 2016, during which Tom Moran testified as Hospital's Rule 30(b)(6)[5] witness, and Myat testified on his own behalf.

Myat argues Hospital's decision to focus solely on its liability defenses was a choice of its own. He asserts allowing Hospital to reopen the case gave Hospital a "second bite at the apple" to prove its defense, which was prejudicial to Myat.

We find the trial court did not abuse its discretion in allowing Hospital to reopen its case to present additional evidence. The trial court allowed Myat to conduct discovery on the issue of Hospital's 501(c)(3) status and the charitable cap, and a hearing was held to present testimony and evidence on the issue of Hospital's charitable immunity. Therefore, Myat was not prejudiced by the new evidence.

III. Charitable Organization

Myat argues the trial court erred in concluding Hospital was qualified to receive the protections of the Act. We disagree.

"Statutes must be read as a whole and sections that are part of the same statutory scheme must be construed together." *Hughes v. W. Carolina Reg'l Sewer Auth.*, 386 S.C. 641, 647, 689 S.E.2d 638, 641 (Ct. App. 2010). "The issue of interpretation of a statute is a question of law for the court" and this court is "free to decide a question of law with no particular deference to the [trial] court." *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). The Act defines a "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(1) (2006).

Myat argues Hospital is not entitled to the protections of the Act because it has not conducted itself as a charitable organization. Myat references another case against Hospital, *United States ex rel. Drakeford v. Tuomey Healthcare Sys., Inc.*, in which Hospital was found to have violated the Stark Law and the False Claims Act

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[5] Rule 30(b)(6), SCRCP, provides: "A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested."

through improper and illegal contracts and arrangements with physicians employed by Hospital.[6] Myat further alleges Hospital has not been forthright in its reporting to the Internal Revenue Service (IRS) of the findings in that case. Myat states that because Hospital has not properly reported its violations of the Stark Law and False Claims Act to the IRS, the matter of whether Hospital still qualifies to receive tax-exempt status by the IRS has never been adjudicated by the IRS. Further, Myat states that because Hospital was purchased by Palmetto Health in January 2016 and the remaining entity is winding down its affairs, there is likely no forthcoming inquiry by the IRS as to Hospital's classification as a 501(c)(3) entity. Regardless, Myat asserts section 33-56-170 of the Act makes no mention of a determination by the IRS being of any importance in determining whether an organization qualifies to receive a limitation on liability. Section 33-56-20(1)(a)(i)[7] of the Act defines a "charitable organization" as one that is "determined by the [IRS] to be a tax exempt organization pursuant to Section 501(c)(3) of the Internal Revenue Code," and Myat argues by using different language in the two sections, the Legislature meant that "charitable organization" under section 33-56-170 is not synonymous with the definition found in section 33-56-20. As a result, Myat maintains the court must determine whether Hospital meets the requirements of an organization that is exempt from taxation pursuant to section 501(c)(3).

Myat asserts Hospital has not shown it operates solely to provide a "community benefit" to qualify for section 501(c)(3) status. Myat further argues the trial court erred in evaluating Hospital's charitable status solely on the date of Myat's fall and injury. He asserts it should have been based on the status at the time of recovery, which he contends was the date of the entry of judgment.

Hospital asserts the *Drakeford* case does not properly address the IRS's definition of charitable entity, and the trial court properly declined to consider it in this case. Hospital argues an evidentiary hearing was not necessary, and the trial court should have taken judicial notice of Hospital's 501(c)(3) status and applied the charitable cap. Hospital states the trial court was permitted to take judicial notice of its 501(c)(3) charitable organization status under Rule 201(d), SCRE. Rule 201(d), SCRE, provides "[j]udicial notice may be taken at any stage of the proceeding." Hospital argues its 501(c)(3) status is self-authenticating under Rule 902, SCRE,

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[6] 976 F. Supp. 2d 776, 784 (D.S.C. 2013), *aff'd*, 792 F.3d 364 (4th Cir. 2015). The *Drakeford* action was filed on October 4, 2005, alleging violations by Hospital between January 1, 2005, and November 15, 2006. *Id.* at 779-81.

[7] S.C. Code Ann. § 33-56-20(1)(a)(i) (Supp. 2018).

and was public information available to the public at all times before and since Myat's date of injury. Rule 902(1) & (5), SCRE, provide that a "document bearing a seal purporting to be that of the United States, or of any State" and "[b]ooks, pamphlets, or other publications purporting to be issued by public authority" are self-authenticating. *Cf. Hughes v. United States*, 953 F.2d 531, 540 (9th Cir. 1992) (holding tax forms were admissible as self-authenticating domestic public documents under Rule 902(1) of the Federal Rules of Evidence because they were certified under seal).

The trial court agreed with Myat that if Hospital was acting in a manner inconsistent with its stated charitable purposes such as would invalidate its 501(c)(3) status, the trial court had the authority to deny Hospital the protections of the Act. However, the trial court found no evidence supported a finding that Hospital acted in a manner inconsistent with its stated charitable purpose. Further, the court found the IRS had not taken any action to revoke Hospital's 501(c)(3) status. The court noted Hospital's tax counsel testified that on the date of Myat's injury, July 6, 2011, and the date of the final hearing in the case, March 8, 2016, Hospital met the definition of a charitable organization under both sections 33-56-20 and 33-56-170. Therefore, the trial court determined Hospital was a 501(c)(3) organization exempt from taxation at the time of Myat's injury, and Hospital's 501(c)(3) status qualified it as a charitable organization under that Act to which the statutory limit applied.

We find the statute, when read as a whole, intends for any organization that is tax exempt by the IRS pursuant to Section 501(c)(3) to be a charitable organization. Further, we find the trial court properly found Hospital was a 501(c)(3) corporation exempt from taxation at the time of Myat's injury. Therefore, the trial court did not err in finding Hospital qualified for the protections of the Act.

CONCLUSION

Accordingly, the decision of the trial court is

AFFIRMED.

LOCKEMY, C.J., and MCDONALD, J., concur.

FINKEL
LAW FIRM LLC

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bpadget@finkellaw.com

Reply to Columbia Office

April 18, 2019

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

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

cc: David Holler, Esq.
Brink Hinson, Esq.
Grayson Lambert, Esq.
Craig Garner, Esq.
Edward J. Bender, Esq.

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 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, SCRCP (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]

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[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 actively 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

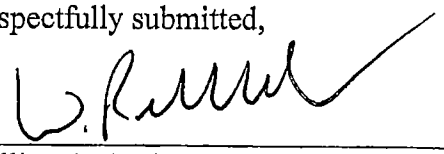
[8] R. p. 1652; March 8, 2016 Hearing Transcript, p. 27.

[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 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.

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.

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.

PROOF OF SERVICE

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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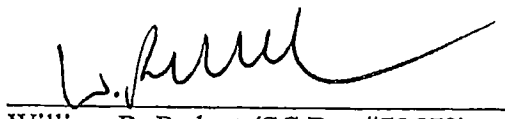

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IN THE STATE OF SOUTH CAROLINA
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v.

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 <u>not</u> 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 <u>actually</u> 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,
HOLDER & SMITH, LLC

David Holler

David C. Holler

DCH/jsm
enclosures

cc: William R. Padget, Esquire
Frances M. Hinson, IV, Esquire
William Grayson Lambert, Esquire
M. Craig Garner, Jr., Esquire
Edward Houseal Bender, Esquire

Lee, Erter, Wilson, Holler & Smith, LLC
Attorneys at Law
PO Box 580
Sumter, SC 29151

RECEIV

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

JUL 02 2(
SC Court of A

The South Carolina Court of Appeals

Win Myat, Appellant,

v.

Tuomey Regional Medical Center, Respondent.

Appellate Case No. 2016-000774

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

C.J.

J.

J.

Columbia, South Carolina

cc:
William R. Padget, Esquire
Francis M. Hinson, IV, Esquire
David Cornwell Holler, Esquire
William Grayson Lambert, Esquire

FILED
September 20, 2019

M. Craig Garner, Jr., Esquire
Edward Houseal Bender, Esquire
The Honorable R. Ferrell Cothran, Jr.