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

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APPEAL FROM SUMTER COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge



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Case No. 2012-CP-43-2030

Appellate Case No. 2016-000774

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Win Myat.....Appellant,

v.

Tuomey Healthcare System.....Respondent.

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**RESPONDENT'S BRIEF**

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## Statement of the Case

Plaintiff Win Myat ("Myat") filed a personal injury action against Tuomey on October 15, 2012. ROA pp 0024-0030. Myat amended his complaint on November 5, 2012. ROA pp 0031-0037. Tuomey answered the amended complaint on January 16, 2013.[1] ROA pp 0038-0040.

On August 21, 2015, Tuomey moved to amend its answer to assert the protections of *South Carolina Code* § 33-56-180, the Solicitation of Charitable Funds Act (hereinafter the "charitable cap"). ROA pp 0041-0043. Both the initial and amended complaints asserted, and Tuomey's answer conceded, that Tuomey was a charitable organization. ROA p 0025, ¶2; ROA 0032, ¶2; ROA 0038, ¶2. On August 24, 2015, the trial court granted Tuomey's motion to amend its answer to assert the charitable cap as a defense. ROA p 0096, line 1 through ROA p 1018, line 14; ROA p 1028, lines 18-20; ROA pp 1892-1894.

The case was tried before a jury beginning on August 31, 2015. ROA pp 1052, 1069. At the close of Tuomey's case in chief on September 2, 2015, Myat moved for a directed verdict on Tuomey's failure to offer evidence of its 501c3 status and the application of the charitable cap. ROA pp 1531-1532. Tuomey immediately moved to reopen its case in chief and requested the court take judicial notice of its 501c3 status and the charitable cap. ROA p 1533. Tuomey also offered to present evidence of its 501c3 status at that time. ROA p 1533.

The trial court took the matters of Tuomey's 501c3 status and the charitable cap under advisement and continued with the presentation of evidence and testimony to the jury. ROA pp

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[1]Tuomey has not included a detailed history of the scheduling orders in its Statement of the Case. Tuomey nonetheless asserts, as discussed fully in its argument, that Myat at all times was actually aware of the charitable cap. Tuomey will refrain from including "contested matters" in this portion of this brief pursuant to Rule 208(b)(C), *SCACR* and does not consent to be bound by Myat's statement of the case.

1536-1538. The parties agreed that Tuomey's 501c3 status and the application of the charitable cap did not present a question of fact for the jury. ROA p 1536.

Prior to receiving the jury's verdict on September 2, 2015, the trial court granted Tuomey's motion to reopen its case in chief on the issues of 501c3 status and the charitable cap. ROA pp 1612-1613. The trial court also granted Myat leave to conduct discovery prior to an evidentiary hearing on Tuomey's 501c3 status and the charitable cap. ROA pp 1620-1621.

Following the trial court's rulings on September 2, 2015, the jury returned a verdict of $2.5 million actual damages for Myat. ROA p 1614.

On March 8, 2016, the trial court conducted an evidentiary hearing on Tuomey's 501c3 status and the charitable cap. ROA pp 1626-1727.

By Order of April 7, 2016, the trial court reduced the verdict to $300,000, entered judgment, and denied Myat's outstanding motions. ROA pp 005-0023.

On April 14, 2016, Myat timely served notice of this appeal.

## Facts

Myat fell on July 5, 2011 while walking through the third floor of Tuomey hospital. Myat injured his knee. Myat filed suit on October 15, 2012 and amended the complaint on November 5, 2012. Tuomey answered the Amended Complaint on January 16, 2013.

On May 9, 2014, Myat underwent a discovery deposition. ROA p 1728, ¶ 5; deposition of Myat, Ex. ROA pp 1752-1890. During the deposition, Robert B. "Sam" Phillips represented Myatt. ROA p. 1728, ¶ 2; See deposition of Myat, Ex ROA pp 1752-1890. Myat's subsequent

attorney, William R. Padget, served initial discovery requests on Tuomey on July 3, 2014.[2] See ROA p 1008; ROA pp 1016-1018.

Tuomey responded to Myat's discovery on September 10, 2014. ROA p 1729, ¶ 8; ROA p. 999, 1004-1012. Interrogatory 1 sought "the names ... of all insurance companies which have liability insurance coverage relating to the claim...." ROA p 1743. 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 that 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.

After the case was placed on a trial roster on June 22, 2014, Padget contacted Tuomey's counsel requesting additional time to prepare for trial. See ROA p. 1729, ¶ 6. Counsel again discussed the statutory cap of $300,000. ROA p 1729, ¶6. Tuomey's summary judgment motion was continued beyond the July 28, 2014 and September 9, 2014 terms of court at Myat's request.

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[2]Padget claims in his letter of July 3, 2014 that Sam Phillips hand-delivered Myat's first discovery requests at Myat's deposition but that "Out of an abundance of caution, my paralegal will be serving these discovery requests upon[sic] via U.S. Mail under separate cover." Letter of July 3, 2014; and Letter of July 3, 2014 serving discovery.

ROA p. 1729, ¶ 7. A new discovery order was entered. 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 with this statement at the motion to amend hearing before the trial judge. ROA p 1729, ¶12.

At the August 24, 2015 motion to amend hearing, Tuomey counsel's affidavit on the issue of Myat's knowledge of the charitable cap was the only evidence submitted to the trial court. No other affidavits, testimony, or evidence was offered to the trial judge to refute Myat's actual knowledge of the charitable cap.

## Arguments

I. **Did trial court properly allow Tuomey to amend its answer where Myat had actual knowledge that Tuomey was a 501C3 corporation asserting the charitable cap, and Myat failed to demonstrate any evidence of detrimental reliance on the purported absence of a statutory cap during discovery, or at any time prior to the motion to amend.**

### A. Standard of Review

Trial courts "have wide latitude in amending pleadings and [w]hile this power should not be used indiscriminately or to prejudice or surprise another party, the decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal." *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct.App.1997). "The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice

has occurred." Id.

Rule 15, *SCRCP*, provides that leave to amend shall be freely given when justice requires and does not prejudice any other party. *Tanner v. Florence County Treasurer*, 336 S.C. 552, 521 S.E.2d 153 (1999). A motion to amend or supplement is addressed to the discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudice. *Tanner*. 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. It is the responsibility of the party opposing an amendment or supplemental complaint to establish prejudice. *Tanner*; *Duncan v. CRS Sirrine Engineers, Inc.*, 337 S.C. 537, 524 S.E.2d 115 (Ct. App. 1999). In considering potential prejudice to the opposing party, the court should consider whether the opposing party has had the opportunity to prepare for the issue being raised formally. *Duncan v. CRS Sirrine Engineers, Inc.*, 337 S.C. 537, 524 S.E.2d 115 (Ct. App. 1999).

Although amendments are to be liberally allowed, inexcusable delay, surprise to the opposing party, and similar circumstances may justify a refusal to allow the amendment. *Crowley v. Spivey*, 285 S.C. 397, 329 S.E.2d 774 (Ct. App. 1985). In the absence of such considerations, the trial judge abuses his discretion in denying a motion to amend. See *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 369 S.E.2d 156 (Ct. App. 1988) (a pretrial amendment case, also noting that the trial judge **should give reasons** for denying a pretrial motion to amend)(emphasis added).

"Amendments are liberally allowed within the sound discretion of the trial judge, and the opposing party must show prejudice to warrant reversal. [citations omitted]" *Weaver v Lentz*, 348 S.C. 672, 677, 561 S.E.2d 360, 363 (Ct. App. 2002). "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. [citation omitted]" Id.

B. Myat knew of the charitable cap, yet now he asserts substantial prejudice

Tuomey respectfully submits the trial court properly allowed Tuomey to amend its answer. In support of its motion to amend, Tuomey submitted the affidavit of counsel that Myat actually knew of the charitable cap throughout the litigation. ROA pp 1728-1730. By virtue of Tuomey's affidavit in support and September 2014 discovery responses, the trial court properly initiated his inquiry on the basis that Myat had actual knowledge of the statutory cap. ROA pp 1728-1730. This initial evidentiary basis, of course, was subject to being factually challenged by Myat. Myat did not, however, offer any evidence or testimony to refute Tuomey's evidence.

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[3] 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.[4] ROA p 1729.

In his brief, Myat claims he was "substantially prejudiced" by Tuomey's amended answer. Myat brief, p. 12. Myat claims that IF he knew of the statutory cap EARLIER, such knowledge would "trigger alternative remedies for the injured plaintiff." Myat brief, p. 14. Myat

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[3]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.

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

laments "discover has long since closed and witnesses' memories had faded." Id.

Myat argues he "didn't have the opportunity to name an individual employee or prepare, in discovery, a gross negligence case." Id. Myat argues he didn't have an "opportunity to meaningfully evaluate alternative remedies, including a potential workers' compensation claim." Myat brief, p. 15. Myat laments the statute of limitations for a workers' compensation claim expired.[5] Myat laments his spouse did not bring a loss of consortium claim relating to her injuries. Myat brief, p. 16. Myat's argument is in the nature of estoppel or detrimental reliance.

Myat asks this court to reverse Judge Cothran because he did not find Myat detrimentally relied upon Tuomey's original answer. Yet, in support of his detrimental reliance position, Myat failed to deny that he had actual knowledge of the charitable cap; and he also failed to offer even a scintilla of evidence that he actually did not know of the charitable cap or detrimentally relied upon Tuomey's initial answer without the charitable cap defense.

In support of his position he detrimentally relied upon Tuomey's original answer, Myat submitted no testimony to the trial judge. Myat failed to identity any witness, including himself. Myat failed to offer any witness(es) or evidence necessary to refute Toumey'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

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[5]Myat did not even initiate discovery until July 3, 2014, well beyond the notice requirements and the two year statute of limitation for filing a workers' compensation claim. See *South Carolina Code* §§ 42-15-20(A)-(B) and 40. "The burden of proof is upon the claimant who asserts an estoppel." *Hucks v. Green's Fuel of S. C.*, 247 S.C. 457, 148 S.E.2d 149 (1966).

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.

In seeking to persuade the trial judge to deny Tuomey's motion to amend, Myat did not deny actual knowledge of the statutory cap. Myat's counsel did not deny actual knowledge of the statutory cap. Myat completely failed to respond to Tuomey's evidentiary position that he knew of the statutory cap at all times. 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.

C. *James v Lister* is distinguishable because the Jameses had no knowledge of charitable cap and the issue of charitable cap was not raised after the jury reached its verdict.

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 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).

Initially it should be noted that in *James,* the Conway hospital did not seek to amend its answer and raise the statutory cap as a defense until its post-trial motions. 331 S.C. at 281, 500 S.E.2d at 200.[6] In the present case, Tuomey amended its answer before the trial began. In

[6] "The jury rendered a verdict against Conway Hospital for $1,000,000 to James and $500,000 to Brenda. Conway then moved to alter or amend the judgment to conform to *S.C.Code Ann.* § 33–55–210(A), which provides a liability limit of $200,000, asserting for the

*James*, the Court of Appeals noted "Conway's 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. In the present case, Myat was actually aware of the statutory cap during discovery and prior to trial. In *James*, plaintiff did not have an opportunity to conduct additional discovery before trial. In the present case, Myat did have an opportunity to seek additional discovery but failed to make such a request prior to trial.

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.

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first time that it was a charitable hospital." [underlining added]

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.

D. Estoppel or detrimental reliance

Assuming *arguendo* Myat lacked actual knowledge of the charitable cap, Myat still failed to demonstrate to the trial court that he suffered a prejudicial change in his position or detrimentally relied upon Tuomey's representations in the original Answer.

"Estoppel arises when a party, relying upon what another has said or done, changes his position to his detriment." *Gibbs v. Kimbrell*, 311 S.C. 261, 268, 428 S.E.2d 725, 729 (Ct.App.1993). A claim of estoppel includes elements for the party asserting estoppel and the party estopped. E.g., *Provident Life and Accident Ins. Co. v. Driver*, 317 S.C. 471, 477, 451 S.E.2d 924, 928 (Ct.App.1994) (listing the elements of equitable estoppel: as to the estopped party, a misrepresentation or non-disclosure, intent to induce the other party to act, and actual or constructive knowledge of the true facts; and as to the party claiming estoppel, lack of knowledge, or means of acquiring knowledge of the true facts, reasonable reliance, and prejudicial change of position). See *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 359, 628 S.E.2d 902, 912 (Ct. App. 2006) (indicating the lack of detrimental reliance is fatal to a claim of estoppel).

To prevail on a claim of estoppel (or detrimental reliance), Myat must establish that he relied upon Tuomey's original answer. This is a factual statement that neither Myat nor his

counsel ever made to the trial judge. Myat must demonstrate that Tuomey intended to induce Myat to rely upon its original answer and that Toumey had actual knowledge that the answer failed to raise the charitable cap as a defense. This is clearly refuted by Toumey's affidavit. ROA pp. 1728-1730.

Myat must also establish that he actually lacked knowledge that Tuomey was entitled to the charitable cap, and that he lacked a means of acquiring actual knowledge that Tuomey was entitled to the charitable cap. Myat failed to offer such proof at the motion to amend hearing. As set forth in Question III below, Tuomey submits that Myat (and the trial court) should take judicial notice that Tuomey is a charitable organization and therefore is entitled to the charitable cap.

Finally, to prevail on establishing estoppel, Myat would have to establish his reasonable reliance upon Tuomey's original answer, and that his detrimental reliance upon the that answer resulting in a prejudicial change of position in the litigation. Tuomey respectfully submits that no such evidence was offered to the trial court at the motion to amend hearing on August 24, 2015.

E. The trial court properly considered Tuomey counsel's affidavit on the issue of notice of the charitable cap

Myat contends Tuomey counsel's affidavit was "desperately filed in support of the Motion to amend [and] ignores the commands of the ADR rules." Myat brief, p. 15, note 48. Myat is mistaken. Offers of compromise are not admissible to prove liability. See Rule 408, SCROE, which provides:

> Evidence of ... offering or promising to accept, a valuable consideration in compromising or attempting to compromise a

> claim which was disputed as to either validity or amount, is not admissible to prove liability.... Evidence of conduct or statements made in compromise negotiations is likewise not admissible [to prove liability]. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay....

Courts favor compromise, and thus evidence relating to settlements is generally not admissible to prove liability. *Commerce Center of Greenville, Inc. v. W. Powers McElveen & Associates, Inc.*, 347 S.C. 545, 556 S.E.2d 718 (Ct. App. 2001).

Rule 408 "does not [however] require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." At issue before Judge Cothran was whether Myat had actual knowledge of the charitable cap. Tuomey submitted counsel's affidavit. ROA pp 1728-1730. Myat failed to object to that evidence at the August 21, 2015 hearing. ROA pp 996-1029. Myat failed to offer any evidence in contradiction. Id. Myat failed to even deny the substance of the statement that Myat knew of the statutory cap. Id.

Rule 408 "also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, [or] negativing a contention of undue delay...." In the present action, Myat contends Tuomey unduly delayed raising the statutory cap as a defense. Tuomey's affidavit properly addressed the issue of undue delay and therefore was properly considered under Rule 408.

The ADR rules also do not prohibit Tuomey's affidavit evidence Myat had actual knowledge of the statutory cap. ADR Rule 6(e) provides:

> Confidentiality. Communications during the mediation settlement conference shall be confidential in accordance with Rule 8.

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.

The trial court properly relied upon Tuomey's affidavit evidence that Myat had actual knowledge of the charitable cap. Myat failed to raise any objection to this evidence. Myat failed to offer evidence to the contrary. Tuomey's evidence is both relevant and admissible under Rule 408, ROE and ethical rules. Ethics Rule 3.4(e), Rule 407, SCACR, provides:

> Rule 3.4. Fairness to opposing party and counsel
> A lawyer shall not:
> (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;

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

Myat failed to object to Tourney's evidence under Ethics Rule 3.7(a), Rule 407, *SCACR* ("Lawyer as a witness"). If Myat had offered evidence he lacked knowledge of the charitable cap, the trial court may have been required to address Rule 3.7(a) in reviewing Holler's affidavit.

However, Myat offered no such evidence. Myat made no such objection. Judge Cothran therefore was not required to conduct an inquiry under Rule 3.7(a). In the absence of Myat's "contested" evidence, Tuomey counsel's affidavit essentially "relate[d] to an uncontested issue" and therefore was properly considered under Ethics Rule 3.7(a).

Myat and his counsel had an opportunity to challenge Tuomey's evidence that he was on notice of the charitable cap and failed to do so. Myat, Tuomey's contends, acquiesced in the truth of his knowledge of the charitable cap because it was true. In the absence of any evidence of detrimental reliance, Judge Cothran properly allowed Tuomey's amended answer.

F. Myat's wife's consortium claim is a separate lawsuit and cause of action

Myat laments his spouse did not bring a loss of consortium claim relating to her injuries. Myat brief, p. 16. His wife's consortium claim, however, is a separate lawsuit with a separate cause of action owned by another person ... his spouse. *South Carolina Code* § 15-75-20 provides:

> Any person may maintain an action for damages arising from an intentional or tortious violation of the right to the companionship, aid, society and services of his or her spouse. Provided, that such action shall not include any damages recovered prior thereto by the injured spouse. This section shall not be retroactive but shall be effective only on cause of action arising after June 25, 1969.

"Under South Carolina law, unlike that of some other states, loss of consortium is an independent action, not derivative." *Preer v Mims*, 323 S.C. 516, 521, 476 S.E.2d 472, 475-476 (1996); *Hiott v. Contracting Servs.*, 276 S.C. 632, 281 S.E.2d 224 (1981) (where husband instituted a personal injury action and wife, an action for loss of consortium, trial court erred in granting a stay on wife's action while her husband's action was pending on appeal); *Priester v.*

*Southern Ry. Co.*, 151 S.C. 433, 149 S.E. 226 (1929) (directed verdict against wife, because of her contributory negligence in a federal action, did not bar husband's cause of action for loss of consortium in state court); *Page v. Crisp*, 303 S.C. 117, 399 S.E.2d 161 (Ct.App.1990) (where wife brought personal injury action and husband instituted a suit for loss of consortium, the claims involved two separate lawsuits). Id. "Although loss of consortium is an independent action, case law has held that the right of action does not accrue until the loss of the services, society and companionship of the spouse has actually occurred, which has been defined as the point when the spouse sustained the injuries." 323 S.C. at 521, 476 S.E.2d at 475.

Myat cannot claim he detrimentally relied upon Tuomey's initial answer and thus his wife failed to pursue her separate claim for loss of consortium.

G. Myat's claim he lost the opportunity to explore alternative remedies fails

Myat claims that IF he knew of the statutory cap EARLIER, such knowledge would "trigger alternative remedies for the injured plaintiff." Myat brief, p. 14. Myat laments "discover has long since closed and witnesses' memories had faded." Id. 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).

The issue is whether Myat, and his counsel, objectively recognized that he may have had separate causes of action (gross negligence, workers' compensation, loss of consortium). If he objectively knew or should have known of these potential claims, then the statute of limitations begins to accrue. 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. **DID THE TRIAL COURT PROPERLY ALLOW TUOMEY TO RE-OPEN ITS CASE WHERE MYAT WAS ALLOWED DISCOVERY ON TUOMEY'S 501C3 STATUS AND THE CHARITABLE CAP, AND THEREBY SUFFERED NO PREJUDICE AS A RESULT OF THE GRANT OF THE MOTION.**

A. Standard of Review

Tuomey respectfully submits the trial court properly allowed it to reopen the evidence. The decision to reopen the evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *Lites v. Taylor*, 284 S.C. 316, 326 S.E.2d 173 (Ct. App. 1985); *Brown v. La France Industries, a Div. of Riegel Textile Corp.*, 286 S.C. 319, 333 S.E.2d 348 (Ct. App. 1985). The trial judge enjoys considerable latitude and discretion in these matters, and the opposing party must demonstrate prejudice before the judge's decision will be reversed. *Id.;* See also *Spinx Oil Co., Inc. v. Federated Mut. Ins. Co.*, 310 S.C. 477, 427 S.E.2d 649 (1993) (generally, the trial judge is endowed with considerable latitude and discretion in allowing a party to reopen a case); *Brenco v. South Carolina Dept. of Transp.*, 377 S.C. 124, 659 S.E.2d 167 (2008) (same);

"It is a well nigh universally recognized principle, and a common practice, for the trial court to allow a case to be reopened and additional evidence introduced in order to prevent a nonsuit or directed verdict, where counsel for plaintiff has omitted evidence by accident, inadvertance, or even because of mistake or misapprehension as to the necessity for offering a particular witness or particular evidence. A matter of this kind is 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);

Courts have allowed parties to reopen the case after closing argument had begun, *Wingo v. Caldwell*, 35 S.C. 609, 14 S.E. 827 (1892); *State v. Thomas*, 42 S.C.L. 295, 8 Rich. 295, 1855 WL 3111 (Ct. App. Law 1855), and after arguments have been made. *Daniel v. Tower Trucking Co.*, 205 S.C. 333, 32 S.E.2d 5 (1944); Alex Sanders, *Trial Handbook for South Carolina Lawyers*, § 8:5 (2014). "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);

"In South Carolina, it is well established that the decision of the trial judge to allow a party to reopen his case will not be reversed unless the opposing party was prejudiced thereby. See McKay, Robinson, and Tate, *Practice and Procedure*, 11 S.C.L.Q. 93 (1958). A trial judge enjoys considerable latitude and discretion in these matters." *Brown v. La France Industries, a Div. of Riegel Textile Corp.*, 286 S.C. 319, 324-325, 333 S.E.2d 348, 351 (Ct. App. 1985)("In the case before us, La France suffered no prejudice by the reopening of the claimants' case. La France was expressly authorized to present rebuttal testimony and failed to do so. We therefore find La France's contention to be without merit. [citations omitted]");

"The circumstance that the plaintiffs' counsel omitted to tender the book formally in evidence before the argument of the cause was gone into, ought not, I think, to deprive him of any benefit he might derive from it. The rule which prohibits the introduction of new evidence after the evidence is closed, was intended to guard against the frauds and inconvenience which might ensue from a different practice. But when important evidence has been omitted by the inadvertence of counsel or from any other cause to which no suspicion attaches, it is not unusual

to admit it at any stage of the case before the jury have retired, and I have myself, when on circuit, sometimes admitted evidence when on summing up to the jury the counsel for the first time discovered the omission." *Allen v Watson*, 2 Hill (SC) 319, 20 S.C.L. 319 (1834);

In the present case, the trial court allowed Myat 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.

The trial court acted within its discretion to allow Tuomey to reopen its case, and 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. Following an evidentiary hearing, did the trial court properly determine Tuomey was a 501c3 and entitled to the charitable cap, and thereby reduced the verdict to $300,000?

After a March 8, 2016 hearing on the merits, the tr vial court properly determined Tuomey was entitled to the charitable cap. See Moran testimony generally. ROA pp 0313-0739. Tuomey respectfully submits the factual finding of the trial court should be affirmed. The issues addressed in *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) do not properly address the I.R.S.' definition of charitable entity and were properly not considered by the trial court.

Tuomey respectfully submits that an evidentiary hearing was not necessary; that the trial court should have taken judicial notice of Tuomey's 501c3 status and the application of the charitable cap.

Under Rule 201(d), SCRCP, the trial court may have taken judicial notice of Tuomey's "charitable organization" status as exempt from taxation under Section 501(c)(3) of the *United States Code*, and therefore was entitled to the limits of liability under *South Carolina Code* § 33-56-180. Rule 201(d) allows "the court may take judicial notice at any stage of the proceeding."

Tuomey respectfully submits that 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.

Tuomey, for the reasons set forth below, asserts that it is entitled to judicial notice of its 501c3 status under Rule 201 and the binding and persuasive case law of South Carolina, the Fourth Circuit and other jurisdictions addressing the issue. A party's 501c3 status is [and should be] routinely resolved without discovery or evidentiary challenge.

In support of its position, Tuomey respectfully submits that 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. Rather, the imposition of statutes of limitation are jurisdictional and matters for the trial court, not a jury.

### A. Tuomey's 501c3 status charitable organization under S.C. Code § 33-56-180 is self authenticating under the Rules of Evidence

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.

Tuomey respectfully submits that Plaintiff does NOT have the right to litigate its 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.").[7] 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.

Rule 201, SOUTH CAROLINA R. CIV. P., provides *inter alia*:

> (a) Scope of Rule. This rule governs only judicial notice of adjudicative facts;
> (b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned;
> (c) When Discretionary. A court may take judicial notice, whether requested or not;
> (d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information;
> (e) Opportunity to Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken;
> (f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding;

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[7] *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.

...

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:

> Every court of this State shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States when such common law or statutes shall have been put in issue by the pleadings.

*South Carolina Code* § 19-3-120. The Uniform Judicial Notice of Foreign Law Act continues under *South Carolina Code* § 19-3-110:

> The court may inform itself of such laws in such manner as it may deem proper and may call upon counsel to aid it in obtaining such information.

The Uniform Judicial Notice of Foreign Law Act continues:

> The determination of such laws shall be made by the court and not by the jury and shall be reviewable.

*South Carolina Code* § 19-3-140.

B. **SOUTH CAROLINA COURTS TAKE JUDICIAL NOTICE:**

"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).

Other jurisdictions similarly use judicial notice to recognize the legal status of public entities. Eg: "The Court takes judicial notice of the fact that NCMC is a state actor." *Hamad v. Nassau County Medical Center*, 191 F.Supp.2d 286, FN 1 (D.C. NY 2000); *Magee v. Nassau County Medical Center*, 27 F.Supp.2d 154 1998)("The Court takes judicial notice that NCMC is a public entity.");

"We also consider matters of which the court may or must take judicial notice [citation omitted] which in this case include statutes of the United States and regulations of the Internal Revenue Service..." citing the statutory equivalent of Evidence Rule 201, *Freis v. Soboroff*, 81 Cal.App.4th 1102, 97 Cal.Rptr.2d 429 (2000); *Kessel v. Albetis*, 56 Barb. 362 (Sup. Ct. NY 1870)("The court is bound to take judicial notice of the statutes relating to internal revenue...");

"University Hospital has requested that the court take judicial notice of its bylaws. .... As the bylaws describe the powers and duties granted to University Hospital's board of trustees and medical staff, their consideration is necessary to determine whether the hospital is an independent entity with respect to its degree of legal autonomy from the Ohio State University of which it is a unit and any other state governing bodies. Plaintiffs do not oppose this request. The court therefore takes judicial notice of the bylaws.", *Daniel v. American Bd. of Emergency Medicine*, 988 F.Supp. 127, 155 (W.D. NY 1997);

For an illustrative discussion of judicial notice: In *Enroth v. Memorial Hosp. at Gulfport*, 566 So.2d 202, 203-204 (Sup. Ct. Miss 1990), the Enroths on appeal from a judgment:

> arguing first that the record was devoid of a factual predicate for the Court's finding that Memorial Hospital was a political subdivision of the state and, further, that this

is the sort of fact of which the Court could not take judicial notice and, thereafter, that, even if the Chancery Court's factual premises were adequately grounded, Memorial Hospital as a matter of law enjoys no protection from the running of limitations.

The Supreme Court remanded to the trial court:

> with instructions that the Court advise us specifically of the basis of the foregoing finding. If the finding is predicated upon judicial notice, the Court should, of course, afford the Enroths a reasonable opportunity to be heard in opposition. See Rule 201(e), *Miss.R.Ev.*

Following a second appeal, the Mississippi Supreme Court addressed the question presented in this case:

> Our first question is whether the ownership, operation and status of a facility such as a hospital are matters, the factual components of which may be judicially noticed. Our point of beginning is Rule 201(b), *Miss.R.Ev.*, which provides
>
> > Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

The question then becomes, how the Court should go about the business of judicially noting these facts?

> It is a cliche of judicial notice that a fact is not judicially noticeable by virtue of being known to the judge; conversely, the mere fact that the judge happens to be unacquainted with the fact of common knowledge should not bar him from taking judicial notice of it. This situation is likely to arise when a judge sits in another district and the fact to be noticed is a matter known only within the territorial jurisdiction of that court or where some local fact is to be noticed on appeal. But even where the judge thinks that he knows the fact to be a matter of common knowledge, it

> would be a salutary practice to check his understanding against other sources of information when this can be conveniently done....
>
> 21 C. Wright & K. Graham, Federal Practice & Procedure: Evidence § 5108 at 513-14 (1977).
>
> A court may look to any source it deems helpful and appropriate, including official public documents, records and publications. The Court is not limited by rules of evidence otherwise enforceable in judicial proceedings. *Witherspoon v. State ex rel. West, 138 Miss.* 310, 320, 103 So. 134, 136-37 (1925) said:
>
> > He may resort to ... government publications, dictionaries, encyclopedias, geographies, or other books, periodicals and public addresses.
>
> (citing, inter alia, *Puckett v. State*, 71 Miss. 192, 195, 14 So. 452, 453 (1893)). Nothing in Rule 201 casts doubt on *Witherspoon*.

In reviewing sources utilized by the trial court in taking judicial notice, the *Enroth* court notes:

> In the case at bar, the Court recited and listed the sources it had considered and included among those (1) numerous newspaper articles discussing the nature, operation and funding of Memorial Hospital, (2) conversations with physicians, (3) conversations with the Chancery Judge's own niece who was an employee at the hospital, (4) conversations with a lawyer not involved with this particular case but who was familiar with the matter, and (5) the fact that, before becoming Chancery Judge and in his prior capacity as a lawyer, he had been involved in a lawsuit regarding the hospital in which its legal status had been an issue. We hold these bases adequate that the Court may judicially know the factual components of the Hospital's status.

Tuomey is properly recognized as a 501c3 charitable organization under Rule 803(8), *SCRE*, which provides, *inter alia*:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to

duty imposed by law as to which matters there was a duty to report....";

C. **SELF-AUTHENTICATING EVIDENCE**

Rule 902(5), *SCRE*, provides, *inter alia*:
"Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: ...

(5) Books, pamphlets, or other publications purporting to be issued by public authority....";

Official records of various government entities, including the I.R.S. have routinely been established by judicial notice. See *Hughes v. U.S*, 953 F.2d 531 (9th Cir. 1992)(taxpayer may not collaterally attack admissibility of IRS records; records fall within the hearsay exception of Rule 803(8) and are self-authenticating under Rule 902(1)); *In re Garm*, 114 B.R. 414 (M.D. Penn. 1990)("the document in question is a Certificate of Official Record from the Internal Revenue Service under seal of the Director of the Internal Revenue Service Center, Mid–Atlantic Region, Philadelphia, Pennsylvania. Under Rule 902(1) of the *Federal Rules of Evidence* this document under seal is self-authenticating and no requirement of extrinsic evidence proving authentication was necessary at time of trial."; "We find that the document in question fits squarely within this hearsay exception [of Rule 803(8)(Public Records and Reports]".); *U.S. v. Ryan*, 969 F.2d 238, 240 (1992)("United States Treasury Department's certified computer records, which demonstrated that the defendant failed to file income tax returns, were admissible as self-authenticating documents."); *U.S. v Thurner*, 21 Fed.Appx. 477, 478 (Ct. App. 7th Cir. 2001)(IRS "records are self-authenticating." citing *U.S. v Ryan, supra*); *Brewer v U.S.*, 764 F.Supp. 309, 318 (D.C. NY 1991)("Consistently, courts have held that [IRS] Form 4340 is self-authenticating.");

"Plaintiffs rather are attacking the entire system of the IRS in transcribing and storing information instead of pointing to any specific item or possible error. This court is not the proper forum for such an attack." ... "The "public records" exception to the hearsay rule admits the [IRS records.]" citing Rule 803(8), the public records exception to hearsay); *U.S. Burdine*, 205 F.Supp.2d 1175, 1178 (2002)('Forms 4340 are admissible into evidence as self-authenticating official records of the United States, and these documents carry a presumption of correctness.'", *Rossi v U.S.*, 755 F.Supp. 314, 317 (D.C. Or. 1990);

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–HFF–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);

The case of *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D.C. MD 2007) offers a cogent discussion of self-authentication of evidence in the 21st century:

> In *Equal Employment Opportunity Commission v. E.I. DuPont de Nemours and Co.*, the court admitted into evidence printouts of postings on the website of the United States Census Bureau as self-authenticating under Rule 902(5). 2004 WL 2347556 (E.D.La. Oct.18, 2004). Given the frequency with which official publications from government agencies are relevant to litigation and the increasing tendency for such agencies to have their own websites, Rule 902(5) provides a very useful method of authenticating these publications. When combined with the public records exception to the hearsay rule, Rule 803(8), these official publications posted on government agency websites should be admitted into evidence easily."; the court extensively discussed the authentication and admissibility of electronically stored information;

citing *Paralyzed Veterans of America v. McPherson, supra*, as follows:

> Federal courts consider records from government websites to be self-authenticating under Rule 902(5). See, e.g., *Estate of Gonzales v. Hickman*, No. ED CV 05-660 MMM (RCx), 2007 WL 3237727, *2 n. 3 (C.D.Cal. May 30, 2007) (unreported) (finding report issued by the Inspector General of the State of California on the Office of the Inspector General's website to be self-authentic); *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 551 (D. Md. 2007) ("Given the frequency with which official publications from government agencies are relevant to litigation and the increasing tendency for such agencies to have their own websites, Rule 902(5) provides a very useful method for authenticating these publications. When combined with the public records exception to the hearsay rule, Rule 803(8), these official publications posted on government agency websites should be admitted into evidence easily"); *United States ex rel. Parikh v. Premera Blue Cross*, No. C01-0476P, slip op., 2006 WL 2841998, *4 (W.D.Wash. Sep.29, 2006) (determining documents found on government websites to be self-authenticating);

> *Hispanic Broad. Corp. v. Educ. Media Found.*, No. CV027134CAS (AJWX), 2003 WL 22867633, *5 n. 5 (C.D.Cal. Oct.30, 2003) (unreported) (holding, "exhibits which consist of records from government websites, such as the FCC website are self-authenticating").
>
> ...
>
> Moreover, "[a] trial court may presume that public records are authentic and trustworthy. The burden of establishing otherwise falls on the opponent of the evidence, who must come 'forward with enough negative factors to persuade a court that a report should not be admitted.' " *Gilbrook v. City of Westminster*, 177 F.3d 839, 858 (9th Cir. 1999) (quoting *Johnson v. City of Pleasanton*, 982 F.2d 350, 352 (9th Cir.1992)). Bowen points to nothing in particular in challenging the authenticity or trustworthiness of what are printouts of her official state website. Defendant Bowen's objection to the printouts is accordingly OVERRULED.";

As cited by Judge Childs and Judge Herlong, *Williams v. Long*, 585 F.Supp.2d 279, 686–89, 688 n. 4 (D. Md. 2008), better describes the self authentication features of a government website:

> "The printed webpage from the Maryland Judiciary Case Search website is self-authenticating under Rule 902(5) for the reasons discussed above. First and foremost, the Maryland Judiciary is a branch of the Maryland State Government; therefore, any online "official publication" issued by the Maryland Judiciary would be self-authenticating. See *Fed.R.Evid.* 902(1), (5). Second, the URL on the top of the printed webpage identifies that the results are in fact from the website. Third, the first page features a caption, stating, "Maryland Judiciary Case Search Results," and the next page states, "District Court of Maryland." Accordingly, there is no doubt that these results were published on the website of a public authority. Thus, they are self-authenticating."

As cited by the trial court order of Judge David C. Norton in *Koon v Toal*, 2015 WL 6466441 [C/A No. 4:15-cv-3357 DCN], signed October 26, 2015, n. 1:

> This Court takes judicial notice of materials in court records from Plaintiff's prior court proceedings. See *Fletcher v. Bryan*, 175 F.2d 716, 717 (4th Cir. 1949); see *Aloe Creme Laboratories, Inc. v. Francine Co.*, 425 F.2d 1295, 1296 (5th Cir. 1970)(a federal court

> may take judicial notice of the contents of its own records); see also *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); *Williams v. Long*, 585 F. Supp. 2d 679, 686-88 & n.4 (D. Md. 2008) (collecting cases indicating that postings on government websites are inherently authentic or self-authenticating); See also *Colonial Penn Ins. Co. v. Coil*, 887 F. 2d 1236, 1239 (4th Cir. 1989) (federal courts may take judicial notice of proceedings in other courts if those proceedings have a direct relation to matters at issue);

Government websites are often the subject of judicial notice. "The Court takes judicial notice of the publicly available information on the IRS website." *Linchpins of Liberty v. United States*, 71 F.Supp.3d 236, FN 7 (D.C. DC 2014); "the Court has taken judicial notice of this description on the IRS website." *Irish v Ferguson*, 970 F.Supp.2d 317, FN 47 (M.D. Penn. 2013); *Arizona Libertarian Party v Reagan*, – F.3d –, 2015 WL 4664606 (9th Cir. April 24, 2015)("We may take judicial notice of 'official information posted on a governmental website, the accuracy of which [is] undisputed.' *Dudum v. Arntz*, 640 F.3d 1098, 1101 n. 6 (9th Cir. 2011) (citing *Daniels–Hall v. Nat'l Educ. Ass'n*, 629 F.3d 998–99 (9th Cir. 2010))." ); *Swindol v Aurora Flight Sciences Corp*, – F.2d –, 2015 WL 5090578 (5th Cir. August 28, 2015)(5th Cir. Court of Appeals *sua sponte* moved to amend complaint to establish diversity jurisdiction holding: "We follow *Kaufman* to the extent it supports the taking of judicial notice of public documents establishing Aurora's citizenship." citing Rule 201(b), *Federal Rules of Evidence*, which mirrors Rule 201, *South Carolina Rules of Evidence*.); *Johnson v United States Steel Corporation*, – Cal. Rptr.3d –, 2015 WL 5120242 (CA Ct. App. 1st District, September 1, 2015)("Court of Appeals

would take judicial notice of government report on toxicological profile for benzene."); *Securities and Exchange Commission v Alexander*, – F.Supp.3d, 2015, 2015 WL 4397421, FN. 3 (Dist. Ct., NDCA July 17, 2015)("The Court may also take judicial notice of the SEC's attestations that a search of SEC records and files do not reveal any registration documents related to this action. (citation omitted) The Court therefore GRANTS Plaintiff's request for judicial notice."); *Clements v Sanofi-Aventis, U.S., Inc.*, – F.Supp.3d –, FN 2, 2015 WL 3648911 (D.C. NJ June 11, 2015)(judicial notice of FDA approvals of drug Sculptra "are also matters of public record, appropriate for judicial notice under FRE 201"); *U.S., ex rel. Modglin v DJO Global, Inc.*, – F.Supp.3d –, 2015 WL 4111709 (C.D. CA May 8, 2015)("Under Rule 201, the court can take judicial notice of "[p]ublic records and government documents available from reliable sources on the Internet," such as websites run by governmental agencies." ... citing *Paralyzed Veterans of Am. v. McPherson*, No. C 06–4670, 2008 WL 4183981, *5 (N.D.Cal. Sept. 8, 2008) ('Information on government agency websites has often been treated as properly subject to judicial notice'). "The court therefore grants defendants' request for judicial notice.");

### D. JUDICIAL NOTICE MAY BE TAKEN AT ANY STAGE OF THE PROCEEDING. SOUTH CAROLINA EVID. RULE 201.

Tuomey respectfully submits that judicial notice of 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).

**E. S.C. CODE § 33-56-180 PREDICATES IMMUNITY ON 501C3 STATUS**

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.

**F. SECRETARY OF TREASURY HAS EXCLUSIVE JURISDICTION TO DETERMINE 501C3 STATUS**

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.

"This section governing declaratory judgments relating to status and classification of organizations under section 501 of this title defining "charitable organization," prescribes an exception to usual rule that United States Court of Claims does not have jurisdiction of declaratory judgment actions. *Northern California Central Services, Inc. v. U.S.*, 591 F.2d 620, 219 Ct.Cl. 60 (1979). See also, 28 *U.S.C.A.* § 2201 (entitled "Creation of remedy"), provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Tuomey respectfully submits that the trial court lack jurisdiction to grant relief under tax law except as provided in 26 U.S.C.A. § 7428 and only at the request of the tax entity, or as the statute defines the person to be a Petitioner. In this case, Tuomey would be the petitioner, and only Tuomey could challenge the Secretary's determination in the district court. The Treasury Secretary alone has the standing to revoke or rescind Tuomey's 501c3 tax exempt status. *In re*

*Heritage Village Church and Missionary Fellowship, Inc. v. United States*, 87 B.R. 401 (1988); *Bob Jones University v United States*, 461 U.S. 574 (1983); An "assessment" of taxes is a formal, discrete act with specific legal consequences. The IRS makes an assessment of unpaid taxes only after a notice of deficiency is sent to the taxpayer. *In re Carlson*, 580 F.2d 1365, 1368 (10th Cir. 1978). See 28 *U.S.C.A.* § 1346(a)(1)(district court has original jurisdiction of "any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected...."); 26 U.S.C.A. § 6303 ("Notice and demand for tax"); *Conway v Commissioner of Internal Revenue*, 137 T.C. 209 (2011).

The ability to challenge the I.R.S. determination is jurisdictional. 28 U.S.C. § 1491(a)(1) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.");

Other state courts have concluded they lack jurisdiction to challenge such a claim. "Claims against the United States were not raised and could not have been raised in the New York lawsuits because New York State Courts do not have jurisdiction to hear issues of federal tax law.", *Imprimis Investors LLC v. U.S.*, 83 Fed.Cl. 46, 66 (U.S.F.C. 2008);

Tuomey respectfully submits that its 501c3 tax exempt status is a matter of public record and available from the Internal Revenue Services government website; http://apps.irs.gov/app/eos/. Tuomey's 501c3 tax exempt status has been available on the IRS website since before the date of Plaintiff's injury; See generally, Donald L. Korb, Chief Counsel, Internal Revenue Service 1965 - present, *The Four R's Revisited: Regulations, Rulings, Reliance,*

*and Retroactivity in the 21st Century: A view from within*, 46 Duq. L. Rev. 323 (Spring 2008);

As a 501c3 tax exempt organization, Tuomey files an IRS Form 990 (Return of Organization Exempt From Income Taxation) annually, and the IRS has widely distributed this information to the public though the internet since year 2002, a time before Plaintiff's date of injury; See https://bulk.resource.org/irs.gov/eo/readme.html; Under federal law, Tuomey is required to provide an IRS Form 990 to any person upon request; See https://bulk.resource.org/irs.gov/eo/doc/about.html;

In addition to receiving this information from the IRS, multiple non-profit and for-profit organizations provide IRS Form 990's to the public through the internet: See, Eg. http://nccs.urban.org/; https://www.citizenaudit.org/; http://www.guidestar.org/Home.aspx; and http://www.metmuseum.org/about-the-museum/annual-reports

## Conclusion

Tuomey respectfully submits the trial court acted within his discretion to allow its 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 the trial court should be affirmed.

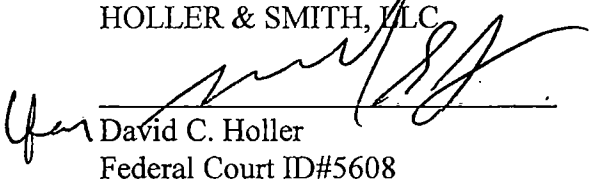
The trial court properly allowed Tuomey to re-open in case in chief on the issue of 501c3 status and the charitable cap. Myat was allowed ample discovery prior to a hearing on those issues. Myat has failed to show any prejudice as a result of reopening of the evidence.

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 property 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, faire, 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,

LEE, ERTER, WILSON,
HOLLER & SMITH, LLC



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June 15, 2017

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,

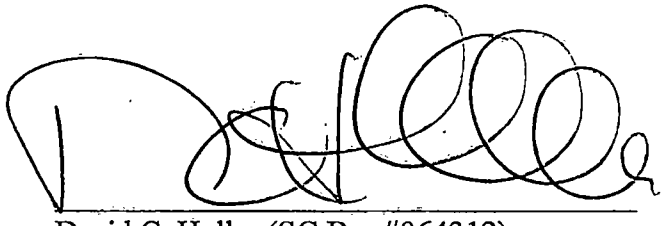
v.

Tuomey Healthcare System.....Respondent.

## CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent hereby certifies that the Respondent's Brief complies with SCAR 211(b).

RESPECTFULLY SUBMITTED.



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