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

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S.C. SUPREME COURT

Case No. 2012-CP-43-2030

Appellate Case No.: 2016-000774

Win Myat..Appellant,

v.

Tuomey Healthcare System..Respondent.

APPELLANT'S FINAL REPLY BRIEF

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Francis "Brink" Hinson (S.C. Bar No. 74917)

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Appellant Win Myat submits this Reply Brief in support of his arguments seeking reversal of the trial court order finding Respondent entitled the protections of the Solicitation of Charitable Funds Act, S.C. Code Ann. §§ 33-56-170 &180 ("SCFA").

I. RESPONDENT'S CLAIMS OF ACTUAL NOTICE FAIL BECAUSE APPELLANT HAD ALREADY SUFFERED LEGAL PREJUDICE BY THE TIME RESPONDENT CLAIMS TO HAVE ASSERTED ITS SCFA DEFENSE.

The trial court erred in granting Respondent leave to belatedly amend its pleadings on the morning of trial to assert its SCFA defense. It is undisputed that Respondent did not seek to plead the cap provided by the SCFA as a defense until the eve of trial and that the first time Respondent ever made written mention of its SCFA defense was by way of its Answers to Plaintiff's Interrogatories dated September 10, 2014. Consideration of the timeline of events is critical when evaluating the prejudice suffered by Appellant.

The fall and injury at issue in this case occurred on July 5, 2011. By the time Respondent first made any written statement regarding its potential SCFA defense (in the Interrogatories of Sept. 10, 2014), the three-year statute of limitations had already expired on Appellant's claims against the individual employees responsible for the fall hazard. Thus, due to Respondent's still unexplained failure to timely plead its affirmative defense, Appellant plainly lost a meaningful opportunity to pursue the alternative remedy of bringing claims against the individual employees.

Further, the two-year statute of limitations on Appellant's potential worker's compensation claim had also expired by the time Respondent made written mention of its potential SCFA defense, let alone actually pleaded the affirmative defense. Appellant's lost opportunity to pursue alternative remedies is the identical prejudice that this Court specifically recognized in James v. Lister, 331 S.C. 277, 500 S.E. 2d 198 (Ct. App. 1998). In that case, this

Court decided that a party suffering such prejudice requires denial of leave to amend. Respondent's attempt to distinguish James v. Lister due to notice to Appellant before trial fails because notice prior to trial does not remedy the prejudice Appellant has suffered. The Appellant's time to pursue those alternative remedies had still passed.

Respondent further claims that its counsel's Affidavit, which evidences conversations between Respondent's counsel and Appellant's prior counsel about its SCFA defense, went unchallenged at the hearing. Again, the timeline is critical to evaluating the prejudice Appellant suffered due to Respondent's last-minute addition of a new affirmative defense. By order entered April 30, 2015, this case had been set for date certain trial to begin on August 27, 2015. Respondent's phone call to the trial court and Respondent's filing of the Motion to Amend occurred on Friday, August 21, 2015. The trial court conducted a hearing on the Motion to Amend at the start of the scheduled trial, on the morning of Monday, August 24, 2015. Put simply, because the conversations claimed by Respondent's Affidavit were made to Appellant's prior counsel, and no one else was a party to those conversations, Appellant had no meaningful opportunity to gather facts and/or affidavits to oppose the statements made by counsel in the Affidavit in Support of the Motion to Amend.[1] Nonetheless, a counter-affidavit was not necessary; as all the information needed to fully evaluate Appellant's lost opportunity to pursue these alternative remedies could and can be gleaned from the timeline established by the pleadings in this case. However, when ruling on the Respondent's last-minute Motion to Amend, the trial court failed to consider the timeline of these events and Appellant's lost alternative remedies.

[1] Attempts to contact Appellant's prior counsel (Robert B. Phillips, Esq.) during those two days over the weekend before the scheduled date certain trial were unsuccessful and trial counsel was making other necessary trial preparations.

Moreover, a casual conversation between attorneys about a putative defense does not amount to properly setting up a legal defense. An attorney for a Plaintiff 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 being brought. So too, it is axiomatic that conversations between lawyers about putative defenses does 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,[2] and mentioning potential defenses in conversation is no substitute for formally 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 triggers the duty of a claimant evaluate and pursue alternative remedies. To so find would render the issues framed by the pleadings absolutely meaningless, and eviscerate counsel's right to rely on those pleadings.

All defenses must be timely pleaded so as not to prejudice the opposing party. Respondent's reliance upon Parker v. Spartanburg County Sanitary Sewer Dist., 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005) is misplaced, as Parker's holding relates only to governmental entities under the Tort Claims Act, under which the cap is self-executing. In contrast, as established by James v. Lister, *supra*, the cap under the SCFA is not self-executing. Rather, it is

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

an affirmative defense that must be specifically pleaded. Moreover, the scheduling orders entered in this case required any motions (including amendments) be made prior to February 15, 2015.[3] Respondent's position that it mentioned its putative defense *in conversation* flies in the face of the governing Rules of Procedure, and the scheduling orders in this case requiring timely amendments. To so find would render the SCRCP and those scheduling orders absolutely meaningless.

Respondent further urges the Court to ignore the legal prejudice suffered by Appellant by equating Appellant's initial allegations that the Respondent was an eleemosynary corporation organized under the laws of South Carolina to an admission that Respondent qualified for the SCFA defense. These are separate and distinct legal classifications. The registration with the South Carolina Secretary of State's Office as "eleemosynary" is not synonymous with Section 501(c)(3) protections afforded under S.C Code Ann. § 33-56-170 &180. Moreover, once Respondent actually pleaded the affirmative defense, Appellant timely filed a Reply challenging the Respondent's qualifications of those protections.[4] Put simply, Appellant has never pleaded, agreed, or otherwise maintained that Respondent was ever qualified for the SCFA defense.

In sum, the trial court erred in failing to recognize the legal prejudice suffered by Appellant, when granting Respondent's last-minute Motion to Amend.

II. THE TRIAL COURT ERRED IN CONCLUDING THAT RESPONDENT QUALIFIED FOR THE PROTECTIONS OF THE SCFA.

A. Standard of Review

It is well settled that determining the proper interpretation of a statute is a question of law, and our appellate courts review questions of law *de novo*. Town of Summerville v. City of

[3] *See* R. pp. 0001-0002; Scheduling Order dated November 2, 2014.

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

N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008); Transportation Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010).

B. Tuomey's egregious and unlawful conduct disqualifies it from the protections of the SCFA.

Quite tellingly, Respondent makes no effort to factually justify its qualification for the protections of the SCFA. Rather, Respondent simply hides behind the self-serving testimony of its own counsel hired to wind up its affairs that it remains "charitable" under the Act. The fact remains that the trial court order did not even address the effect of the Drakeford[5] case, Respondent's improper reporting to the IRS, the overpayment of key employees, and Respondent's admission that it no longer serves a community benefit, any of which are Section 501(c)(3) disqualifying events. The trial court blindly ignored the reality that Respondent was forced to sell off its assets and wind down its affairs after having been found guilty of anti-kickback and anti-fraud laws and ordered to pay the federal government $237,000,000 due to the findings in the Drakeford case.

C. Judicial notice is not appropriate for the adjudication of the SCFA protections.

Respondent argues that Appellant has no standing, right, or opportunity to question its qualification for the SCFA protections and that the trial court should have taken judicial notice of its "charitable status." As the trial court properly recognized, when a defendant's qualification to receive the protections of the SCFA are contested, judicial notice of the issue is not a matter on which the court can conclusively substitute alleged common knowledge for actual proof.

[5] 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).

Rule 201 of the SCRE governs the taking of judicial notice. [6] A trial court may take judicial notice of a fact only if sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof. *See* Moss v. Aetna Life Ins. Co., 267 S.C. 370, 228 S.E.2d 108 (1976). A fact is not subject to judicial notice unless the fact is either of such common knowledge that it is accepted by the general public without qualification or contention, or its accuracy may be ascertained by reference to readily available sources of indisputable reliability. Bowers v. Bowers, 349 S.C. 85, 94, 561 S.E.2d 610, 615 (Ct. App. 2002). A trial court must distinguish between facts and regulations proper for judicial notice and the application of those facts to the case, which may be improper for judicial notice. *See* Martin v. Bay, 400 S.C. 140, 732 S.E.2d 667, 674 (2012) (holding it was proper for master to take judicial notice of county land development regulations but not proper to take judicial notice of movement of setback line). "Ordinarily, the internal affairs and transactions of a private corporation are not a proper subject for judicial notice." Moss, at 377, 228 S.E.2d at 112.

In the present case, given that the issue was contested due to Respondent's unlawful and egregious conduct, it is improper for the court to take judicial notice that Respondent qualifies for the SCFA protections. These are not facts or circumstances of such notoriety or common knowledge to assume their existence without proof. This is precisely the type of internal affairs of a corporation that is not a proper subject for judicial notice. As these were contested issues, the trial court correctly determined that a hearing was required to determine whether Respondent

[6] There are major differences between the state and federal rules governing judicial notice. *See* Rule 201, SCRCP (2015) and Rule 201, FRCP (2015); State v. Odom, 412 S.C. 253, 772 S.E.2d 149 (2015)(noting significant differences in the rules, including that the federal rule is permissive and the fact finder is not bound by the judicially noticed fact, which differs from the state rule). Thus, Defendant's reliance on federal authority for facts proper for judicial noticed is misplaced.

was entitled to the protections of the SCFA.[7]

D. The qualification for the protections of the SCFA under S.C. Code §§ 33-56-170 & 180 is a legal determination that must be made by our courts.

Respondent urges that our courts should defer to the United States Secretary of the Treasury to make the determination as to whether Respondent qualifies and continues to qualify for the protections of S.C. Code § 33-56-170. Respondent relies on tax assessment cases from the federal courts to argue that the Treasury Secretary has the sole authority to revoke or rescind its tax exempt status. This may be true for tax assessment matters that arise under federal law; however, this is not a tax assessment case. Here, by reference and incorporation of Section 501(c)(3) of Title 26 of the U.S. Code, the state statute requires the court to conduct an analysis to determine whether the entity at issue qualifies for the protections of the SCFA. The language of the statute itself belies the argument that the United States Treasury Secretary makes the determination.[8] The plain language of the statute dictates that qualification for the protections of the SCFA is a legal determination that must be made by our courts. The statutory language

[7] As set forth in Section III of Appellant's Final Brief, the trial court erred in the finding that Respondent in fact qualified for the protections of the SCFA.

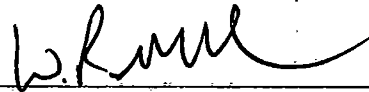
[8] In situations where 501(c)(3) status has been conferred, so long as annual Form 990 filings are provided, the IRS rarely independently launches an inquiry into an organization's qualifications to continue to receive tax exempt treatment. *See* U.S. Government Accountability Office Report on Tax-Exempt 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). In the matter at hand, where the Respondent entity has effectively ceased to exist and certain assets purchased by Palmetto Health, there is little to no likelihood that the IRS will endeavor to revoke Respondent's tax-exempt status. 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.

preserves the historic role of our trial courts in making this determination[9] and that determination must be reviewed *de novo* by the appellate court.

CONCLUSION

For these reasons and for those set forth in Appellant's Final Brief, Appellant respectfully requests reversal of the trial court order and reinstatement of the jury verdict in its full amount.

Respectfully submitted,



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