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.

PETITION FOR WRIT OF CERTIORARI

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THE COURT OF APPEALS ERRED IN ITS CONSTRUCTION OF THE SOLICITATION OF CHARITABLE FUNDS ACT, REDUCING THE JURY'S VERDICT OF $2,500,000 TO $300,000, AND FOR ANY ONE OF THE FOLLOWING REASONS, AT LEAST ONE OF WHICH INVOLVES NOVEL AND IMPORTANT QUESTIONS OF LAW, CERTIORARI SHOULD BE ISSUED TO THE COURT OF APPEALS AND THE JURY'S VERDICT REINSTATED:

I. THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE RESPONDENT HOSPITAL WAS QUALIFIED TO RECEIVE THE PROTECTIONS OF THE SOLICITATION OF CHARITABLE FUNDS ACT, S.C. CODE ANN. § 33-56-170 &180 WHERE RESPONDENT HAS BEEN FOUND GUILTY OF FEDERAL FALSE CLAIMS ACT VIOLATIONS FOR DEFRAUDING THE FEDERAL GOVERNMENT AND OTHER WRONGDOING..... 7

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CERTIFICATE OF COUNSEL

In accordance with Rule 242(d), SCACR, Counsel for Petitioner certifies that a Petition for Rehearing was made to the Court of Appeals on April 18, 2019, and denied on September 20, 2019.

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in concluding that the Respondent Hospital was qualified to receive the protections of the Solicitation of Charitable Funds Act, S.C. Code Ann. § 33-56-170 &180 where Respondent has been found guilty of federal False Claims Act violations for defrauding the federal government and other wrongdoing.

II. Whether the Court of Appeals erred in permitting the Respondent to amend its answer to assert a new affirmative defense, *i.e.* the protections of the Solicitation of Charitable Funds Act, on the first day of the scheduled date certain trial, after nearly three years of litigation, where Petitioner was substantially prejudiced by the tardy amendment.

III. Whether the Court of Appeals erred in affirming the grant of leave to the Respondent to reopen its case and offer new evidence never previously disclosed in discovery in support of its charitable affirmative defense after the Defense had rested and after Plaintiff had moved for directed verdict on the charitable defense.

STATEMENT OF THE CASE

This case involves novel and important issues of law related to the construction and application of the Solicitation of Charitable Funds Act, S.C. Code Ann. §§ 33-56-170 & 180 (hereinafter "the SCFA"). In July of 2011, Petitioner Win Myat ("Petitioner" or "Dr. Myat") was seriously injured when he fell as a result of a liquid on the floor of a hallway at Tuomey Hospital in Sumter. Dr. Myat initiated this premises liability action by the filing of a complaint on October 15, 2012.[1] Petitioner filed an amended complaint to properly identify the Defendant as Tuomey Regional Medical Center (hereinafter "Respondent" or "Tuomey").[2] Respondent filed its answer on January 16, 2013, asserting the following defenses: (1) general denial; (2) statutory employee defense under the Worker's Compensation Act; (3) comparative negligence; and (4) unavoidable accident.[3] Respondent did not plead the affirmative defense of the SCFA. For several years thereafter, the parties participated in discovery and entered into several scheduling orders setting forth deadlines to conduct discovery, disclose witnesses, file motions, and complete mediation. On November 2, 2014, the parties entered into an Amended Consent Scheduling Order that held that all motions were to be filed on or before February 15, 2015.[4] On April 30, 2015, the parties entered into a Consent Order setting the case for date certain trial beginning on Monday, August 24, 2015.[5]

On Friday, August 21, 2015, more than six months after all motions were ordered to have been filed and just one business day before trial was to set begin, Tuomey filed a Motion to

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[1] See R. pp. 0024-0025; Complaint.
[2] See R. p. 0032, line 5; Amended Complaint.
[3] See R. pp. 0038-0040; Answer.
[4] See R. p. 0001, lines 8-11; Scheduling Order dated November 2, 2014.
[5] See R. p. 0003; Order Setting Date Certain Trial dated April 30, 2015.

Amend its Answer so as to assert the protections of the SCFA.[6] Earlier that day, prior to Tuomey's filing of the Motion to Amend, Respondent's counsel initiated a telephone call to the trial judge and Petitioner's counsel seeking leave to amend, during which time the trial judge indicated a willingness to allow the amendment over Petitioner's objection. Petitioner's counsel requested that a motion be filed and a hearing conducted on the record.[7] Tuomey's last-minute Motion to Amend was heard by the trial court the following business day (Monday, August 24, 2015), and, over Petitioner's objection and claims of legal prejudice, the trial court gave leave to Tuomey to make a last-minute amendment to its pleading. On August 24, 2016, Respondent Tuomey filed its Amended Answer that, for the first time, asserted the protections of the SCFA, more specifically the cap on damages.[8]

The case was tried to verdict over the course of three days. On the third day of trial, after opting to focus solely on its liability defenses, the Respondent rested its case without having introduced any evidence of its charitable status to support its affirmative defense.[9] Petitioner moved for a directed verdict on the charitable defense, reciting to the trial court all that Tuomey was required, but had failed, to prove.[10] With the advantage of having heard counsel's recitation of Tuomey's deficiencies, thereafter, the Respondent sought to reopen the evidence to put up testimony of its charitable status, proffering the testimony of witnesses who were not previously disclosed and documents that had not been previously produced.[11] The trial court opted to hold the matter in abeyance and to proceed with closing arguments and the jury charge. Both parties

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[6] See R. pp. 0041-0043; Respondent's Motion to Amend dated August 21, 2015.
[7] R. p 0996; Transcript of August 24, 2015 Motion Hearing p. 2 (Respondent's counsel referencing Friday call). R. p. 1729, ¶ 12; Affidavit of David Holler ¶ 12 (referencing call to trial judge on Friday afternoon). The Motion was filed at 4:14 pm, this call was at around 12:30pm.
[8] R. p. 1892; Amended Answer dated August 24, 2015.
[9] R. p. 1529; Trial Transcript p. 485.
[10] R. p. 1531; Trial Transcript p. 487.
[11] R. p. 1533; Trial Transcript p. 489.

completed their closing arguments and the jury was charged on the law. The court and both parties then received word that the jury had reached a verdict. Just before publishing the verdict and without further argument, the trial court granted Respondent Tuomey's motion to reopen its case and to put up additional facts in support of the SCFA defense.[12] The jury found in favor of Dr. Myat, rendering a $2,500,000 verdict against the Respondent. The trial court gave the parties ten days to file post-trial motions.

On September 4, 2015, Petitioner served a motion to reconsider the granting of leave to Tuomey to Amend its Answer[13] and, on September 10, 2015, served a motion to reconsider the reopening of the defense's case.[14] On September 9, 2015, Petitioner served a Reply to the newly filed Amended Answer, specifically denying that Respondent was entitled to the protections of the SCFA because Tuomey was no longer acting as a "charitable organization" as defined in S.C. Code § 33-56-180. Petitioner specifically sought declaratory judgment that Respondent was not entitled to the protections under the SCFA.[15]

Respondent filed its Post-Trial Motions for JNOV and for a new trial on September 14, 2015.[16] The trial court conducted a hearing on all post-trial motions on March 8, 2016. On April 7, 2016, the trial court entered an order denying Respondent's motion for JNOV and for a new trial, but reduced the judgment to $300,000, finding that Tuomey had met its burden of proving the affirmative defense by showing that the organization qualified for the protections of the SCFA. The Order also denied Petitioner's other outstanding motions.[17]

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[12] R. p. 1612; Trial Transcript p. 568.

[13] R. pp. 0044-0048; Motion to Reconsider Granting of Leave to Amend.

[14] R. pp. 0052-0055; Motion to Reconsider Reopening of Defense Case.

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

[16] See R. pp. 0056-0082; Respondent's Post-Trial Motions.

[17] R. pp. 0005-0021; Order dated April 7, 2016.

On April 14, 2016, Petitioner filed his notice of appeal of the trial court's order from April 7, 2016. On April 3, 2019, the Court of Appeals affirmed the trial court order in Myat v. Toumey Regional Medical Center, 832 S.E.2d 306 (Ct. App. 2019). Petitioner filed a motion for rehearing on April 18, 2019, which was denied on September 20, 2019. Petitioner now seeks this Court to issue certiorari to the Court of Appeals.

FACTS

Petitioner Win Myat was a thirty-nine-year-old infectious disease specialist practicing in Sumter.[18] At approximately 5:30 AM on July 6, 2011, while rounding on patients admitted to Tuomey Hospital, Dr. Myat slipped on a puddle of liquid near a nurse's station. He suffered a fractured patella and ruptured patella tendon.[19] Following numerous treatments and therapies, these injuries left him with a severe and painful limp and unable to continue his medical practice.[20] Dr. Myat timely filed this case alleging that Tuomey's employees created the dangerous condition that caused his fall.

At the time of the filing of this case, Respondent Tuomey operated a 300-bed hospital in Sumter. 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"), the Respondent has spent the last decade in litigation with the federal government. In Drakeford, Tuomey was found to have violated both the Stark Law (anti-kickback laws) and the False Claims Act (antifraud laws) for having entered into improper and illegal contracts and arrangements with physicians employed by

[18] R. pp. 1265-1275; Trial Transcript at pp. 220-230.

[19] R. p. 1286, 1291; Trial Transcript pp. 241, 246.

[20] R. p. 1309; Trial Transcript p. 264 (description of limp). R. pp. 1312-1313; Trial Transcript pp. 267-68 (unable to continue work).

the hospital.[21] The District Court entered a judgment against Tuomey that, including penalties and fines, totaled $237,454,195.00 and which has been affirmed on appeal.[22]

Since the time the Drakeford litigation began, Tuomey's sole means of communication with the Internal Revenue Service ("IRS") has been through its annual Form 990 filings.[23] During this time period, Respondent was less than forthright in reporting to the IRS about the Federal Court's findings in the Drakeford case. Tuomey's Form 990 filings for 2010, 2011, 2012, and 2013 evidence Tuomey's shameful withholding of information from the IRS and outright deception as to the findings in the Drakeford case.[24] Tuomey's Form 990 for 2010, filed a time which was after the first federal jury had specifically found that Tuomey had violated the Stark Law, simply omits any mention that the *qui tam* lawsuit alleged that Tuomey violated the Stark Law's anti-kickback provisions or that the federal jury had specifically found the hospital to be in violation of the Stark Law.[25, 26] Omission of such key facts is tantamount to fraud and, given that our nation's system of taxation relies largely on self-reporting, likely explains why Tuomey never had its 501(c)(3) status revoked. Tuomey's statement to the IRS is a misrepresentation of the jury's finding, seeking to portray the verdict as some sort of innocuous equitable restitution matter and giving no indication that Tuomey was found to have violated federal anti-kickback laws. Tuomey has since admitted that it failed to disclose the adverse jury verdict to the IRS.[27]

Tuomey's disclosure to the IRS in its Form 990 for 2011 was equally as deceptive and

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[21] Specifically, the government claimed and proved that "payment[s] were unlawful under the Stark Law, 42 U.S.C. § 1395m, and thus violative of the False Claims Act (FCA), 31 U.S.C. §§ 3729 et seq." U.S. ex rel. Drakeford v. Tuomey, 976 F. Supp. 2d 776, 780 (D.S.C. 2013) aff'd., 792 F.3d 364 (4th Cir. 2015).

[22] For a more detailed description of Drakeford see Petitioner's Final Brief at pp. 6- 7.

[23] R. p. 1675; March 8, 2016 Hearing Transcript p. 50. R. pp. 0321-0322; Tuomey Rule 30(b)(6) Depo Transcript pp. 9-10.

[24] R. pp. 0374-0680; Tuomey Rule 30(b)(6) Depo Transcript, Ex. 2, 3, 4, 5.

[25] R. pp. 0376; Tuomey Rule 30(b)(6) Depo Transcript, Ex. 2, Form 990 for 2010, p. 86.

[26] See R. p. 1731; 2010 Drakeford Jury Verdict Form p. 1

[27] R. pp. 0327-0328; Tuomey Rule 30(b)(6) Transcript pp. 15-16.

devoid of critically important information regarding the 2010 Drakeford jury findings.[28] Once again, Tuomey failed to even so much as mention the jury's significant findings regarding the Stark Law violation. Further, after having had a judgment of more than $44 million rendered against it, and for which a new trial had been granted, Tuomey wrote to the IRS saying that less $1.8 million had been set aside to address the long-term liability. Seemingly knowledgeable that its 501(c)(3) status could be in jeopardy, Tuomey grossly mischaracterized the Drakeford case, concealing from the IRS the nature and significance of the case and hiding the specific findings that had been levied against the Respondent.

This deceptive mischaracterization continued in Tuomey's 2012 filing with IRS, wherein the Respondent's disclosure again flagrantly omitted the material fact that the 2010 jury had found it guilty of Stark Law violations, and Respondent even went so far as to falsely assert that it had been victorious in the 2010 trial, stating "[s]ubsequent to the jury verdict in favor of the System [...]."[29] In its 2013 filing with IRS (filed in late 2014), Tuomey finally admitted to the IRS that the 2010 jury found the Tuomey guilty of having violated the Stark Law, noting: "In the first trial in this matter in 2010, a jury rendered a verdict that the System violated the Stark Law but did not violate the False Claims Act."[30] However, after mentioning the 2013 jury verdict, Tuomey again made certain to emphasize the appeal and, grossly minimizing the $237,454,195.00 in penalties and fines, told the IRS that Tuomey "has included an estimated obligation of $1,790,000."

On July 2, 2015, the Fourth Circuit Court of Appeals issued its order affirming the District Court's decision and the nearly quarter billion-dollar judgment against Tuomey. By its own admission, Tuomey has never informed the IRS about the final outcome of the Drakeford

[28] R. p. 0870; Form 990 for 2011, p. 83.
[29] R. pp. 0613-0614; Tuomey 30(b)(6) Transcript, Ex. 4, Form 990 for 2012, pp. 83-84.
[30] R. p. 0968; Form 990 for 2013, p. 89.

litigation.[31] Despite its lack of candor (if not outright deception) to the IRS, Tuomey asks to have our courts defer solely to a decades-old IRS determination of its tax status for the purpose of evaluating the Respondent's qualification to receive the limited liability protections of the SCFA. The Court of Appeals agreed.

During the time period when the Drakeford litigation and appeals progressed, Tuomey was paying its CEO the following compensation: 2010: $840,622; 2011: $1,011,073 (including a $161,003 performance bonus): 2012: $991,462 (including a $173,050 performance bonus); and 2013: $1,485,190.[32] The CEO's country club dues were also part of his compensation package.[33]

Effective January 1, 2016, Tuomey sold the hospital and virtually all of its assets to Palmetto Health, and Palmetto Health Tuomey (now Prisma Health Tuomey) is currently operating the hospital. The affairs of the Respondent have ended or otherwise are winding down.[34] It has no employees, and, as of January 1, 2016, it is no longer providing any medical services to the Sumter community.[35] Virtually all of Respondent's assets were sold to Palmetto Health, and all that remains of the Respondent entity is for its counsel to complete winding down its affairs and a $2,200,000.00 contingent liability fund for certain creditor claims.[36]

ARGUMENT

I. THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE RESPONDENT WAS QUALIFIED TO RECEIVE THE PROTECTIONS OF THE SCFA, S.C. CODE ANN. § 33-56-170 &180, WHERE RESPONDENT HAS BEEN FOUND GUILTY OF FEDERAL FALSE CLAIMS ACT VIOLATIONS FOR DEFRAUDING THE FEDERAL GOVERNMENT AND OTHER WRONG DOING.

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[31] R. pp. 0364-0365; Tuomey Rule 30(b)(6) Transcript., pp. 52-53. *See also* R. pp. 1677-1678; March 8, 2016 Hearing Transcript pp. 52-53.

[32] R. pp. 1687-1693; March 8, 2016 Hearing Transcript pp. 62-68.

[33] R. pp. 0664-0665; Tuomey 30(b)(6) Transcript Ex. 5, Form 990 for 2013 pp. 40-41.

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

[35] R. pp. 1658-1659; March 8, 2016 Hearing Transcript pp. 33-34.

[36] R. p. 1693; March 8, 2016 Hearing Transcript p. 68.

Respondent Tuomey is not entitled to the protections offered under the SCFA because it has not conducted itself as "charitable organization." As conclusively established by the Drakeford case, the Respondent has not conducted itself as required of a charitable entity seeking the protections of the SCFA. Moreover, Tuomey has not been forthright in its reporting to the IRS of the findings in the Drakeford case. Lastly, Tuomey has failed to show that it operates solely to provide a "community benefit" in order to qualify for Section 501(c)(3) status.

A. THE SOLICITATION OF CHARITABLE FUNDS ACT

1. Strict Interpretation/Construction Required

Prior to the adoption of the SCFA, under the common law charitable immunity had been completely abrogated by the Court in Fitzer v. Greater Greenville South Carolina Young Men's Christian Ass'n, 277 S.C. 1, 282 S.E.2d 230 (1981). Because the limitation of liability that Respondent seeks is in derogation of the common law, the statute must be strictly construed in favor of Petitioner. Major v. National Indemnity, 267 S.C. 517, 229 S.E.2d 849 (S.C. 1976), *see also* Doe v. Marion, 361 S.C. 463, 605 S.E.2d 556 (Ct. App. 2004).

Our courts have held that "a statute is not to be construed in derogation of common law rights if another interpretation is reasonable." Doe at 473, 605 S.E.2d at 561. Thus, if the statute can reasonably be construed in a manner that would not be in derogation of Petitioner's common law right to have the jury's verdict entered without limitation, the Court should construe the statute strictly in applying it to this case.

2. Language of the SCFA

The Court of Appeals erred in holding that 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." (emphasis added).[37] The relevant portion of the SCFA, the section stating what organizations can claim the protection of a cap on liability,[38] gives no deference to whether or not the IRS has previously made a determination regarding entity's tax-exempt status. The language of the statute preserves the Court's historic role in reviewing the activities of the organization claiming charitable status. The distinction in the statutory language, compared to other parts of the SCFA, is of the utmost importance.

Like most legislation, the SCFA begins with a general definitions section and provides:

> As used in this chapter, **unless a different meaning is required** by the context:
>
> (1)(a) "Charitable organization" means a person, as defined in item (7):
> (i) **determined by the Internal Revenue Service to be a tax exempt** organization pursuant to Section 501(c)(3) of the Internal Revenue Code;

S.C. Code Ann. § 33-56-20 (emphasis added). However, later in the SCFA, in the operative section of the law governing the limitation of liability, an entirely a different definition of "charitable organization" is provided:

> [A]ny 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 (emphasis added). Critically, when limiting liability, the language that the Legislature chose is markedly different than that used in the general definitions section, giving no weight or deference as to whether an organization has previously been designated by the IRS to be a 501(c)(3) entity. The language employed looks only to whether the organization should be exempt from taxation pursuant to the tax code. In the Code section governing when the

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[37] Myat v. Toumey Regional Medical Center, 832 S.E.2d 306, 312 (Ct. App. 2019).

[38] The SCFA caps tort liability of qualifying "charitable organizations" at the same liability limits imposed by the Tort Claims Act. S.C. Code Ann. § 33-56-180(A). The Tort Claims Act, more specifically S.C. Code Ann. § 15-78-120, sets this limit at $300,000 for a single occurrence of liability.

cap can be asserted, the Legislature took effort to use alternate language and gives an entirely different definition of "charitable organization," specifying organizations that should be exempt from taxation and not specifying organizations that have previously been determined by the IRS to be exempt. The Court of Appeals' Opinion gives no weight to this critically different statutory language.

When interpreting a statutory term, a court must read the statute as a whole, and sections that are part of the same statutory scheme must be construed together. Hughes v. West Carolina Reg. Sewer Auth., 386 S.C. 641, 647, 689 S.E.2d 638, 641 (Ct. App. 2009). Our courts apply the canon of construction *expressio unius est exclusion alerius*, which provides that "to express or include one thing implies the exclusion of another, or of the alternative." Riverwoods, LLC v. County of Charleston, 349 S.C. 378, 384, 563 S.E.2d 651, 655 (2002); Hughes, 386 S.C. at 647, 689 S.E.2d at 642; State v. Leopard, 349 S.C. 467, 473, 563 S.E.2d 342, 345 (Ct. App. 2002).

Similarly to Hughes, in this case, the Legislature's choice of different language in the SCFA is significant. As elucidated in Hughes, *supra*, statutory provisions must be read as they relate to the statutory scheme as a whole. The Legislature's decision to use different language in defining a "charitable organization" under § 33-56-170 (when compared to § 33-56-20) signifies legislative intent that the sections have distinct applications. Had the Legislature intended the two definitions to be synonymous, the drafters would not have gone to the trouble to employ different language in the respective provisions. More specifically, if the Legislature intended for the definition of a charitable organization under § 33-56-170 to be solely determined by the IRS, then the drafters simply would have used the same language chosen in § 33-56-20, or simply not have included any alternate definition in § 33-56-170. However, to the contrary, § 33-56-170 makes no mention of a determination by the IRS being of any importance in determining whether an institution qualifies to receive a limitation on liability. The Court of Appeals' Opinion gives no

weight to this distinction.

By using different operative language in § 33-56-170, the Legislature has signaled that "charitable organization" is not synonymous with the definition found in § 33-56-20. Accordingly, in construing the provisions of § 33-56-170, the Court should find that qualifying as a "charitable organization" eligible for protections of a cap on liability is not wholly dependent on whether the organization has received an IRS determination of tax-exempt status. Rather, the proper inquiry is whether the entity meets the provisional requirements for an organization to be exempt from taxation pursuant to Sections 501(c)(3) of the Internal Revenue Code. Thus, whether a party has or has not been previously determined by the IRS to be a tax exempt entity is not, in and of itself, dispositive as to whether it is entitled to the limitations on liability offered under the SCFA.

3. The Qualification for the Protections of the SCFA is a legal determination that must be made by our Courts

The Court of Appeals' Opinion defers the determination of charitable status solely to the IRS. The implications of deferring the determination of the SCFA defense to the IRS cannot be understated. The latest data indicates that that the IRS's examination rate for charitable entities was 0.81 percent in 2011, and declined to 0.71 percent in 2013. In other words, only 7 of every 1,000 charitable entities are examined by the IRS for compliance with their claimed 501(c)(3) status.[39] Setting precedent that the IRS stands as the sole arbiter of the SCFA defense creates

[39] 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

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 minuscule fraction of applications for 501(c)(3) status, in essence, there is no mechanism for review. The result will be that unscrupulous entities, having no charitable purpose, will be allowed to effectively hide behind the SCFA protections with no mechanism for review.

The SCFA definition under § 33-56-170 incorporates Section 501(c)(3) qualifications, and the statute inherently requires the Court to conduct an analysis to determine whether the entity should qualify for the protections of the SCFA. The language of the statute itself belies the argument that the IRS is the sole arbiter of those protections and dictates that the qualification for the protections of the SCFA is a legal determination that must be made by our courts. The statutory language preserves the historic role of the trial court in making this determination.[40]

4. Qualification for 501(c)(3)(3) Status

Section 501(c)(3) provides that, in order to qualify and keep tax exempt status, an organization must not permit any part of its net earnings to "inure[] to the benefit of any private shareholder or individual [....]" 26 USCA § 501(c)(3). In its entirety, the relevant portion of Section 501(c)(3) defines an exempt organization as:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of

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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.

[40] *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).

which ***inures*** to the benefit of any private shareholder or individual...

IRS Publications further explain this principle:

> No part of an organization's net earnings may inure to the benefit of an insider. An insider is a person who has a personal or private interest in the activities of the organization such as an officer, director, ***or a key employee***. This means that an organization is prohibited from allowing its income or assets to accrue to insiders. An example of prohibited inurement would include payment of unreasonable compensation to an insider. Any amount of inurement may be grounds for loss of tax-exempt status.

IRS Pub. 4421, *Compliance Guide for 501(c)(3) Public Charities*, p. 4 (Rev. July 2014) (emphasis added); *see also*, IRS Pub. 557, *Tax-Exempt Status for Your Organization* (Rev. Feb. 2015).

In addition to approval by the IRS, in order to qualify as a § 501(c)(3) nonprofit, a corporation: (1) must have a charitable purpose; (2) cannot permit any of its earnings or assets to inure to the benefit of a private individual; (3) cannot engage in substantial lobbying activities; and (4) cannot participate in political campaigns. Martin McWilliams, Jr., et al., *Sculpting a Nonprofit: Part II*, SOUTH CAROLINA LAWYER, March/April 1996. Failure to comply with any of these elements, which comprise the "operational test," will result in the organization losing its eligibility for tax exempt status. Church of Scientology of California v. Comm'r, 823 F.2d 1310, 1315 (9th Cir. 1987). If an organization does not demonstrate that it is operated exclusively for exempt purposes, then it is not eligible for § 501(c)(3) status. 26 C.F.R. § 1.501(c)(3)-1(a).

Courts addressing the issue have held that an organization's Section 501(c)(3) status must be revoked or denied, "if even a small part of its income inures" to the benefit of a private shareholder or individual. *See* Orange County Agr. Soc., Inc. v. C.I.R., 893 F.2d 529, 534 (2nd Cir. 1990); Church of Scientology of California, 823 F.2d at 1316. A "private shareholder or individual" is defined broadly as "having a personal and private interest in the activities of the organization." Presbyterian and Reformed Publishing Co. v. Comm'r, 743 F.2d 148, 153 (3rd

Cir. 1984). The payment of excessive salaries or the "unaccounted for diversions of an organization's resources 'by one who has complete and unfettered control can constitute inurement.'" Arlie Foundation v. United States of America, 826 F.Supp. 537, 550 (D.D.C. 1993). Likewise, earnings are found to inure to an individual in instances where a limited number of individuals "reap commercial benefits from the operation of the instrumentality, though they do not do so by direct acquisition or payment over to them of its earnings." Harding Hospital v. United States, 505 F.2d 1068, 1072 (6th Cir. 1974).

B. TUOMEY NO LONGER QUALIFIES TO RECEIVE TAX EXEMPT STATUS

1. Drakeford disqualifies Tuomey from the protections of the SCFA

The Drakeford case conclusively established Tuomey guilty of paying key employees "in excess of the fair market value for their services" in violation of the provisions of the Stark Laws and False Claims Act, and such excess payments are akin to allowing part of Tuomey's net earnings to inure to the benefit of private individuals. Thus, these findings are established by the doctrine of collateral estoppel, particularly issue preclusion. Carolina Renewal, Inc. v. South Carolina Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009).

Because of its wrongdoing, Respondent Tuomey does not meet and/or no longer meets the 501(c)(3) qualifications to remain tax exempt, and thus is not entitled to the protections of the SCFA. Congress created a tax-exempt category under Section 501(c)(3) as a means to assist charitable organizations – such as the Red Cross, soup kitchens, American Lung Association, animal shelters, etc. – that were providing benefits to the communities throughout the United States. It did not intend to offer this benefit to organizations operating outside the law and in such an unscrupulous manner that a nearly quarter billion-dollar judgment is levied against them for defrauding the federal government while, at the very same time, overpaying key employees and awarding large raises to the CEO. Similarly, the Legislature did not intend for the SCFA to

protect unscrupulous entities with unqualified limitations on liability.

The Stark Law and False Claims Act embody important federal policies to prevent illegal referral fees and to prevent fraud upon the taxpayers by those entities that submit claims to the federal government. Summarizing the Government's claims against Tuomey in the Drakeford case, the District Court wrote: "[a]ccording to the Government, the compensation packages paid physicians 31% above and beyond their total net collections as independent contractors, and thus in excess of the fair market value for their services." Drakeford, 976 F. Supp. 2d at 781. The federal jury found for the Government and against Tuomey. The District Court's Order states: "[o]n May 8, 2013, the jury returned a verdict finding that Tuomey had violated the Stark Law, that Tuomey had violated the FCA, that 21,730 claims were submitted in violation of the FCA, and that the value of the claims submitted in violation of the FCA equals $39,313,065.00." Id. at 783. Having overpaid key employees/physicians in violation of both anti-kickback and antifraud laws, Tuomey no longer qualifies to receive tax-exempt treatment by the IRS (and therefore does not qualify to receive the limitations of liability under the SCFA). However, this matter has never been adjudicated by the IRS, for, as described below, Tuomey has not properly reported its these violations to the IRS.

2. *Tuomey's Failure to Properly Report Drakeford to the IRS*

By failing to properly report the Drakeford violations to the IRS, Respondent Tuomey does not qualify to receive a limitation of liability under the SCFA. It is axiomatic that the tax collection is done through a self-assessment and self-reporting system by the taxpayers. Here, Tuomey failed to accurately report important court decisions detailing its illegal conduct that should disqualify the organization from receiving an exemption from taxation.

In a system of self-reporting, Tuomey has failed to inform the IRS of the Fourth Circuit's final decision on the matter finding Tuomey guilty of Stark Law and False Claims Act violations

and a $237 million judgment. Failure to report the outcome of these violations, offenses which should have resulted in Tuomey having its 501(c)(3) status revoked by the IRS,[41] should result in Tuomey being disqualified to receive the liability protections under the SCFA.

3. *Unclean Hands and Public Policy*

Because of Tuomey's actions, it comes into court with unclean hands, and, as such, must not be allowed to avail itself to the protections offered by the SCFA. With regard to other, analogous statutory protections, our courts have denied parties the right to avail themselves of such protections where they have "unclean hands." *See* In re Lafferty, 469 B.R. 235, 245 (Bankr. D.S.C. 2012) ("This maxim illustrates the principle that the court will not grant relief to a party who has engaged in wrongful, illegal, or unethical acts."). In Lafferty, the bankruptcy court denied the debtors their statutory homestead exemption protections because the debtors sought to avoid a judicial lien through fraudulent and unethical conduct. 469 B.R. at 246. The court further explained, "The purpose of the unclean hands doctrine is to prevent a court from aiding or abetting a party in the commission of a fraud or other misconduct." Id. at 245-46.

It is a "well-established principle that the Congressional intent in providing tax deductions and exemptions is not construed to be applicable to activities that are either illegal or contrary to public policy." Green v. Connally, 330 F. Supp. 1150, 1161 (D.D.C.) aff'd sub nom.; Coit v. Green, 404 U.S. 997, 92 S. Ct. 564, 30 L. Ed. 2d 550 (1971); *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 598, 103 S. Ct. 2017, 2031-32, 76 L. Ed. 2d 157 (U.S.S.C. 1983) (refusing

[41] Tuomey's assets, including the hospital, have recently been purchased by Palmetto Health, and the remaining entity is winding down its affairs. Due to this purchase, there is likely no forthcoming inquiry, by the IRS, as to Tuomey's proper classification as a 501(c)(3) entity. This lack of investigation emphasizes why the Legislature intended the courts to be tasked with performing an analysis as to whether an organization should be "exempt from taxation pursuant to Section 501(c)(3)" and why a "determin[ation] by the [IRS]" is not the language used in the operative section of the SCFA. Our courts will be the only adjudicative body to determine whether the Tuomey is entitled to the protections of this state statute.

to permit a racially discriminatory school from claiming benefit of tax exempt status). "Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." Muschany v. United States, 324 U.S. 49, 66, 65 S. Ct. 442, 451, 89 L. Ed. 744 (1945). Federal statutory law is a proper source of declarations of public policy.

As a matter of public policy, just as articulated in Green and Bob Jones, *supra*, Tuomey must not be afforded the protections of tax-exempt status conferred by the SCFA, due to the illegal conduct committed by it, as has been established by the Drakeford case. Further, by its Form 990 filings and misleading/improper communications with the IRS, Tuomey has failed to properly report its violations to the very body that governs "tax exempt" entities. Its failure to properly report the outcome in Drakeford amounts to unclean hands by Tuomey and must disqualify the organization from the protections of the SCFA.

4. *No True "Community Benefit"*

Hospitals seeking Section 501(c)(3) status are subject to the "community benefit standard." St. David's Healthcare System v. United States of America, 349 F.3d 232, 235 (5th Cir. 2003); IHC Health Plans, Inc. v. C.I.R., 325 F.3d 1188, 1198 (10th Cir. 2003). Under the community benefit test, a hospital will be eligible for exempt status if it: (1) provides an emergency room open to all persons, regardless of their ability to pay; (2) is willing to hire any qualified physician; (3) is run by an independent board of trustees composed of representatives of the community; and (4) uses all excess revenues to improve facilities, provide educational services, and/or conduct medical research. St. David's Healthcare System, 349 F.3d at 235. The existence or absence of one factor is not decisive either way, and eligibility must be looked at based on the totality of the circumstances. Id. at 236. If more than an "insubstantial" amount of a hospital's activities are not for exempt purposes, then it is not deemed as being operated exclusively for exempt purposes and

is not eligible for § 501(c)(3) status. Id. at 237.

Other state courts have denied charitable protections to hospitals classified as 501(c)(3) organizations when those hospitals did not act in accordance with their charitable purposes. In Univ. of Virginia Health Serv. Found. v. Morris ex rel Morris, 275 Va. 319, 657 S.E.2d 512 (2008) the Supreme Court of Virginia denied a health care provider the protections of charitable immunity against medical malpractice suits. Despite the health care provider's status as a 501(c)(3) corporation based on a 1980 IRS ruling, the court found that the organization did not operate itself with a charitable purpose so as to qualify for charitable immunity. In arriving at this decision, the court considered factors including the manner in which the organization aggressively pursued legal action and collections; ratio of revenue to the cost of charitable work; and physician salaries and incentive payments. Id. at 336-39, 657 S.E.2d at 520-22. The court concluded that "it is clear that the manner in which [the defendant] actually conducts its affairs is not in accord with the charitable purpose stated in its Articles of Incorporation. [The defendant] operates like a profitable commercial business with extensive revenue and assets." Id. at 340, 657 S.E.2d at 522.

Prior to the adoption of the SCFA, our courts routinely examined the character and manner of operations of "charitable" entities to determine if they were, in fact, entitled to immunity. Eiserhardt v. State Agr. & Mech. Soc. of S.C., 235 S.C. 305, 309, 111 S.E.2d 568, 570 (1959). In the face of nearly a quarter billion dollar judgment against the organization for violations of federal law, Tuomey gave it's CEO two performance bonuses, and nearly 50% pay increase, raising Mr. Cox's salary from $991,462 in 2012 to $1,485,190 in 2013 (in addition to his country club dues).[42] As conclusively established by Drakeford, Tuomey has paid certain of its physicians in "excess of the fair market value" for their services, and giving a nearly half million dollar raise to the chief executive officer, in face of such operational blunders, is yet another example of

[42] See R. pp. 0664; Tuomey 30(b)(6) Transcript, Ex. 5, Form 990 for 2013 pp. 40-41.

Tuomey paying key employees in excess of what they should earn. This is the precise inurement of benefits to key employees that is a disqualifying event under Section 501(c)(3).

Tuomey's business model was similarly not "charitable." Further, only after requiring patients to sign a guaranty of financial responsibility when seeking treatment, after billing the patient, seeking to collect with internal collection efforts, thereafter sending accounts to collection for 120 days, Tuomey writes off nonpayment of that bad debt.[43] This is not the behavior of a truly charitable organization, but is identical to that of for-profit corporations in the business of medicine, as hospital's routinely write off the cost of services provided to indigent patients. In the instant case, the burden is on Tuomey to prove the affirmative defense that it qualifies for the protections of the SCFA, that the organization operates *primarily* for the purpose of benefitting the Sumter community. To the contrary, the evidence indicated that Tuomey acts no differently than any other commercial business.

Moreover, it appears the Court of Appeals did not consider that Tuomey was no longer serving the community because it was no longer operating the hospital. Tuomey has now sold the hospital and virtually all of its assets to Palmetto Health, effective January 1, 2016, and is no longer providing the "community benefit" it claims. By its own admission, Tuomey concedes that the affairs of Tuomey are winding down,[44] it has no employees, and is no longer providing any medical services as of January 1, 2016.[45] Tuomey simply is no longer fulfilling its stated charitable purpose. 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.

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[43] See R. p. 0562; Tuomey 30(b)(6) Transcript, Ex. 4, Form 990 for 2012 p. 33.

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

[45] R. pp. 1658-1659; March 8, 2016 Hearing Transcript pp. 33-34.

The Court of Appeals erred in concluding to the contrary. In fact, the Opinion did not even address the effect of the Drakeford case, Tuomey's improper reporting to the IRS, the overpayment of key employees, and Tuomey admission that it no longer serves a community benefit.

The legislative intent behind the SCFA is patent—to preserve the resources of true charitable organizations and the benefits they confer on the community. Protections under the SCFA are premised on an organization's eligibility as a 501(c)(3) under federal law. Thus, if an organization is acting in a manner inconsistent with its stated charitable purposes that would invalidate its Section 501(c)(3) status, it must not be permitted to avail itself of the protections of the SCFA. Because illegal and fraudulent behavior is harmful to the public and should always be discouraged by the courts, it follows that such an organization cannot avail itself of statutory protections reserved for those organizations that serve the public interest.

II. THE COURT OF APPEALS SHOULD NOT HAVE AFFIRMED THE ORDER PERMITTING THE RESPONDENT TO AMEND ITS ANSWER TO ASSERT A NEW AFFIRMATIVE DEFENSE, *I.E.* THE PROTECTIONS OF THE SCFA, ON THE FIRST DAY OF THE SCHEDULED DATE-CERTAIN TRIAL, AFTER NEARLY THREE YEARS OF LITIGATION, AND WHERE PETITIONER WAS SUBSTANTIALLY PREJUDICED BY THE TARDY AMENDMENT.

Rule 15, SCRCP governs the amendment of pleadings. It provides that "leave [to amend pleadings] shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP; Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 218, 493 S.E.2d 826, 835 (1997). "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, 328-9, 494 S.E.2d 820, 823 (1998). However, when a late amendment would cause prejudice to the opposing party, the trial court should either deny the amendment or grant a continuance to allow the time reasonably necessary to prepare for the new issue. Armstrong v. Collins, 366 S.C. 204, 232, 621 S.E.2d 368,

382 (Ct. App. 2005).[46]

If affirmatively pled as a defense and proven at trial, the SCFA may serve to limit a party's recovery. S.C. Code Ann. § 33-56-180(A). However, the SCFA provides for an exception to the liability cap and allows claimants to pursue gross negligence claims against individual employee defendants. Id.

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, the Court of Appeals overlooked the substantial prejudice to Petitioner because he lost the ability to make claims against the individual employees who created the dangerous condition that caused his injury. Dr. Myat'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 his 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 Petitioner, but the prejudice related to Respondent's unexplained failure to plead the affirmative defense during the three years of litigation and resulted in the statute of limitations expiring on alternative remedies that otherwise would have been available. Essentially, the Court of Appeals held that Petitioner should have evaluated and pursued alternative remedies years before the SCFA defense was ever plead.

The Court of Appeals' 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, the court held that because invoking the protection of the cap would "trigger alternative remedies for the injured

[46] As described below, a continuance would not cure the prejudice suffered by Petitioner.

plaintiff," the defense is an affirmative defense. Specifically, the James 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 Petitioner, the distinction that Respondent moved to amend before trial is a distinction without a difference. The Opinion suggests that, to prevent prejudice, Petitioner 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 were time barred by the statute of limitations during the three years that elapsed before Respondent sought to plead the affirmative defense at issue. The only remedy available to prevent this prejudice was a denial of the untimely amendment.

Moreover, the two-year statute of limitations on Petitioner'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 asserted its potential SCFA defense. The time to pursue those alternative remedies had also long passed, which is what makes Respondent's late amendment so prejudicial.

The Opinion suggests that, because Petitioner's pleadings stated that Respondent was an eleemosynary corporation, therefore Petitioner 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 501(c)(3) qualification and/or 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."). Petitioner's recitation of the corporate registration with the Secretary of State's Office in his pleading does not equate to a concession of Respondent's qualifications to receive the affirmative defenses provided in the SCFA.[47]

The Opinion relies heavily on Respondent's counsel's representations, which recites conversations between counsel about the 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,[48] and mentioning potential defenses in conversation is no substitute for 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. The Opinion's rationale is that Tuomey's counsel mentioned the potential SCFA defense in

[47] Moreover, once Respondent actually pleaded the affirmative defense, Petitioner timely filed a Reply challenging the Respondent's qualifications of those protections.

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

several conversations simply does not equate to properly pleading a defense that triggers a duty for a claimant to evaluate and pursue alternative remedies. Such 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 precedent when advising clients of their options and rights in litigation.[49]

III. THE COURT OF APPEALS ERRED IN CONCLUDING THE RESPONDENT COULD REOPEN ITS CASE AND OFFER NEW EVIDENCE NEVER PREVIOUSLY DISCLOSED IN DISCOVERY IN SUPPORT OF ITS SCFA DEFENSE AFTER THE DEFENSE HAD RESTED AND AFTER PETITIONER HAD MOVED FOR DIRECTED VERDICT ON THE SCFA DEFENSE AND WHERE PETITIONER WAS SUBSTANTIALLY PREJUDICED.

During the trial, no evidence or testimony had been submitted by Respondent in support of SCFA defense. In timely moving for the directed verdict on the affirmative defense, Petitioner's counsel provided a roadmap of what must be proven under SCFA, in order to properly prove up the defense.[50]

It is well settled that our courts should not permit a party to reopen its case if doing so would give one party a tactical advantage. State v. Wright, 416 S.C. 353, 785 S.E.2d 479 (Ct. App. 2016). The Court of Appeals' 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 Petitioner's counsel had timely moved for directed verdict on the SCFA defense and, in so doing, provided a detailed account of what Respondent had failed to prove. The witness and documents that Respondent would later present had been available to be disclosed by Respondent much earlier. None of the evidence that Respondent offered was newly acquired or previously unavailable. At the very least, Respondent

[49] *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).

[50] R. pp. 1530-1531; Trial Transcript pp. 486-87.

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 Petitioner'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 Petitioner's rights requiring reversal.

CONCLUSION

The Court of Appeals erred in finding that Tuomey qualifies for the protections of the SCFA, rewards Tuomey for its extensive wrongdoing, and sets a precarious precedent deferring SCFA protections solely to the IRS. The Court of Appeals further erred in permitting Respondent Tuomey leave to plead its SCFA defense on the eve of trial that resulted in substantial prejudice to Petitioner. Then, after Tuomey failed to put up *any* evidence of the affirmative defense at trial, and after Petitioner moved for a directed verdict, and provided a roadmap of all that Respondent had failed to prove, the lower court granted Respondent leave to reopen its case and put up new evidence that it qualified for the protections of limited liability under the SCFA. Such a tactical advantage to one litigant cannot be permitted to stand. For all of these reasons, or importantly, for any one of these reasons, Petitioner respectfully requests the Court grant certiorari to the Court of Appeals, reverse the decision, and reinstate the jury verdict.

Respectfully submitted,

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October 18, 2019
Columbia, South Carolina

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.

PROOF OF SERVICE

I certify that I have served the ***Petition for Certiorari and Appendix*** on the following counsel of record by depositing a copy of it in the United States Mail, postage prepaid, on October 18, 2019:

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October 18, 2019

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*
Court of Appeals Case No.: 2016-000774
Opinion No. 5636 (S.C. Ct. App. filed April 3, 2019)

Dear Ms. Kitchings:

Enclosed for filing is a copy of a Petition for Certiorari and Proof of Service in the above referenced case, which we are filing with the South Carolina Supreme Court today.

If you require anything further, please contact me. Thank you for your consideration of this matter. With kind regards, I remain

Sincerely,

William R. Padget

cc.

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