Original

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 Regional Medical Center.....Respondent.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S COUNTER-STATEMENT OF THE CASE

Petitioner Win Myat ("Petitioner") filed a personal injury action against Respondent Tuomey Regional Medical Center ("Respondent" or "Tuomey") on October 15, 2012. (R. p. 24–30). Petitioner amended his complaint on November 5, 2012. (R. p. 31–37). Respondent answered the amended complaint on January 16, 2013. (R. p. 38–40).

On August 21, 2015, Respondent moved to amend its answer to assert the protections of the Solicitation of Charitable Funds Act (hereinafter "the charitable cap") pursuant to section 33-56-180 of the South Carolina Code.[1] (R. p. 41–43). In both the initial and amended complaints, Petitioner asserted that Respondent was a charitable organization, and Responded conceded this in its answer. (R. p. 25, 32, 38). On August 25, 2015, the trial court granted Respondent's motion to amend its answer to assert the charitable cap as a defense. (R. p. 96–1018, 1028, 1892–94).

The case was tried before a jury on August 31, 2015. (R. p. 1052, 1069). At the close of Respondent's case-in-chief on September 2, 2015, Petitioner moved for a directed verdict on Respondent's failure to offer evidence of its 501(c)(3) status and the application of the charitable cap. (R. p. 1531–32). Respondent immediately moved to reopen its case-in-chief and requested the trial court take judicial notice of its 501(c)(3) status and the application of the charitable cap. (R. p. 1533). Respondent also offered to present evidence of its 501(c)(3) status at that time. (R. p. 1533).

The trial court took the matters of Respondent's 501(c)(3) status and the charitable cap under advisement and continued with the presentation of evidence and testimony to the jury. (R. p. 1536–38). The parties agreed that Respondent's 501(c)(3) status and the application of the

[1] The Solicitation of Charitable Funds Act caps tort liability of charitable organizations at the same liability limits imposed by the South Carolina Tort Claims Act (SCTCA), found in section 15-78-120 of the South Carolina Code.

charitable cap was not a question of fact for the jury. (R. p. 1536). Prior to receiving the jury's verdict on September 2, 2015, the trial court granted Respondent's motion to reopen its case-in-chief to present evidence on the issues of its 501(c)(3) status and the application of the charitable cap and also granted Petitioner leave to conduct discovery prior to an evidentiary hearing. (R. p. 1612–13, 1620–21). Following the trial court's rulings on September 2, 2015, the jury returned a verdict of $2.5 million actual damages for Petitioner. (R. p. 1614).

On March 8, 2016, the trial court conducted an evidentiary hearing on Respondent's 501(c)(3) status and the application of the charitable cap. (R. p. 1626–1727). By Order of April 7, 2016, the trial court reduced the verdict to $300,000, entered judgment, and denied Petitioner's outstanding motions. (R. p. 5–23).

On April 14, 2016, Petitioner timely served a Notice of Appeal of the trial court's April 7, 2016 Order. The Court of Appeals issued an opinion April 3, 2019, affirming the trial court. *Win Myat v. Tuomey Reg'l Med. Ctr.*, 427 S.C. 601, 832 S.E.2d 306 (Ct. App. 2019). Specifically, the Court of Appeals found "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," and thus, the charitable cap applied in the instant case. *Id.* at 612, 832 S.E.2d at 312. The Court of Appeals further held there was no prejudice to Petitioner because he "knew [Respondent] was a charitable entity and should have known the statutory cap would apply." *Id.* at 609, 832 S.E.2d at 310. Further, there was no prejudice to Petitioner, as the Court of Appeals noted, because the trial court allowed him to conduct discovery on the issue of Respondent's 501(c)(3) status and participate in a hearing on the issue. *Id.* at 610, 832 S.E.2d at 310. Petitioner filed a motion for rehearing, and the Court of Appeals denied rehearing on September 20, 2019. Petitioner now seeks a writ of certiorari from this Court to review the Court of Appeals' decision.

STATEMENT OF THE FACTS

Petitioner was injured after he fell on July 5, 2011, while walking through the third floor of Tuomey hospital. Petitioner filed suit on October 15, 2012 and filed an amended complaint on November 5, 2012. (R. p. 24–37). Respondent answered the amended complaint on January 16, 2012. (R. p. 38–40).

Respondent took Petitioner's deposition on May 9, 2014. (R. p. 1728, 1752–1890). Petitioner served initial discovery requests on Respondent on July 3, 2014, and Respondent responded on September 10, 2014. (R. p. 1008, 1016–18). In the initial discovery requests, Petitioner sought "the names . . . of all insurance companies which have liability insurance coverage relating to the claim." (R. p. 1743). Respondent answered, "Coverage for Tuomey and its employees is provided by Continental Insurance Company . . . with limits of coverage sufficient to meet Tuomey's limits of liability as set forth in the South Carolina Solicitation of Charitable Funds Act." (R. p. 1743).

Prior to Petitioner's deposition, counsel for the parties "had numerous conversations about the $300,000 statutory limitation of [Petitioner's] claim." (R. p. 1728). After the May 9, 2014 deposition, counsel for the parties discussed for "the statutory cap of $300,000 and the fact that no physician ha[d] taken [Petitioner] out of work" for "nearly two hours." (R. p. 1728). After the case appeared on a trial roster for June 22, 2014, Petitioner's counsel contacted Respondent's counsel requesting additional time to prepare for trial. (R. p. 1729). Counsel for the parties again discussed the statutory cap. (R. p. 1729). At the request of Petitioner, Respondent's motion for summary judgment was continued beyond the July 28, 2014 and September 9, 2014 terms of court, and a new discovery order was entered. (R. p. 1729). On February 18, 2015, the parties attended mediation and discussed the statutory cap extensively, as the charitable cap was Petitioner's

opening demand at mediation. (R. p. 1729).

On August 21, 2015, the trial court held a telephone conference with the parties, and Petitioner's counsel indicated he was not aware the charitable cap had not been plead as a defense until sometime after the February 2015 mediation. (R. p. 998). When Respondent's counsel brought the telephone conversation up in his argument to the trial court at the motion to amend hearing, neither Petitioner or his counsel disagreed with the statement. (R. p. 1729). At the motion to amend hearing, Respondent's counsel's affidavit on the issue of Petitioner's knowledge of the application of the charitable cap was the only evidence submitted to the trial court. No other affidavits, testimony, or evidence were offered to the trial court to refute Petitioner's actual knowledge of the assertion and application of the charitable cap.

ARGUMENTS

I. This Court should deny the petitioner for writ of certiorari because the Court of Appeals properly found the trial court did not err in following the bright-line test established by the South Carolina General Assembly in section 33-56-170 in determining Respondent was entitled to receive the protections of the Solicitation of Charitable Funds Act because Respondent is a charitable organization by virtue of the Internal Revenue Service's determination that it is entitled to an exemption pursuant to section 501(c)(3) of the Internal Revenue Code.

The Court of Appeals did not err in affirming the trial court's finding that Respondent, a federally tax-exempt organization pursuant to section 501(c)(3), was entitled to receive the protections of the charitable cap. The trial court conducted an extensive hearing on the issue of the application of the charitable cap to Respondent, weighed the evidence and arguments put forth by both parties, and correctly found Respondent was entitled the charitable cap applied to Respondent. Petitioner cross-examined Respondent's witness regarding the *Drakeford* case and presented arguments throughout the trial about the perceived effect of the *Drakeford* opinion on Respondent's entitlement to the charitable cap. *See United States ex rel. Drakeford v. Tuomey*, 976 F.Supp.2d 776 (D.S.C. 2013), aff'd 792 F.3d 364 (4th Cir. 2015). The trial court considered

the evidence and arguments Petitioner presented and did not find them persuasive because the *Drakeford* case does not have any bearing on the application of the charitable cap on Respondent or its status as a 501(c)(3) organization.

Respondent respectfully submits the trial court did not need to conduct an evidentiary hearing, and instead, the trial court could have taken judicial notice of Respondent's 501(c)(3) status and the application of the charitable cap. *See* Rule 201(d), SCRE (allowing a court to take judicial notice at any stage in the proceedings). Respondent respectfully submits the General Assembly chose the 501(c)(3) status as an objective, fair, and bright-line test of charitable status for protection under the charitable cap. The use of this bright-line test avoids costly and unnecessary litigation on the issue of charitable status and promotes judicial economy. The question of whether the charitable cap applies should be routinely resolved without discovery or evidentiary challenge, as it merely requires a determination of whether the corporation is recognized by the IRS as being exempt from taxation pursuant to section 501(c)(3).

Plaintiff argues the determination of whether an organization qualifies as a charitable organization under sections 33-56-170 and 33-56-180 requires a case-by-case determination by the trial court. Plaintiff bases its argument on the fact that the language used in section 33-56-20 of the South Carolina Code to define a charitable organization is slightly different than the language used to define a charitable organization in section 33-56-170 of the South Carolina Code. However, Plaintiff ignores the plain language of the statute and attempts to create conflicting statutory provisions where there are none.

"The cardinal rule of statutory construction is to ascertain and effectuate the intention of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute."

Id. "Where the statute's language is plain and unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)).

According to section 33-56-180 of the South Carolina Code, a person sustaining an injury because of the tortious act of an employee of a charitable organization may recover against the charitable organization "only the actual damages he sustains in an amount not exceeding the limitations on liability imposed in the" SCTCA, or $300,000. Section 33-56-170 defines charitable organization, for the purposes of the charitable cap in section 33-56-180, as "any organization, institution, association, society, or corporation *which is exempt from taxation pursuant to Section 501(c)(3)* or 501(d) of Title 26 of the United States Code, as amended." (emphasis added). Section 33-56-20 defines a charitable organization as one

> (i) determined by the Internal Revenue Service to be a tax exempt organization pursuant to Section 501(c)(3) of the Internal Revenue Code;
>
> (ii) that is or holds itself out to be established for any benevolent, social welfare, scientific, educational, environmental, philanthropic, humane, patriotic, public health, civic, or other eleemosynary purpose, or for the benefit of law enforcement personnel, firefighters, or other persons who protect the public safety; or
>
> (iii) that employs a charitable appeal as the basis of solicitation or an appeal that suggests that there is a charitable purpose to a solicitation, or that solicits or obtains contributions solicited from the public for a charitable purpose.

Throughout his Petition for Writ of Certiorari, Petitioner states section 33-56-170 "looks

only to whether the organization *should be exempt* from taxation pursuant to the tax code." (Petition for Writ of Certiorari p. 9 (emphasis added); *see also* Petition for Writ of Certiorari p. 10 "specifying organizations that *should be exempt* from taxation" (emphasis added); *see also* Petition for Writ of Certiorari p. 16 "whether an organization *should be* "exempt" (emphasis added)). Petitioner ignores the clear language of section 33-56-170. When discussing the statutory language, Petitioner adds a "should" into the statute that is not there in an attempt to further distinguish the definition in section 33-56-170 from the one in 33-56-20. The operative inquiry under section 33-56-170 is not whether an organization "should be exempt" under section 501(c)(3), as Petitioner claims, but whether an organization "is exempt" under section 501(c)(3). The IRS is the organization that makes the determination of whether an organization *is exempt* under section 501(c)(3), and thus, their determination is what shows an organization is entitled to the protection provided for in the charitable cap. Thus, the plain language of the statute indicates the proper inquiry is whether the organization is currently exempt under section 501(c)(3), and a determination of whether an organization is exempt requires an inquiry into the organization's 501(c)(3) status, as determined by the IRS.

The Secretary of the Treasury has exclusive jurisdiction to challenge Respondent's 501(c)(3) status. *See* 26 U.S.C.A. § 7428. Tuomey respectfully submits that the trial court lacked 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, Respondent would be the petitioner, and only Respondent could challenge the Secretary's determination in the district court. The Treasury Secretary alone has the standing to revoke or rescind Respondent's 501(c)(3) tax exempt status. *In re Heritage Village Church and Missionary Fellowship, Inc. v. United States*, 87 B.R. 401 (1988). Petitioner attempts to have this Court

improperly revoke Respondent's 501(c)(3) status. Furthermore, Respondent's 501(c)(3) tax exempt status is a matter of public record and available on the IRS website, and the trial court could have taken judicial notice of this status.

Furthermore, courts in South Carolina have found that when an organization is qualified by the IRS as tax-exempt pursuant to section 501(c)(3), there is an irrebuttable presumption that it qualifies as a charitable organization as defined by section 33-56-170 and entitled to the charitable cap established by the General Assembly in section 33-56-180. In *Lazerson v. Hilton Head Hosp., Inc.*, this Court considered whether the charitable cap statutes were unconstitutional because they created "an irrebuttable presumption that an organization exempt from taxation under the Internal Revenue Code qualifies as a charitable organization and thus is entitled the limitation on liability." 312 S.C. 211, 213, 439 S.E.2d 836, 838 (1994). This Court found the statutes were not unconstitutional. *Id.* The Court found "tax exempt status under the Internal Revenue Code to be an objective criterion that bears a close nexus with the underlying legislative policy to preserve the resources of charitable organizations." *Id.* The Court noted, "It is for the legislature and not this Court to determine what criteria best establish eligibility for the statutory limitation on liability." *Id.* Accordingly, under *Lazerson*, there is an irrebuttable presumption that Respondent is entitled to the protections of the charitable cap by virtue of its tax exempt status under section 501(c)(3). *See Brown v. Roper Hosp.*, No. 2007-CP-10-3428, 2008 WL 8833549 (S.C. Com. Pl. June 12, 2008) ("Because it is a 501(c)(3) tax exempt organization as recognized by the Internal Revenue Service, there is an irrebuttable presumption that Roper qualifies as a 'charitable organization' under *S.C. Code Ann.* § 33-56-170(a)."). Accordingly, Petitioner did not have a right to challenge Respondent's status as a charitable organization entitled to the charitable cap.

As noted in *Lazerson*, the General Assembly provided clear criteria to establish whether

an organization is entitled to receive the protections of the charitable cap. 312 S.C. at 213, 439 S.E.2d at 838. The statute specifically requires an inquiry into whether the organization *is exempt* under section 501(c)(3). An organization *is exempt* under section 501(c)(3) when they are determined by the IRS to be tax exempt pursuant to that section. Respondent was determined by the IRS to be tax exempt under section 501(c)(3). The status of Respondent as tax exempt pursuant to section 501(c)(3) is a matter of public record, and Petitioner knew of Respondent's tax exempt status. Accordingly, the trial court did not err in, and the Court of Appeals did not err in affirming, that Respondent was entitled to the protections provided by the charitable cap. This clear bright-line rule established by the General Assembly best effectuates their intent to preserve the resources of charitable organizations. *Id.*

Petitioner cites to numerous cases regarding the qualifications of organizations to be tax exempt under section 501(c)(3). (Petition for Writ of Certiorari p. 13–14). However, these cases all concern the litigation in federal courts over whether the IRS properly revoked an organization's 501(c)(3) status or determined an organization was not entitled to tax exempt status under section 501(c)(3). Accordingly, in the cases Petitioner cites, the proper avenue of relief was followed by the corporations to challenge the revocation of their tax exempt status by the IRS. There is no method for Petitioner to challenge Respondent's 501(c)(3) status, as he attempts to do here.

If the General Assembly intended as Petitioner argues to have the courts conduct an evidentiary hearing into an organization's actions every time an organization seeks to raise the protection of the charitable cap, it could have simply added language to that effect into the statute. For example, the General Assembly could have defined a charitable organization entitled to the charitable cap as one that "should be tax exempt pursuant to the criteria listed in section 501(c)(3)" or one that "has been determined by the circuit court to meet the qualifications listed in section

501(c)(3)." The General Assembly did not do that. Instead, it incorporated whether the organization is tax exempt under section 501(c)(3), which necessarily implies that it has received tax exempt status under section 501(c)(3) by the only entity available to grant that status, the IRS.

Petitioner further argues Respondent no longer acts in accordance with its charitable purpose and should not receive the protections of the charitable cap. (Petition for Writ of Certiorari p. 18). In support of this argument, Petitioner cites to *Univ. of Va. Health Serv. Found. v. Morris ex rel Morris*, 657 S.E.2d 512 (Va. 2008), which Petitioner argues stands for the proposition that Virginia courts have found an organization did not qualify for charitable immunity despite the IRS classifying the organization as tax exempt pursuant to section 501(c)(3). However, this case involves a completely different statutory scheme than South Carolina. In Virginia, there are statutes specifically enacted to provide certain instances when hospitals do not receive charitable immunity. *Id.* at 517–18. For example, Virginia law provides hospitals do not receive charitable immunity unless the hospital "renders exclusively charitable medical services for which service no bill for service is rendered to, nor any charge is ever made to the patient." *Id.* (quoting Code of Virginia § 8.01-38). Accordingly, Virginia statues specifically provide instances where the *charitable immunity* can be inapplicable, and Virginia courts must make the determination of whether the organization has a charitable purpose and whether it acts within that charitable purpose. However, that same Virginia statute provides there can still be a *limitation* on the hospital's liability, i.e. a charitable cap, where the hospital "is exempt from taxation pursuant to § 501(c)(3)" and maintains insurance in an amount not less than $500,000. Code of Virginia § 8.01-38. The *University of Virginia Health Services* case is simply immaterial to the statutory scheme in South Carolina, and Virginia's statutory limitations on *full charitable immunity* have no bearing on the issues in this case.

Petitioner further cites to South Carolina cases prior to the adoption of sections 33-56-170 and 33-56-180 when South Carolina merely had common law charitable immunity. (Petition for Writ of Certiorari p. 18). However, these cases are inapplicable because the General Assembly specifically decided to incorporate an organization's tax exempt status under section 501(c)(3) when it adopted the Solicitation of Charitable Funds Act.

II. The Court should deny the petition for writ of certiorari because the Court of Appeals properly found the trial court did not err in allowing Respondent to amend its Answer to assert the protections provided to it by the Solicitation of Charitable Funds Act where Petitioner was not prejudiced and knew Respondent was a 501(c)(3) organization asserting the cap.

The Court of Appeals did not err in finding the trial court did not abuse its discretion in allowing Respondent to amend its answer where Petitioner was aware Respondent was asserting the charitable cap and was not prejudiced. Trial courts "have wide latitude in amended 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 [court's] finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Id.*

Rule 15(a) of the South Carolina Rules of Civil Procedure provides the court should "freely" grant a party leave to amend its pleadings "when justice so requires and [the amendment] does not prejudice any party." The party opposing a motion to amend has the burden of proving prejudice. *Tanner v. Florence County Treasurer*, 336 S.C. 552, 559, 521 S.E.2d 153, 156 (1999). "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." *Id.* (quoting *Pool v. Pool*, 329 S.C. 324, 494 S.E.2d 820 (1998)). "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 now being raised formally.'" *Soil*

& Material Eng'rs, Inc. v. Folly Assocs., 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct. App. 1987) (quoting H. Lightsey & J. Flanagan, South Carolina Civil Procedure at 291 (1985)).

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. 397,414, 329 S.E.2d 774, 784 (Ct. App. 1985). In the absence of such considerations, the trial court abuses his discretion in denying a motion to amend. *See Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 510–11, 369 S.E.2d 156, 160 (Ct. App. 1988) (finding the trial court abused its discretion in denying an amendment without reason where there was no manifest injustice resulting from the amendment).

The trial court in the instant case did not err in granting the amendment because Petitioner was aware of the charitable cap and Respondent's assertion of it. In support of its motion to amend, Respondent submitted an affidavit of counsel outlining the discussions he had with Petitioner's counsel from the inception of the case, showing that Petitioner actually knew the charitable cap applied and Respondent was asserting the cap. (R. p. 1728–30). In the affidavit, Respondent's counsel testified he spoke with Petitioner's counsel about the application of the charitable cap in initial conversations, conversations leading up to Petitioner's deposition on May 9, 2014, conversations after Petitioner's deposition, and conversations prior to and during mediation. (R. p. 1728–29). Respondent's counsel further testified Petitioner's opening demand at mediation was $300,000, showing Petitioner was aware Respondent was a charitable organization asserting the charitable cap. (R. p. 1729). Respondent's counsel further outlined the conversation he, Petitioner's counsel, and the trial court had in discussing the potential amendment where Petitioner's counsel stated he was *not* aware that Respondent failed to plead the charitable cap until "sometime after the mediation held on February 18, 2015." (R. p. 1729). Respondent further

argued this fact during the motion to amend hearing. (R. p. 998). Accordingly, from the beginning of this case until sometime after mediation, Petitioner was acting under the belief that Respondent was asserting the charitable cap. Petitioner did not offer any evidence to refute Respondent's evidence that Petitioner had actual knowledge of the charitable cap and its application throughout the case.

Furthermore, Petitioner admitted, and Respondent agreed, that Respondent was a charitable organization in the initial pleadings of this case. (R. p. 25, 32, 38). Thus, Petitioner had actually knowledge Respondent was a charitable entity when he drafted his complaint and amended complaint and when Respondent answered the amended complaint. Respondent also indicated, in its responses to Petitioner's initial discovery requests, insurance coverage was provided "with limits of coverage sufficient to meet Tuomey's limits of liability as set forth in the Solicitation of Charitable Funds Act." (R. p. 1743). The trial court, in exercising its discretion and following the liberal requirement to allow amendments, found this extensive evidence to be persuasive, and the Court of Appeals agreed. (R. p. 14–17). *See also Win Myat v. Tuomey Reg'l Med. Ctr.*, 427 S.C. 601, 609, 832 S.E.2d 306, 310 (Ct. App. 2019). Based on the evidence before it, the trial court found Petitioner failed to prove his burden of establish prejudice because he "was on notice of the statutory cap and had ample opportunity to refute it." (R. p. 16). As the trial court noted, "justice was furthered by allowing [Respondent] to amend its answer." (R. p. 17).

Although Petitioner argues he was prejudiced by the amendment because he failed to raise alternative remedies, the trial court properly found, and the Court of Appeals property affirmed, that Petitioner did not detrimentally rely on Respondent's failure to initially plead the charitable cap. Petitioner has not denied he had actual knowledge of the charitable cap. Petitioner points to his wife's failure to assert a loss of consortium claim to show prejudice. However, a loss of

consortium claim is entirely separate and distinct from Petitioner's claims against Respondent, and any decision his wife made in not bringing a separate loss of consortium claim is not due to reliance on Respondent's initial answer. *See Preer v. Mims*, 323 S.C. 516, 521, 476 S.E.2d 472, 475–76 (1996) ("Under South Carolina law, unlike that of some other states, loss of consortium is an independent action, not derivative."); *Hiott v. Contracting Servs.*, 276 S.C. 632, 633, 281 S.E.2d 224, 225 (1981), *overruled on other grounds Edwards v. SunCom*, 369 S.C. 91, 631 S.E.2d 529 (2006) (finding the trial court erred in granting a stay on the wife's loss of consortium action while her husband's personal injury action was pending on appeal); *Priester v. Southern Ry. Co.*, 151 S.C. 433, 149 S.E. 226 (1929) (directing a verdict against wife because of her contributory negligence claim 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, 119, 399 S.E.2d 161, 162 (Ct. App. 1990) (holding where a wife's personal injury claim and a husband's loss of consortium claim involved two separate lawsuits). Petitioner's cannot argue that his reliance upon Respondent's failure to plead the charitable cap and caused his wife not to bring her own separate loss of consortium claim.

Although Petitioner argues he was prejudiced because he could not bring other claims, such as a gross negligence claim against an individual employee, at no time did Petitioner attempt to amend his complaint to add any additional claims and argue that the amendment would have related back to the original complaint for statute of limitations purposes. Petitioner requests this Court to overturn a well-reasoned opinion by the trial court based on a suggestion in Petitioner's brief that he would have acted differently if Respondent would have initially plead the charitable cap. According to the evidence in the record before the trial court, Petitioner had actual knowledge of the charitable cap and was acting under the impression Respondent plead the charitable cap until sometime after mediation. Petitioner was on notice from the very beginning of the case that

Respondent could assert the charitable cap as seen by his compliant acknowledging that Respondent was a charitable organization. Furthermore, the evidence in the record shows Petitioner acted under the impression that Respondent raised the charitable cap and knew Respondent was asserting the cap from numerous, extensive discussion with Respondent's counsel, despite it not being asserted in the initial pleading.

As the trial court also noted, Petitioner's reliance on *James v. Lister* is misplaced. 331 S.C. 277, 500 S.E.2d 198 (Ct. App. 1998). In *James*, the Court of Appeals held a trial court erred in allowing a party to amend its answer to assert the charitable cap *after the verdict*. *Id.* at 282, 500 S.E.2d at 201. The Court of Appeals found the plaintiffs would be prejudiced by the amendment because they had no notice of the charitable cap and could not pursue alternative remedies at trial. *Id.* at 282–83, 500 S.E.2d at 201. Here, however, Respondent presented evidence Petitioner had notice of the charitable cap and assumed it was plead. Furthermore, Respondent filed its motion to amend prior to the trial in the case instead of in post-trial motions. Petitioner had the opportunity to seek additional discovery prior to trial but never requested to do so. At no point after Respondent's amendment did Petitioner ask for a continuance or to amend his pleadings. Accordingly, the trial court properly found Petitioner was not prejudiced by allowing Respondent to amend its answer to specifically plead the charitable cap because Petitioner had notice the charitable cap applied and knowledge Respondent was asserting the charitable cap.

III. The Court should deny the petition for writ of certiorari because the Court of Appeals properly found the trial court did not err in allowing Respondent to reopen its case to present evidence of its charitable status where Petitioner was allowed the opportunity to participate in discovery regarding this issue and was not prejudiced.

The trial court did not abuse its discretion in granting Respondent's motion to reopen its case. 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, 319,

326 S.E.2d 173, 175 (Ct. App. 1985). The trial court enjoys considerable latitude and discretion in these matters, and the opposing party must demonstrate prejudice before the judge's decision will be revered. *Brown v. La France Indus., a Div. of Riegel Textile Corp.*, 286 S.C. 319, 325, 333 S.E.2d 348, 351 (Ct. App. 1985); *Brenco v. S.C. Dep't of Transp.*, 377 S.C. 124, 127, 659 S.E.2d 167, 169 (2008).

> 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 Transp., 218 S.C. 554, 563, 63 S.E.2d 465, 469 (1951). "A motion to reopen the evidentiary record and to allow additional evidence is addressed to the sound discretion of the trial judge. His ruling will not be reversed absent an abuse of discretion. A trial is a search for the truth; concomitantly, liberality is the linchpin of the rule." *State v. Wren*, 470 S.E.2d 111, 112 (Ct. App. 1996) (quoting *State v. Humphrey*, 276 S.C. 42, 274 S.E.2d 918 (1991)).

In the instant case, Petitioner was not prejudiced by the trial court's decision to allow Respondent to reopen its case to present evidence of its charitable status and the application of the charitable cap because the trial court allowed Petitioner the opportunity to conduct discovery on the issue and participate in a hearing on the issue. After Petitioner moved for a directed verdict, Respondent immediately moved to reopen its case. (R. p. 1531–33). Both parties agreed the issue of whether the charitable cap applied was a question for the trial court and not the jury. Petitioner was able to conduct extensive discovery on the issue and present evidence and testimony to the trial court for review. The trial court granted Respondent's motion to reopen its case prior to the

jury verdict on September 2, 2015. (R. p. 1613). The parties attended a hearing before the trial court six months later on March 8, 2016, to present evidence and argue whether Respondent was entitled to the charitable cap. (R. p. 1626). At trial, Petitioner argued he would be prejudiced by allowing Respondent to reopen its case because discovery was already completed in the case. (R. p. 1611).

In his Petition for Writ of Certiorari, Petitioner argues Respondent received a "tactical advantage" by moving to reopen its case after Petitioner made the directed verdict motion because it received "a roadmap of what [it] needed to prove for its charitable defense." (Petition for Writ of Certiorari p. 25). This is an exaggeration. In his argument, Petitioner argued he was entitled to a directed verdict because Respondent "failed to set forth and offer any evidence . . . [it was] an entity that qualifies for protections of the charitable cap in that the tax status of the entity has to be offered under the definitional section of the statute." (R. p. 1531). Petitioner further cited to its previous arguments against the motion to amend that Respondent did not qualify for the protections of the charitable cap due to the *Drakeford* case. (R. p. 1531). It was not a tactical advantage for Respondent to hear Petitioner's argument that it had to present evidence of its 501(c)(3) status, especially when the trial court gave Petitioner months to conduct additional discovery on the issue, including conducting a 30(b)(6) deposition of the witness Respondent relied on at the eventual hearing. Petitioner had a full and fair opportunity to present its case, and the trial court allowed Respondent a full and fair opportunity to present its defenses by allowing it to reopen its case. The trial court acted properly within its discretion in allowing Respondent to reopen its case and even eliminated any prejudice Petitioner might have suffered by allowing him adequate time to conduct full discovery and prepare arguments on the issue.

CONCLUSION

Accordingly, for the reasons discussed herein, Respondent respectfully requests the Court deny Petitioner's Writ of Certiorari as the South Carolina Court of Appeals did not err in affirming the trial court's determination that (1) Respondent was entitled to the charitable cap by virtue of its tax-exempt status pursuant to section 501(c)(3) of the Internal Revenue Code; (2) Respondent was entitled to amend its answer to assert the charitable cap; and (3) Respondent was entitled to reopen its case to present evidence of its status as a 501(c)(3) charitable organization. The trial court properly considered the issue, evidence, and arguments before it and properly exercised its discretion to find Respondent was entitled to the protections of the charitable cap and Petitioner would not be prejudiced by allowing Respondent a full and fair opportunity to assert those protections. As the trial court noted, "justice was furthered" in this case by confirming Respondent's and other similar charitable organizations' ability to benefit from the protections provided to them by South Carolina law and preserve their resources in furtherance of their charitable purpose. (R. p. 17).

Respectfully Submitted,

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December 2, 2019

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 Regional Medical Center.....Respondent.

PROOF OF SERVICE

I certify that I have served the Respondent's Return to Petitioner's Petition for Writ of Certiorari on the following counsel of record by depositing a copy of same in the United States Mail, postage prepaid, on December 2, 2019.

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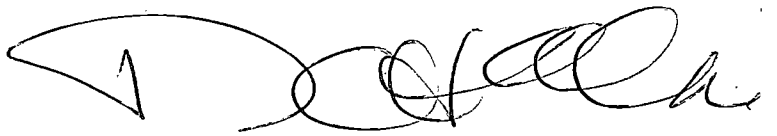

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