THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

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S.C. SUPREME COURT

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

Win Myat..... Petitioner,

v.

Tuomey Healthcare System..... Respondent.

PETITIONER'S BRIEF

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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 Petitioner 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 Amend its Answer so as to assert the protections of the SCFA.[6] Earlier that day, prior to Tuomey's filing

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[1] See Appendix, Record on Appeal at pp. 0024-0025; Complaint. Hereinafter references to the Appendix, and the included Record on Appeal may be abbreviated as "App. R _____."
[2] See App. R. p. 0032, line 5; Amended Complaint.
[3] See App. R. pp. 0038-0040; Answer.
[4] See App. R. p. 0001, lines 8-11; Scheduling Order dated November 2, 2014.
[5] See App. R. p. 0003; Order Setting Date Certain Trial dated April 30, 2015.
[6] See App. R. pp. 0041-0043; Respondent's Motion to Amend dated August 21, 2015.

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 arguments 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 during the prior three years of litigation.[11] The trial court opted to hold the matter in abeyance and to proceed with closing arguments and the jury charge. Both parties completed their closing arguments and the jury was

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[7] App. R. p 0996; Transcript of August 24, 2015 Motion Hearing p. 2 (Respondent's counsel referencing Friday call). App. 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] App. R. p. 1892; Amended Answer dated August 24, 2015
[9] App. R. p. 1529; Trial Transcript p. 485.
[10] App. R. p. 1531; Trial Transcript p. 487.
[11] App. R. p. 1533; Trial Transcript p. 489.

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, concluding that Tuomey qualified for the protections of the SCFA. The Order also denied Petitioner's remaining outstanding motions.[17]

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*

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

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

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

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

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

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

Regional Medical Center, 427 S.C. 601, 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 sought certiorari to the Court of Appeals, which was granted by Order dated May 22, 2020.

FACTS

At the time of the events giving rise to this case Petitioner Win Myat was a thirty-nine-year-old infectious disease physician practicing in Sumter.[18] At approximately 5:30 AM on July 6, 2011, while rounding on patients at 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 extensive surgeries 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 by dropping ice from a nearby ice machine onto the floor without cleaning it up.

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 a 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 (anti-fraud laws) for having entered into improper and illegal contracts and arrangements with physicians employed by the hospital.[21] The District

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

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

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

[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, 31 U.S.C. §§ 3729 et seq.". *Drakeford*, 976 F. Supp. 2d at 780, aff'd., 792 F.3d 364.

Court entered a judgment against Tuomey that, including penalties and fines, totaled $237,454,195.00 and which has been affirmed on appeal.

More specifically, in October of 2005, Michael Drakeford, M.D., filed a *qui tam* action against Tuomey. Dr. Drakeford and the United States of America alleged that the compensation packages that Respondent paid some of its key physicians were in excess of the fair market value for their services and were thus in violation of the anti-kickback provisions of the Stark Law and antifraud laws of the False Claims Act.[22] On March 29, 2010, a federal jury returned a verdict in favor of the United States, finding that Tuomey had violated the Stark Law but had not violated the False Claims Act.[23] The District Court granted a new trial on the issue of the False Claims Act and issued an order finding that: (1) pursuant to the jury verdict, Tuomey violated the Stark Law; and (2) Tuomey submitted claims in violation of the Stark Law, and the United States paid those improper claims to Tuomey in the amount of $44,888,651.00. The Court concluded that the United States was entitled to judgment in its favor as to its equitable claims in that amount.

Tuomey appealed that Order, and, in 2012, the Fourth Circuit remanded the case to District Court instructing:

> [T]he jury must determine on remand whether the contracts took into account the volume or value of referrals. If it so finds, the jury must further determine whether Tuomey could bear its burden of proof with respect to the indirect compensation arrangement exception. Finally, if the jury finds that the contracts created a financial relationship—as defined by the Stark Law—between Tuomey and the physicians, it must determine the number and value of claims Tuomey presented to Medicare for payment of facility fees resulting from the facility component referrals made by the physicians, and for which it received payment.

Drakeford, 675 F.3d at 405.

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[22] Specifically, the United States contended that fourteen (14) employment contracts with certain physicians were improper and violated federal law.

[23] App. R. pp. 1731-1732; March 2010 *Drakeford* Jury Verdict Form.

The case proceeded to trial a second time, and, in May of 2013, the jury returned a verdict that Tuomey had violated both the Stark Law and the False Claims Act. The jury found that Tuomey had submitted 21,730 patient claims in violation of the False Claims Act, and that the value of these claims totaled $39,313,065.00. Applying statutory penalties for the antifraud violations, in October of 2013, the District Court issued a judgment against Tuomey, under the False Claims Act, in the amount of $237,454,195.00.[24] Tuomey appealed but was unsuccessful, and in July 2015, the Fourth Circuit Court of Appeals issued an order affirming the District Court's decision and the nearly quarter billion dollar judgment against Tuomey.[25]

Since the time the *Drakeford* litigation began, Tuomey's sole means of communication with the IRS has been through its annual Form 990 filings.[26] During this time, Respondent was less than forthright in reporting to the Internal Revenue Service ("IRS") about the Federal Court's findings in the *Drakeford* case. Tuomey' 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.[27] Tuomey's Form 990 for 2010, filed at a time which was after the first federal jury had specifically found that Tuomey had violated the Stark Law, 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.[28, 29] Omission of such key facts is tantamount to fraud and, given that our nation's system of taxation

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[24] See App. R. pp. 0694-0709; Tuomey 30(b)(6) Depo Transcript, Ex.8 (*Drakeford* District Court Order.

[25] See App. R. pp. 0710-0737; Tuomey 30(b)(6) Depo Transcript, Ex. 9 (*Drakeford* 4th Circuit Opinion

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

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

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

[29] See App. R. p. 1731; 2010 *Drakeford* Jury Verdict Form p. 1

relies largely on self-reporting, explains the likely reason 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.[30]

Tuomey's disclosure to the IRS in its Form 990 for 2011 was equally as deceptive and devoid of critically important information regarding the 2010 *Drakeford* jury findings.[31] 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 with a retrial upcoming, 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 [...]."[32] 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

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[30] App. R. pp. 0327-0328; Tuomey Rule 30(b)(6) Transcript pp. 15-16.
[31] App. R. p. 0870; Form 990 for 2011 p. 83.
[32] App. R. pp. 0613-0614; Tuomey 30(b)(6) Transcript, Ex. 4, Form 990 for 2012, pp. 83-84.

the False Claims Act."[33] 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." The basis for these optimistic figures has never been explained.

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. The Fourth Circuit expressly addressed the enormity of the frauds committed by Respondent stating that "while the penalty is certainly severe, it is meant to reflect the sheer breadth of the fraud Tuomey perpetrated upon the federal government." *Drakeford*, 792 F.3d at 389. By its own admission, Tuomey has never informed the IRS about the final outcome of the *Drakeford* litigation.[34] 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.

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.[35] The CEO's country club dues were also paid as part of his compensation.[36]

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

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[33] App. R. p. 0968; Form 990 for 2013, p. 89.
[34] App. R. pp. 0364-0365; Tuomey Rule 30(b)(6) Transcript., pp. 52-53. *See also* App. R. pp. 1677-1678; March 8, 2016 Hearing Transcript pp. 52-53.
[35] App. R. pp. 1687-1693; March 8, 2016 Hearing Transcript pp. 62-68.
[36] App. R. pp. 0664-0665; Tuomey 30(b)(6) Transcript Ex. 5, Form 990 for 2013 pp. 40-41.

hospital. The affairs of the Respondent have ended or otherwise are winding down.[37] It has no employees, and, as of January 1, 2016, it is no longer providing any medical services to the Sumter community.[38] Virtually all of Respondent's assets were sold to Palmetto Health (now Prisma Health), and all that remains of the Respondent entity is for its counsel to complete the winding down of its affairs and a $2,200,000.00 contingent liability fund for certain creditor claims, primarily for Petitioner's putative judgment.[39]

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 AND STARK LAW VIOLATIONS FOR DEFRAUDING THE FEDERAL GOVERNMENT AND OTHER WRONGDOING.

Respondent Tuomey is not entitled to the protections under the SCFA because it has not conducted itself as a "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. *Standard of Review/Strict Construction Required*

This Court reviews questions of statutory interpretation *de novo*. "Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Brock*, 410 S.C. 361, 365, 764 S.E.2d 920, 922 (S.C.

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

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

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

2014); *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).

Common law charitable immunity was 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). After *Fitzer*, but prior to the adoption of the SCFA, under the common law there was no liability cap that could be sought by charitable institutions. Thus, because the limitation of liability provided by the SCFA 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). "[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. The Recodified 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).[40] The relevant portion of the SCFA, the section stating what organizations can claim the protection of a cap on liability,[41] 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 recodified after *Lazerson v. Hilton Head Hospital, Inc.*, 312 S.C. 211, 439 S.E.2d 836 (1994) preserves the Court's historic role in reviewing the activities of the organization claiming

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

[41] 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.

charitable status. The distinction in the statutory language, compared to other parts of the SCFA, is of the utmost importance.

The SCFA contains two markedly different definitions of a "charitable organization." The general definitions section 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**;
>
> (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.

S.C. Code Ann. § 33-56-20(1) (emphasis added). Notably, an entity does not have to be tax exempt under Section 501(c)(3) to be subject to the SCFA. An entity can simply hold themselves out to be charitable *or* employ a charitable appeal as the basis for the solicitation of funds to be subject to the Act. *See* S.C. Code Ann. § 33-56-20(1)(a)(ii) & (iii). Importantly, in the operative section of the statute governing the limitation of liability, 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). When limiting liability, the language that the Legislature chose when recodifying the SCFA is markedly different than the general definitions

section, thereby, giving no weight or deference as to whether an organization has previously been designated by the IRS to be a 501(c)(3) or 501(d) entity. Put simply, Section 170's determining factor is not whether an organization has been determined by the IRS to be tax exempt, but whether an organization qualifies to be exempt from taxation under Section 501(c)(3).

Respondent relies on *Lazerson* to suggest the IRS's determination is the sole criterion. While *Lazerson* held the SCFA cap constitutional and found it bore a close nexus to the underlying policy objectives of preserving charitable resources, the Court did *not* decide whether the varying definitions of the SCFA permit a court to determine if an organization is eligible to receive the cap on liability established by the SCFA. Such an issue was not before the *Lazerson* Court as the statutory expansion came later that year.

Specifically, *Lazerson* was decided on January 6, 1994. Six months later the Legislature expanded and recodified the SCFA simultaneously providing these two varying definitions for "charitable organization." *See* 1994 S.C. Acts No. 461 [42] (June 29, 1994); *Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) ("there is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects"). Critically, one definition defers to the IRS's determination while the operative definition does not. Accordingly, the recodified statute with two varying definitions evidences the Legislative intent not to defer to the IRS determination, but to look into whether an entity actually should qualify for tax exempt status under Section 501(c)(3).

It is well settled that the cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578,

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[42] Codified at S.C. Code § 33-56-10 *et seq.*

581 (2000). 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. It is well settled that distinct statutory language should be given different meanings. *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 393, 134 S.E.2d 206, 208 (1964) ("Clearly, the legislature, by using this differing language, recognized the distinction...."); *Hughes*, 386 S.C. at 647, 689 S.E.2d at 642 (construing different meanings to statutes with using the words "truck" and "motor truck").

When the two definitions are read together, it is apparent that the Legislature intended for not just those organizations that have garnered tax-exempt status to be subject to the SCFA, but also those that advance "charitable" purposes and those that solicit funds for "charitable" purposes to be subject to the SCFA. *Hodges*, 341 S.C. at 88, 533 S.E.2d at 583 ("statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative"); *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005) ("the language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose").

In construing Section 33-56-170, the precise meaning of "pursuant to Section 501(c)(3)" is critical. "[P]ursuant to" means "in compliance with." BLACK'S LAW DICTIONARY (10th Ed. 2009). Applying the ordinary meaning, the plain language requires the organization to be in compliance with Section 501(c)(3), not simply to have been approved for tax exempt status decades ago.[43] The

[43] At trial, Respondent offered letters dated July 9, 1991, and July 13, 1998, to show its tax-exempt status. App. ROA II pp. 686-687.

trial court properly recognized this distinction, rejecting the notion that the IRS's tax-exempt status is all the corporation was required to show.[44] The Court of Appeals' Opinion gives no weight to this statutory distinction.

When recodifying the SCFA after *Lazerson*, 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, this 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 solely to the IRS cannot be overstated. 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.[45]

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[44] App. R p. 20 ("This Court agrees with the Plaintiff's contention that if an organization is acting in a manner inconsistent with its stated charitable purposes that would invalidate is 501(c)(3) status, this Court has the authority to not permit the organization to avail itself to the protections of the SCFA.")

[45] 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

Setting precedent that the IRS stands as the sole arbiter of the SCFA defense creates 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 actually qualifies for 501(c)(3) status, and in light of the reality of the fact that 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, but armed with perfunctory tax-exempt status, will use that status as a "get out of jail free card" and 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 recodified statutory language preserves the historic role of the trial court in making this determination.[46]

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

The relevant portion of Section 501(c)(3) defines an exempt organization as:

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continue to receive tax exempt treatment. *See* U.S. Government Accountability Office Report on Tax-Exempt Organizations, December 2014 at p. 2, available at: http://www.gao.gov/assets/670/667595.pdf (detailing that the IRS examination rate for charitable entities was 0.81 percent in 2011, and declined to 0.71 percent in 2013). As such, when a party challenges a defendant's qualifications to receive the protections of the SCFA, it is paramount that our courts have the ability to analyze an entity's behavior and determine whether it should receive the benefit of the SCFA cap by determining if the entity meets the criteria set forth under Title 26, Section 501(c)(3) of the U.S. Code, as contemplated by S.C. Code § 33-56-170.

[46] *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).

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

26 U.S.C. Section 501(c)(3) (emphasis added). IRS publications further explain this inurement 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 that Tuomey is 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 Tuomey's net earnings inuring 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 established overpayment of fourteen (14) key employees, 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 truly charitable organizations that are providing gratuitous 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 unjustified pay 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 enforced in *Drakeford* 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 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 law, 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 issue has not been determined by the IRS, for, as described below, Tuomey has not properly reported 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 material 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. This likely explains why the IRS has never sought to revoke Tuomey's tax exempt status. 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,[47] should result in Tuomey being disqualified from receiving the limitation of liability 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 of 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, "[t]he 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. Inexplicably, the Court of Appeals decision effectively turned a blind eye to Respondent's conduct and rewarded its wrongdoing by

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[47] Tuomey's assets, including the hospital, were purchased by Palmetto Health effective January 1, 2016, and the remaining Tuomey entity is winding down its affairs. Due to this sale, 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]" was not the language chosen in the operative section of the SCFA. The Legislature may have recognized that often our courts will be the only adjudicative body to determine whether the entity is entitled to the protections of this state statute.

clothing Tuomey with SCFA's protections.

So too, public policy weights strongly against a finding of 501(c)(3) protections. 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, (1983) (refusing 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 (1945). Federal statutory laws such as the False Claims Act and the Stark Law are proper sources of declarations of public policy.

As a matter of public policy, Tuomey must not be afforded the protections conferred by the SCFA due to its illegal conduct as 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* if not outright fraud, 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); *see also 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*, 657 S.E.2d 512 (Va. 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 IRS determination from 1980, 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.*, 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.,* 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 laws, Tuomey gave its CEO two performance bonuses, and nearly 50% pay increase, raising his

salary from $991,462 in 2012 to $1,485,190 in 2013 (in addition to paying his country club dues).[48] 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 blunders, is yet another example of 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.[49] 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 hospitals 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 even 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. Tuomey admits that its affairs are winding down,[50]

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[48] See App. R. pp. 0664; Tuomey 30(b)(6) Transcript, Ex. 5, Form 990 for 2013 pp. 40-41.
[49] See App. R. p. 0562; Tuomey 30(b)(6) Transcript, Ex. 4, Form 990 for 2012 p. 33.
[50] App. R. p. 1652; March 8, 2016 Hearing Transcript p. 27.

it has no employees, and is no longer providing any medical services as of January 1, 2016.[51] At the time of Myat's judgment entry Tuomey simply is no longer fulfilling its stated charitable purpose. Thus, Tuomey has failed to carry its burden of proving a community benefit under Section 501(c)(3), and thus does not qualify for the protections of the SCFA.

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, or Tuomey's admission that it no longer serves a community benefit.[52]

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 should always be discouraged by the courts, it follows that such an organization cannot avail itself of statutory protections reserved for those charitable organizations that rightly serve the public interest.

II. 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 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 LAST-MINUTE AMENDMENT.

Rule 15(a) of the South Carolina Rules of Civil Procedure provides:

> **Amendments.** A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or,

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

[52] The Court of Appeals decision and the trial court seemingly focused the timing of the inquiry at the time of the underlying incident. However, the SCFA language focuses on the recovery of the judgment. See S.C. Code § 33-56-180(a) ("a person sustaining injury or dying . . . ***may recover***"). Thus the Court should consider all available information at the time of entry of judgment when making the SCFA cap determination.

> if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise **a party may amend his pleading only** by leave of court or by written consent of the adverse party; and leave shall be freely given **when justice so requires and does not prejudice any other party**....

(emphasis added). "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). The decision whether to grant leave to amend is within the sound discretion of the trial judge. *Soil & Material Eng'rs, Inc. v. Folly Assoc.,* 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct.App.1987). 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).[53] "Central to requiring the pleading of affirmative defenses is the prevention of unfair surprise. A defendant should not be permitted to 'lie behind a log' and ambush a plaintiff with an unexpected defense." *Garrison v. Target Corp.*, 429 S.C. 324, 360, 838 S.E.2d 18, 37 (Ct. App. 2020).

If affirmatively pled as a defense and proven at trial, the SCFA may serve to limit a party's recovery:

> A person sustaining an injury or dying by reason of the tortious act of commission or omission of an employee of a charitable organization, when the employee is acting within the scope of his employment, may recover in an action brought against the charitable organization only the actual damages he sustains in an amount not exceeding the limitations on liability imposed in the South Carolina Tort Claims Act in Chapter 78 of Title 15. An action against the charitable organization pursuant to this section constitutes a complete bar to any recovery by the claimant, by reason of the same subject matter, against the employee of the charitable organization whose act or omission gave rise to the claim unless it is alleged and proved in the action that the employee acted in a reckless, wilful, or grossly negligent manner, and the employee must be joined properly as a party defendant. A judgment

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

> against an employee of a charitable organization may not be returned unless a specific finding is made that the employee acted in a reckless, wilful, or grossly negligent manner. If the charitable organization for which the employee was acting cannot be determined at the time the action is instituted, the plaintiff may name as a party defendant the employee, and the entity for which the employee was acting must be added or substituted as party defendant when it reasonably can be determined.

S.C. Code Ann. § 33-56-180(A). The section references the South Carolina Tort Claims Act as to the limitations of actual damages recoverable. The Tort Claims Act, more specifically S.C. Code Ann. § 15-78-120, sets this limit is $300,000 for a single occurrence. The SCFA provides for an exception to the liability cap and allows claimants to pursue gross negligence claims against individual employee defendants.

In affirming the decision to permit Respondent's untimely amendment 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 of the Court of Appeals, the mode of trial is not what resulted in the prejudice to Petitioner, but was due 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 pled.

The Court of Appeals' Opinion is in direct contravention to the well-reasoned holdings of *James v. Lister*, 331 S.C. 277, 500 S.E. 2d 198 (Ct. App. 1998) and *Garrison v. Target Corp.*, 429 S.C. 324, 838 S.E.2d 18 (Ct. App. 2020), which both required cap defenses to be pled in advance of trial because they affect the proof relevant to the exceptions of the caps. In *James*, the court held that because invoking the protection of the cap would "trigger alternative remedies for the injured plaintiff," the defense is an affirmative defense. Specifically, 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 one day 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 that were long since time barred by the statute of limitations that elapsed before Respondent sought to plead the affirmative defense at issue.[54] The only remedy available to prevent this manifest prejudice to Petitioner was denial of the untimely amendment.

Most recently, in *Garrison*, the Court of Appeals again recognized the prejudice caused by the failure to timely plead cap defenses. The court reasoned that the application of the statutory punitive damages limit was waived because the store failed to plead the recovery limits in S.C.

[54] Tuomey had ample opportunity to do so as it had over one and half years to plead the defense before statute of limitations would have barred claims against the individual employees.

Code Ann. § 15-32-530 or, at the very least, raise the defense prior to the conclusion of discovery so that the plaintiffs would have had prior notice of the additional evidence required to seek exception to the damage limitation. *Garrison,* 429 S.C. at 335, 838 S.E.2d at 24. A plaintiff lacking notice that a defendant will rely on such a statute is unlikely to conduct the discovery or other investigation necessary to obtain proof overcoming the statutory limit. *Id.* at 361, 838 S.E.2d at 38. So too, in this case because the SCFA cap was not pled until one day prior to trial Myat never had reason to conduct discovery, or pursue the claims against the individual employees responsible for the dangerous condition.

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, let alone actually pleaded the affirmative defense. The time to pursue those alternative remedies had also long passed, which rendered Respondent's late amendment so prejudicial.

In this case the Court of Appeals reasoned that, because Petitioner's pleadings stated that Respondent was an eleemosynary corporation, therefore Petitioner knew of Respondent's "charitable" status. *C.f. Garrison* at 363, 838 S.E.2d at 38-39 ("statute imposing a cap on recovery against a charitable organization did not automatically place the plaintiff on notice that the defendant would invoke the cap as a defense."). Further, the court failed to recognized that 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,* 235 S.C. 305 at 309, 111 S.E.2d at 570 (1959) ("[E]ven 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. Moreover, once Respondent actually pleaded the affirmative defense, Petitioner timely filed a Reply challenging the Respondent's qualification for those protections.[55]

The lower courts relied heavily on Respondent's counsel's representations, which recite casual conversations between counsel about the SCFA defense.[56] 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,[57] 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 rationale that Tuomey's counsel mentioned the potential SCFA defense in several conversations simply does not equate to properly pleading a defense that triggers a duty for a party to evaluate and pursue

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

[56] Many of those conversations involved Petitioner's prior counsel, and the Undersigned counsel had no opportunity to refute those alleged conversations in the one day prior to the start of the date certain trial.

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

exceptions to a cap not pled, or other 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. The untimely amendment should have been denied due to the same prejudice properly recognized in *James* and *Garrison.*

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.

On the eve of the date-certain trial, Respondent was granted leave to amend its answer by the trial court. After nearly three years of litigation, and even after the filing of the Amended Answer, Respondent disclosed no evidence and disclosed no witnesses in support of its SCFA defense.[58]

At trial, Respondent Tuomey chose to focus solely on its liability defenses and presented no evidence that it qualified for the protections of the SCFA, *i.e.* it never put forth any evidence that Respondent's operations qualified it to be a section 501(c)(3) entity under federal tax law. After the Respondent rested its case, Petitioner moved for a directed verdict and argued that Respondent had not met its burden of proving the affirmative defense and, in fact, had offered zero evidence to prove that it qualified as a tax-exempt charitable organization under the applicable statute.[59] In moving for the directed verdict on the affirmative defense, Petitioner's counsel

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[58] This lack of disclosure of any evidence in support of its SCFA defense is truly telling about the merit of the disclosure of the SCFA defense and weighs strongly against Respondent's claims that Petitioner was on notice of the defense prior to suffering the legal prejudice as detailed in section II. To litigators focusing on the burden of proof, no witnesses, and no documents equates to no defense.

[59] App. R. p. 1529; Trial Transcript p. 485 ("Mr. Holler: The defense rests."); After which Petitioner's counsel specifically inquires whether the defense has presented all the facts in support

provided a roadmap of what must be proven under S.C. Code 33-56-170 and Section 501(c)(3) to prove up the defense.[60] Having no valid rebuttal for this failure to present the requisite evidence for the defense, and now armed with a roadmap (provided by opposing counsel) of what must be proven under the governing statutes, Respondent moved to reopen its case. A little over an hour later, Respondent brought new, never disclosed, documents and a new witness,[61] also never previously identified/disclosed, into the courtroom. Upon receiving word of the jury's verdict, without further argument, the Court granted Respondent's motion to reopen its case, and gave the parties ten days to file post-trial motions.[62]

"The decision whether to reopen a record for additional evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion." *Brenco v. South Carolina Dep't. of Transp.*, 377 S.C. 124, 127, 659 S.E.2d 167, 169 (2008), *citing Wright v. Strickland*, 306 S.C. 187, 188,410 S.E.2d 596,597 (Ct. App. 1991). It is an abuse of discretion to reopen a case where reopening will prejudice the non-moving party. *Perry v. Smalls*, 308 S.C. 259, 262, 417 S.E.2d 611, 613 (Ct. App. 1992). "A failure to exercise discretion amounts to an abuse of that discretion. When a trial judge is vested with discretion but his ruling reveals no discretion was in fact exercised, an error of law has occurred." *CEL Prod., LLC v. Rozelle*, 357 S.C. 125, 130, 591 S.E.2d 643, 645 (Ct. App. 2004).

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of its defenses and called all its witnesses, which was specifically confirmed by the trial court. App. R. pp. 1530-1531; Trial Transcript at pp. 486-87.

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

[61] Respondent sought to call Debra Mixon, a Tuomey employee, not previously disclosed as a witness, to testify as to Respondent's alleged tax status. See App. R. pp. 1743-1747; Respondent's Answers to Interrogatories dated September 10, 2014, and App. R. pp. 1748-1751; Respondent's Supplemental Answers to Interrogatories dated October 2, 2014, which were the only witness disclosures provided by Respondent prior to trial.

[62] App. R. p. 1612; Trial Transcript p. 568. Respondent filed and served its Post-Trial Motions on September 14, 2016 (seemingly outside the time period directed by the trial court).

"The gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party. Essentially, the rights of discovery articulated by the rules give the attorney the means to prepare for trial. Discovery is the quintessence of preparation for trial and, when discovery rights are trampled, prejudice must be presumed. Unless the party who has failed to submit to discovery can show lack of prejudice, reversal is mandated." *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003)(citations omitted); *Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987).

When the party could have offered the same evidence in discovery and at trial, it is an abuse of discretion to allow the case to be reopened for new evidence to be admitted. See *Brenco v. South Carolina Dept. of Transp.*, 377 S.C. 124 (S.C. 2008) (where moving party was aware of its evidentiary burden and chose to pursue other theories it was proper to refuse reopening of evidence for a redo); *Spinx Oil Co., Inc. v. Fed. Mut. Ins. Co.*, 310 S.C. 477, 482, 427 S.E.2d 649, 651 (1993)[63] (finding that because the moving party could have provided same evidence during trial, the trial judge may properly decline to reopen the record).

Courts should not permit a party to reopen its case if it gives one party a tactical advantage. In *State v. Wright*, 416 S.C. 353, 785 S.E.2d 479 (Ct. App. 2016), a criminal defendant opted not to take the stand in his own defense, but following a charge conference, changed his mind after learning that the trial court would not charge self-defense. The defendant then sought to reopen his case and the court refused the criminal defendant's request to reopen the evidence so as to allow defendant to take the stand in support of his claim of self-defense. The court found that it would

[63] O*verruled on other grounds* in *Joe Harden Builders, Inc. v. Aetna Cas. and Sur. Co.,* 326 S.C. 231, 486 S.E.2d 89 (1997).

give the defendant a tactical advantage to testify after learning the roadmap of testimony required to prove his self-defense claim during the charge conference. The court noted:

> after hearing its ruling on the charges, Wright knew which supporting evidence was missing, had it "all mapped out," and would be able to fit his testimony into the required parameters and tell the jury he "was afraid to death." The trial court refused to reopen the record to allow Wright to testify.

Id., 416 S.C. at 373, 785 S.E.2d at 489.

In the present case, only after the Defense had rested and after Petitioner's counsel provided a roadmap of what Respondent must prove for its charitable defense did Respondent move to reopen the case to present evidence that it failed to disclose and failed to present at trial. 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 moved for directed verdict on the SCFA defense. To this very issue, following its motion to reopen the case, one of the documents that Respondent sought to proffer was a 1991 letter from the IRS. The witness and these documents were available to be disclosed by Respondent Tuomey weeks, months and even years earlier.[64] None of the evidence that Respondent offered was newly acquired or previously unavailable. At the very least, Respondent had the opportunity to disclose these documents and witnesses at the time it moved to amend its answer; however, Respondent did not do so. Permitting this tactical advantage to Respondent at trial constitutes a plain abuse of discretion by the trial court. See *Brenco* 659 S.E.2d at 169; *Wright*, 785 S.E.2d at 489. Tuomey's decision

[64] The fact that no witness and no document had ever been produced to establish its SCFA defense calls into question Respondent's claims of informal discussions of the cap with Petitioner's prior counsel. In either case, Petitioner maintains that a casual discussion between lawyers about case does not amount to proper disclosure of the Rule 8 affirmative defense. To hold otherwise renders the pleadings and discovery responses meaningless and means that counsel have no right to rely on the opposing party's pleadings or discovery responses to frame the issues and analyze the expected testimony and evidence.

to focus solely on its liability defenses was a choice of its own making. The lower courts' willingness to allow Respondent to reopen the case to allow Respondent a second bite at the apple to correct its material evidentiary and discovery failures to prove its SCFA defense constitutes manifest prejudice to the Petitioner's rights.[65]

CONCLUSION

The Court of Appeals erred in finding that Tuomey qualifies for the protections of the SCFA damages cap, and rewards Tuomey for its extensive wrongdoing, and sets a precarious precedent deferring the SCFA protections solely to the IRS. The Court of Appeals further erred in permitting Respondent Tuomey leave to plead its SCFA defense on the first morning of trial that resulted in substantial prejudice to Petitioner. Then, after Tuomey failed to put up any evidence of the affirmative defense, and after Petitioner moved for a directed verdict, and provided a roadmap of all that Respondent had failed to prove, the 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 reverse the decision of the Court of Appeals and reinstate the jury verdict.

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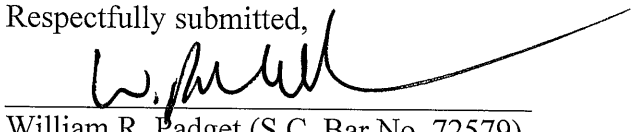
[65] Given the trial court's grant of leave to amend previously, this the proverbial third bite at the apple afforded to Respondent.

Respectfully submitted,



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