THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Sep 08 2020

S.C. SUPREME COURT

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

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

Win Myat..... Petitioner,

v.

Tuomey Healthcare System..... Respondent.

PETITIONER'S REPLY BRIEF

William R. Padget (S.C. Bar No. 72579)
Francis M. "Brink" Hinson, IV (S.C. Bar No. 74917)

FINKEL LAW FIRM LLC
1201 Main Street, Suite 1800
Post Office Box 1799
Columbia, South Carolina 29202
(803) 765-2935
Attorneys for Petitioner Win Myat

Other Counsel of Record:

David C. Holler
Smith Robinson Holler DuBose and Morgan, LLC
126 N. Main Street
Sumter, South Carolina 29151
Attorney for Respondent Tuomey Regional Medical Center

Edward H. Bender
S.C. Hospital Association
1000 Center Point Road
Columbia, South Carolina 29210
Attorney for Amicus Curiae S.C. Hospital Association

Wm. Grayson Lambert
M. Craig Garner, Jr.
Burr & Forman LLP
Post Office Box 11390
Columbia, South Carolina 29211
Attorneys for Amicus Curiae Prisma Heath Tuomey

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Petitioner Win Myat submits this Reply Brief in support of reversal of the Court of Appeal's decision concluding that Respondent is entitled the protections of the Solicitation of Charitable Funds Act, S.C. Code Ann. §§ 33-56-170 &180 ("SCFA").

I. THE COURT OF APPEALS ERRED IN CONCLUDING THAT RESPONDENT QUALIFIED FOR THE PROTECTIONS OF THE SCFA.

A. Standard of Review

It is well settled that determining the proper interpretation of a statute is a question of law, and our appellate courts review questions of law *de novo*. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

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

Quite tellingly, Respondent makes no effort to factually justify its qualification for the protections of the SCFA. Rather, Respondent argues that our state's courts have no authority to determine if an entity qualifies under the SCFA and that *Drakeford*[1] has nothing to do with Respondent's tax-exempt status. However, the factual findings in *Drakeford* that are the basis of the decision (overpayment of key employee physicians) are precisely the type of finding that disqualifies organizations from 501(c)(3) status.[2] The *Drakeford* case confirmed that "the

---

[1] *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).

[2] The inurement prohibition under Section 501(c)(3) (emphasis added) is explained as follows:

> 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.***

compensation packages paid [to fourteen] 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 fact remains that no lower court has addressed the effect of the *Drakeford* case, Respondent's improper reporting to the IRS (failing to truthy report *Drakeford's* finding to the IRS), the overpayment of key employees, and Respondent's admission that it no longer serves a community benefit, any of which are Section 501(c)(3) disqualifying events. The Court of Appeal's decision blindly ignored the reality that Respondent was forced to sell off its assets and wind down its affairs after having been found guilty of anti-kickback and anti-fraud laws and ordered to pay the federal government $237,000,000 due to the findings in the *Drakeford* case.

Compounding this established wrongdoing, Petitioner has submitted significant evidence indicating that Respondent provided misleading and false information to the IRS in its annual Form 990 filings, even falsely claiming to the IRS that it had been victorious in the initial trial of the *Drakeford* case.[3] Even while the *Drakeford* litigation with the federal government was ongoing, Respondent was paying its CEO the following compensation in violation of Section 501(c)(3)'s inurement prohibitions:

2010 $840,622
2011 $1,011,073 (including $161,003 performance bonus)
2012 $991,462 (including $173,050 performance bonus)
2013 $1,485,190 [4]

IRS Pub. 4421, *Compliance Guide for 501(c)(3) Public Charities*, p. 4 (Rev. July 2014) (emphasis added).

[3] *E.g.* App. R. II pp. 0613-0614 (Tuomey 30(b)(6) Transcript, Ex. 4, Form 990 for 2012, pp. 83-84). Respondent's statement flagrantly omitted the material fact that the 2010 jury had found Tuomey guilty of Stark Law violations and even stated, "[s]ubsequent to the jury verdict in favor of the System [...]," falsely claiming that Tuomey had been victorious in the 2010 trial.

[4] App. R. IV pp. 1687-1693 (March 8, 2016 Hearing Transcript.

The CEO's country club dues were also part of his compensation package.[5] Again, the trial court and Court of Appeals provided no discussion as to the effect of this evidence of inurement as to Respondent's 501(c)(3) status. Such blatant evidence of 501(c)(3) noncompliance disqualifies an organization from the SCFA protections. The Respondent urges a bright-line rule as a means to gloss over the egregious facts of this case.

C. *Bright-line rules deprive courts of discretion, produce irreconcilable results, and the re-codified SCFA leaves the qualification for the SCFA protections to our courts.*

Bright-line rules eviscerate this Court's aims and ignores the Fourth Circuit's decision to directly addressing Respondent's known frauds. Specifically, the Fourth Circuit stated that "while the penalty is certainly severe, it is meant to reflect the sheer breadth of the fraud Tuomey perpetrated upon the federal government."[6] With such blatant evidence of inurement in violation of Section 501(c)(3) qualification, the best hope for SCFA protection is to urge the Court to rely solely on the decades-old tax status determinations made by the IRS. Our courts should not permit such a myopic standard of review.

Bright-line rules have often been rejected by our courts and for good reason. This Court has "decline[d] to set bright-line rules, as we believe the better approach is to defer to the broad discretion of our able trial courts in addressing such claims on a case-by-case basis." *In Ex Parte Brown*, 393 S.C. 214, 224, 711 S.E.2d 899, 904 (2011) ("we do not draw a bright-line rule requiring the use of one method over the other" to determine if a foreclosure sale shocks the conscience*); Crossland v. Crossland*, 408 S.C. 443, 453, 759 S.E.2d 419, 424 (2014) ("Formulaic principles and bright-line rules will only hinder the ability of family court judges to reach an

---

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

[6] *U.S. ex rel. Drakeford v. Tuomey*, 792 F.3d at 389.

equitable result."); *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 317 S.C. 274, 275, 453 S.E.2d 253, 254 (Ct. App. 1994), aff'd, 323 S.C. 454, 476 S.E.2d 149 (1996) (rejecting a bright line application of the Uniform Arbitration Act); *Wiedemann v. Town of Hilton Head Island*, 326 S.C. 573, 580, 486 S.E.2d 263, 266 (Ct. App. 1997), aff'd in part, rev'd in part, 330 S.C. 532, 500 S.E.2d 783 (1998) (interpreting the FOIA laws "we decline to adopt a bright line test which would resolve every dispute on this issue"). As recognized by these courts, bright-line rules deprive courts of discretion to ensure that just results are reached in individual cases. The Respondent's position seeks to strip such discretion from our courts in the application of the SCFA.

Our courts must be afforded discretion to apply the SCFA because the reality is that, once tax-exempt status has been conferred, the IRS rarely reexamines an organization's qualifications and seldom looks into whether an entity continues to quality to receive tax exempt treatment. In fact, the IRS examines only seven out of every one thousand entities for a determination as to whether they actually qualify to receive tax-exempt status.[7] Even in a highly publicized situation where an allegedly charitable organization has been assessed $237,000,000 in penalties and fines for having committed a massive taxpayer fraud, the IRS never undertook any action to evaluate Respondent's 501(c)(3) status.[8]

Respondent cites to the language of S.C. Code § 33-56-20,[9] but ignores the operative language in § 33-56-170 that such tax status is conferred "pursuant to Section 501(c)(3)." The

---

[7] *See* U.S. Government Accountability Office Report on Tax-Exempt Organizations, at p. 2 (December 2014) 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).

[8] The trial court noted "the Court is not aware of any action taken by the IRS to revoke Tuomey's 501(c)(3) status"). App. R. p. 20.

[9] Respondent's Brief at p. 8.

SCFA's recodified language invites judicial examination to determine eligibility for SCFA protections. As stated by the trial court:

> Protections under the Charitable Funds Act are premised on an organization's eligibility as a 501(c)(3) under federal law. Unless operating exclusively for 501(c)(3) purposes, there is no longer a charitable purpose entitling that organization to the protections of the Charitable Funds Act.
>
> [....] if an organization is acting in a matter inconsistent with its stated charitable purpose that would invalidate is 501(c)(3) status, this Court has the authority to not permit the organization to avail itself of the protections of the SCFA.[10]

It is of paramount importance that our courts be empowered to determine the protections of the SCFA, because it is litigants whose rights are most seriously and individually affected by that determination.

As in this case, bright-line rules often produce irreconcilable results. For example, the federal courts have conclusively determined that Respondent violated federal antifraud laws (i.e. the False Claims Act), assessed hundreds of millions of dollars in penalties and fines, and practically insisted that the offending entity be shut down. To the contrary, the state courts have clothed the same entity with statutory protections specifically designed to protect the resources of charitable institutions that are acting for charitable purposes. These starkly different results cannot be logically reconciled, and highlights why our courts should not be forced to turn a blind eye toward fraudulent and unlawful conduct in evaluating SCFA qualifications.

Respondent urges that our courts should defer to the United States Secretary of the Treasury to make the determination as to whether Respondent qualifies and continues to qualify for the protections of S.C. Code § 33-56-170. Respondent relies on tax assessment cases from the federal courts to argue that the Treasury Secretary has the sole authority to revoke or rescind its

[10] App. R. I p. 20 (Trial Court's Order of April 7, 2016)

tax-exempt status. This may be true for tax assessment matters that arise under federal law; however, this is not a tax assessment case. Here, by reference and incorporation of Section 501(c)(3) of Title 26 of the U.S. Code, the state statute requires the court to conduct an analysis to determine whether the entity at issue qualifies for the protections of the SCFA. The language of the statute itself belies the argument that the United States Treasury Secretary makes the determination. The plain language of the statute dictates that qualification for the protections of the SCFA is a legal determination that must be made by our courts. The statutory language preserves the historic role of our trial courts in making this determination.[11]

The Respondent urges that *Lazerson v. Hilton Head Hosp. Inc.*, 312 S.C. 211, 439 S.E.2d 836 (1994) forecloses any review of an organizations tax status under SCFA. 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 Court as the statutory expansion came later that year.

Lazerson was decided on January 6, 1994, and, 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 [12] (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

---

[11] *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).

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

are enacted concerning related subjects"). Critically, one definition defers to the IRS's determination, while the operative definition does not. Accordingly, interpretation of the recodified statute with two definitions is one of first impression and requires clarification.

To the extent this Court considers the *Lazerson* "irrebuttable presumption," the Petitioner urges the Court to fashion a rule that better fits the recodified and expanded statute and the facts of this case. Petitioner urges the Court to fashion a "rebuttable presumption" for qualification for the SCFA protections that our trial courts would apply where there are genuine questions of SCFA eligibility, such as in this case, where the *Drakeford* decision has already determined the hospital operations unlawful under other similar federal regulatory provisions. Lastly, Petitioner urges the Court to fashion a remedy founded on equitable principles such as unclean hands and/or violations of public policy that do not implicate any of the other policy considerations advanced by Respondent and the *Amicus Curiae*.

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

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

Rule 201 of the SCRE governs the taking of judicial notice. A trial court may take judicial notice of a fact only if sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof. *See Moss v. Aetna Life Ins. Co.*, 267 S.C. 370, 228 S.E.2d 108 (1976). A fact is not subject to judicial notice unless the fact is either of such common knowledge that it is accepted by the general public without qualification or contention, or its accuracy may be

ascertained by reference to readily available sources of indisputable reliability. *Bowers v. Bowers*, 349 S.C. 85, 94, 561 S.E.2d 610, 615 (Ct. App. 2002) A trial court must distinguish between facts and regulations proper for judicial notice and the application of those facts to the case, which may be improper for judicial notice. *See Martin v. Bay*, 400 S.C. 140, 732 S.E.2d 667, 674 (2012) (holding it was proper for master to take judicial notice of county land development regulations but not proper to take judicial notice of movement of setback line). "Ordinarily, the internal affairs and transactions of a private corporation are not a proper subject for judicial notice." *Moss*, at 377, 228 S.E.2d at 112.

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

II. RESPONDENT FAILED TO TIMELY PLEAD THE SCFA DEFENSE AND ITS CLAIMS OF NOTICE FAIL BECAUSE PETITIONER HAD ALREADY SUFFERED LEGAL PREJUDICE WHEN RESPONDENT ASSERTED THE SCFA DEFENSE.

The Court of Appeals erred in confirming the decision to allow Tuomey leave to belatedly amend its pleadings on the morning of trial to assert its SCFA defense. It is undisputed that Tuomey did not seek to plead the cap provided by the SCFA as a defense until the eve of trial and that the first time Tuomey made written mention of its SCFA defense was by way of its Answers

to Plaintiff's Interrogatories dated September 10, 2014.[13] Consideration of the timeline of events is critical when evaluating the prejudice suffered by the Petitioner.

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

Further, the two-year statute of limitations on Petitioner's potential worker's compensation claim had also expired by the time Respondent made written mention of its potential SCFA defense, let alone actually pleaded the affirmative defense. Petitioner's lost opportunity to pursue alternative remedies is the identical prejudice that the court specifically recognized in *James v. Lister*, 331 S.C. 277, 500 S.E. 2d 198 (Ct. App. 1998) and more recently in *Garrison v. Target Corp.*, 429 S.C. 324, 838 S.E.2d 18 (Ct. App. 2020). In *James v. Lister*, the Court of Appeals held that a party suffering such prejudice requires denial of leave to amend. Respondent's attempt to distinguish the *James* case due to notice to Petitioner before trial fails because notice prior to trial does not remedy the prejudice Petitioner has suffered. The Petitioner's time to pursue those alternative remedies had still passed.

Tuomey further claims that its counsel's Affidavit, which evidences conversations between Respondent's counsel and Petitioner's *prior* counsel about its SCFA defense, went unchallenged at the hearing. Again, the timeline is critical to evaluating the prejudice Petitioner suffered due to

[13] App. R IV at p. 1743. Notably, this insurance disclosure does not formally assert this SCFA defense, it simply only discloses that insurance is available in accordance with those limits.

Respondent's last-minute addition of a new affirmative defense. By order entered April 30, 2015, this case had been set for date certain trial to begin on August 27, 2015. Respondent's phone call to the trial court and Respondent's filing of the Motion to Amend both occurred on Friday, August 21, 2015. The trial court conducted a hearing on the Motion to Amend at the start of the scheduled trial, on the morning of Monday, August 24, 2015. Put simply, because the conversations detailed by Respondent's Affidavit were made to Petitioner's prior counsel, and no one else was a party to those conversations, Petitioner had no meaningful opportunity to gather facts and/or affidavits to oppose the statements in the Affidavit in Support of the Motion to Amend in that weekend before trial was set to begin.[14] Nonetheless, a counter-affidavit was not necessary, as all the information needed to fully evaluate Petitioner's lost opportunity to pursue these alternative remedies could and can be gleaned from the timeline established by the pleadings in this case. However, when ruling on the Respondent's last-minute Motion to Amend, the trial court failed to consider the timeline of these events and Petitioner lost the opportunity to pursue alternative remedies.

Critically, a conversation between attorneys about a putative defense does not amount to properly alleging a legal defense. An attorney for a plaintiff mentioning a cause of action that does not appear in a complaint does not toll the statute of limitations or otherwise equate to the claim being brought. So too, it is axiomatic that conversations between lawyers about putative defenses does not equate to those defenses having been pled. Our Rules of Civil Procedure require defenses to be made in writing by way of an answer and served upon the adverse party,[15] and mentioning

---

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

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

potential defenses in conversation is no substitute for formally pleading them. Litigants have the right to rely upon the pleadings to determine the issues framed by those filings. *See e.g. Crocker v. Crocker*, 281 S.C. 154, 158, 314 S.E.2d 343, 346 (Ct. App. 1984) (holding it was error for court to go beyond the scope of the pleadings and grant relief on a theory which was not pleaded). It is paramount that "[a] judgment or decree, whether in law or equity, must accord with and be warranted by the pleadings . . . . If it is not supported by the theory of action on which the pleadings were framed, it is fatally defective." *Id.* Respondent's argument that its counsel mentioned the potential SCFA defense in conversation does not equate to properly pleading a defense that triggers the duty of a claimant evaluate and pursue alternative remedies. To so find would render the issues framed by the pleadings absolutely meaningless and eviscerate counsel's right to rely on those pleadings.

All defenses must be timely pleaded so as not to prejudice the opposing party. Moreover, the scheduling orders entered in this case required any motions (including amendments) be made prior to February 15, 2015.[16] Respondent's position that it mentioned its putative defense *in a conversation* flies in the face of the governing Rules of Procedure, and the scheduling orders in this case requiring timely amendments. To permit this tardy and prejudicial amendment renders the SCRCP and those scheduling orders absolutely meaningless.

Respondent further urges the Court to ignore the legal prejudice suffered by Petitioner by equating Petitioner's initial allegations that the Respondent was an eleemosynary corporation organized under the laws of South Carolina to an admission that Respondent qualified for the

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

SCFA defense. These are separate and distinct legal classifications.[17] The registration with the South Carolina Secretary of State's Office as "eleemosynary" is not synonymous with Section 501(c)(3) protections afforded under S.C Code Ann. § 33-56-170 & 180. Moreover, once Respondent actually pleaded the affirmative defense, Petitioner timely filed a Reply challenging the Respondent's qualifications of those protections.[18] Put simply, Petitioner has never pleaded, agreed, or otherwise conceded that Respondent was ever qualified for the SCFA defense.

In sum, the Court of Appeals erred in failing to recognize the legal prejudice suffered by Petitioner, when granting Respondent's last-minute Motion to Amend.

CONCLUSION

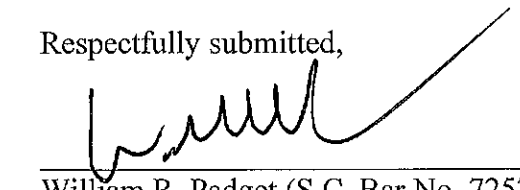
The guiding principle of statutory construction is to effectuate the intent of the Legislature. The Legislature never intended the SCFA to afford liability protections to an entity that has committed taxpayer fraud in violation of Section 501(c)(3)'s inurement prohibition. The recodified SCFA's differing definitions meanings must be honored. Moreover, the bright-line rule advanced by the Respondent would invite massive fraud, deprive the courts of necessary discretion to ensure just results, and produce irreconcilable results. Additionally, such a rule is particularly unwarranted when the doctrines of unclean hands and illegality provide courts with an avenue to fashion a unique remedy for this unique circumstance that does not implicate those policy considerations underlying the SCFA. Further, the SCFA defense was not timely plead, nor timely proven at trial, causing substantial legal prejudice to the Petitioner. For these reasons and

[17] *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.").

[18] *See* App. R. I pp. 0049-0051; Reply pp. 1-3.

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

Respectfully submitted,



William R. Padget (S.C. Bar No. 72579)
Francis M. "Brink" Hinson (S.C. Bar No. 74917)
FINKEL LAW FIRM LLC
1201 Main Street, Suite 1800
Post Office Box 1799 (29201)
Columbia, SC 29201
(803) 765-2935
Attorneys for Petitioner Win Myat