THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2019-001757
Case No. 2012-CP-43-2030

Win Myat…….Petitioner,

v.

Tuomey Healthcare System……...Respondent.

BRIEF OF *AMICUS CURIAE* SOUTH CAROLINA ASSOCIATION FOR JUSTICE

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INTERESTS OF AMICUS

Founded more than five decades ago, the South Carolina Association for Justice ("SCAJ") (formerly known as the South Carolina Trial Lawyers Association) is a statewide organization with over 1,200 members. In addition to providing education to and promoting a supportive network for its members, the organization seeks to preserve justice in South Carolina. An advocate for those who are harmed by the negligence and wrongful actions of others, SCAJ seeks to uphold and defend the constitutions of South Carolina and the United States, fights to protect the rights of the individual, seeks justice through open and fair courtrooms, aims to resist unjust laws, and vocally supports policies that hold wrongdoers accountable.

STATEMENT OF THE ISSUE ON APPEAL

The South Carolina General Assembly has, through the Solicitation of Charitable Funds Act ("SCFA") §33-56-180, provided certain protections from liability for charitable organizations. The issue before the Court is whether the General Assembly intended a one-time grant of tax exempt status by the Internal Revenue Service under 26 USC §501(c)(3) to provide liability protection for an organization *ad infinitum*, or whether that status merely creates a rebuttable presumption of protection under §33-56-180, subject to scrutiny by the courts of South Carolina to prevent fraudulent application of liability caps.

INTRODUCTION

The Solicitation of Charitable Funds Act (SCFA), §33-56-170 defines a charitable organization as "any organization, institution, association, society or corporation which is exempt from taxation *pursuant to* Section 501(c)(3) …" (emphasis added). The Court of Appeals accepted the proposition that once an organization has been granted tax exempt status, its protections under the SCFA are preserved inviolate and forever, and that South Carolina courts are powerless to review whether or not the organization actually operates in accordance with and pursuant to the requirements of §501(c)(3). This holding should be reversed as contrary to legislative intent, would lead to absurd results, and it is violative of public policy.

The General Assembly's inclusion of the limiting term "pursuant to" indicates its intent to incorporate by reference the requirements of Section 501(c)(3) as a justification for an organization being afforded the protections of the SCFA. Had the General Assembly wished to make a one-time grant of tax exempt status the controlling fact, it could have done so by simply eliminating the "pursuant to" language.

The South Carolina Hospital Association's ("SCHA") Amicus Brief argues the SCFA requires an inflexible, bright line rule; however, none of the purported benefits of such an approach outweigh the risks inherent therein. This Court must not sacrifice accountability for the sake of convenience. Defendant Tuomey's criminal behavior in the operation of its charity as exposed in *United States ex rel. Drakeford v. Tuomey Healthcare Sys., Inc.*, 976 F.Supp. 776 (D.S.C. 2013), aff'd 792 F.3d 364 (4th Cir. 2015) is a glaring example of what happens when there is no accountability for fraudulent behavior. When one has no risk of losing liability protection, accountability, and its deterrent effect, falls to the wayside.

Affirmation of the Court of Appeals' decision would require South Carolina circuit courts to act as unwilling accomplices to a "charitable" organization's fraudulent schemes, and be prevented from protecting truly charitable organizations that have inadvertently lost tax exempt status. Such an unbending interpretation of §33-56-170 would lead to absurd results. It is well settled that statutes should be interpreted to avoid absurd results. *Unison Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); *Browning v Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). Its decision should therefore be overturned.

STATEMENT OF THE CASE

This case arises from a negligence action where Plaintiff, a physician, was severely injured due to Defendant Tuomey's negligence in creating a dangerous condition in its hallways by dropping ice chips and not cleaning them up, causing Plaintiff to fall. (R. p. 1266, lines 15-17; p.1286, line 15-p. 1287, line 2). Initially, Defendant Tuomey did not raise the SCFA as an affirmative defense in any pleading. (R. pp. 0038-40; Answer). On the eve of trial, it moved to amend, and the Court granted the motion to amend to add the affirmative defense of the liability caps afforded by the SCFA. (R. pp.0041-0043; Respondent's Motion to Amend dated August 21,

2015). However, during the trial of the case, Defendant Tuomey offered zero evidence into the record that it met the conditions set forth in §§33-56-170. (R. p. 1529; Trial Transcript p. 485). The case was tried to a jury, and the jury returned a verdict in favor of the Plaintiff in the amount of $2.5 Million. After closing arguments, but prior to receiving the jury's verdict, the Court allowed Defendant Tuomey to re-open its case and present little more than a decades old letter that the IRS had previously granted Tuomey §501(c)(3) status. Following a post-trial motion regarding the application of the SCFA, the Court found at the time of the injury, Defendant Tuomey held tax exempt status by the IRS and was therefore entitled to the protections of the SCFA. (R. p. 1612; Trial Transcript p. 568). The Court subsequently reduced the jury's verdict to $300,000 pursuant to S.C. Code §§33-56-170 & 180 (SCFA).

However, the Court did not consider evidence that subsequent to Defendant Tuomey's initial grant of tax exempt status from the federal government, it was fined more than $230 Million *by* the federal government for violating the Stark law and the False Claims Act, as established in *United States, ex rel. Drakeford v. Tuomey Healthcare Sys.*, Inc., 976 F. Supp. 2d (D.S.C. 2013), nor that Defendant Tuomey provided false and misleading information to conceal its fraudulent activity on its annual filings to the IRS.

On appeal, the Court of Appeals upheld the trial court's order finding the late amendment did not amount to prejudice, and that the evidence of Defendant Tuomey's §501(c)(3) status was determinative as to the application of the SCFA caps. The Appellants then sought certiorari, which was granted, leading to SCAJ's request to be heard on the issues raised by this appeal.

STANDARD OF REVIEW

The parties agree the issue of the application of the SCFA is a matter of law for the court, rather than one for the jury. It is axiomatic that question of statutory interpretation are matters of

law. *Univ of S. California v. Moran*, 365 S.C. 270, 275, 617 S.E.2d 135, 137 (Ct. App. 2005). When addressing novel issues of law, this Court is free to decide the question based on its views of the statute and with no particular deference to the lower court. *I'On L.L.C. v. Town of Mt. Pleasant* 338 S.C. 406, 411, 526 S.E.2d 716, 718-19 (2000).

ARGUMENT

I. The plain language of S.C. Code §33-56-170 is a separate and more narrow definition of "charitable entity' than §33-56-20 which allows for judicial review of charitable status to determine whether to apply the damage caps of §33-56-180.

"[T]he cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *State v. Alexander*, 424 S.C. 270, 275, 818 S.E.2d 455, 458 (2018) (citing *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 864, 863-864). When determining the meaning of a statute, "the courts must look at the particular statutory language at issue and the language and design of the statute as a whole." *Fox v. Moultrie*, 379 S.C. 609, 614, 666 S.E.2d 915, 917 (2008).

It is a well-established rule of statutory construction that each word of a statute should be given meaning and that the legislature does not intend a futile act, thus no words should be treated as mere surplusage. *Proctor v. Dep't of Health and Envtl. Control*, 368 S.C. 279, 311, 628 S.E.2d 496, 513 (Ct. App. 2006); *Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citing 82 C.J.S. *Statutes*, §346).

The SCFA, specifically the definitional section, §33-56-20(1)(a)(i) defines "charitable organization" as an entity "*determined by the Internal Revenue Service* to be a tax-exempt organization pursuant to Section 501(c)(3) of the Internal Revenue Code." (emphasis added). The general definition encompasses several other ways an organization may fall under the definition of "charitable." By contrast, S.C. Code Ann., §33-56-170, which defines "charitable organization" for the purpose of applying the damage caps of §33-56-180, as "any organization, institution,

association, society, or corporation which is tax-exempt *pursuant to* Section 501(c)(3) or 501(d) of Title 26 of the United States Code." (emphasis added). The difference in the language cannot be assumed to be accidental.

If the General Assembly intended to make §501(c)(3) tax exempt status of an organization the end of the inquiry as to whether it was entitled to the damage caps of §33-56-180 there would be no reason for the two definitions, as §33-56-20 makes it clear that the determination of the IRS is part and parcel of the definition of "charitable organization." Instead, in §33-56-170, the General Assembly chose to make the grant of liability protection be "pursuant to" the requirements of §501(c)(3).

The logical conclusion is that the General Assembly intended a narrower definition of "charitable organization" for §33-56-170, particularly since the statute has a singular function; i.e., to provide liability caps to worthy entities. By including the limiting phrase "pursuant to" the General Assembly preserved the trial court's traditional role of determining whether the organization seeking protection as a charity is, in fact, acting as a charity. Any other interpretation would render the "pursuant to" language as mere surplusage, in violation of the rules of statutory interpretation. "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous…." *Matter of Decker*, 322 S.C. 215, 219 471 S.E.2d 462, 463 (1995) (citing 82 C.J.S. *Statutes* §346).

II. The General Assembly intentionally preserved the inherent power of the trial court to prevent the fraudulent application of the SCFA's charitable protections.

An interpretation by this Court that the SCFA acts as a forever protection for charitable organizations is in derogation of the common law. It has long been held in South Carolina that statutes in derogation of the common law are to be strictly construed against abrogation of the

common law. Statutes in derogation of the common law are strictly construed. *Grier v. AMISUB of South Carolina, Inc.,* 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012). Applying this rule means statutes that restrict the common law will not be extended beyond the clear intent of the legislature. *Id*.; *Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000).

As far back as *Eiserhardt v. State Agr. & Mech. Soc. of S.C.*, 235 S.C. 305, 111 S.E.2d 568 (1959) courts have determined whether an organization's behaviors justified the protections of charitable immunity. When charitable immunity was abolished in 1981 by *Fitzer v. Greater Greenville Young Men's Christian Ass'n*., 277 S.C. 1, 282 S.E.2d 230 (1981), the General Assembly responded with the SCFA. The statute defines which organizations would receive a modified version of charitable immunity and set forth the extent of the liability protections in §§33-56-170 and -180. The codification of limited charitable immunity does not mean the underlying justification for the principal was abandoned, nor does it mean trial courts were stripped of their inherent power to ensure that purpose is being met and to protect themselves from being used to perpetuate an organization's fraudulent charitable status.

III. Public policy favors accountability and transparency.

In its Amicus brief, the South Carolina Hospital Association (SCHA) has argued this Court should interpret §33-56-170 as a bright-line, non-reviewable test. As justification for this position, they extol the virtues of certainty and preservation of judicial resources. Neither of these goals are sacrificed by an interpretation of the SCFA that retains the ability of the circuit courts to evaluate whether a specific instance of application is appropriate and in keeping with the intent of the statute.

While predictability can be useful, it is no more important than accountability. The behavior of Defendant Tuomey in the way it operated a "charitable" organization is a glaring

example of what happens when there is no risk of being held fully accountable.[1] It is also an example of how a South Carolina court was essentially compelled to uphold a fraud perpetrated by the Defendant. Surely, this is not what the General Assembly intended. Such an unbending interpretation of §33-56-170 would lead to absurd results. It is well settled that statutes should be interpreted to avoid absurd results. *Unisun*, *supra*.

The SCHA also claims that anything other than a bright-line rule for applying §§33-56-170 and -180 to a jury verdict would create a waste of judicial resources. Apparently, SCHA is only concerned about circuit court resources where monetary damages are at stake. SCHA's cited alternative to judicial oversight by the circuit court is that the South Carolina Secretary of State may bring an action before an Administrative Law Judge (ALJ) under S.C. Code Ann §33-56-140 to challenge an organization's South Carolina charitable status. Necessarily then, neither the Secretary of State nor the administrative law courts are resources which concern the SCHA. Further, this would lead to an absurd outcome where the Attorney General and an Administrative Law Judge have stripped charitable status from an organization, but the circuit court would be compelled to treat that same entity as charitable and, thus, protected by the SCFA.

Neither the South Carolina Secretary of State, nor a South Carolina Administrative Law Judge, can revoke federally granted status. Therefore, if mere granting of §501(c)(3) status by the IRS ends the inquiry, both our Secretary of State and our Administrative Law Courts are powerless to prevent an abuse of that status.[2] Likewise, 26 U.S.C. §6033(j) of the Internal Revenue Code requires tax exempt status to be automatically revoked for failing to file IRS Form 900 for three

[1] As highlighted in Appellant Myat's brief, there is little accountability from the IRS. Manpower shortages and budget constraints limit review of compliance §501(c)(3) requirements to a tiny fraction of those organizations previously granted tax exempt status.

[2] This is no academic risk. Charitable caps have been plead as an affirmative defense on behalf of adult entertainment establishments in our Circuit Courts. *See*, Answer at 19, *Fant v. Nepal, Inc., d/b/a Lust Gentleman's Club, et al*., No. 2016-CP-23-01268 (Greenville Cnty. Circuit Ct. filed May 24. 2016).

straight years. This raises the distinct possibility an unsophisticated charity, although actively doing charitable work, could lose the protections of the SCFA due to paperwork errors and our courts would be helpless to prevent such an injustice. This would indeed be an absurd result.

Such a rigid, bright line, interpretation would necessarily lead to the conclusion that the South Carolina General Assembly intended the SCFA to allow a bureaucrat in a cubicle in Washington D.C. to strip our Attorney General, the Administrative Law Courts, and our circuit courts of their inherent authority to ensure full justice for the citizens of South Carolina. "However clear the language of a statute may be, the court will reject that meaning when it leads to an absurd result not possibly intended by the legislature." *Hamm v. S.C. Pub. Serv. Com.*, 287 S.C. 180, 182, 336 S.E.2d 470, 471 (1985) (citing *State, ex rel. McLeod v. Montgomery*, 244 S.C. 308, 136 S.E. (2d) 778 (1964)).

SCHA further argues having to conduct discovery to prove a defendant who claims to hold §501(c)(3) status was acting in accordance with a charitable purpose would require expense and time. Discovery conducted pursuant to the SCRCP would, of course, already have been undertaken in the underlying tort action. As all of the necessary evidence to establish a defendant's right to the protections of the SCFA would be in said defendant's control, and would likely already be compiled to comply with the IRS Form 900 reporting requirements, and would be regurgitated in every case the charitable organization found itself defending, asking for the production of said documentation can hardly be considered overly burdensome. Simply put, organizations acting in accordance with their §501(c)(3) requirements need not be concerned.

Pretending the sky is falling if charitable organizations have to at least support the presumption they are behaving in the required charitable manner is reminiscent of the arguments made recently by *Mosley v. Alston*, Case No. 2019-01056, writ dismissed as improvidently

granted Op. No. 2020-MO-010 (S.C. Sup. Ct. filed Oct. 21, 2020). The skepticism of the Court as to the magnitude of the discovery burden alleged by Davita in *Alston* is equally applicable here. Charitable organizations such as Defendant Tuomey (now Prisma Health), or other health care networks currently claiming charitable status, are sophisticated, complex corporations. Producing evidence of financial charity should be as simple as a computer search of existing records, or even simply providing a digital copy of an existing file. This would seem to be a small burden to place on defendants seeking protection from their own negligence, and a routine task for the courts evaluate. Such a slight imposition hardly outweighs a rule which would force courts to be complicit in a fraud, which is what happened in this case.

CONCLUSION

To avoid the absurd and unjust result that S.C. Code Ann., §33-56-170(1) imposes a bright-line, non-rebuttable limitation on liability for organizations who were once granted 501(c)(3) status by the IRS, but who no longer act in a charitable manner, this Court should reverse the Court of Appeals and reinstate the jury verdict, or in the alternative remand the case back to the trial court for a review of Defendant Tuomey's charitable activity in light of the *Drakeford* case.

SIGNATURE PAGE ONLY FOLLOWS

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CERTIFICATE OF COMPLIANCE

This Brief of *Amicus Curiae* complies with Rules 208(b) and 211, SCACR, as required by Rule 213, SCACR.

s/ Daniel W. Luginbill
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