

ORIGINAL

IN THE SUPREME COURT OF OHIO

DIALYSIS CLINIC, INC.,)
)
Appellant,)
)
v.)
)
RICHARD A. LEVIN,)
TAX COMMISSIONER OF OHIO,)
)
Appellee.)

CASE NUMBER 2009-2310

(Appeal from the Ohio Board
of Tax Appeals Case No. 2006-V-2389

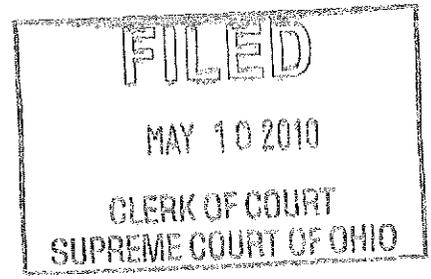
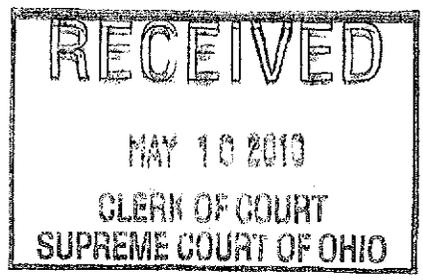
BRIEF OF *AMICI CURIAE*, OHIO SCHOOL BOARDS ASSOCIATION, OHIO ASSOCIATION OF SCHOOL BUSINESS OFFICIALS, BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS, OHIO JOB AND FAMILY SERVICES DIRECTORS ASSOCIATION, COUNTY COMMISSIONERS ASSOCIATION OF OHIO, OHIO ASSOCIATION OF COUNTY BEHAVIORAL HEALTH AUTHORITIES, THE MUNICIPAL LEAGUE, OHIO FIRE CHIEFS ASSOCIATION, OHIO PARKS AND RECREATION ASSOCIATION, OHIO TOWNSHIP ASSOCIATION, and OHIO LIBRARY COUNCIL ON BEHALF OF TAX COMMISSIONER

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I. STATEMENT OF INTEREST OF AMICI CURIAE

Ohio School Boards Association, Ohio Association of School Business Officials, and Buckeye Association of School Administrators (“Ohio School Boards Organizations”) represent Ohio public school boards, school administrators, and the diverse public schools that they represent.

Ohio Job and Family Services Directors Association, County Commissioners Association of Ohio, Ohio Association of County Behavioral Health Authorities, The Ohio Municipal League, Ohio Fire Chiefs Association, Ohio Parks and Recreation Association, Ohio Township Association, and Ohio Library Council (hereinafter “Local and State Government Organizations”) are a diverse group of organizations which represent entities that levy local real property taxes, receive real property tax revenue from taxing authorities, and/or support state and local government entities.

Taxing authorities and the entities which receive support from them have financial and legal interests in the outcome of the instant matter. Local taxing authorities, boards of education, municipalities, county commissioners, townships, libraries, and parks, among others, derive significant funding from real property taxation. Ohio law authorizes school boards to participate as a party in real property exemption proceedings under R.C. 5715.27(B) and to file complaints to challenge the continued exemption of real property under R.C. 5715.27(E).

II. STATEMENT OF THE CASE

To determine whether an applicant for real property tax exemption is a charitable institution, this Court has provided direction to the Ohio Department of Taxation and Board of Tax Appeals to review whether the applicant's activities and services amount

to charity. *Planned Parenthood Assn. of Columbus, Inc. v. Tax Commr.* (1966), 5 Ohio St.2d 117, 214 N.E.2d 222, (“Do Parenthood's activities and services amount to charity?”); *Northeast Ohio Psych. Inst. v. Levin* (2009), 121 Ohio St.3d 292, 903 N.E.2d 1188, citing *OCLC Online Computer Library Ctr., Inc. v. Kinney* (1984), 11 Ohio St.3d 198, 464 N.E.2d 572 (“In that case, we stated that the status of an institution as ‘charitable’ under R.C. 5709.121 depends upon the ‘charitable activities of the taxpayer seeking the exemption.’”). Further, the “circumstances” which concern whether an institution is a charitable institution are whether the institution “...does not use its property in furtherance of or incidently to its charitable purposes, because it charges patients for services rendered, accepts payment from private and government sources, writes off unpaid amounts, and does not offer its services free of charge or in accordance with a sliding scale.” *Community Health Professionals, Inc., v. Levin* (2007), 113 Ohio St.3d 432, 866 N.E.2d 478.

Dialysis Clinic Inc. (“DCI”) and *Amicus Curiae* Ohio Hospital Association (“OHA”) request this Court to overrule the preceding cases in favor of a definition of charity so amorphous to be devoid of any meaning. DCI and OHA request the Court to enact a *per se* tax exemption for any healthcare provider in place of current law authorizing the Tax Commissioner and/or BTA to consider the overall operation conducted by the applicant and to make a determination on the totality of the circumstances whether the applicant is a charitable institution and renders sufficient services to persons unable to afford them to be considered as making charitable use of property. *Bethesda Healthcare, Inc. v. Wilkins* (2004), 101 Ohio St.3d 420, 806 N.E.2d 142. DCI and OHA seek nothing short of a reversal of long-standing Ohio law. They make the request

despite that it contravenes current Ohio law and in the absence of legislative authority for such a presumption.

For a healthcare provider pursuing a real property tax exemption, Ohio law requires an affirmative demonstration of a charitable purpose which includes the provision of some level of health care for free or at a reduced cost. As early as 1917, the Ohio Supreme Court identified that “the first concern of a public charitable hospital must be for those who are unable to pay.” *O'Brien, Treas., v. Physicians Hospital Assn.* (1917), 96 Ohio St. 1, 8; *Cleveland Osteopathic Hosp. v. Zangerle* (1950), 153 Ohio St. 222, 91 N.E.2d 261 (“But where a hospital extends its facilities and services very largely to those who are able to and do pay the established rates for their accommodation and designedly makes a very substantial profit in so doing, it places itself in the classification of a business enterprise amenable to taxation, notwithstanding that some unfortunate persons without means are cared for free of charge.”); *Planned Parenthood Assn. of Columbus, Inc., supra* (a broad definition of charity to include free care as “in the year 1959, 13 per cent of the recipients of Parenthood's services were charged no fee, and that only 11 per cent were charged the maximum fee of \$ 10”); *Community Health Professionals, Inc., supra*; and *Bethesda Healthcare, Inc., supra*. (“When charges are made for the services being offered, we must consider the overall operation being conducted to determine whether the property is being used exclusively for charitable purposes.” And, “whether an institution renders sufficient services to persons who are unable to afford them to be considered as making charitable use of property must be determined on the totality of the circumstances; there is no absolute percentage.”)

DCI sought tax exemption for a new dialysis clinic in West Chester, Ohio under R.C. 5709.12(B) (property belonging to an institution used exclusively for charitable purposes) and R.C. 5709.121 (property belonging to a charitable institution used exclusively for charitable purposes and without a view toward profit). Tethered to the applicable precedent of this Court, both the Tax Commissioner and Board of Tax Appeals determined that DCI is not a charitable institution under R.C. 5709.121.

In a desperate attempt to mislead the Court, DCI and OHA erroneously claim the BTA mandated a threshold or quota of free care for a healthcare provider to be deemed a charity. DCI inaccurately claims that the BTA will not consider a healthcare provider which accepts reimbursement for services from Medicare or Medicaid to be a charity or to use the property for charitable purposes. (DCI brief, p. 2).

III. STATEMENT OF FACTS

A. DCI Operates a Profitable Multi-State Business

DCI operates approximately 195 outpatient dialysis clinics in 26 states. (BTA-2). In 2003, DCI earned \$6,306,492 on revenues of \$479,127,641. (BTA-2). In 2004, the net income increased six-fold to \$32,167,517 on revenues of \$514,053,981. (BTA-2). As with a for-profit entity, "DCI's mission is to provide treatment for end-stage renal disease." (BTA-5). DCI conceded that its dialysis services are similar to that of a for-profit provider. (BTA-2, 7). DCI states that it provides no charitable activities at the subject property facility. (S.T. 1, BTA-15). DCI acknowledged that "...it may not provide much care to patients who are uninsured, unable to pay, and wholly ineligible for government support." (DCI brief, p. 29).

In successfully expanding its business, DCI opened the West Chester clinic in October, 2003, two months prior to the tax lien date of January 1, 2004. In the first year (2004) of operation the clinic generated \$552,488 in charges with 10 patients. (H.R. at 152-156, 206-207). The revenue at the subject property increased to \$866,646 in 2005 with 25 patients. (H.R. at 197-198, 221). The dialysis services provided by DCI are the same as that of a for-profit provider, such as DaVita. (BTA-7). DCI invests excess revenue toward construction of new clinics. (H.R. at 141, 220).

All DCI patients are referred to its clinics after being treated and discharged from hospitals. (H.R. at 139, 168). (BTA-7). All patients treated at the West Chester clinic since it opened in late 2003 have had some type of insurance. (H.R. at 172, 221-222). As is the case with nearly every healthcare provider in the United States, DCI agrees to accept patients insured by Medicare and Medicaid. (BTA-7). At the subject property, DCI is reimbursed for dialysis services from three main sources: Medicare (62%), Medicaid (9%) and other private insurance. (S.T. 1). Company-wide, Medicare insured almost 75% of DCI patients for the 2006 to 2007 period. (BTA-6). Private insurance covered 12.6% of DCI's patients, with Medicaid, HMOs, and the Veteran's Administration insuring, respectively, 6.2%, 5%, and 1.3% of patients. (BTA-6, 7).

Private insurers negotiated charges of \$175 to \$475 per treatment, with Medicaid-insured patients charged the maximum reimbursement amount of \$155 per treatment. (BTA-8). DCI charged \$800 per treatment to patients without insurance when not refused treatment under the indigent care policy. (H.R. at 186,187, BTA-5, 8). While Medicare patients were responsible for a 20% copayment of the Medicare rate, which is \$160 per treatment, approximately 85% of DCI's Cincinnati area Medicare

patients have a secondary insurer that covers the copayment. (H.R. at 166-168, 183-186, BTA-8). DCI accepts the \$160 Medicaid payment as a full payment. (H.R. at 184).

B. DCI Retains Right to Refuse to Admit/Treat Patients Under Charity Care Policy

DCI maintains an indigent care policy for individuals who do not have insurance through Medicare, Medicaid, private insurance, or self-pay for care. (BTA-3).

Specifically, the charity care policy states as follows: "DCI indigence policy is not a charity or a gift to patients." (BTA-5). Further, DCI retains the right to refuse to admit or treat a patient without the ability to pay. (BTA-5). The indigence policy dictates that all patients are personally responsible to pay for treatment and services that DCI provides them. (BTA-5). The indigence policy provides that indigent patients must first exhaust all possible insurance payment options before amounts owed will be considered under the policy. (H.R. at 47, 70-71). Further, the policy provides that reasonable collection actions will be taken against those who do not pay, including court action. (BTA-5).

In practice, the indigent patient must exhaust all payment options before being considered under the policy. (H.R. at 47, 70-71). Further, if a patient qualifies under the indigence policy and is unable to pay for treatment, the patient will be billed for the outstanding amount and then, "after a certain amount of time," DCI's accounts-receivable billing department will write off the charge as an uncollectible bad-debt expense from the accounts-receivable ledger. (H.R. at 78-81, Appellant's Ex. 5, BTA-6). Also, "to be considered under DCI's indigence policy, patients must complete a financial analysis form, which is then used to determine ability to pay." (BTA-5). Lee Horn, counsel for DCI, did not know whether the amount written off as bad debt is

considered free care. (H.R. at 79). Roy Dansro, an administrator of DCI, considers bad debt to be free care. (H.R. at 179).

DCI claims it is unable to provide free care to patients eligible for and/or receiving Medicaid and Medicare. (BTA-3,15). Medicare patients are responsible for a 20% co-payment of the Medicare rate, which is \$32 of the \$160 treatment. (BTA-8).

Approximately 85% of DCI's Cincinnati area patients have a secondary insurer that covers the copayment. (H.R. at 166-168, 183-186, BTA-8). DCI provided no evidence as to the alleged charitable Medicare write-offs for the application year. (BTA-15).

C. DCI Provides No Free or Discounted Care at West Chester Clinic

Company-wide, DCI provided 1,836,058 treatments per year to a monthly average of 13,082 patients, generating \$526,891,082 in charges between October, 2006 and September, 2007. (BTA-7). Of this amount, 11,840 treatments per year (less than 1% at 0.6448%) were provided for a monthly average of 96 indigent patients with no insurance. (BTA-7). DCI characterized approximately \$6.7 million, or 1.27% of the charges as a "bad debt charity write off" for patients insured by Medicare. (BTA-7).

DCI acknowledged to the Tax Commissioner that "the Facility currently does not have any charity patients." (S.T. 115, BTA-15). The higher-volume and established Walnut Hills property has between two to five of 140 patients receiving healthcare without private insurance, Medicare, or Medicaid. (H.R. at 173). One person each at Western Hills and Maysville receives free care. (H.R. at 173). Two of seventy patients receive free care at DCI's Forest Park clinic. (173-174). Of the approximately 350 total patients at the five clinics managed by Mr. Dansro at the time of the merit hearing, approximately six to nine patients receive treatment without insurance or the ability to

pay. (H.R. at 173-174, BTA-8). Insurance companies paid approximately \$1,400,000 in charges while a mere \$8,000 was billed to dialysis patients at the West Chester facility for 2004 and 2005. (BTA-9).

The BTA determined that DCI provides services with an expectation of compensation and is not a charitable organization using the property exclusively for charitable purposes under R.C. 5709.121. The BTA found that DCI does not use the clinic in furtherance of or incidental to a charitable purpose because DCI is not a charitable institution and conducts no charitable activity at the clinic. (BTA-13). The BTA agreed with the Tax Commissioner that DCI does not qualify for exemption under R.C. 5709.12(B) as an institution that uses the clinic exclusively for charitable purposes as DCI concedes it provides no charitable service at the subject property. (BTA-12).

IV. LAW AND ARGUMENT

A. Applicable Standard of Review

This Court has repeatedly stated that in reviewing BTA decisions, this Court is not a trier of fact de novo, but that it is confined to its statutorily delineated duties (R.C. 5717.04) of determining whether the board's decision is reasonable and lawful. *Columbus City School Dist. Bd. of Edn. v. Zaino* (2001), 90 Ohio St.3d 496, 497, 739 N.E.2d 783; *Howard v. Cuyahoga Cty. Bd. of Revision* (1988), 37 Ohio St.3d 195, 197, 524 N.E.2d 887. This court "will not hesitate to reverse a BTA decision that is based on an incorrect legal conclusion." *Gahanna-Jefferson Local School Dist. Bd. of Edn. v. Zaino* (2001), 93 Ohio St.3d 231, 232, 754 N.E.2d 789. But the BTA is responsible for determining factual issues and, if the record contains reliable and probative support for these BTA determinations, this Court will affirm them. *Ameritech Publishing, Inc. v.*

Wilkins (2006), 111 Ohio St.3d 114, 855 N.E.2d 440; *Am. Natl. Can Co. v. Tracy* (1995), 72 Ohio St.3d 150, 152, 648 N.E.2d 483. Under this standard, the BTA's determination that DCI is not a charitable institution and did not use the property exclusively for charitable purposes is reasonable and lawful.

B. Exemption From Taxation is The Exception to the Rule

Ohio Law provides that "all real property in this state is subject to taxation, except only such as is expressly exempted therefrom." R.C. 5709.01(A).

In *Cincinnati College v. State* (1850), 19 Ohio 110, 115, this Court stated "that all laws that exempt any of the property of the community from taxation should receive a strict construction. All such laws are in derogation of equal rights." The Court pointed out, "If property, employed in one kind of business, is exempted from taxation, the burden will necessarily fall more heavily on property employed in other pursuits." When an exemption is granted by the General Assembly, "the rationale justifying a tax exemption is that there is a present benefit to the general public from the operation of the charitable institution sufficient to justify the loss of tax revenue." *White Cross Hosp. Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199, 201, 311 N.E.2d 862. Statutes providing exemption from taxation must be strictly construed. *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 407, 105 N.E.2d 648, paragraph two of the syllabus. The burden rests on the party claiming an exemption to demonstrate that the property qualifies for the exemption. *OCLC Online Computer Library Ctr. Inc., supra*. Based on the theory that all property should bear its proportionate share of the costs of government, and property should be absolved from such obligation only for good cause, taxation is the

rule and exemption the exception. See, *Crown Hill Cemetary Ass'n v. Evatt*, Tax Com'r (1944), 143 Ohio St. 399.

C. Statutory Requirements Under R.C. 5709.12 and R.C. 5709.121

Revised Code 5709.121 provides real property tax exemption for property belonging to a charitable institution which is uses for charitable purposes. DCI argues that its property is entitled to exemption from real property taxation inasmuch as it is a charitable institution under R.C. 5709.121. DCI argues that its property should also be exempt under R.C. 5709.12 on the grounds that the property is exclusively used for charitable purposes.

Under R.C. 5709.12, the arbiter must determine that (1) the property belongs to an institution, and (2) the property is being used exclusively for charitable purposes. *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405, 406-407, 644 N.E.2d 284. The difference between the two statutes is that the R.C. 5709.12 "exempts from taxation real property belonging to institutions that is used exclusively for charitable purposes" while R.C. 5709.121 provides exemption to charitable institutions using their property for charitable purposes. *Seven Hills Sch. V. Kinney* (1986), 28 Ohio St.3d 186, 503 N.E.2d 163.

If the institution using the property is charitable, its property may be exempt if it uses the property exclusively for charitable purposes or it uses the property under the terms set forth in R.C. 5709.121. *Olmsted Falls Bd. of Ed. V. Tracy* (1997), 77 Ohio St.3d 393, 674 N.E.2d 690. In *Episcopal Parish of Christ Church, Glendale v. Kinney* (1979), 58 Ohio St.2d 199, 200-201, 389 N.E.2d 847, 848 and recently in *Community Health Professionals, Inc., supra*, and *Bethesda Healthcare, Inc., supra*, this court

approved of Justice Stern's concurring opinion in *White Cross Hosp. Assn., supra.*, in which he explained the relationship between R.C. 5709.12 and 5709.121, and the legislative definition of exclusive charitable use:

"[I]t is important to observe that, although R.C. 5709.121 purports to define the words used exclusively for 'charitable' or 'public' purposes, as those words are used in R.C. 5709.12, the definition is not all-encompassing. R.C. 5709.12 states: '* * * Real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation.' Thus any institution, irrespective of its charitable or noncharitable character, may take advantage of a tax exemption if it is making exclusive charitable use of its property. * * * The legislative definition of exclusive charitable use found in R.C. 5709.121, however, applies only to property 'belonging to,' i.e., owned by, a charitable or educational institution, or the state or a political subdivision. The net effect of this is that R.C. 5709.121 has no application to noncharitable institutions seeking tax exemption under R.C. 5709.12. Hence, the first inquiry must be directed to the nature of the institution applying for an exemption."

As this Court stated in *Olmsted Falls Bd. of Edn. v. Tracy* (1997), 77 Ohio St.3d 393, 396, 674 N.E.2d 690, 692, 'in deciding whether property is exempt under the charitable use provisions of R.C. 5709.12 and 5709.121, tax authorities must first determine whether the institution seeking exemption is a charitable or noncharitable institution.

Real property belonging to a charitable institution is tax-exempt if such institution makes it available for use in furtherance of or incidental to its charitable purpose, and without a view to profit. In *Cincinnati Nature Ctr. Assn. v. Bd. of Tax Appeals* (1976), 48 Ohio St.2d 122, 357 N.E.2d 381, this Court set forth the complete test to determine whether property is exempt from real estate taxation in accordance with R.C. 5709.121. There, this Court stated: "To fall within the terms of R.C. 5709.121, property must (1) be under the direction or control of a charitable institution or state or political subdivision,

(2) be otherwise made available 'for use in furtherance of or incidental to' the institution's 'charitable * * * or public purposes,' and (3) not be made available with a view to profit." *Id.* at 125, quoting R.C. 5709.121.

The Tax Commissioner found DCI to be a non-profit institution, but not a charitable one, and concluded R.C. 5709.121 is, therefore, inapplicable. (S.T. at 1-2). The BTA determined that DCI failed to provide competent, credible, and probative evidence that it is a charitable institution to qualify for exemption under R.C. 5709.121, along with competent, credible, and probative evidence that the property is being used exclusively for charitable purposes to qualify for exemption under R.C. 5709.12.

Proposition of Law No. 1:

DCI is not entitled to exemption from real property taxation under R.C. 5709.121 because the property at issue does not belong to a charitable institution.

A. BTA Properly Determined Activities and Services of DCI Do Not Amount to Charity

The General Assembly has not defined what activities of an institution constitute charitable purposes. This Court nearly 60 years ago discussed the exclusive use for charitable purposes set forth by our General Assembly in R.C. 5709.12 prior to the enactment of R.C. 5709.121 through the Ohio Constitution in paragraph one of the syllabus in *Am. Commt. of Rabbinical College of Telshe, Inc. v. Bd. of Tax Appeals* (1951), 156 Ohio St. 376, by providing "if operated without any view to profit, an institution used exclusively for the lawful advancement of education and of religion is an institution used exclusively for charitable purposes, within the meaning of Section 2 of Article XII of the Constitution and of Section 5353, General Code [now R.C. 5709.12]."

The term "charitable purposes" is not defined for property-tax-exemption purposes; however, this court has defined "charity" in *Planned Parenthood Assn. of*

Columbus, Inc. v. Tax Commr., supra, and stated that:

“Do Parenthood's **activities and services** amount to charity? When the last syllable has been uttered in the quest to define charity (and the attempts have been legion) this hallmark will survive: charity is the attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general, or those in need of advancement and benefit in particular, without regard to their ability to supply that need from other sources and without hope or expectation, if not with positive abnegation, of gain or profit by the donor or by the instrumentality of the charity.”

(emphasis added)

Charity is dispensed to all who need and apply for it, and there are no obstacles placed in the way to obtain the benefits. While an entity may be described as a charity, the entity dispenses charity through activities and services (“Do Parenthood's **activities and services** amount to charity?”). Among the activities and services considered by the Court was the provision of free care by Planned Parenthood. Specifically, the Court pointed out that:

“...in the year 1959, **13 per cent of the recipients of Parenthood's services were charged no fee, and that only 11 per cent were charged the maximum fee of \$ 10** for all of the interviews, lectures, instructions, examinations, and prescriptions which constitute the activities with respect to any one individual woman.”

(emphasis added)

Contrary to the argument of OHA, a consideration of charity for this Court includes providing free or discounted medical care to the poor. (OHA brief, pp. 3, 7). As such, the BTA used the broad definition of charity in *Planned Parenthood Assn. of Columbus, Inc., supra*, which this Court has recognized includes activities and services such as providing free care.

The BTA did not restrict the scope of the review of the activities and services of DCI to determine if it is a charity, as contended by OHA. (OHA Brief, p. 15). The BTA reviewed the activities and services advocated by DCI such as (1) operation of 195 clinic in 26 states; (2) net income of \$32,167,517 on revenue of \$514,053,981 in 2004; (3) operation of a summer camp for children who have chronic renal failure or who received a kidney transplant; (4) reimbursement by Medicare, Medicaid, and insurers for medical services; (5) donation for research; (6) indigence policy for which DCI retains all rights to refuse to admit or treat a patient who has no ability to pay; (7) provision of dialysis services similar to that of a for-profit provider; (8) investment of excess revenue in new clinics; (9) free care not provided at West Chester clinic; and (10) charge for treatment of \$800 to patients without insurance, \$175 to \$475 for patients with insurance, \$160 to patients with Medicare, and \$155 for patients with Medicaid. DCI failed to advocate other services or activities for DCI to qualify as a charitable institution.

OHA relies on a decision in *Goldman v. Friars Club, Inc.* (1952), 158 Ohio St. 185, 107 N.E.2d 518, a case which precedes the enactment of R.C. 5709.121 by the General Assembly and the 1996 decision in *Planned Parenthood Assn. of Columbus, Inc., supra*, for a definition of charity that is so broad to include any socially desirable activity by the applicant. (OHA brief, p. 7).

Charity is not providing medical care merely to heal or relieve a person from suffering, pain, or a disease. Every healthcare worker provides medical care to patients. To rule that providing medical care is "charity" would provide a tax exemption to every physician and hospital. A ruling that charity is merely providing health care would excuse hospitals and physicians from any charitable mission to give free or

discounted care.

B. Whether an Entity is a Charitable Institution “Depends Upon the ‘Charitable Activities of the Taxpayer Seeking the Exemption”

To address an argument that the totality of evidence in the record establish DCI as a charitable institution, this Court last year in *Northeast Ohio Psych. Inst., supra*, noted “the most significant precedent is our decision in *OCLC Online Computer Library Ctr., Inc. v. Kinney* (1984), 11 Ohio St.3d 198, 464 N.E.2d 572.” As with the question presented by this Court in 1966 in *Planned Parenthood Assn. of Columbus, Inc.* (“Do Parenthood’s **activities and services** amount to charity?”) this Court in 1984 again considered the **activities** to determine whether an institution is a charity:

“In that case, we stated that the status of an institution as ‘charitable’ under R.C. 5709.121 depends upon the ‘charitable **activities** of the taxpayer seeking the exemption,’ not the ‘charitable nature of the institutional customers.’”

(emphasis added).

Thus, DCI is incorrect in arguing that the focus of the analysis under R.C. 5709.121 is on the institution generally, not the particular activities and services that comprise the use of any specific property. (DCI brief, pp. 1, 16). Under the logic of DCI and OHA, if “charity” is the creation of the entity with a charitable mission, the “gift” was the creation of the entity years ago regardless of the charitable activities of the healthcare provider.

C. The Relationship Between the Actual Use of the Property and the Purpose of the Institution Is Dispositive to the Question of Whether a Charitable Institution Uses its Property in Furtherance of or Incidental to its Charitable Purposes

The BTA relied on *Community Health Professionals, Inc., supra*, and pointed out that “when considering R.C. 5709.121 and the question of whether a charitable institution uses its property in furtherance of or incidental to its charitable purposes, this

court focuses on the relationship between the actual use of the property and the purpose of the institution." In *Community Health Professionals, Inc., supra*, the issue as to whether the applicant is a charitable institution was not before the Court.

This Court pointed out, however, in the event the charitable nature was at issue, that CHP did not use the property in furtherance or incidental to its charitable purpose because, like DCI, CHP charges patients for services, accepts payment from government sources, writes off bad debt, and does not offer services for free. The Court stated the circumstances as to whether a healthcare provider is a charitable institution is as follows:

"We acknowledge the position of the Tax Commissioner that CHP does not use its property in furtherance of or incidentally to its charitable purposes, because it charges patients for services rendered, accepts payment from private and government sources, writes off unpaid amounts, and does not offer its services free of charge or in accordance with a sliding scale. However, these circumstances concern the question of whether CHP is a charitable institution, which, as we have emphasized, is not before this court."

This Court provided the preceding factors to determine whether a healthcare provider is charitable institution, and after the BTA applied the preceding factors, DCI erroneously concludes that the BTA ignored DCI as an institution or provided no meaningful analysis of DCI as an institution. (brief, pp. 17-18).

DCI's argument on pages 19 and 20 that *Community Health Professionals, Inc., supra*, is analogous is misleading. DCI failed to acknowledge that the issue of whether CHP is a charity was not before the BTA or the Court because the Tax Commissioner failed to challenge the charitable nature of CHP in the notice of appeal. DCI fabricates conclusions of this Court in arguing on page 19 that "as the Court noted in *Community*

Health Professionals, while an applicant may not offer free care, an applicant is charitable...” Because the Court did not address whether CHP was a charity, this Court did not conclude, contrary to DCI’s argument on pages 19 and 20, that “an applicant is charitable if it provides services without regard to a patient’s ability to pay and no evidence is provided that a patient was denied services due to an inability to pay.”

OHA’s argument is misleading as it provides authority preceding the enactment of R.C. 5709.121 and this Court’s decisions in *Planned Parenthood Assn. of Columbus, Inc.*, *supra*, *OCLC Online Computer Library Ctr., Inc.*, *supra*, *Community Health Professionals, Inc.*, *supra*. To determine whether an institution is a charity, there is no current authority for this Court to limit review to an institution’s charter, articles of incorporation, or its mission or bylaws in place of the services and activities of the institution and the circumstances specified by this Court in *Community Health Professionals, Inc.*, *supra*. (OHA brief, p. 11).

D. Whether an Institution Renders Sufficient Services to Persons Who Are Unable to Afford them is Considered as Making Charitable Use of Property Must be Determined on the Totality of the Circumstances.

Finally, the BTA relied on this Court’s 2004 ruling in *Bethesda Healthcare, Inc.*, *supra*, wherein the Court affirmed a decision of the Tax Commissioner and BTA involving a fitness center at a hospital which provided eight (8) scholarships and an unknown number of partial scholarships out of the 5,400 members. The Court clearly set forth that free care is a consideration to determine charitable use of a property:

“[w]hen charges are made for the services being offered, we must consider the overall operation being conducted to determine whether the property is being used exclusively for charitable purposes.”

Further and significantly, this Court held that:

"Whether an institution renders sufficient services to persons who are unable to afford them to be considered as making charitable use of property must be determined on the totality of the circumstances; there is no absolute percentage."

To develop the "totality of the circumstances test" to be applied by the Tax Commissioner or BTA, this Court was influenced by and cited *Cleveland Osteopathic Hosp., supra*, ("an exemption case involving a hospital,") for which former Justice Zimmerman stated as follows:

"It seems obvious that no single test is dispositive of whether a **hospital, for example, is being conducted exclusively as a charitable project.** All the facts in each individual case must be assembled and examined in their entirety and the substance of the scheme or plan of operation exhibited thereby will determine whether the institution involved is entitled to have its property freed from taxes."

(emphasis added)

In agreeing with the decision of the Tax Commissioner and BTA that the number of free or discounted memberships was inadequate to indicate charitable use of the property, the Court observed:

"Here the small number of members able to use the Fitness Center without payment of membership dues does not indicate a charitable use under the facts of this case."

Remarkably, OHA claims that this Court's analysis in *Bethesda Healthcare, Inc., supra*, of providing free or discounted care is not applicable to DCI because the case involved a fitness facility. (OHA brief, p. 17). OHA claims that the *Bethesda Healthcare, Inc., supra*, test has no application when medical services are involved and proceeds to cite *Community Health Professionals, Inc., supra*. Yet, in *Community Health Professionals, Inc., supra*, the Court after setting forth the circumstances to consider whether an entity is a charity next states that "we stated in *Bethesda Healthcare*, 101 Ohio St.3d 420,

2004 Ohio 1749, 806 N.E.2d 142, that "[w]hether an institution renders sufficient services to persons who are unable to afford them to be considered as making charitable use of property must be determined on the totality of the circumstances."

E. Summary of Circumstances as to Whether an Institution is a Charitable Institution

This Court in recent years has set forth the following standard of review when considering whether an entity is a charity and, if so, whether that charity uses the property in furtherance or incidental to its charitable purpose:

1. Whether an entity is a charitable institution depends upon the charitable activities of the taxpayer seeking the exemption. *Northeast Ohio Psych. Inst. v. Levin* (2009), 121 Ohio St.3d 292 citing *OCLC Online Computer Library Ctr., Inc. v. Kinney* (1984), 11 Ohio St.3d 198.
2. When considering R.C. 5709.121 and the question of whether a charitable institution uses its property in furtherance of or incidentally to its charitable purposes, this court focuses on the relationship between the actual use of the property and the purpose of the institution. *Community Health Professionals, Inc., supra*.
3. Whether the institution "... does not use its property in furtherance of or incidentally to its charitable purposes, because it charges patients for services rendered, accepts payment from private and government sources, writes off unpaid amounts, and does not offer its services free of charge or in accordance with a sliding scale." *Community Health Professionals, Inc., supra*.
4. "When charges are made for the services being offered, we must consider the overall operation being conducted to determine whether the property is being used exclusively for charitable purposes." And, "whether an institution renders sufficient services to persons who are unable to afford them to be considered as making charitable use of property must be determined on the totality of the circumstances; there is no absolute percentage." *Bethesda Healthcare, Inc., supra*.

The BTA found that although DCI is a non-profit corporation, that DCI, however, concedes it provides no free or charitable service at the subject property. (BTA-12).

Further, DCI may not provide much care to patients who are uninsured, unable to pay, wholly ineligible for government support. (DCI brief, p. 29). DCI does not use the

property in furtherance of or incidental to its charitable purpose because it conducts no charitable activity at the dialysis clinic. (BTA-13). Rather, the BTA recognized like most for-profit corporations, DCI: 1) charges all patients for dialysis services; 2) voluntarily enters contracts with government and private insurers to set charges for the provision of services, and 3) does not donate any of its services without charge or at a reduced charge. See, *Community Health Professionals, Inc., supra*.

The BTA fully reviewed DCI's indigence policy and practices as to charity care. Because DCI pursues collection against patients, including court action, if payment is not received for services, and characterizes its charity as writing off a portion of some patient charges as uncollectible bad debt, the BTA found no evidence DCI acted as a donor of healthcare services sufficient to qualify for tax exemption.

The BTA could not find evidence quantifying any meaningful act of DCI "giving" anything to patients. *Planned Parenthood Assn. of Columbus, Inc., supra*. (BTA-15). In reviewing the company-wide 1.27% of charges as "bad debt charity write off" and treatment of less than one percent (0.64%) of indigent patients out of total patients, the BTA could not find that DCI rendered sufficient services to persons who unable to afford them to be considered as making charitable use of property. *Bethesda Healthcare, Inc., supra*. (BTA-15, 16). As a result, the BTA could not find DCI acts as a donor "without hope or expectation, if not with positive abnegation, of gain or profit." *Planned Parenthood Assn. of Columbus, Inc., supra*. (BTA-16).

The BTA reviewed the activities and services advocated by DCI such as the following: (1) operation of 195 clinic in 26 states; (2) net income of \$32,167,517 on revenue of \$514,053,981 in 2004; (3) operation of a summer camp for children who

have chronic renal failure or who received a kidney transplant; (4) reimbursement by Medicare, Medicaid, and insurers for medical services; (5) donation for research; (6) provision of dialysis services similar to that of a for-profit provider; (7) investment of excess revenue in new clinics; and (10) charge for treatment of \$800 to patients without insurance, \$175 to \$475 for patients with insurance, \$160 to patients with Medicare, and \$155 for patients with Medicaid. Contrary to argument of OHA, the BTA did not restrict its review of DCI's activities to determine if it was charitable. (OHA brief, p. 15). DCI failed to advocate other services or activities for DCI to qualify as a charitable institution. Clearly, the BTA did not "conflate" the analysis of R.C. 5709.12. and R.C. 5709.121 as speciously advocated by OHA. (OHA brief, p. 6).

F. DCI Failed to Provide Credible, Competent, and Probative Evidence to the Tax Commissioner That DCI is a Charitable Institution.

1. DCI Generates Substantial Revenue Through Payment For Services

Although DCI claims it "...was never intended be a money-maker," DCI in 2003 earned \$6,306,492 on revenues of \$479,127,641. (DCI brief, p. 5, BTA-2). In 2004, the net income increased six-fold to \$32,167,517 on revenues of \$514,053,981. (BTA-2). According to the Ohio Supreme Court, one recognized test for ascertaining whether a hospital is charitable or otherwise is whether it is maintained and conducted for gain, profit or advantage. *Cleveland Osteopathic Hosp.*, supra; *Battelle Memorial Institute v. Dunn* (1947), 148 Ohio St. 53, 73 N.E. 2d 88; *Lutheran Book Shop v. Bowers* (1955), 164 Ohio St. 359, 131 N.E.2d 219. Under Ohio law, a taxpayer is not a charitable institution because it generates a profit. *Am.Soc. for Metals. v. Limbach* (1991), 59 Ohio St.3d 38, 40, 569 N.E.2d. 1065, 1067.

2. The Loss of Money by DCI is Not the Donation of Services of a Charity

DCI claims it is charitable because it initially lost money at the West Chester clinic in 2004 and had no plans to close the clinic which opened in October, 2003, two months prior to the tax lien date. (DCI brief, pp. 7-8). DCI claims that the clinic was "...indisputably unprofitable" and that it would have closed the West Chester Clinic as an economic failure if it was not a charity. (DCI brief, pp. 24, 27). In addition to being a new clinic, the loss in revenue is caused by the relatively small number of patients that get treated at West Chester. (H.R. 154, 205-208). The lack of patient volume at West Chester is driven by the patients' ability to end dialysis treatment by obtaining a kidney transplant. (H.R. 154, 205-208). Mr. Dansro explained that the patients at West Chester are well-suited to receive kidney transplants because of their financial resources and educational backgrounds. (H.R. 154, 207-208).

DCI erroneously contends it is a charity because the two month old West Chester clinic initially lost money. (DCI brief, p. 7). DCI contends that it donates its services akin to the activity of a charity in *Planned Parenthood Assn. of Columbus, Inc., supra*. by opening and operating a clinic which lost money. (DCI brief, p. 18). Further, DCI claims that it operates unprofitable clinics among the 195 clinics in 26 states. (DCI brief, p. 7). DCI acknowledges that the West Chester clinic is a new addition to DCI's empire and that the initial "shortfall at the West Chester Clinic is funded by excess revenue from other clinics." There are other DCI clinics in the Cincinnati area that have generated net income. The Maysville Clinic in a rural area once generated a profit when it served "about 70" patients. (H.R. 140-141, 148-150). The Western Hills Clinic, located in a "pretty dense" and "middle class" area, has also generated net income.

(H.R. 150-152). The third DCI clinic to have operated at a profit is the Walnut Hills clinic. (H.R. 152-153). The average profit is "about \$200,000 a year." (H.R. 152-153).

3. DCI provides Similar Services and Operates in a Manner Similar to a For-profit Provider of Dialysis Services

It is not clear the extent to which DCI provides charity and assistance in place of doing what DCI's for-profit competitor, DaVita, does: selling dialysis services. DCI's fellow mega-competitor, DaVita, provides charitable programs and research. See, <http://www.davita.com/about/>. DaVita provides assistance to patients without insurance. See, <http://www.davita.com/about/company/?id=488>. DaVita founded The Kidney TRUST in 2006 which is a non-profit organization dedicated to chronic kidney disease (CKD) prevention, as well as providing financial assistance to people already on dialysis. <http://www.kidneytrust.org/who/>. The Kidney TRUST's Financial Assistance Program is for people on dialysis who are having trouble managing co-pays, co-insurance and deductibles for medical treatment, services, and prescription drugs that are covered under their private health insurance plan. <http://www.kidneytrust.org/what/financial-assistance/>.

While DCI claims its dialysis services are similar to that of a profit provider, DCI also claims without providing evidence that it does not operate in the same fashion as a for-profit dialysis center. (H.R. at 141, DCI brief p. 14, BTA-7). DCI makes wild, self-serving accusations such as "for-profit dialysis clinics generate tremendous profits by ignoring patients who cannot pay the full cost of treatment." (DCI brief, p. 15). As to its competitor, DCI claims that "DaVita, only takes those that can pay." (Supp. 200, Tr. 212.). Further, DCI claims that DaVita - a for-profit competitor - is "pretty exclusive" about who they accept and "generally accept[s] patients who can pay." (DCI brief, p.

13). In contrast, and in contravention of the record, DCI claims that it is different from for-profit clinics because it accepts patients regardless of the ability to pay. (DCI brief, p. 15). Yet, the record provides that DCI provides no charity care or charitable activities at the West Chester clinic and provides less than 1% of charity care on a company-wide basis.

DCI claims that it does not operate like a business because it does not advertise though DCI does acknowledge that it typically receives patients through third party hospital or physician referrals. (DCI brief, p. 8). There is no evidence in the record that DaVita or any other competitor of DCI does not also receive patients by referrals. Thus, DCI is incorrect that the reliance by DCI (or for that matter DaVita) on "...referrals as opposed to advertising really means that DCI does not strive to obtain only those patients that can pay." (DCI brief, p. 8).

To distinguish itself from DaVita, DCI claims in building a new facility that "site location is not driven by the potential profitability of the site." (DCI brief, p. 7). However, as with any business, "DCI considers the current dialysis population and the future dialysis population in order to determine locations that best serve the citizenry." (Supp. 188, Tr. 16465.) Further, DCI as with any competitor, works with local community and government leaders to develop a clinic in the community. The majority of dialysis clinics in Ohio are owned by for-profit entities. <http://www.dialysisunits.com/> The opening of the West Chester Clinic at the urging of the University of Cincinnati physicians affiliated with DCI constitutes a business decision to take advantage of a business opportunity, not necessarily a charitable activity. (DCI brief, p. 14). Further, there is no evidence in the record that DCI opened the West Chester clinic with knowledge that it would not be

profitable. (DCI brief, pp. 17, 26).

DCI claims that it is a charity because no person or organization profits financially from DCI's operations, and that upon dissolution DCI's assets will not benefit a private person or entity. (DCI brief, pp. 8, 17, 22, 34). DCI claims that it uses the net revenue for research and allegedly, unlike DaVita, returns profits to shareholders. (DCI brief, p. 8). However, in *Northeast Ohio Psych. Inst.*, *supra*, this Court pointed out that "it is true that Northeast operates on a nonprofit basis, and there is no evidence of private inurement of its earnings. But that fact alone does not establish charitable status." ("The inurement constraint alone is not sufficient reason to grant favorable tax treatment to one institution and not the other.") See, David Hyman, *The Conundrum of Charitability: Reassessing Tax Exemption for Hospitals*, 16 Am.J.L. & Med. 327, 378 (1990).

DCI operates in competition with for-profit businesses. In *Zindorf v. Otterbein Press* (1941), 138 Ohio St., 287, 34 N. E.2d, 748, this Court found that exemption was not available where a printing establishment was in competition with other concerns engaged in commercial printing and because a profit motive was plainly discernible from the manner in which it ran its business. This Court discussed the development of the modern, businesslike hospital:

"The hospital of the early mid-nineteenth century would not be recognizable as such to a modern observer.

Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and interns, as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action.

The average nonprofit hospital of today is a large well run corporation, and, in many instances, the hospital is so 'businesslike' in its monetary requirements for entrance and in its collections of accounts that a shadow is thrown upon the word, 'charity,' and the base of payment mentioned above is broadened still more.

As an industry, hospitals spend enormous amounts of money advertising in an effort to compete with each other for the health care dollar, thereby inducing the public to rely on them in their time of medical need."

Clark v. Southview Hosp. & Family Health Ctr. (1994), 68 Ohio St.3d 435, 628 N.E.2d 46. ("A number of empirical studies***generally have found that***private non-profit, tax-exempt hospitals do not operate much differently than for-profit counterparts in similar geographic areas. These studies confirm that the levels of 'uncompensated care' differ little between exempt and for-profit providers; that the range of services provided by both are similar; and that under current measures of quality assessment, there is little difference between the two.") See, J. Colombo, *The Role of Access in Charitable Tax Exemption*, 82 Wash.U.L.Q. 343,344 (2004).

4. Use of Excess Revenue for Research

DCI presented evidence as to \$1.7 million in research funding it provides to the University of Cincinnati Medical College from 2004 to 2008. (H.R. at 142, 215-217). DaVita too provides charitable programs and research. OHA asserts that "charitable use" has a broader meaning than credited by the BTA and therefore DCI is a charitable institution, primarily because it donates some of its revenues for research and its revised charter indicates that it is engaged only in nonprofit medical and scientific activities. Contrary to OHA's claim that the BTA failed to consider DCI's donations to research when determining whether DCI was charitable, the BTA, on pages 2, 13, and

16 reviewed the donation of revenue for research yet concluded that “any charitable purpose based on this use is vicarious.” (OHA brief, p. 4). Further, other than the bare information reported on corporate tax returns and witness testimony regarding one donation to the University of Cincinnati, the BTA found no evidence regarding research or contributions by DCI. (See footnote 1, *supra*; H.R. at 142).

The BTA recognized the only difference between DCI’s operations and that of a for-profit corporation is the use of excess revenue which DCI applies toward further clinic development and alleged financial support of research – a use the BTA deemed vicarious to any charitable purpose. “It is only the use of property in charitable pursuits that qualifies for tax exemption, not the utilization of receipts or proceeds that does so.” *Hubbard Press v. Tracy* (1993), 67 Ohio St.3d 564, 566, 621 N.E.2d 396. See also, *Seven Hills Schools, supra*; *Vick v. Cleveland Memorial Medical Foundation* (1965), 2 Ohio St.2d 30, 33, 206 N.E.2d 2.

DCI uses revenue for opening new clinics and supporting charitable endeavors such as a summer camp. (brief, bpp. 6, 7, 13). It is not unusual for business to use revenue to expand or for community or public support. These activities represent good business decisions but do not constitute charitable activities. Recently this Court pointed out in *Northeast Ohio Psych. Inst., supra*, “...that charitable activities may generate incidental revenue and still qualify as charitable...,” however, “but that does not mean, as Northeast appears to suggest, that all income-producing activities will qualify as charitable merely because their proceeds are applied to charitable purposes.” 121 Ohio St.3d at 296, 903 N.E.2d at 1193.

5. No Charitable Activity in Policy and in Practice by DCI

DCI provided NO charity care at the subject property. (BTA-15). On a company-wide basis, DCI provided charity care to less than 1% (at 0.6448%) of patients. (BTA-7). There is no record that DCI willingly accepts indigent patients at the subject property. (DCI brief, pp. 17, 22).

DCI acknowledges that it “may not provide much care to patients who are ‘uninsured, unable to pay, and wholly ineligible for government support,’” nonetheless, “DCI engages in charitable activity by providing care to patients regardless of their ability pay.” DCI claims that it “accepts all patients” and “does not turn away patients it knows cannot pay the full cost of treatment.” However, DCI’s “indigence policy is not a charity or gift to patients. DCI retains all rights to refuse to admit and treat a patient who has no ability to pay.” Appellant's Ex. 4 at 2. The policy also states “all patients are personally responsible to pay for the treatment and services that DCI provides them.” Further, if payment is not received for services provided, DCI can pursue court action including the right to obtain judgment and record liens against patient property. The current DCI web site significantly limits DCI’s acceptance of patients needing financial assistance:

“If a patient does not have primary or secondary insurance, every effort is taken to find a DCI facility that can accept the financial burden of an uninsured patient.”

<http://www.dciinc.org/corporate/philosophy.htm>

Because of these limitations in policy and practice, DCI erroneously contends that it accepts all patients or has an open-access policy. (DCI brief, p. 27). The subject

property is not used for charitable purposes where no patients are treated without regard to the ability to pay for services.

6. Charging Patients for Services and Entering Into Contracts with Government and Private Insurers is Not Charitable Activity

DCI erroneously claims the BTA held that it does not use the property for charitable purposes or can be considered a charitable institution because DCI accepts Medicare and Medicaid reimbursements. (brief pp., 2, 14). Though contrary to Ohio law, DCI argues the “acceptance of government reimbursement is the modern incarnation of charity.” (DCI brief, p. 3). Or, “accepting Medicare and Medicaid without restriction is a charitable decision.” (DCI brief, p. 15).

The Tax Commissioner found the West Chester clinic is used by DCI to generate revenue through insurance reimbursements for services rendered, much like a physician’s practice or a commercial laboratory. (S.T. 2). As to whether receiving payment from Medicare and Medicaid constitute charitable activity, the Tax Commissioner pointed out the following:

“It is noted that merely collecting Medicaid or Medicare reimbursements is not a charitable act, but is receiving full agreed payment under a guaranteed insurance payment for medical services. The Medicaid fees paid are ones agreed to between the health care provider and the Medicaid insurer. Such insured payments are no different than payments agreed to and paid under commercial insurance agreements, whereby the insurer may contract with the care provider to pay a lower fee for services than that charged to uninsured patients.”

(S.T. at 4).

Following *Community Health Professionals, Inc., supra.*, the BTA concluded that “...DCI does not use the subject property in furtherance of or incidently to its charitable purpose because it conducts no charitable activity at the clinic.” Further, “like the operations of a

for-profit corporation, it charges all patients for dialysis services, voluntarily enters into contracts with government and private insurers to set charges for the provision of these services...” (BTA-13).

DCI erroneously claims the Medicare and Medicaid reimbursements do not cover the cost of treatment at many facilities, including the West Chester clinic. (DCI brief, pp. 11, 26). Because Medicare and Medicaid reimbursements do not cover the cost of treatment, DCI claims it provided free care (DCI brief pp., 2, 3). On examination, Mr. Horn acknowledged to have little knowledge as what Medicare reimburses. (H.R. at 110).

DCI erroneously claims that “effectively, the BTA’s Decision means that accepting Medicare patients cannot be a charity.” (DCI brief, p. 26). While the BTA acknowledged that DCI, as with nearly every healthcare provider in the U.S., voluntarily accepts government reimbursements, the BTA did not imply that a true charity would refuse such reimbursements. (DCI brief, p. 2). The BTA did not rule that the acceptance of government reimbursements will impair the charitable status of a healthcare provider. (DCI brief, p. 35). DaVita receives Medicare and Medicaid reimbursements. Catholic Hospital Association does not include Medicaid and Medicare shortfalls in its definition of charity. So the choice is not for DCI to accept reimbursement or to cease to exist. To be a charity to receive a tax exemption, DCI, unlike DaVita, has requirements to conduct charitable activities such as providing free care to indigents. The acceptance of Medicare and Medicaid reimbursement is a circumstance specified in *Community Health Professionals, Inc., supra.*, yet not the

“touchstone” for determining whether a healthcare provider uses its property for charitable purposes or whether the provider is a charitable institution. (DCI brief, p. 4).

While DCI claims it is prohibited from providing care for less than the cost charged to Medicare, DCI is not prohibited from providing charity care to individuals who do not receive reimbursement for care from Medicare or Medicaid. (DCI brief pp., 3, 12, 25). DCI’s argument does not make any sense considering the argument that it has a indigence policy and claims to provide services to indigent patients without ability to pay the full cost of treatment. (brief, p. 20).

DCI claims that it is a charity because 15% of patients reimbursed under Medicare do not have a secondary insurer for the 20% co-payment. (brief, p. 8). The record is not clear as to the number of Medicare patients without secondary insurance who paid the co-payment out-of-pocket. Moreover, if there is a requirement for a co-payment for Medicare recipients, the same requirement would be imposed on a for-profit dialysis provider such as DaVita.

7. Writing Off Bad Debt Is Not a Charitable Activity

For any entity collecting a charge, the end result of bad debt and charity is the lack of payment. Yet bad debt is not considered charity. *Community Health Professionals, Inc., supra*. Writing off a charge as bad debt is a decision for accounting purposes to not enforce the debt. As to healthcare, this is not a gift between the hospital and the patient. For charges for services a hospital cannot be both the patient’s charitable benefactor and creditor. As noted by the Illinois Fourth District Court of Appeals, “if an organization could acquire a tax exemption for giving up on collecting

from deadbeat customers, nearly every business in Illinois would be tax exempt.”

Provena Covenant Med. Center v. Dept. of Revenue (2008), 384 Ill.App.3d 734.

DCI characterizes the approximately \$6.7 million, or 1.27%, of \$526,891,082 of total charges as a "bad debt charity write off" for those patients insured by Medicare.

(BTA-7). However, the Tax Commissioner disagreed and pointed out as follows:

“Further, medical care does not become charitable merely because a medical billing is deemed uncollectible and written off; such action being no more than an accounting tool by which a company may offset its business losses. *** Therefore, the write-offs submitted for the subject property or those submitted for the entire DCI system are insufficient to determine the amount of indigent patients seen without regard to ability to pay.”

(S.T. at 3-4).

The Tax Commissioner concluded that at best the ‘write-offs submitted for the subject property or those submitted for the health care system are insufficient to determine the amount of indigent patients actually seen without regard to ability to pay.’ (S.T. 4).

Any healthcare provider, for-profit or non-profit, which must collect a co-payment will have patients unable to secure additional insurance or have funds for the payment. DCI acknowledges that the “charity care policy” is a “bad debt” policy to write off the co-payment DCI is unable to collect from patients. (DCI brief, p. 11).

As to the alleged charitable Medicare write-offs, the record provides no evidence as to the relevant application year. Witness testimony revealed that DCI expects payment for services rendered in all cases and that less than 2% of annual revenues in 2006-2007 were written off as a “bad debt charity write off” for patients insured by Medicare. The BTA was unable to determine from the record whether the amount written off were anything more than simply excess charges over costs. (BTA-16).

8. No Evidence of DCI Acting as a Donor to Patients

As noted by the BTA, while DCI characterizes as charity the writing off of charges it deems uncollectible as debt, the BTA found no evidence of DCI acting as a donor at any time by relinquishing its legal right to payment from patients for services provided. (BTA-14). To discuss the relationship between charity and gift-giving, the BTA cited without comment two paragraphs in *Provena Covenant Med. Center v. Dept. of Revenue* (2008), 384 Ill.App.3d 734, which was subsequently affirmed by the Illinois Supreme Court in March, 2010. *Provena Covenant Med. Center v. Dept. of Revenue* (Ill. Mar. 18, 2010), Docket No. 107328. The Appellate Court did not refer to Illinois law, yet provided a definition of “charity” and “gift” from Merriam-Webster’s Collegiate Dictionary and referred to two law review articles. (BTA-14). Reviewing the record and Ohio law -- *Planned Parenthood Assn. of Columbus, Inc., supra*, the BTA found no evidence of any meaningful act or “giving” to DCI patients. (BTA-15). Under the Ohio definition of charity the BTA found no evidence of charitable behavior by DCI.

9. Ohio Law Provides for Consideration of Free or Discounted Medical Care

The Ohio Supreme Court in 1917 pointed out that “the first concern of a public charitable hospital must be for those who are unable to pay.” *O'Brien, Treas., supra*. Moreover, “if, after taking care of these, it still has further accommodations, there can be no objection to making use of the same for pay patients in order to increase the fund which may be at its disposal for the benefit of the poor.” *Id.* Justice Bell in a concurring opinion noted that “hospitals are charitable institutions because of the services furnished to the public...” *Doctors Hospital v. Bd. of Tax Appeals* (1962), 173 Ohio St. 283, 287, 181 N.E.2d 702.

Relied on by this Court in *Bethesda Healthcare, Inc.*, *supra*, this Court in 1950 held that a hospital is considered charitable if it provides “service and assistance to the sick, injured and ailing, with open doors and benevolent concern for the afflicted souls who lack the ability to pay for the attentions they receive.” *Cleveland Osteopathic Hosp.*, *supra*. Further,

“Predicated upon language used in the opinion in the case of *O'Brien, Treas., v. Physicians Hospital Assn.*, 96 Ohio St., 1, 116 N. E., 975, L. R. A. 1917F, 741, and in accordance with the concept of an organization devoted *exclusively* to charitable purposes, a hospital to qualify as a charitable institution, the property of which is exempt from taxation, should have as an important objective the care of the poor, needy and distressed who are unable to pay, although the fact that it admits and ministers to a number of pay patients will not necessarily destroy its charitable character. See *Trust Company of Georgia v. Williams*, 184 Ga., 706, 192 S. E913.,

But where a hospital extends its facilities and services very largely to those who are able to and do pay the established rates for their accommodation and *designedly makes a very substantial profit* in so doing, it places itself in the classification of a business enterprise amenable to taxation, notwithstanding that some unfortunate persons without means are cared for free of charge. See 51 American Jurisprudence, 607, Section 635.”

As such, a hospital has been required to “have as an important objective the care of the poor, needy and distressed who are unable to pay...” See Also, *Vick v. Cleveland Mem'l Med. Found.* (1965), 2 Ohio St.2d 30, 206 N.E.2d 2. Health facilities have been denied exemption where the number of nonpaying or charitable patients was decidedly in the minority. *Lincoln Mem'l Hosp., Inc. v. Warren* (1968), 13 Ohio St.2d 109, 235 N.E.2d 129.

This Court citing *Vick* pointed out in *Church of God in N. Ohio, Inc. v. Levin* (2009), 124 Ohio St.3d 36, 918 N.E.2d 981, that “we have recognized specific activities as constituting charitable ones in the proper context. Thus, the provision of medical or ancillary healthcare services qualifies as charitable if those services are provided on a nonprofit basis to those in need, without regard to race, creed, or ability to pay. (DCI brief, p. 16). Yet, DCI in the brief fails to acknowledge in *Vick* that **“the percentage of nonpaying patients was estimated to be about six or seven per cent, and counsel for appellant conceded that ‘some’ charity work was done.”** (emphasis added).

While the hospital in *Vick* provided 6% or 7% of charity care, DCI provides no charity care at the subject property and less than one percent to patients on a company-wide basis. (BTA-13, 16). DCI charges all patients at the subject property for dialysis services. (BTA-13). Though DCI claims to provide healthcare without regard to ability pay, DCI acts to the contrary in practice and retains the right to refuse to admit or treat patients under the indigence care policy. (DCI brief, pp. 20, 23, 24, BTA-13).

Contrary to argument of DCI, this Court has long recognized the provision of nonprofit medical care as charitable. (DCI brief, p. 17). In *Community Health Professionals, Inc., supra.*, the issue of the entity as a charity was not before the BTA or the Court. *Warman v. Tracy* (1995), 72 Ohio St.3d 217, 648 N.E.2d 833 regarded the exemption of a house used by nuns near a hospital and did involve whether the provision of healthcare by the hospital was charitable. *Bowers v. Akron City Hosp.* (1968), 16 Ohio St.2d 94, 96, 243 N.E.2d 95, involved the exemption of a parking garage and not whether a hospital was a charity.

10. An Institution May Be Non-Profit and Yet Not a Charitable Institution

It is possible for an institution to be non-profit and yet not charitable. *Northeast Ohio Psych. Inst., supra*. The Tax Commissioner's Final Determination found DCI to be a non-profit institution, but not a charitable one, and concluded R.C. 5709.121 is, therefore, inapplicable. (S.T. at 1-2., BTA-4). As identified by the Tax Commissioner, "even though the Clinic may be a not for-profit entity, it is more in the nature of a medical practice and would not qualify under R.C. 5709.121." As an analogy, the Tax Commissioner pointed out the following:

"For example, if a group of attorneys organized as a non-profit entity, billing for services, while doing a modicum of pro bono work while paying high salaries to the group members, the mere fact of non-profit status would not make the law practice a charity."

(S.T. 2).

A review of DCI's articles of incorporation, with self-serving clauses as to the purpose of DCI, may serve to establish that DCI is recognized as a non-profit entity by the Ohio Secretary of State but not necessarily as a charitable entity. The presence or absence of a statement of exclusive charitable purpose in the Articles of Incorporation is neither determinative nor necessary in deciding tax status. *Carmelite Sisters, St. Rita's Home v. Bd. of Review* (1969), 18 Ohio St.2d 41, 247 N.E.2d 477; *Planned Parenthood Assn, supra*; Herbert, J., concurring opinion, in *In re Application of American Legion* (1969), 20 Ohio St.2d 121, 123, 254 N.E.2d 21.

11. Charitable Use of Property is Focus in Place of Purported Charitable Mission

An institution having a charitable mission is inadequate for a determination as to whether the entity is a charity for purposes of R.C. 5709.121. As pointed out in *Community Health Professionals, Inc., supra*, "when considering R.C. 5709.121 and the

question of whether a charitable institution uses its property in furtherance of or incidentally to its charitable purposes, this court focuses on the relationship between the actual use of the property and the purpose of the institution."

DCI has a "...mission of patient service" which is not unique to DCI, DaVita or any healthcare provider. (DCI brief, p. 3). DCI's mission of "...striving to improve the methods and quality of ESRD treatment" is not unique to DCI, DaVita or any dialysis provider. (DCI brief, p. 6). As Medicare provides the majority of reimbursement for dialysis care, DCI like DaVita accepts Medicare for business reasons and not necessarily for a charitable mission. (DCI brief, p. 10).

OHA focuses on *Akron Golf Charities, Inc. v. Limbach* (1987), 34 Ohio St. 3d 11, 516 N.E.2d 222, a case involving the sales and use tax exemption in R.C. 5739.02(B)(12) for nonprofit corporations operated exclusively for charitable purposes. (OHA brief, p. 21). The case involved a nonprofit corporation which sponsored profit-making golf tournaments and then distributed the net proceeds to various charitable organizations. In reversing the two lower decisions, the Supreme Court looked to the operation of Akron Golf Charities, Inc. and disagreed with the conclusion of the BTA that the operation of a golf tournament merely to raise revenue to local charities is a profit-making endeavor merely because the World Series of Golf is a major sporting event and that the applicant retains a reserve for future contingencies." While Akron Golf Charities limited its operations to running a golf tournament to raise money for local charities and was found to be a charitable institution, the operations of DCI extend far beyond running a sole golf tournament. DCI engages in commercial activities of operating 195 clinics in 26 states, all of which are in competition with for-profit entities.

12. Absent a Change of the Law by the Ohio General Assembly, There is No Presumption That An Entity Exempt From Federal Income Taxation Under Section 501(c)(3) of the Internal Revenue Code is a Charitable Institution For Purposes of R.C. 5709.12 and 5709.121.

Contrary to argument of OHA, the status of DCI as a 501(C)(3) entity for purposes of federal taxation is irrelevant to whether DCI is a charitable institution under R.C. 5709.12 and R.C. 5709.121. (OHA brief, pp. 11-12). No Ohio Court or the BTA has made the determination that an entity is a charitable institution for purposes of R.C. 5709.12 and 5709.121 on account of Section 501(c)(3) status. Nor has the General Assembly established a presumption that a 501(c)(3) entity is a charity for purposes of R.C. 5709.121.¹

For the proceeding reasons, Ohio School Boards Organizations and Local and State Government Organizations request the Court to affirm the Decision of the BTA that DCI is not a charitable institution under R.C. 5709.121.

Proposition of Law Number 2:

The Board of Tax Appeals correctly found that DCI does not exclusively use the subject property for a charitable purpose as contemplated by Revised Code 5709.12.

DCI is not entitled to exemption from real property taxation under R.C. 5709.12.

¹ In a recent property tax exemption case, the Minnesota Supreme Court last year declared: "If the legislature had intended all organizations exempt from payment of federal income taxes under I.R.C. § 501(c)(3) also to be exempt from payment of real property taxes, it could have so provided, as it did with regard to state income taxation. . . . That it has not done so indicates that, in the legislature's view, there is a difference between an entity that qualifies for exemption from payment of federal income taxes because it does good works and from which its owners do not personally benefit, and an entity that qualifies for exemption from payment of property taxes as an institution of purely public charity." *Under the Rainbow Child Care Center, Inc. v. County of Goodhue*, 741 N.W. 2d 880 2007 Minn. LEXIS 775 at *20 (Minn. 2007).

R.C. 5709.12(B) exempts from taxation "[r]eal and tangible personal property belonging to institutions that is used exclusively for charitable purposes. Further, "under this provision this Court has emphasized that the entitlement of a particular parcel to exemption depends on the use of the property, not the nature of the institution. *First Baptist Church of Milford, Inc. v. Wilkins* (2006), 110 Ohio St.3d 496, 854 N.E.2d 494, citing *White Cross Hosp. Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199, 203, 311 N.E.2d 862 (Stern, J., concurring); *True Christianity Evangelism v. Tracy* (2001), 91 Ohio St.3d 117, 118, 742 N.E.2d 638 (under R.C. 5709.12, "whether the institution is religious or charitable is not a relevant factor" because the relevant factor is "whether the institution is using the property exclusively for charitable purposes"). See, *NBBTA-USA Hous., Inc.–Five v. Levin*, Slip Opinion No. 2010-Ohio-1553.

In determining whether property is "used exclusively for charitable purposes," we look to the property's "primary use, not secondary or ancillary activities." *NBBTA-USA Hous., Inc.–Five, supra; Hubbard Press v. Tracy, supra*. Where the property is not used exclusively for charitable purposes, exemption under R.C. 5709.12 is not available. For example, property owned by a veterans' organization not used exclusively for charitable purposes cannot be exempted from taxation. *East Cleveland Post v. Board of Tax Appeals* (1942), 139 Ohio St. 554, 41 N.E.2d 242. Contrary to the argument on page 22 of the brief, DCI witnesses admitted that DCI provided no free or charitable service at the facility. (BTA-15). DCI retains the right to refuse to admit and treat a patient who has no ability to pay. (BTA-5). DCI pursues collection actions, including court action, if payment is not received for services provided. (BTA-14). Consequently, the BTA easily

determined that the property was not used by DCI exclusively for charitable purposes and was not exempt under R.C. 5709.12(B).

As to revenue or profit generated by activities undertaken by DCI, the current use of the property rather than the ultimate use of the proceeds from the property is considered in determining whether the subject's use is for an exempt purpose.

Lutheran Book Shop, supra. When that profit is dedicated to a charitable cause, the property is precluded from the exemption found in R.C. 5709.12. *American Society for Metals v. Limbach* (1991), 59 Ohio St.3d 38, 569 N.E.2d 1065. Consequently, the use of property for charitable purposes is dispositive as to whether the property is entitled to tax exemption in place of the provision of excess revenue by DCI for research at a university or by DaVita to support The Kidney Trust.

As to the charitable mission of DCI to treat each end state renal disease patients and use excess revenue for research, this Court recently addressed a similar issue and pointed out that "the status of NBC as carrying out a religious mission does not by itself entitle it to a charitable exemption." *NBBTA-USA Hous., Inc.–Five v. Levin*, Slip Opinion No. 2010-Ohio-1553. This Court disagreed with the taxpayer and held that the existence of a public policy favoring an activity does not establish that activity as being charitable for purposes of exempting property from taxation.

"NBC asserts that its "use of the subject property is inherently charitable since it coincides with Congress's expressed public policy goals." In essence, NBC argues that nonprofit use plus conformity with congressional public policy equals charitable use."

In addressing an argument that "nonprofit use plus conformity with congressional public policy equals charitable use," the Court disagreed and pointed out as follows:

“But tying charitable use so tightly to Congress's policy goals is wrong because Congress does not define the scope of charitable use under Ohio law.”

In a footnote the Court pointed out the following:

“Neither the statute nor the administrative rule purports to control whether or not Ohio can impose property taxes on subsidized projects. It follows that federal law does not control the availability of a charitable-use exemption for the property.”

For the proceeding reasons, Ohio School Boards Organizations and Local and State Government Organizations request the Court to affirm the Decision and Order of the BTA that DCI does not use the property exclusively for charitable purposes.

Proposition of Law Number 3:

The Board of Tax Appeals correctly found that the subject property is not exempt from taxation

A. The BTA's Decision Properly Defined Charity to Include the Provision of Free Care

DCI and OHA erroneously claim that “the BTA equated charity with free care” and “suggested that a threshold level of free care is required in order for an institution to be a ‘charitable institution.’” (DCI brief, p. 24, OHA brief, p. 2).

This Court in *O'Brien, Treas., supra, Cleveland Osteopathic Hosp., supra, Lincoln Mem'l Hosp., Inc., supra, Vick, supra, Planned Parenthood Assn. of Columbus, Inc., supra*, and recently in *Bethesda Healthcare, Inc., supra*, and *Community Health Professionals, Inc., supra*, has been crystal clear that the provision of free or discounted care is to be considered in the totality of the circumstances to determine whether the institution is a charity and uses the property exclusively for charitable purposes. The BTA applied the preceding law and the acknowledgement of DCI that it provided no

charity care at the subject property, treated 1.27% of charges as bad debt charity write off, and provided free care on a company-wide basis at a rate of less than one percent (.64%) of charges. (BTA-7, 16). The BTA concluded that the provision of no charity at the subject property and minimal charity care company-wide to be deficient. As such, the BTA could not find that DCI used the property without an expectation to be compensated. (BTA-16). Nowhere in the BTA's decision is there a conclusion or statement that charitable health care is limited to free care as claimed by DCI. (DCI brief, p. 30). Consequently, DCI is incorrect that "the BTA also implicitly and impermissibly substituted its definition of charity – completely "free care" - for this Court's definition." (DCI brief, p. 18). It is disingenuous for OHA to claim that the BTA's decision amounts to judicial legislation. (OHA brief, p. 18).

Another red herring is the attempt of DCI and OHA to establish that "the BTA's decision was clearly premised on a mistaken belief that charitable care in Ohio requires a threshold level of completely 'free care.'" (DCI brief, p. 30, OHA brief, p. 3). Or, the erroneous claim of OHA that the BTA's decision threatens a "one size fits all" quota or an "arbitrary free-care quota" of free care. (OHA brief, p. 26). The fact that the BTA recognized that DCI "provides no free or charitable services at the subject property" does not necessarily *imply* or *mandate* a threshold level or "quota" of free care for DCI or a healthcare provider under recent precedent of this Court. The free care provided by DCI at the West Chester Clinic was not merely insufficient; it was non-existent. As with the hospital fitness center in *Bethesda Healthcare, Inc.*, *supra* ("the small number of members able to use the Fitness Center without payment of membership dues does not indicate a charitable use under the facts of this case") or the hospital in *Vick* (6% or

7% of charity care), the BTA found the number of patients receiving free care to be insufficient to meet the charitable services standards requirements for exemption.

Thus, DCI misleads the Court in arguing that “at its core, the BTA's entire decision rests solely upon the notion that a healthcare provider must provide a certain quantum of so-called ‘free care’ to be deemed ‘charitable.’” (DCI brief, p. 2.) As the BTA did not adopt or mandate a threshold for charity care for DCI or any healthcare provider, DCI is incorrect that a decision to affirm the BTA’s decision will “...eliminate the real estate tax exemption for any healthcare provider in Ohio.” (DCI brief, p. 3).

OHA preaches “for a flexible rule that simply examines whether an entity has refused to serve patients because of their inability to pay.” A free care consideration, according to OHA would force hospitals to provide artificially high levels of free care in “boon” years rather than saving to pay for the extra subsidies required during recessionary years. There is no record of DCI providing any charitable services at the subject property in “boon” years or during a recession, and DCI maintains a policy to deny care to indigent persons and take them to court if they are unable to pay for care.

B. Other States Consider Free or Discounted Care in the Totality of the Circumstances as to Whether an Healthcare Provider is a Charity Exclusively Using the Property for Charitable Purposes

The vast majority of state supreme courts considering this issue require the provision of free care for a healthcare provider to obtain a tax exemption. In 1985 the Utah Supreme Court ruled in *Utah County v. Intermountain Health Care, Inc.*, 709 P.2d 265, that two IHC hospitals were not automatically considered charitable and thus might be subject to taxation. The Utah Court concluded that the manner in which health care was being delivered in the 1980's was sufficiently different from the older model, that

the nonprofits hospital should not be exempt but instead treated the same as for-profit hospitals. The Court found that there was no evidence that the exemption is a substantial factor in the operation of the hospital. In summarizing its decision, the Court observed that the IHC had expended “minimal effort to show charity.”

In *Under the Rainbow Child Care Ctr., Inc. v. County of Goodhue* 741 N.W.2d 880 (Minn. 2007), the Minnesota Supreme Court held that Rainbow failed to show that it provided a substantial proportion of its services for free or at considerably reduced rates. The Court made clear that the fundamental definition of a charity is not the nature of what is provided but whether what is provided is a gift. As a result, the nonprofit nursing home or the community clinic cannot assume that providing healthcare while barely breaking even in an underserved area will qualify them as a charity. The consequence of the *Rainbow* decision is that simply providing a needed, worthwhile public service in a way that no profits inure to the benefit of private individuals is not enough. Cited by DCI is an earlier decision of the Minnesota Supreme Court to deny a property tax exemption. *SHARE v. Commr. of Revenue* (Minn. 1985) 363 N.W.2d 47.

In a Pennsylvania Supreme Court decision, *Hosp. Utilization Project v. Commonwealth*, 487 A.2d 1306 (Pa. 1985), the court limited the definition of purely public charity to an organization that “[d]onates or renders gratuitously a substantial portion of its services.”

C. Illinois Supreme Court in *Provena Provided That Charity Care is a Consideration for Charitable Tax Exemption to be Evaluated on a Case-by-Case Basis.*

The BTA cited the 2008 appellate court decision in *Provena Covenant Med. Center v. Dept. of Revenue* (August 26, 2008), 384 Ill. App.3d 734, which was recently affirmed by the Illinois Supreme Court. *Provena Covenant Med. Center v. Dept. of*

Revenue (Ill. Mar. 18, 2010), Docket No. 107328.

Provena, a non-profit, IRC 501(C)(3), hospital, owns and operates six hospitals, including Provena Covenant Medical Center (“PCMC”), a full-service hospital located in the City of Urbana. The charity care policy provided that the institution would “offer, to the extent that it is financially able, admission for care or treatment, and the use of the hospital facilities and services regardless of race, color, creed, sex, national origin, ancestry or ability to pay for these services.” During 2002, only 302 of PCMC’s 10,000 inpatient and 100,000 outpatient admissions were granted reductions in their bills under the charitable care program. That figure is equivalent to just 0.27% of the hospital’s total annual patient census.

The Court found that Provena satisfied the first of the factors for determining whether an organization can be considered a charitable institution: it has no capital, capital stock, or shareholders. Provena also meet the fourth factor. It does not provide gain or profit in a private sense to any person connected with it.

However, Provena did not meet the second criterion: its funds are not derived mainly from private and public charity and held in trust for the purposes expressed in the charter. They are generated, overwhelmingly, by providing medical services for a fee. The Court concluded the hospital generates revenue overwhelmingly from fees in exchange for medical services provided.

Provena failed to show it dispensed charity to all who needed it and applied for it and did not appear to place any obstacles in the way of those who needed and would have availed themselves of the charitable benefits it dispenses.

The Court defined charity as “a gift to be applied *** for the benefit of an indefinite number of persons, persuading them to an educational or religious conviction, for their general welfare—or in some way reducing the burdens of government.” *Methodist Old Peoples Home v. Korzen*, 39 Ill. 2d at 156-57. Further, in explaining what constitutes charity, the Court noted that a century earlier it held in that “ ‘charity, in a legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.’ ” *Crerar v. Williams*, 145 Ill. 625 (1893), quoting *Jackson v. Phillips*, 96 Mass. 539, 556 (1867).

The Court did not set a standard for how much charity care a non-profit hospital must provide in exchange for local property tax exemption. That is evaluated on a case-by-case basis applying the *Methodist* factors. With very limited exception, the property was devoted to the care and treatment of patients in exchange for compensation through private insurance, Medicare and Medicaid, or direct payment from the patient or the patient’s family. The Court did not count Provena’s bad debt as charity.

Provena argued that the delivery of medical care in and of itself was charitable. The Court dismissed this argument, pointing out that “[a]s a practical matter, there was little to distinguish the way in which Provena dispensed its “charity” from the way in which a for-profit institution would write off bad debt.”

The Court rejected a community benefit argument for the provision of ambulance services, support of crisis nurseries, donations made to other non-profits, volunteer initiatives (health screenings and wellness classes), support for graduate medical education, behavioral health services and emergency services training. The Court provided that “while all of these activities unquestionably benefit the community, community benefit is not the test.

D. Ohio Does Not Follow Out-of-State Authority Cited by DCI and OHA

Cited in the opinion of Justice Burke, concurring in part and dissenting in part, in *Provena* and relied on by DCI and OHA are *Wexford Medical Group v. City of Cadillac*, 474 Mich. 192, 713 N.W.2d 734 (2006) and the Vermont Supreme Court case of *Medical Center Hospital of Vermont, Inc. v. City of Burlington*, 152 Vt. 611, 566 A.2d 1352 (1989). DCI also cites the Connecticut Supreme Court in *St. Joseph's Living Center, Inc. v. Town of Windham*, 240 Conn. 695 (March 24, 2009). These cases provide for a review of the overall charitable nature of the health care institution in contrast to analysis of specific activities, such as free care for the poor, in gauging qualification for exemption. In *Wexford*, the Court rejected a monetary threshold which was also rejected in *Provena* and not applied by the BTA in the instant matter. Further, *Medical Center of Vermont, Inc.* is not helpful to DCI because of the inquiry used by the Court for the provision of health care to all who need it regardless of the ability to pay, which DCI fails to do. DCI relies on *ElderTrust of Florida, Inc. v. Town of Epsom* (2007), 154 N.H. 693, 703, 919 A.2d 776, though residents received discounted care. DCI also relies on *Miracit Development Corp. v. Zaino* (March 10, 2005), Case Number 04AP-322, 2005-Ohio-1021, unreported, which involved the leasing of property for

which the Court recognizing the exemption of a nonprofit day-care center that furthers the “objective of revitalizing an economically depressed neighborhood neighborhood . . . and assisting the economically disadvantaged residents of that neighborhood.” The decision in *Northeast Ohio Psych. Inst.*, *supra*, effectively overruled *Miracit*.

In *Provena*, there is no threshold requirement for the provision of charity care and the determination as to whether a healthcare provider is a charity is made on a case-by-case analysis. This Court has been clear that the provision of free care is to be considered in the totality of the circumstances to determine if the applicant is a charity and uses the property exclusively for charitable purposes. *O'Brien, Treas.*, *supra*, *Cleveland Osteopathic Hosp.*, *supra*, *Lincoln Mem'l Hosp., Inc.*, *supra*, *Vick*, *supra*, and *Bethesda Healthcare, Inc.*, *supra*, *Community Health Professionals, Inc.*, *supra*.

E. OHA and DCI Policy Considerations

The BTA's decision did not break from the Court's longstanding precedents for tax exemptions for charitable use of property. OHA is convinced that the BTA “conflated” the legal standards for exemption under R.C. 5709.12 and 5709.121 by considering the amount of free and reduced care provided by DCI. OHA suggests that the DCI's lack of charity care cannot be considered as evidence that relates both to the DCI's use of the property and its alleged status as a charitable institution. OHA then characterizes the BTA's reasoning as circular and erroneous on this basis. The BTA recognized that DCI functions in the same way as most for-profit corporations in that it charges all patients for dialysis services, voluntarily enters contracts with government and private insurers to set charges for the provision of services, and does not donate any of its services without charge or at a reduced charge.

OHA charges that the BTA's ruling ignores the fact that most nonprofit hospitals engage in a host of community outreach programs. However, DCI failed to submit any such evidence. OHA opines that the BTA's decision has dramatic ramifications for charitable activity in Ohio, both in terms of charitable giving by individuals and charitable activities by healthcare organizations. There is no evidence in the record to this effect. By raising these alleged issues, OHA is not arguing the merits of this case but instead appears to be asking the Court to issue a decision here that goes beyond the facts and circumstances actually presented in the record on appeal.

Both DCI and OHA claim a decision to affirm the BTA's decision "could pose dire consequences for Ohio's charitable hospitals." (DCI brief, p. 34). Although DCI provides no charitable activities at the subject property, remarkably, DCI claims "without question, affirming the BTA's decision would reduce the resources available to charitable healthcare providers to treat less-fortunate Ohio residents. (DCI brief, p. 34). With that said, DCI offers no explanation as to how it could provide less than zero charity care at the West Chester clinic if the Court affirms the decision.

There is no evidence as to how DCI reduces the burden on government if it was not in existence. Exemption from taxation is in derogation of rights of all taxpayers and effectively shifts a greater tax burden to the nonexempt. *Ohio Children's Society v. Porterfield* (1971), 26 Ohio St.2d 30, 32, 268 N.E.2d 585. ("An inescapable problem besets arguments for exempting nonprofits per se. They are, at heart, claims that this tax expenditure is worth incurring because it buys personal and public health benefits that exceed its cost. But a tax preference for nonprofits per se is an imprudent way for government to procure these benefits." M. Gregg Bloche, *Tax Preference for*

Nonprofits: From Per Se Exemption to Pay-for-Performance, Health Aff., June 2006, at w.304. Justice Bell in *Doctors Hospital, supra*, recognized the “applicant desires to dispense a charity it ought to do so without enforced contribution from other taxpayers.”

V. CONCLUSION

Ohio School Boards Organizations and Local and State Government Organizations respectfully request the Court to affirm the Decision of the BTA that (1) DCI is not a charitable institution and (2) does not use the property exclusively for charitable purposes. R.C. 5709.12, 5709.121. Further, the Ohio School Boards Organizations and Local and State Government Organizations request this Court to reject the Propositions of Law advanced by DCI and OHA.

Respectfully submitted,



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Certificate of Service

A copy of *Amici Curiae*, Ohio School Boards Association, Ohio Association of School Business Officials, Buckeye Association of School Administrator's, Ohio Job and Family Services Directors Association, County Commissioners Association of Ohio, Ohio Association of County Behavioral Health Authorities, The Ohio Municipal League, Ohio Fire Chiefs Association, Ohio Parks and Recreation Association, Ohio Township Association, and Ohio Library Council Brief was sent via Overnight Mail on this 7 day of May, 2010, to Sean O. Callan, Esq., Dinsmore & Shohl, LLP, 1900 Chemed Center, 225 East Fifth Street, Cincinnati, Ohio 45202, Chad A. Readler, Esq., Jones Day, 325 John H. McConnell Blvd., Suite 600, P.O. Box 165017, Columbus, OH 43216-5017, and Lawrence D. Pratt, Esq., Assistant Attorney General, 16th Floor – Rhodes Tower, Columbus, OH 43215.



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