

**IN THE SUPREME COURT OF OHIO**

DIALYSIS CLINIC, INC.,

Appellant,

-vs-

WILLIAM W. WILKINS  
[RICHARD A. LEVIN],  
TAX COMMISSIONER OF OHIO,

Appellee.

Case No. 2009-2310

On Appeal from the Ohio Board of Tax  
Appeals

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**MOTION FOR RECONSIDERATION  
OF APPELLANT DIALYSIS CLINIC, INC.**

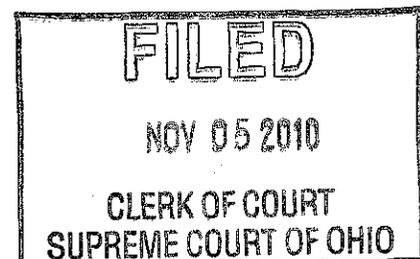
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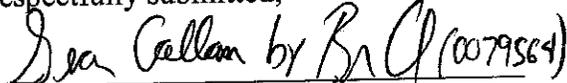
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TAX COMMISSIONER OF OHIO



**MOTION**

Now comes Appellant Dialysis Clinic, Inc. ("DCI"), pursuant to S.Ct.Prac.R. XI, and respectfully requests that the Court reconsider its decision in this case entered on October 26, 2010. The Court's decision affirming the Board of Tax Appeals' denial of DCI's claim for charitable-use exemption largely rests on the fact that DCI has a policy that allows DCI to refuse to admit and treat a patient who is unable to pay. However, as the BTA's counsel admitted at oral argument, the Court should look to actual practice to determine whether an entity is entitled to the charitable-use exemption. The record clearly shows that DCI's actual practice is to accept all patients without regard to their ability to pay. Accordingly, the Decision should be reconsidered. The reasons for this motion are set forth more fully in the attached Memorandum in Support.

Respectfully submitted,

  
Sean P. Callan, COUNSEL OF RECORD

COUNSEL FOR APPELLANT DIALYSIS  
CLINIC, INC.

## MEMORANDUM IN SUPPORT

### I. INTRODUCTION

On October 26, 2010, this Court, in a 4-3 decision, affirmed the decision of the Board of Tax Appeals (“BTA”) that DCI is not entitled to a charitable-use exemption under R.C. 5709.12(B) or R.C. 5709.121. See, Slip Opinion, 2010-Ohio-5071, ¶2 (the “Decision”). The Court noted that the BTA relied on “three principle factors” in denying the exemption. *Id.* at ¶31. First, the BTA found that DCI did not provide free, unreimbursed care at the West Chester Clinic. *Id.* at ¶32. Second, the BTA found that DCI could not base its claim for exemption on its distribution of surplus revenue to kidney research. *Id.* at ¶33. Third and finally, the BTA emphasized that DCI retains the right to refuse to treat a patient with no ability to pay. *Id.* at ¶34.

The majority rejected the first reason and instead noted that DCI’s acceptance of Medicare and Medicaid patients, to some extent, qualifies as providing care to those who cannot afford it. *Id.* at ¶ 38. As to the second basis of denial, DCI never sought exemption based on the distribution of surplus revenue to kidney research. Rather, DCI merely pointed to this and many other facts to illustrate DCI’s charitable nature and the fact that DCI does not operate with a view to profit. This leaves only the third reason — DCI’s policy that it retains the right to refuse to treat patients who cannot pay.

However, all parties agree that the case should be decided based upon DCI’s actions, not its policy. The Attorney General conceded at oral argument that the Court should look to actual practice — not policy — to determine whether an entity is entitled to a charitable exemption. In response to questioning on this issue from Justice Cupp, the Attorney General stated as follows: “Because what the Court has said on many occasions, it’s not a piece of paper that determines whether or not you’re eligible for a charitable exemption. It’s what you actually do and the Court

has said that over and over again. \* \* \* We have to look at the actual activities of the organization to determine status for exemption. And that applies not only to the use of the property under [R.C. 5709.12] but whether or not the institution is a charitable institution under [R.C. 5709.121].” Here, the record clearly demonstrates that DCI’s actual practice is to accept all individuals regardless of their ability to pay. Accordingly, the BTA’s only remaining reason for denying the exemption is rendered baseless. Without a lawful or reasonable basis to deny the exemption, the BTA erred, and the Court should reconsider its decision and reverse the BTA’s decision.

**II. THE COURT RECOGNIZED THAT DCI PROVIDED CARE TO PATIENTS WITHOUT REGARD TO THEIR ABILITY TO PAY BY PROVIDING CARE TO MEDICARE OR MEDICAID PATIENTS.**

The BTA relied heavily on its assertion that “the provision of free, unreimbursed care constitutes an essential part of a tax-exemption claim for a healthcare-services provider.” Decision, at ¶32. The entire Court squarely rejected this argument: “Because of the existence of Medicare and Medicaid, which reimburse providers for the provision of dialysis services to the indigent, few patients actually receive free care that is wholly unreimbursed. A threshold amount of unreimbursed care is not required, and the commissioner’s contrary assertion is unfounded.” Id. at ¶40; see, also, id. at ¶55 (O’Donnell, J., dissenting (“[T]he BTA erroneously determined that a taxpayer must demonstrate a minimum threshold or percentage of unreimbursed care to qualify as a charitable institution.”)).

In order to be a “charitable institution” under R.C. 5721.121, DCI had to show that “it provided service ‘on a nonprofit basis to those in need, without regard to race, creed, or ability to pay.’” Id. at ¶30, citing *Church of God in N. Ohio*, 124 Ohio St.3d 36, 2009-Ohio-5939, 918 N.E.2d 981, ¶19. The Court stated that “DCI’s decision to serve [Medicare or Medicaid] patients to some extent qualifies as the provision of care to persons who otherwise lack the means to afford it.” Id. at

¶38. The record is clear that DCI served numerous Medicare and Medicaid patients at its West Chester facility. The typical “patient mix” at the West Chester facility is 65-70% Medicare, 10% Medicaid, and the remainder self pay or self-insured. (Supp. 188, Tr. 164-65.) Accordingly, the Court implicitly recognized that DCI showed that it provided services on a nonprofit basis to those in need, without regard to ability to pay. As such, DCI is a charitable institution using the West Chester facility exclusively for charitable purposes and in furtherance of its charitable mission.

The fact that DCI donates half of its surplus revenue to kidney research was not the sole basis for DCI’s claimed exemption. Rather it was one of many factors that DCI cited to show that, under the totality of the circumstances, DCI is a charitable institution. (See, Merit Brief of Appellant DCI at pg. 17.) DCI also used this fact to illustrate that the profits, if any, do not inure to any private person or entity, but rather are impressed into the public trust to further DCI’s mission. (See, Reply Brief of Appellant DCI at pg. 13.) Moreover, the Court’s implicit recognition that DCI is a charitable institution because it provides services to patients without regard to their ability to pay, renders this argument inconsequential. In sum, the first two reasons cited by the BTA to deny DCI the charitable-use exemption are not reasonable and lawful.

### **III. DCI’S PRACTICE, NOT DCI’S POLICY, DETERMINES WHETHER IT IS ELIGIBLE FOR A CHARITABLE-USE TAX EXEMPTION.**

The only remaining reason for the BTA’s decision to deny DCI the charitable-tax exemption is DCI’s policy stating that “DCI retains all rights to refuse to admit and treat a patient who has no ability to pay.” Id. at ¶34. This policy, however, is not DCI’s practice, and the Court’s jurisprudence requires that the BTA focus on practice, not policy.

At oral argument, Justice Cupp inquired as to this issue during Mr. Pratt’s argument on behalf of the BTA. Justice Cupp noted the difference between DCI’s policy and its practice. After disparaging DCI’s policy, Mr. Pratt admitted that practice is paramount:

Mr. Pratt: \* \* \* [The policy] says on its face this is not charity care. It says on its face that we reserve the right to turn people away.

J. Cupp: Is that the end of the question here then for real estate tax exemption? It is not a charity then?

Mr. Pratt: It's a start, your Honor. It's not the end. Because what the Court has said on many occasions, it's not a piece of paper that determines whether or not you're eligible for a charitable exemption. It's what you actually do and the Court has said that over and over again. They said it last year in *Northeast Ohio Psychiatric*. Just earlier this year, the Court recognized the proper denial of an exemption for subsidized, low-income housing. That was a 501(c)(3) organization with a nice piece of paper.

Justice Cupp: Does that work in the way that they're asserting as well? That, they say they don't have a policy that allows provision of care without ability to pay. But in practice they do. So should we look at the practice rather than the policy? Is that the argument?

Mr. Pratt: That's what the Court has said your honor. We have to look at the actual activities of the organization to determine status for exemption. And that applies not only to the use of the property under [R.C. 5709.12] but whether or not the institution is a charitable institution under [R.C. 5709.121].

Thus, all parties agree that practice, not policy determines an organization's status for exemption. Here, the record overwhelmingly demonstrates that DCI's practice is to accept all patients without regard to ability to pay. (See, Supp. 182, Tr. 138-39.) Therefore, the BTA's reliance on DCI's policy was wrong.

In sum, the Court recognized that DCI provides healthcare services "on a nonprofit basis to those in need, without regard to \* \* \* ability to pay" by providing care to patients receiving benefits from Medicare and/or Medicaid. The record clearly shows that DCI served these patients at the West Chester Clinic, and that DCI's practice is to accept all patients without regard to their ability pay. Accordingly, the BTA's decision was unlawful and unreasonable and should be reversed.

**IV. CONCLUSION**

For all the foregoing reasons, DCI respectfully requests that the Court reconsider its decision in this case entered on October 26, 2010.

Respectfully submitted,

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Sean P. Callan, COUNSEL OF RECORD

COUNSEL FOR APPELLANT DIALYSIS  
CLINIC, INC.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been duly served upon the following by regular U.S. mail postage pre-paid this 5th day of November, 2010:

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