

IN THE SUPREME COURT OF OHIO

AKRON GENERAL MEDICAL CENTER	:	
	:	
Appellant,	:	
	:	Case No. 14-0876
v.	:	
	:	Appeal from the
JOSEPH W. TESTA,	:	Ohio Board of Tax Appeals
Tax Commissioner of Ohio, et al,	:	Case No. 2012-426
	:	
Appellees.	:	

---

**MERIT BRIEF OF AMICUS CURIAE  
OHIO HOSPITAL ASSOCIATION  
IN SUPPORT OF APPELLANT  
AKRON GENERAL MEDICAL CENTER**

---

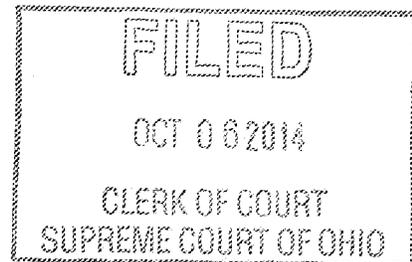
Mark A. Engel (0019486)  
*Counsel of Record*  
Bricker & Eckler LLP  
9277 Centre Pointe Drive, Suite 100  
West Chester, OH 45069  
Tel: (513) 870-6565  
Fax: (513) 870-6699  
[mengel@bricker.com](mailto:mengel@bricker.com)

Michael DeWine (0009181)  
Attorney General of Ohio  
Melissa W. Baldwin (0066681)  
Assistant Attorney General  
*Counsel of Record*  
30 East Broad Street, 25th Floor  
Columbus, Ohio 43215  
Tel: (614) 466-5967  
Fax: (614) 466-5087  
[melissa.baldwin@ohioattorneygeneral.gov](mailto:melissa.baldwin@ohioattorneygeneral.gov)

Sean M. McGlone (0075698)  
Sr. Vice President & General Counsel  
Ohio Hospital Association  
155 East Broad St., Suite 301  
Columbus, OH 43215-3640  
Tel: (614) 384-9139  
Fax: (614) 917-2260  
[seanm@ohanet.org](mailto:seanm@ohanet.org)

*Counsel for Appellee*  
*Joseph W. Testa, Ohio Tax Commissioner*

*Co-Counsel for Amicus Curiae,*  
*Ohio Hospital Association*



Stephen W. Funk (0058506)  
*Counsel of Record*  
Jessica A. Lopez (0090508)  
Roetzel & Andress, LPA  
222 S. Main Street, Suite 400  
Akron, OH 44308  
Tel: (330) 376-2700  
Fax: (330) 376-4577  
E-mail: [sfunk@ralaw.com](mailto:sfunk@ralaw.com)

*Counsel for Appellant*  
*Akron General Medical Center*

Mark H. Gillis, Esq. (0066908)  
Kelley A. Gorry, Esq. (0079210)  
*Counsel of Record*  
Rich & Gillis Law Group, LLC  
6400 Riverside Drive, Suite D  
Dublin, OH 43017  
Tel: (614) 228-5822  
Fax: (614) 540-7476  
E-mail: [kgorry@richgillislawgroup.com](mailto:kgorry@richgillislawgroup.com)

*Counsel for Appellee*  
*Stow-Munroe Falls City Schools Board of Education*

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
STATEMENT OF INTEREST OF AMICUS CURIAE.....	1
STATEMENT OF FACTS.....	3
LAW AND ARGUMENT.....	3
PROPOSITION OF LAW	
In applying the charitable exemption provisions in R.C. 5709.12 and 5709.121, a threshold level of unreimbursed care by a taxpayer is not required as a condition of the exemption.....	3
CONCLUSION.....	10
CERTIFICATE OF SERVICE.....	11

## TABLE OF AUTHORITIES

	<u>Page</u>
 <b><u>CASES</u></b>	
<i>Akron General Medical Center v. Testa</i> , BTA No. 2012-426, 2014 Ohio Tax LEXIS 2563 (April 29, 2014) .....	7
<i>Bethesda Healthcare, Inc. v. Wilkins</i> , 101 Ohio St. 3d 420, 2004-Ohio-1749, 806 N.E.2d 142.....	7
<i>Cincinnati Community Kollel v. Testa</i> , 135 Ohio St. 3d 219, 2013-Ohio-396, 985 N.E.2d 1236.....	6
<i>Cincinnati Nature Ctr. Assn. v. Bd. of Tax Appeals</i> , 48 Ohio St. 2d 122, 247 N.E.2d 381 (1976).....	6, 9
<i>Columbus Suburban Coach Lines, Inc. v. PUCO</i> , 20 Ohio St. 2d 125, 254 N.E. 2d 8 (1969).....	9
<i>Community Health Professionals, Inc. v. Levin</i> , 113 Ohio St. 3d 432, 2007-Ohio-2336, 866 N.E.2d 478 .....	4, 6, 7, 8
<i>Dialysis Clinic, Inc. v. Levin</i> , 127 Ohio St. 3d 215, 2010-Ohio-5071, 938 N.E.2d 329.....	5, 7
<i>Episcopal Parish of Christ Church, Glendale, v. Kinney</i> , 58 Ohio St. 2d 199, 389 N.E.2d 847 (1979).....	4
<i>Gerke v. Purcell</i> , 25 Ohio St. 229, 1874 Ohio Lexis 174 (1874) .....	5
<i>Lancaster Colony Corp. v. Limbach</i> , 37 Ohio St. 3d 198, 524 N.E.2d 1389 (1988).....	9
<i>O'Brien v. Physicians Hospital Ass'n.</i> , 96 Ohio St. 1, 116 N.E. 975 (1917) .....	7
<i>Olmstead Falls Bd. of Edn. v. Tracy</i> , 77 Ohio St. 3d 393, 674 N.E.2d 690 (1997).....	4
<i>Planned Parenthood Assn v. Comm'r</i> , 5 Ohio St. 2d 117, 214 N.E.2d 222 (1966).....	5
<i>State ex rel. Foster v. Evatt</i> , 144 Ohio St 65, 56 N.E.2d 265 (1944).....	9
<i>Storer Communications, Inc. v. Limbach</i> , 37 Ohio St. 3d 193, 525 N.E. 2d 466 (1988) .....	9
<i>Vick v. Cleveland Mem. Med. Found.</i> , 2 Ohio St. 2d 30, 206 N.E. 2d 2 (1965).....	5, 8
<i>Warman v. Tracey</i> , 72 Ohio St. 3d 217, 648 N.E.2d 833 (1995) .....	6

**STATUTES**

R.C. 5709.12 ..... passim  
R.C. 5709.12(B)..... 2, 5, 7, 8  
R.C. 5709.121 ..... passim  
R.C. 5709.121(A)..... 3  
R.C. 5709.121(A)(2) ..... passim  
R.C. 5709.121(B)..... 6

**OTHER AUTHORITIES**

Section 2, Article XII, Ohio Constitution ..... 1

**IN THE SUPREME COURT OF OHIO**  
**Appeal from the Ohio Board of Tax Appeals**

Akron General Medical Center, Appellant	:	
	:	
vs.	:	Case No. 14-0876
	:	
Joseph W. Testa, Tax Commissioner of Ohio, et al, Appellees.	:	Brief of Amicus Curiae Ohio Hospital Association
	:	

**STATEMENT OF INTEREST OF AMICUS CURIAE**

Following the adoption of the constitution of 1851, the nature and extent of exemptions from taxation was limited to those specific areas listed in the constitution. One of those provisions currently found in Art. XII, Sec. 2 permits laws to be passed to exempt, among other items, institutions used exclusively for charitable purposes. The current statutory exercise of that authority is found in R.C. 5709.12 and 5709.121.

A review of the official reports of this Court discloses that litigation regarding the scope of the exemption began almost immediately and has continued unabated since. This case is but the latest in a long line of cases seeking to apply a variant of the seemingly simple language of R.C. 5709.12: “Real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation” as amplified by R.C. 5709.121(A)(2) for property that is used “in furtherance of or incidental to” the owner’s charitable purpose.

Amicus Curiae, the Ohio Hospital Association (“OHA”), is a nonprofit association established in 1915 as the first state-level hospital association in the United States. Membership in OHA is limited to Ohio hospitals and health systems. OHA currently represents over 210 nonprofit and governmental hospitals and health systems located throughout Ohio. OHA’s

mission is to collaborate with member hospitals and health systems to ensure a healthy Ohio. Over the years, OHA has been instrumental in assisting its members navigate the changing business, legal and regulatory environment faced by hospitals.

OHA's interest in this case stems from the excessively narrow and unlawful interpretation given by the Tax Commissioner to the concept of "charitable use" for purposes of administering the real property tax exemption provided by R.C. 5709.12(B) and R.C. 5709.121. Although this Court has rejected the argument in the past, the Tax Commissioner persists in requiring some unspecified level of uncompensated care as a precondition to this exemption. This erroneous interpretation of the charitable exemption threatens the property tax exemption currently available to OHA members for their healthcare facilities and related structures that are operated in furtherance of their charitable purposes. Any loss of property tax exemption will require that nonprofit hospitals divert funds otherwise earmarked for patient care and community benefit programs to pay these taxes, substantially degrading the availability of healthcare services to all Ohio residents.

The decision of the Board of Tax Appeals ("BTA") upholding the Tax Commissioner's denial of real property tax exemption for the Lifestyles portion of Appellant Akron General Medical Center's Health & Wellness Center is extremely important to all persons making charitable use of their property, but especially so to taxpayers, such as members of Amicus, that provide healthcare services. The holding not only applies the wrong legal standard for determining whether the property is exempt, but more importantly, it continues to give life to the Tax Commissioner's repeated insistence that the charitable exemption may only be granted if the taxpayer provides some minimal, yet unspecified, level of uncompensated care. The Tax Commissioner's position has never been the applicable standard in Ohio and this Court has

repeatedly rejected the efforts of the Tax Commissioner to engraft such a provision onto the law. Nevertheless, the Tax Commissioner continues to make some unspecified level of uncompensated care a litmus test for charitable exemptions, and the BTA closed its eyes and sanctioned that position in this case. It is time for the Court to make its ruling clear: There is no pre-determined level of uncompensated care that is required to qualify for the exemption under R.C. 5709.12 or 5709.121.

### STATEMENT OF FACTS

Amicus agrees with the Statement of Facts set forth in the Brief of Appellant Akron General Medical Center.

### LAW AND ARGUMENT

#### PROPOSITION OF LAW

**In applying the charitable exemption provisions in R.C. 5709.12 and 5709.121, a threshold level of unreimbursed care by a taxpayer is not required as a condition of the exemption.**

R.C. 5709.12 and 5709.121 authorize the exemption from property taxes where the property is used exclusively for charitable purposes. Akron General Medical Center (“AGMC”) applied for exemption pursuant to both R.C. 5709.12 and 5709.121. At the urging of the Tax Commissioner, the BTA denied the exemption on the alleged basis that AGMC failed to provide an adequate amount of services on the property at issue for free or at a reduced cost. In doing so, the BTA not only failed to apply the plain language of R.C. 5709.121(A)(2), but it also applied a test regarding a minimal level of uncompensated care that this Court has repeatedly rejected. Consequently, the decision of the BTA is unreasonable and unlawful and it must be reversed.

R.C. 5709.12 provides “Real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation.” R.C. 5709.121(A) provides in part:

Real property and tangible personal property belonging to a charitable or educational institution or to the state or a political subdivision, shall be considered as used exclusively for charitable or public purposes by such institution, the state, or political subdivision, if it meets one of the following requirements:

\* \* \* \*

(2) It is made available under the direction or control of such institution, the state, or political subdivision for use *in furtherance of or incidental to* its charitable, educational, or public purposes and not with a view to profit.

(emphasis added)

This Court has explained the interrelationship between these two sections many times. R.C. 5709.12 provides an exemption for property that is used exclusively for charitable purposes, regardless of the status of the owner. R.C. 5709.121 explains situations in which property that is owned by a charitable institution, or by the state or a political subdivision of the state, may be considered to be used exclusively for charitable, educational, or public purposes for purposes of R.C. 5709.12. Thus, the charitable nature of the owner is not relevant for purposes of R.C. 5709.12, but is an essential prerequisite for R.C. 5709.121. *Community Health Professionals, Inc. v. Levin*, 113 Ohio St. 3d 432, 2007-Ohio-2336, 866 N.E.2d 478, ¶¶ 17, 18; *Olmstead Falls Bd. of Edn. v. Tracy*, 77 Ohio St. 3d 393, 396, 674 N.E.2d 690 (1997); *Episcopal Parish of Christ Church, Glendale, v. Kinney*, 58 Ohio St. 2d 199, 200-201, 389 N.E.2d 847 (1979).

For more than 140 years, this Court has recognized that “charity” for purposes of statutes relating to property taxation is more than mere alms-giving.

The meaning of the word “charity,” in its legal sense, is different from the signification which it ordinarily bears. In its legal sense it includes not only gifts

for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, and, it is said, for any other useful and public purpose.

*Gerke v. Purcell*, 25 Ohio St. 229, 1874 Ohio Lexis 174 (1874).

In 1966, this Court articulated a similar definition of “charity” as:

[T]he 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 [pay], and without hope or expectation, if not positive abnegation, of gain or profit.

*Planned Parenthood Assn v. Comm’r*, 5 Ohio St. 2d 117, 214 N.E.2d 222 (1966), syllabus.

In the context of taxpayers providing healthcare services, this Court has held that property is used exclusively for charitable purposes under R.C. 5709.12(B) when services are provided on a nonprofit basis to those in need, without regard to race, creed, or ability of the recipients to pay for them. *Vick v. Cleveland Mem. Med. Found.*, 2 Ohio St. 2d 30, 206 N.E. 2d 2 (1965), paragraph two of the syllabus. Similarly, this Court has held that a taxpayer providing healthcare services is a charitable institution under R.C. 5709.121 if its core activity is to provide services on a nonprofit basis to those in need, without regard to race, creed, or ability of the recipients to pay for them. *Dialysis Clinic, Inc. v. Levin*, 127 Ohio St. 3d 215, 2010-Ohio-5071, 938 N.E.2d 329, ¶ 30.

In this case, as noted by the BTA at page 4 of its Decision & Order, there was no dispute that AGMC was a charitable institution. Therefore, analysis of this case may proceed under R.C. 5709.121(A)(2).

In addressing a claim under R.C. 5709.121(A)(2), this Court has established a three-part test for exemption. The 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. *Cincinnati Nature Ctr. Assn. v. Bd. of Tax Appeals*, 48 Ohio St. 2d 122, 125, 247 N.E.2d 381 (1976),<sup>1</sup> *Warman v. Tracey*, 72 Ohio St. 3d 217, 648 N.E.2d 833 (1995); *Community Health Professionals, Inc.* 113 Ohio St. 3d 432, 2007-Ohio-2336, 866 N.E.2d 478, at ¶ 19; *Cincinnati Community Kollel v. Testa*, 135 Ohio St. 3d 219, 2013-Ohio-396, 985 N.E.2d 1236, ¶ 26.

AGMC presented evidence in order to satisfy all three requirements for exemption under R.C. 5709.121(A)(2) as set forth in *Cincinnati Nature Ctr. Assn.* Despite the positive assertions of R.C. 5709.121(A)(2) as the basis for the exemption and the evidence in the record directed towards and indicating compliance with the three-part test, the BTA denied the exemption. In doing so, the BTA inexplicably failed to follow the plain language of R.C. 5709.121(A)(2) or to acknowledge or apply the three-part test enunciated in *Cincinnati Nature Ctr. Assn.* Indeed, had it applied the appropriate statutory language and three-part test under R.C. 5709.121(A)(2), the BTA only could have concluded that the exemption should have been granted in this case. Instead, it simply asserted that exemption should be denied because AGMC allegedly did not provide a sufficient level of uncompensated services at the property.<sup>2</sup> For the reasons more fully laid out by AGMC in its Merit Brief, however, the BTA’s utter failure to follow the plain

---

<sup>1</sup> At the time of the decision in *Cincinnati Nature Ctr. Assn.*, the language currently found in R.C. 5709.121(A)(2) was lodged in R.C. 5709.121(B).

<sup>2</sup> In its Merit Brief, AGMC also takes issue with the BTA’s determination as to the level of uncompensated services that are provided at the property.

language of the applicable statutory provision and to apply the proper legal test to the evidence presented all render the BTA's decision unreasonable and unlawful.

More important to Amicus, however, is that the *sole* stated basis for denying the exemption was that AGMC failed to provide a sufficient level of services at no-cost or reduced-cost within the Lifestyles portion of the Health & Wellness Center. *Akron General Medical Center v. Testa*, BTA No. 2012-426, 2014 Ohio Tax LEXIS 2563 (April 29, 2014), Slip Opinion at 5. No other factors were recited.

Time and again, the Tax Commissioner has sought to deny property tax exemption on the basis that insufficient "uncompensated service" was provided. Time and again, this Court has rebuffed that effort. *O'Brien v. Physicians Hospital Ass'n.*, 96 Ohio St. 1, 116 N.E. 975 (1917); *Community Health Professionals, Inc.*, 113 Ohio St. 3d 432, 2007-Ohio-2336, 866 N.E.2d 478, at ¶ 22; *Dialysis Clinic, Inc. v. Levin*, 127 Ohio St. 3d 215, 2010-Ohio-5071, 938 N.E.2d 329, ¶¶ 39, 40; *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St. 3d 420, 2004-Ohio-1749, 806 N.E.2d 142, ¶ 39. Indeed, the Court could hardly be more direct: "A threshold amount of unreimbursed care is not required, and the commissioner's contrary assertion is unfounded." *Dialysis Clinic, Inc.* at ¶ 40. Yet, once again the Tax Commissioner has inexplicably taken that position in direct opposition to this Court's consistent and seemingly clear holdings. This time, he convinced the BTA that there is an insufficient level of uncompensated services provided at a property to warrant granting an exemption. There is no requisite level of uncompensated services that is required by R.C. 5709.121(A)(2), or in defining the charitable use of property under R.C. 5709.12(B). There is no requisite level of uncompensated care that has been imposed by this Court in defining "charity." Therefore, exemption cannot be denied under R.C. 5709.121(A)(2) solely on the basis of an insufficient level of uncompensated care or services.

So long as the core activity of an institution is to provide healthcare services on a nonprofit basis to all who seek them without regard to the ability of the recipients to pay for the services it may qualify as a charitable institution and obtain a charitable exemption for any property that is used in furtherance of this charitable purpose. *Vick*, 2 Ohio St. 2d 30, 206 N.E. 2d 2; *Community Health Professionals, Inc.*, 113 Ohio St. 3d 432, 207-Ohio-2336, 866 N.E.2d 478. That should be the end of the inquiry. Neither R.C. 5709.12(B), nor R.C. 5709.121(A)(2), contemplates some minimal level of uncompensated care before an exemption may be granted. Amicus asks the Court to put this issue to bed, and provide a clear holding that no specified level of uncompensated care is required under Ohio law.

Such a holding does not eviscerate the exemption. In order to claim the charitable exemption under R.C. 5709.12(B) on the basis of providing healthcare services, a taxpayer must still use the property on a nonprofit basis. The taxpayer must still establish that it will provide services to all who need them without regard to race, creed, or the ability of the patients to pay for the services. If any of those conditions is not met, the property is not exempt under R.C. 5709.12(B). But there is no threshold level of uncompensated care that is required before exemption may be had.

Similarly, there is no language contained in R.C. 5709.121(A)(2) that the exemption is contingent on some minimal level of uncompensated care. Rather, the operative question is whether the property is used under the direction or control of a charitable entity in furtherance of, or incidental to, its charitable purposes and not with a view to profit. The failure to establish the existence of any of these conditions, again, will result in the denial of the claim for exemption. However, a prescribed level of uncompensated care, or any level at all, is not contained in the statute and is not a precondition to the exemption under R.C. 5709.121(A)(2). Instead, the three-

part analysis articulated in *Cincinnati Nature Ctr. Assn.*, 48 Ohio St. 2d 122, at 125, 247 N.E.2d 381, should be applied.

In applying statutory provisions, a statute is to be applied as enacted. “Courts have no legislative authority and should not make their office of expounding statutes a cloak for supplying something omitted from an act by the Ohio General Assembly.” *Storer Communications, Inc. v. Limbach*, 37 Ohio St. 3d 193, 194, 525 N.E. 2d 466 (1988), quoting *State ex rel. Foster v. Evatt*, 144 Ohio St 65, 56 N.E.2d 265 (1944), paragraph seven of the syllabus. Words that are used are not to be ignored, nor are words to be added that are not included in the statute. *Columbus Suburban Coach Lines, Inc. v. PUCO*, 20 Ohio St. 2d 125, 254 N.E. 2d 8 (1969). As a result, when a statute is clear on its face, there is no need to resort to any rule of statutory construction. The statute is to be applied as enacted. *Lancaster Colony Corp. v. Limbach*, 37 Ohio St. 3d 198, 199, 524 N.E.2d 1389 (1988).

In this case, neither R.C. 5709.12, nor 5709.121(A)(2) makes any mention of any specified level of uncompensated care. Therefore, none may be imputed by either the Tax Commissioner, or the BTA. Amicus does not ask the Court to create new law, or to extend existing holdings to a new situation. Amicus merely asks the Court to reiterate emphatically its prior holdings on the matter. Amicus asks the Court to make it as plain as possible that no specified level of uncompensated care is required and that no such requirement may be interposed as a condition for the exemption afforded by R.C. 5709.12 and 5709.121(A)(2).

## CONCLUSION

AGMC requested exemption of its LifeStyle Health Center pursuant to R.C. 5709.12 and 5709.121(A)(2). At the urging of the Tax Commissioner, the BTA denied the exemption without applying R.C. 5709.121(A)(2) and solely on the basis that AGMC did not provide a satisfactory level of uncompensated care on the property. Some unspecified level of uncompensated care, or whether any such care exists at all, is not required by R.C. 5709.121(A)(2). In reversing the decision of the BTA because it is unlawful, the Court is asked to send a clear message to taxpayers, the Tax Commissioner, and the BTA, that the level of uncompensated care is not a litmus test for exemption under R.C. 5709.12 and 5709.121, and may not be used to deny an exemption pursuant to those two statutes.

Respectfully submitted,

*Mark A. Engel by James C. Eckler*  
Mark A. Engel (0019486) *cc - court*  
Bricker & Eckler LLP *attney*  
9277 Centre Pointe Drive, Suite 100  
West Chester, OH 45069  
Tel: 513.870.6700  
Fax: 513.870.6699  
[mengel@bricker.com](mailto:mengel@bricker.com)

Attorneys for Amicus Curiae  
Ohio Hospital Association

## CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief of Amicus Curiae Ohio Hospital Association was mailed this 6<sup>th</sup> day of October, 2014, to Stephen W. Funk Roetzel & Address, LPA, 222 S. Main Street, Suite 400, Akron, Ohio 44308, Attorneys for Akron General Medical Center, Appellant; to Michael DeWine, Attorney General, and Melissa W. Baldwin, Assistant Attorney General, Taxation Section, 30 East Broad Street, 25th Floor, Columbus, OH 43215, attorneys for Joseph W. Testa, Tax Commissioner of Ohio, Appellee; and Mark H. Gillis, Rich & Gillis Law Group, LLC, 6400 Riverside Drive, Suite D, Dublin, OH 43017, attorneys for Stow-Munroe Falls City Schools Board of Education, Appellee.

*Mark Engel by James R. Peth*  
Mark A. Engel (0019486) *per court records*  
Attorney for Amicus Curiae