

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF CASE AND FACTS 5

 A. Procedural Posture 6

 B. Statement of Relevant Facts..... 8

 1. RHC Realty, the owner and lessor of the subject property, has not “established” a dialysis clinic or provided health care to anyone. Instead, RHC Realty’s core activity is limited to leasing the subject property through a lease where DCI, as lessee, pays roughly \$60,000 per year in rent 9

 2. Dialysis Clinic, Inc., the lessee of the subject property, annually earns millions of dollars in excess revenues over expenses due primarily to federal government reimbursement for dialysis services rendered..... 13

 3. Under the discriminatory DCI indigence policy, which “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.” 17

 4. The DCI Seaman Clinic incurred losses for uncompensated care of \$4,587 in 2006, which is an immaterial amount that constitutes roughly 1% of DCI total service revenue for 2006 20

ARGUMENT 23

Proposition of Law No. I:

Under Dialysis Clinic v. Levin, real property is not entitled to charitable exemption where it is used by a non-charitable institution such as Dialysis Clinic, Inc. to provide non-charitable dialysis care pursuant to an indigence policy that discriminates against those who cannot pay 23

A. DCI is not a charitable institution because its core activities of providing fee-for-service dialysis care are non-charitable activities..... 25

B. The DCI Seaman Clinic is used to provide non-charitable fee-for-service dialysis care just as with the DCI West Chester Clinic in *Dialysis Clinic*,

Inc. Dialysis Clinic, Inc. v. Levin, 127 Ohio St.3d 214, 2010-Ohio-5071, ¶¶ 35-36 (“[n]othing about the operation of the clinic in West Chester differs from the core activities of DCI that were reasonably and lawfully found not to qualify DCI as a charitable institution.”).....28

Proposition of Law No. II:

A property owner is not a charitable institution and exemption is defeated under R.C. 5709.121 where the owner’s only longstanding activity is leasing property to a health care provider and the owner does not itself provide health care services.

Northeast Ohio Psychiatric Institute v. Levin, 121 Ohio St.3d 292, 2009-Ohio-583, ¶¶ 11-20; *Joint Hospital Services, Inc. v. Lindley*, 52 Ohio St.2d 152, 153 (1977).....32

- A. RHC Realty’s core activity is leasing the subject property to DCI in order for DCI, not RHC Realty, to manage the Seaman Clinic34
- B. RHC Realty is not a charitable institution because its core activity of leasing the subject property to DCI under a lease is not charitable.36

Proposition of Law No. III:

To qualify leased property for charitable exemption pursuant to R.C. 5709.121, the property must be leased to and from a “charitable institution” in accordance with division (A)(1) of R.C. 5709.121, not the mutually exclusive division (A)(2). Further, leased property qualifies for charitable exemption only if it satisfies a strict standard for “exclusive charitable use”.....40

CONCLUSION.....43

CERTIFICATE OF SERVICE

APPENDIX (separately attached with table of contents thereto)

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Anderson/Maltbie Partnership v. Levin</i> , 127 Ohio St.3d 178, 2010-Ohio-4904.....	4, 42
<i>Bethesda Healthcare, Inc. v. Wilkins</i> , 101 Ohio St. 3d 420, 2004-Ohio-1749.....	29
<i>Church of God in Northern Ohio, Inc. v. Levin</i> , 124 Ohio St.3d 36, 2009-Ohio-5939.....	42
<i>Dialysis Clinic, Inc. v. Levin</i> , 127 Ohio St.3d 215, 2010-Ohio-5071.....	<i>passim</i>
<i>Joint Hospital Services, Inc. v. Lindley</i> , 52 Ohio St.2d 152 (1977).....	<i>passim</i>
<i>Long Term Care Pharm. Alliance v. Ferguson</i> 362 F.3d 50 (1st Cir. 2004).....	15
<i>Lutheran Book Shop v. Bowers</i> , 164 Ohio St. 359 (1955).....	30
<i>NBC-USA Hous., Inc.-Five v. Levin</i> , 125 Ohio St.3d 394, 2010-Ohio-1553.....	27
<i>Northeast Ohio Psychiatric Institute v. Levin</i> , 121 Ohio St.3d 292, 2009-Ohio-583.....	<i>passim</i>
<i>OCLC Online Computer Library Ctr., Inc. v. Kinney</i> , 11 Ohio St.3d 198 (1984).....	37
<i>Ohio Masonic Home v. Bd. of Tax Appeals</i> , 52 Ohio St.2d 127 (1977).....	30
<i>Planned Parenthood v. Tax Commissioner</i> , 5 Ohio St.2d 117 (1966).....	37
<i>Rural Health Collaborative of Southern Ohio v. Testa</i> , BTA Case No. 2012-3421 (May 8, 2014) (“ <i>BTA Decision and Order</i> ”).....	<i>passim</i>
<i>Satullo v. Wilkins</i> , 111 Ohio St.3d 399, 2006-Ohio-5856.....	25

<i>Seven Hills Schools v. Kinney</i> , 28 Ohio St.3d 186 (1986).....	30
<i>Vick v. Cleveland Mem. Med. Found.</i> 2 Ohio St.2d 30 (1965).....	27
<i>Wehrle Found. v. Evatt</i> , 141 Ohio St. 467 (1943).....	24, 29

Statutes

42 U.S.C. 426-1	15
R.C. 1.47(B).....	42
R.C. 5321.02(B).....	41
R.C. 5709.12	<i>passim</i>
R.C. 5709.121	<i>passim</i>
R.C. 5715.271	4, 38, 42
R.C. 5717.02	1
R.C. 5717.04	8

Other Authorities

42 C.F.R. § 413.89	16
42 C.F.R. § 413.178	16, 18
Ohio Adm. Code 5160:3-13-01.9(A).....	5, 16

INTRODUCTION

This appeal involves a real property tax exemption claim for the 2006 tax year filed by Rural Health Collaborative of Southern Ohio, Inc. (“RHC Realty”), as owner of realty located in Seaman, Ohio. RHC Realty seeks charitable exemption for a two-acre parcel of land that it leases to the highly profitable Dialysis Clinic, Inc. (“DCI”) to operate a dialysis clinic. The relevant facts concerning the operation of the Seaman Clinic are materially the same as those that were at issue in *Dialysis Clinic, Inc. v. Levin*, where this Court upheld the Tax Commissioner’s denial of charitable exemption for the DCI dialysis clinic in West Chester, Ohio. 127 Ohio St.3d 215, 2010-Ohio-5071.

As controlling Ohio Supreme Court precedent, *Dialysis Clinic, Inc.* is directly on point and forecloses charitable exemption in this case. In *Dialysis Clinic, Inc.*, this Court held that DCI was not a charitable institution and did not use property holding a loss-generating dialysis clinic exclusively for charitable purposes. *Dialysis Clinic, Inc.* at ¶¶ 31-37. DCI is the exact same entity as the one operating on the property in the *Dialysis Clinic, Inc.* case and maintains the exact same indigent care policy that this Court already found “discriminates” against those who cannot pay.

DCI’s profits have actually grown richer since the 2004 year at issue in *Dialysis Clinic, Inc.*, when DCI had \$32 million in excess revenues over expenses. *Dialysis Clinic, Inc.* at ¶ 5. For the 2013 fiscal year alone, DCI’s professionally audited financial statements show that DCI generated over \$60 million in excess revenues over expenses. Ex. O, at 4, TC Supp. 567 (DCI audited financial statements); Hr. Tr. 309, TC Supp. 204.¹ For the 2012 fiscal year end, that

¹ For purposes of this brief, the statutory transcript of evidence that the Commissioner certified to the Board of Tax Appeals pursuant to R.C. 5717.02 will be referenced as “S.T. ____.” Citations

figure exceeded \$57 million. Ex. O, at 4, TC Supp. 567 (DCI audited financial statements); Hr. Tr. 309, TC Supp. 204.

Perhaps more importantly, DCI kept the same indigence policy in place for the 2006 tax year at issue here that the Court found to be “discriminatory” in *Dialysis Clinic, Inc.* Compare Ex. 6, at 2, TC Supp. 317 (DCI indigence policy) with *Dialysis Clinic, Inc.* at ¶ 11 (reciting the DCI indigence policy), ¶ 34 (finding that DCI indigence policy is discriminatory). That is, the *Dialysis Clinic* Court found that DCI’s indigence policy discriminates against those who cannot pay. The indigence policy expressly states that it is “not a charity or gift to patients [and that] DCI retains all rights to refuse to admit and treat a patient who has no ability to pay.” Ex. 6, TC Supp. 315-331 (DCI indigence policy); *Dialysis Clinic, Inc.* at ¶ 34.

Further mirroring *Dialysis Clinic Inc.*, the DCI Seaman Clinic that operates at a loss on the subject property in this appeal is akin to the loss-generating DCI West Chester Clinic at issue in *Dialysis Clinic, Inc.* *Dialysis Clinic, Inc.* at ¶¶ 36-37. In *Dialysis Clinic, Inc.*, the West Chester Clinic lost \$250,000 during 2004. *Dialysis Clinic, Inc.* at ¶ 5. Similarly, the Seaman Clinic here lost \$313,420 during 2006. Ex. 15, at 2, TC Supp. 389.

Despite the clear applicability of *Dialysis Clinic, Inc.* to this case, the BTA went to great lengths to reverse the Commissioner’s final determination and hold that RHC Realty *is* entitled to exemption. The BTA simply brushed aside the nearly identical non-charitable use of the property by the same non-charitable institution as in *Dialysis Clinic, Inc.* Without question, the use of the property is central to any charitable exemption claim. *Id.* at ¶ 33 (“It is only the use of

to the hearing transcript from the evidentiary hearing before the Board will be referenced as “Hr. Tr. ____.” The appellant’s supplement will be referred to as “TC Supp. ____” and the appellant’s appendix will be referred to as “Appx. ____.”

property in charitable pursuits that qualifies for tax exemption, not the utilization of receipts or proceeds that does so.”), citing *Hubbard Press v. Tracy*, 67 Ohio St.3d 564, 566 (1993).

The BTA’s decision and order paid lip service to the use of the property by finding that the “charity care figure” distinguishes this case from *Dialysis Clinic, Inc.* But at the same time, the BTA curiously omitted from its decision the amount of non-reimbursable health care charges for the Seaman Clinic in 2006, *i.e.* the same “charity care figure” it found so important. Had the BTA addressed the “charity care” figure, it would have *cut against* exemption. DCI wrote-off non-reimbursable charges of only \$4,587 for the Seaman Clinic for 2006, which constituted *only 1%* of total Seaman Clinic service revenues during 2006.²

More fundamentally, the BTA brushed aside DCI’s discriminatory indigence policy based upon the exact same arguments that this Court already rejected once in *Dialysis Clinic, Inc.* At BTA hearing, DCI representatives argued that the discriminatory indigence policy does not foreclose exemption due to their assertions that patients are not actually turned away under the policy. But this Court has already rejected that same argument. *Dialysis Clinic, Inc.* at ¶¶ 34-35 (“We are not persuaded, however, that this evidence required the BTA to find that DCI satisfied the nondiscrimination requirement, given that DCI’s own policy statement explicitly reserved the right to refuse to treat indigent patients.”).

Rather than focus on the use of the property, the BTA held that “the party in interest is different in this case” and that “the focus in this matter is whether RHC is a charitable institution, not DCI.” *Rural Health Collaborative of Southern Ohio v. Testa*, BTA Case No. 2012-3421 (May 8, 2014) (hereinafter “*BTA Decision and Order*,” at 4), Appx. 4. By this reasoning, and the presence of a lease, the BTA sidestepped the important question as to whether DCI is a

² This figure is explained through a detailed discussion in the Statement of Facts and Proposition of Law I.

“charitable institution.” Pursuant to R.C. 5709.121(A)(1), leased property must be held by and leased to a “charitable institution” in order to qualify for charitable exemption. The BTA never addressed whether DCI is a charitable institution even though *Dialysis Clinic, Inc.* holds that DCI fails to qualify as a charitable institution.

The BTA further erred in finding that RHC Realty *is* a “charitable institution” on the basis that it allegedly “establish[ed] the subject dialysis clinic” that DCI operates. As a fundamental error, determining a property owner’s charitable institution status based upon the activities of a third party violates this Court’s longstanding ban on vicarious exemption. *Northeast Ohio Psychiatric Institute v. Levin*, 121 Ohio St.3d 292, 2009-Ohio-583, ¶¶ 11-20; *Joint Hospital Services, Inc. v. Lindley*, 52 Ohio St.2d 152, 153 (1977). But by attributing DCI’s dialysis activities to RHC Realty, which does little else than hold and lease the subject property to DCI, the BTA allowed a vicarious exemption. Ironically, vicariously attributing DCI’s activities to RHC Realty *cuts against* finding that RHC Realty is a charitable institution because this Court already held that DCI is not a charitable institution and operating a DCI dialysis clinic is not “exclusive charitable use.” *Dialysis Clinic, Inc.* at ¶¶ 31-37.

The BTA failed to even recognize the “strict construction” principle for tax exemption statutes. Tax exemption statutes must be strictly construed to protect the rights of all taxpayers not receiving a tax benefit. This well-settled principle places the onus on the taxpayer to show that the statute’s language “clearly express[es] the exemption” in relation to the facts of the claim. *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 16; R.C. 5715.271 (“the burden of proof shall be placed on the property owner to show that the property is entitled to exemption.”), Appx. 24. “In all doubtful cases,” the claim must be resolved against the asserted exemption. *Anderson/Maltbie Partnership* at ¶ 16.

Against this background, the BTA's unreasonable and unlawful decision and order must be reversed. The BTA should have affirmed the Commissioner's final determination denying exemption for the Seaman Clinic. The reasons for denying charitable exemption are set forth more fully below.

STATEMENT OF CASE AND FACTS

DCI annually earns tens of millions of dollars in profits for rendering dialysis care to patients with end-stage renal disease ("ESRD"). Ex. O, at 4, TC Supp. 567 (DCI audited financial statements). DCI earns its profits overwhelmingly through federal government programs including Medicare and Medicaid, which reimburse DCI for dialysis services rendered. As detailed more thoroughly below, Medicare and Medicaid reimbursement policies for health care providers remained substantially similar from the 2004 tax year in *Dialysis Clinic, Inc.* to the 2006 tax year at issue here. *Dialysis Clinic, Inc. v. Levin*, 127 Ohio St.3d 215, 2010-Ohio-5071, ¶ 6 (explaining Medicare and Medicaid reimbursement).

Dialysis is a process for cleansing waste products from a patient's body when kidneys are not functioning properly. Ohio Adm. Code 5160:3-13-01.9(A)(6) (defining "dialysis"), Appx. 33. Patients with ESRD, or the permanent loss of kidney function, require dialysis treatments unless they are able to obtain a kidney transplant. Ohio Adm. Code 5160:3-13-01.9(A)(8) (defining "end-stage renal disease"), Appx. 33. As noted, DCI reserves the right to refuse dialysis treatment to ESRD patients due to their inability to pay. Ex. 6, at 2, TC Supp. 317 (DCI "indigence policy").

The realty at issue in this case ("the subject property") is a two acre parcel of land in Seaman, Ohio with a one-story building used as a DCI dialysis clinic. Ex. 12, TC Supp. 376-78;

S.T. 63, TC Supp. 65 (auditor's records). The owner of the property is RHC Realty, an entity that does little more than hold the subject property and lease it to DCI for use as a dialysis clinic. Ex. 10, TC Supp. 362-73 (lease agreement).

A. Procedural Posture

On November 8, 2006, RHC Realty filed an application with the Commissioner seeking exemption for the Seaman Clinic. S.T. 119-123, TC Supp. 121-25 (application for exemption). RHC Realty's application sought exemption solely under R.C. 5709.12. S.T. 120, TC Supp. 122.

In his final determination dated June 20, 2012, the Commissioner addressed whether the subject property qualified for exemption under both R.C. 5709.12 and R.C. 5709.121, even though RHC Realty only applied for exemption under R.C. 5709.12. Citing to controlling Ohio Supreme Court precedent in *Dialysis Clinic, Inc. v. Levin*, the Commissioner reasonably and lawfully denied RHC Realty's exemption claim. S.T. 1-3, TC Supp. 3-5 (final determination). The Commissioner specifically found that DCI is the same entity that was denied exemption in *Dialysis Clinic, Inc.* Further, the Commissioner noted that DCI maintains the same exact indigence policy that this Court held discriminatory in that case. For these reasons, among others, the Commissioner held that RHC Realty did not satisfy its burden to show that it uses the property exclusively for charitable purposes.

Thereafter, on September 28, 2012, RHC Realty filed a notice of appeal with the BTA to assert that the Seaman Clinic is entitled to charitable exemption pursuant to both R.C. 5709.12 and R.C. 5709.121. Following discovery, the BTA held a two day hearing where it heard testimony and received evidence from both RHC Realty and the Commissioner.

Then on May 8, 2014, the BTA issued its decision and order reversing the Commissioner's denial of exemption despite *Dialysis Clinic, Inc. v. Levin*. The BTA simply

brushed aside the nearly identical *non-charitable* use of the property by the same *non-charitable* institution as was present in *Dialysis Clinic, Inc.* Rather than focus on the use of the property, in fact, the BTA held that “the party in interest is different in this case” and that “the focus in this matter is whether RHC is a charitable institution, not DCI.” *BTA Decision and Order*, at 4, Appx. 4. The BTA never addressed whether DCI is a charitable institution.

The BTA went on to hold that RHC Realty *is* a “charitable institution” principally because it allegedly “establish[ed] the subject dialysis clinic” that DCI operates. As a fundamental error, determining RHC Realty’s charitable institution status based upon the activities of a third party, DCI, violates this Court’s longstanding ban on vicarious exemption. *Northeast Ohio Psychiatric Institute v. Levin*, 121 Ohio St.3d 292, 2009-Ohio-583, ¶¶ 11-20; *Joint Hospital Services, Inc. v. Lindley*, 52 Ohio St.2d 152, 153 (1977). Ironically, vicariously attributing DCI’s activities to RHC Realty *cuts against* finding that RHC Realty is a charitable institution because this Court already held that DCI is not a charitable institution and operating a DCI dialysis clinic is not “exclusive charitable use.” *Dialysis Clinic, Inc.* at ¶¶ 31-37.

Next, the BTA distinguished the present case from *Dialysis Clinic, Inc.* on the basis that RHC Realty has presented “substantially more evidence regarding . . . DCI’s activities at the subject property.” *BTA Decision and Order*, at 4, Appx. 4. The BTA further found that “the evidence presented in this case differs from that presented in *Dialysis Clinic*, supra, where the court noted that ‘DCI did not present a charity care figure.’” *BTA Decision and Order*, at 7, citing *Dialysis Clinic, Inc.* at ¶ 14, Appx. 7.

Curiously, while stressing the importance of the “charity care figure” in its decision, the BTA altogether omitted the “charity care figure” from its decision. Had the BTA addressed the actual figures, they would have *cut against* exemption. DCI wrote-off non-reimbursable charges

constituting *only 1%* of its total service revenues for the Seaman Clinic during the relevant 2006 year.³ Ex. 15, at 1, TC Supp. 388 (service revenue listed as “In Center Tx”). This *de minimus* “charity care figure” confirms that exemption must be denied.

Finally, the BTA brushed aside DCI’s discriminatory indigence policy based upon the exact same arguments that this Court already rejected once in *Dialysis Clinic, Inc.* The BTA recognized that DCI’s indigence policy retains all rights to refuse to admit and treat a patient who has no ability to pay. However, the BTA overlooked the discriminatory policy due to self-serving testimony from DCI officers that patients are not actually turned away (even though potential patients may decide not to go to the Seaman Clinic upon learning of the discriminatory policy).

When this argument regarding the exact same policy was presented in *Dialysis Clinic, Inc.*, this Court swiftly rejected it. *Dialysis Clinic, Inc.* at ¶¶ 34-35 (“We are not persuaded, however, that this evidence required the BTA to find that DCI satisfied the nondiscrimination requirement, given that DCI’s own policy statement explicitly reserved the right to refuse to treat indigent patients.”). The same should be done here.

Based upon flawed analysis, then, the BTA held that RHC Realty is entitled to charitable exemption for the land it leases to DCI to operate the Seaman Clinic. On June 9, 2014, the Commissioner appealed the BTA’s unreasonable and unlawful decision and order to this Court pursuant to R.C. 5717.04.

B. Statement of Relevant Facts

Particularly relevant to RHC Realty’s charitable exemption claim are the following facts, each of which will be discussed in turn: (1) RHC Realty’s core activity is leasing real estate;

³ 2006 write-off amount (\$4,785.32) ÷ total DCI service revenue (“In Center Tx” on Ex. 15) for fiscal year end 2006 (\$454,159) = 1.05%. See discussion below in Proposition of Law I.

(2) DCI has annual profits running into the tens of millions of dollars; (3) DCI's express written policy reserves the right to deny care based upon ability to pay; and (4) DCI does not use the property exclusively for charitable purposes.

- 1. RHC Realty, the owner and lessor of the subject property, has not "established" a dialysis clinic or provided health care to anyone. Instead, RHC Realty's core activity is limited to leasing the subject property through a lease where DCI, as lessee, pays roughly \$60,000 per year in rent.**

Organized in 2001, RHC Realty is an Ohio nonprofit corporation originally consisting of four members, including Adams County Hospital, Brown County General Hospital, Highland District Hospital and Health Source Ohio. Hr. Tr. 14, TC Supp. 131; Ex. 8, TC Supp. 342-57 (RHC Realty Code of Regulations). In 2011, Brown County General Hospital left RHC Realty, leaving just three members. Hr. Tr. 15, TC Supp. 387-89. RHC Realty enjoys exemption from federal income taxation under Section 501(c)(3) of the Internal Revenue Code. Ex. 9, TC Supp. 358-61 (RHC Realty IRS letter).

RHC Realty's articles of incorporation provide that its purposes are: "(i) to enhance the quality, availability and efficiency of comprehensive health services for the people of southern Ohio by enabling and mobilizing community partnerships and resources; (ii) identifying and addressing healthcare needs which can be most effectively and efficiently responded to collectively (or 'in a collective manner'); and (iii) supporting and furthering the missions of the member organizations." Ex. 7, at 3, TC Supp. 335.

According to the BTA, RHC Realty "established" the DCI dialysis clinic at issue and, therefore, acted "congruent" with its purpose. *BTA Decision and Order*, at 5, Appx. 5. But RHC Realty has no more "established" the DCI dialysis clinic through a real estate lease than a linen service company providing services to a hospital provides health care. *Joint Hospital Services, Inc. v. Lindley*, 52 Ohio St.2d 152, 153 (1977) (consortium of hospitals providing laundry service

could not claim vicarious charitable sales tax exemption on the basis of the member hospitals' health care activities); *Northeast Ohio Psychiatric Institute v. Levin*, 121 Ohio St.3d 292, 2009-Ohio-583, ¶ 18, citing *OCLC Online Computer Library Ctr., Inc. v. Kinney*, 11 Ohio St.3d 198 (1984).

The claim that RHC Realty “established” the Seaman Clinic through a lease is a *vicarious* claim. What the BTA is really referring to when it finds that RHC Realty “established” the Seaman Clinic is leasing property. And, this Court has uniformly held that leasing property, in and of itself, is not a charitable activity. *Northeast Ohio Psych.*, at ¶ 11 (“the property at issue plainly would not qualify for exemption, because Northeast is using that property for leasing, not for providing mental health care.”).

Currently, RHC Realty’s activities are limited to its core activities of holding the subject property and leasing it to DCI. Each year, DCI pays RHC Realty roughly \$60,000 in rent pursuant to a lease agreement. Hr. Tr. 44, TC Supp. 138; Ex. 10, at Second Addendum, TC Supp. 372-73; Ex. 11, TC Supp. 374-75 (“Dialysis operations”). And for each of 2011, 2012, and 2013, RHC Realty’s revenue was limited nearly exclusively to revenue obtained as lease payments from DCI for the subject property. Ex. 11, TC Supp. 374-75 (RHC Realty Statement of Activities); Hr. Tr. 44, TC Supp. 138 (testimony that “Dialysis operations” on Ex. 11 refers to lease payments). During the 2006 tax year at issue, RHC Realty turned a surplus in revenue over expenses in excess of \$10,000. Ex. 11, TC Supp. 374-75 (“change in net assets”).

While RHC Realty asserts that it operated at an annual loss in subsequent years, the purported loss is substantially or wholly a “paper loss” that does not result in negative cash outflow. Hr. Tr. 43-45, 58-59, TC Supp. 138, 142. According to Randy Lennartz, the Chief Financial Officer of RHC Realty, RHC Realty runs at a loss “based upon accounting principles.”

Hr. Tr. 43, 48, TC Supp. 138-39. CFO Lennartz's statement, however, is without competent support. CFO Lennartz based his statement on RHC Realty Ex. 11, a summary RHC Realty financial statement for which RHC Realty did not present underlying business records kept and maintained in the ordinary course of business. Hr. Tr. 59-60, TC Supp. 142; Ex. 11, TC Supp. 374-75 ("Change in unrestricted net assets"). Moreover, the summary financial statement is not supported by RHC Realty IRS Forms 990 showing greater detail regarding expenses. When questioned, CFO Lennartz acknowledged that RHC Realty incurs losses based upon *non-cash* depreciation expense for the Seaman dialysis clinic building *constructed with funds it obtained from a federal grant*. Hr. Tr. 58-59, TC Supp. 142.

CFO Lennartz further testified that "[t]he dialysis clinic is very easy to manage, so there's not a lot of time spent on that." Hr. Tr. 70, 72, TC Supp. 145. In fact, managing the lease agreement for the DCI Seaman Clinic is RHC Realty's only longstanding activity. RHC Realty has no employees, such that RHC Realty acts through member organizations assigning their employees to work on RHC Realty related matters. Hr. Tr. 17, TC Supp. 131.

But those individuals do not spend much time on RHC Realty either. As CFO of RHC Realty, Mr. Lennertz testified that he spends only two hours per month on RHC Realty. Hr. Tr. 17, TC Supp. 131. Similarly, Kim Patton, who is currently Vice Chair of the RHC Realty Board of Directors and who previously served as President of RHC Realty from 2008 to 2010, testified that she spends only about two hours per month on RHC Realty related matters. Hr. Tr. 407; Ex. C, at 7; Ex. D, at 7; Ex. E, at 12 (RHC Realty IRS Forms 990 for 2008 through 2010), TC Supp. 435, 464, 499.⁴

⁴ Ms. Patton was also Secretary of RHC Realty in 2006 and Vice President of RHC Realty in 2007, 2011, and 2012. Ex. A, at 5; Ex. B, at 5; Ex. F, at 7; Ex. G, at 7 (RHC Realty IRS Forms 990 for 2006, 2007, 2011, and 2012), TC Supp. 395, 415, 523, 550.

In the past, prior to 2012, RHC Realty occasionally applied for and obtained grants for health related activities. At hearing, however, President Patton and CFO Lennartz could collectively recall RHC Realty receiving only four grants, a Health Resources and Services Administration grant, a tobacco grant, a diabetic grant, and a managed care grant. Hr. Tr. 50-51, 401, TC Supp. 140, 274. Indeed, just three grants are expressly listed on Ex. 11, a summary financial statement, though others may be consolidated under other line items.

When asked at hearing, President Patton and CFO Lennartz knew little about RHC Realty *applications* for grants. Despite identifying RHC Realty as “a vehicle in which we can go out and apply for things and represent the three providers at this point in time,” CFO Lennertz could not recall any grants applied for and not received. Hr. Tr. 72, TC Supp. 144. Likewise, President Patton had no recollection of RHC Realty applying for a grant in the past three years. Hr. Tr. 402, TC Supp. 274. At best, RHC Realty sporadically applies for grants.

RHC Realty nonetheless maintains that leasing the Seaman Clinic is not its overriding purpose due to conference calls that RHC Realty board members hold every other month to discuss health related issues. Hr. Tr. 398, TC Supp. 273. But only rarely does RHC Realty itself implement these ideas discussed during these conference calls. Not surprisingly, President Patton’s testimony revealed only one activity that RHC Realty was actually involved in implementing— making arrangements for DCI to lease the subject property and operate a dialysis clinic. Hr. Tr. 385-390, TC Supp. 270-71.

All other activities that President Patton identified at hearing were put into practice through the RHC Realty member hospitals, not RHC Realty itself. For example, President Patton testified that member hospitals discussed coordinating care for patients exposed to rabies. As a result of the discussions, member hospital Health Source Ohio, a primary care facility,

stopped carrying the rabies vaccine because the vaccine is needed in other RHC Realty members' emergency rooms more so than in Health Source's primary care offices. Hr. Tr. 376-377, TC Supp. 268. In President Patton's other example she simply noted that RHC Realty facilitated a discussion about replacing an orthopedic physician. Hr. Tr. 410, TC Supp. 276. These activities merely require a telephone or other communication device, not a separate legal entity such as RHC Realty.

RHC Realty also does not have established decision-making rules. There are no written policies for deciding when to implement a program or when to apply for a grant. Hr. Tr. 403, TC Supp. 275. RHC Realty has a Code of Regulations, but it has not taken the time to formally amend the articles when necessary. Ex. 8, TC Supp. 342-57 (RHC Realty Code of Regulations). For example, President Patton testified that RHC Realty has three board members, but the Code of Regulations still provide for 12 directors. Ex. 8, at 2, TC Supp. 344; Hr. Tr. 399-400, TC Supp. 274. In a similar vein, CFO Lennertz testified that RHC Realty did not update its Code of Regulations for a change in its fiscal year end. Hr. Tr. 74, TC Supp. 146.

Thus, RHC Realty is a real estate holding entity with the core activity of leasing the subject property and managing rental payments and expenses for the Seaman Clinic. RHC Realty does not provide health care.

2. Dialysis Clinic, Inc., the lessee of the subject property, annually earns millions of dollars in excess revenues over expenses due primarily to federal government reimbursement for dialysis services rendered.

The lessee of the subject property, Dialysis Clinic, Inc., is organized as a Tennessee non-profit corporation that generates substantial profits by providing dialysis services to individuals with end stage renal disease. Ex. 4, TC Supp. 308-14 (Ohio business registration for foreign corporation). Like RHC Realty, DCI enjoys exemption from federal income taxation under

Section 501(c)(3) of the Internal Revenue Code. S.T. 21, TC Supp. 23 (DCI IRS letter). But 501(c)(3) status does not render property exempt under Ohio law.

As DCI General Counsel Gina Zylstra testified, DCI nationally operates approximately 216 outpatient dialysis clinics throughout 28 states. Hr. Tr. 141, TC Supp. 162. DCI has a mission to provide dialysis services to ESRD patients and support ESRD research. Ex. 3, TC Supp. 303-07. According to DCI General Counsel Zylstra, DCI policies regarding its mission, value, and vision have remained unchanged from the 2004 tax year at issue in *Dialysis Clinic, Inc. v. Levin* to the 2006 tax year at issue in the present appeal. Hr. Tr. 132, 180, TC Supp. 160, 172; Ex. 3, TC Supp. 303-07 (DCI information brochure).

In addition to providing dialysis services, the DCI Administrator for the Seaman Clinic, Andy Mazon, testified that DCI funds ESRD research with excess revenues over expenses from its dialysis operations. Hr. Tr. 312-314, TC Supp. 205-06; Ex. 3, TC Supp. 303-07 (DCI brochure). None of the DCI funded research, however, is performed at the Seaman Clinic. Hr. Tr. 313, TC Supp. 205.

DCI incurred a loss of \$313,420 for the Seaman Clinic during tax year 2006. Ex. 15, at 2, TC Supp. 389. Despite incurring losses at the Seaman Clinic, DCI annually accumulates tens of millions of dollars in excess revenues over expenses from all DCI clinics nationwide. For the 2013 fiscal year alone, DCI's professionally audited financial statements show that DCI generated over **\$60 million** in excess revenues over expenses. Ex. O, at 4, TC Supp. 567 (DCI audited financial statements); Hr. Tr. 309, TC Supp. 204. For the 2012 fiscal year end, that figure exceeded **\$57 million**. Ex. O, at 4, TC Supp. 567 (DCI audited financial statements); Hr. Tr. 309, TC Supp. 204. In other words, DCI's excess revenues over expenses have grown richer since the 2004 year at issue in *Dialysis Clinic, Inc.*, when DCI had roughly \$32 million in excess

revenues over expenses. *Dialysis Clinic, Inc.*, 127 Ohio St.3d 214, 2010-Ohio-5071, ¶ 5. In 2003, DCI had roughly \$6 million in excess revenues over expenses. *Id.*

The Medicare and Medicaid programs provide the means through which DCI earns its profits. Medicare and Medicaid reimburse DCI for dialysis treatments provided to patients on a fee-for-service basis. *Dialysis Clinic, Inc.*, at ¶ 6 (explaining Medicare and Medicaid reimbursement); Hr. Tr. 283, TC Supp. 198. Medicare is a federally run public health care insurance program for elderly and disabled Americans. Hr. Tr. 333, TC Supp. 211 (testimony of Deborah Saxe, Bureau Chief for the Bureau of Health Plan Policy for the Ohio Department of Medicaid). Medicaid, on the other hand, “is a federal-state program to assist the poor, elderly, and disabled in obtaining medical care.” *Long Term Care Pharm. Alliance v. Ferguson* (1st Cir. 2004), 362 F.3d 50, 51, Appx. 25-27; Hr. Tr. 333-334, TC Supp. 211.

Medicare provides dialysis coverage to all U.S. citizens with ESRD, the only condition-based entitlement to Medicare. 42 U.S.C. 426-1, Appx. 25-27; Hr. Tr. 167, TC Supp. 169 (testimony of General Counsel Zylstra). Under the Medicare reimbursement scheme, dialysis providers are reimbursed for 80% of an ESRD patient’s bill. Dialysis providers frequently offer care during the waiting period for patients to register for Medicare coverage, but Medicare retroactively reimburses providers for care offered during the waiting period.⁵ Hr. Tr. 219, TC Supp. 182. Still, absent a secondary insurer, the ESRD patient is responsible for the remaining 20% co-pay.

Fortunately, many patients have secondary insurance to cover the cost of their co-pay. Hr. Tr. 209, TC Supp. 179. For Medicare patients that also meet Medicaid eligibility requirements, so-called “dual eligible” patients, Medicaid picks up that remaining 20%.

⁵ Providers are reimbursed for only the last three months of the waiting period, but the waiting period typically does not exceed three months.

Hr. Tr. 216, TC Supp. 181; Ohio Adm. Code 5160:3-13-01.9(A)(7) (defining “dual eligible”), Appx. 33.⁶ The Medicaid payment is treated as payment-in-full and DCI is prohibited from seeking payment from any other source.

In addition, the Centers for Medicare and Medicaid Services of the U.S. Department of Health and Human Services reimburse providers for the unpaid portion of the ESRD patient’s bill, allowable as a Medicare bad debt, up to an amount equaling the facilities’ costs in providing the service. 42 C.F.R. § 413.178, Appx. 28-29; 42 C.F.R. § 413.89, Appx. 30-32.

Private commercial insurers such as Aetna or Blue Cross Blue Shield are yet another source of secondary insurance for dialysis patients. Hr. Tr. 209, TC Supp. 179. If a dialysis patient has a commercial *group* insurance plan, as opposed to a commercial *individual* plan, the commercial plan is the primary insurer of dialysis services for the first 36 months. Hr. Tr. 172, TC Supp. 170. Thereafter, Medicare takes over as primary insurer and the primary insurer reverts to secondary insurance. Hr. Tr. 172-173, TC Supp. 170.

As DCI’s financial statements show, in excess of 70% of its total revenues come from reimbursements from Medicare and Medicaid. The following table from the DCI financial statements for the fiscal years ended September 30, 2013 and September 30, 2012 (Ex. O, at 9, TC Supp. 572) show DCI revenue sources:

⁶ The legislation for administration of the Medicaid program in Ohio is set forth at Title 51 of the Ohio Revised Code. For further information on administration of the Medicaid program with respect to those with ESRD, see Ohio Adm. Code 5160:3-13-01.9, Appx. 33.

	<u>2013</u>	<u>2012</u>
Medicare	\$ 355,012,000	\$ 346,288,000
Medicaid	\$ 28,353,000	\$ 26,125,000
Medicare and Medicaid HMO	\$ 48,479,000	\$ 43,365,000
VA and Governmental	\$ 17,569,000	\$ 15,358,000
Blue Cross and Commercial	\$ 100,286,000	\$ 104,954,000
No Insurance	\$ 3,731,000	\$ 3,663,000
Other	\$ 7,502,000	\$ 4,817,000
In Hospital Acute	\$ 25,683,000	\$ 26,217,000
Non Dialysis Revenue	\$ 83,755,000	\$ 78,664,000
	<hr/>	
Total	\$ 670,370,000	\$ 649,451,000

As DCI's large profits reveal, the substantial revenues that DCI generated were well in excess of the costs incurred to provide dialysis services. Ex. O, at 4, TC Supp. 567. Pursuant to federal government reimbursement and commercial insurance coverage, DCI annually earns millions of dollars in excess revenues over expenses in exchange for dialysis services rendered.

3. Under the discriminatory DCI indigence policy, which "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." Ex. 6, at 2, TC Supp. 315-331 (DCI indigence policy).

The DCI indigence policy clearly provides that DCI does *not* provide its patients with charity care, stating in pertinent part:

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.

Ex. 6, at 2, TC Supp. 317.⁷ At hearing, DCI General Counsel Gina Zylstra confirmed that indeed Ex. 6 is the DCI policy regarding charity care. Hr. Tr. 178-179, TC Supp. 172. Moreover,

⁷ Ex. 6 is a DCI indigence policy dated Nov. 6, 2006, well after the Jan. 1, 2006 tax lien date at issue in this case. The Commissioner's statutory transcript includes a DCI indigence dated 2003, which is materially the same as Ex. 6 and presumably the DCI indigence policy relevant to this case and in place on Jan. 1, 2006. S.T. 96, TC Supp. 98. At hearing, General Counsel Zylstra was not certain which policy was in place on Jan. 1, 2006. Hr. Tr. 165, TC Supp. 168.

General Counsel Zylstra and Admin. Mazon both testified that the DCI indigence policy, Exhibit 6, is applicable to all DCI patients. Hr. Tr. 158, TC Supp. 167 (Zylstra); Hr. Tr. 224, TC Supp. 184 (Mazon).

The DCI “indigence policy” is designed to uniformly determine when DCI may write-off “bad debts” in accordance with federal laws providing Medicare reimbursement for such bad debts. 42 C.F.R. § 413.178(a), Appx. 28-29; Hr. Tr. 146-148, TC Supp. 164 (Zylstra testimony); Hr. Tr. 246, TC Supp. 190 (Mazon testimony). Under Medicare laws and regulations, health care providers may be reimbursed for unpaid patient balances for dialysis treatment, but only if the provider has, one, established the patient’s financial need, or two, made reasonable collection efforts. 42 C.F.R. § 413.178, Appx. 28-29 (“CMS will reimburse each facility its allowable Medicare bad debts”).

As cogently explained on the very first page of the DCI indigence policy, the policy is indeed designed to identify uncollectible deductibles and coinsurance amounts as “allowable Medicare bad debts” for purposes of the Medicare Provider Reimbursement Manual. Ex. 6, at 1, TC Supp. 316 (“In order to deem a debt as “uncollectible[“], the provider may use reasonable collection efforts and/or adopt a system to determine a patient’s indigence.”).

Thus, if DCI is to obtain Medicare reimbursement for bad debts on unpaid patient balances, then it must either make reasonable collection efforts or document patients’ financial need. As General Counsel Zylstra explained at hearing, DCI *does* make collection efforts, including such practices as sending invoices to the patient, counseling the patient, referring the balances to a collection agency, or even court action. Hr. Tr. 147, TC Supp. 164.

Because the policies are materially the same, Ex. 6 was used at hearing and referenced throughout this brief as the DCI indigence policy.

As an alternative to collection, patients may document their need through a financial analysis form (“FAF”). Ex. 6, at 1, TC Supp. 316; Hr. Tr. 148, TC Supp. 164. The FAF is a multi-page questionnaire that poses several questions to the patient regarding living arrangements, family size, liquid assets, liabilities, gross annual income, types of income, and monthly household expenses. Ex. 6, at Attachment 901-A, TC Supp. 322-23. Patients must supplement the FAF with documentation, such as pay stubs, IRS Forms W-2, and/or state and federal income tax returns. Ex. 6, at Attachment 901-E, TC Supp. 330-31. If patient income or net wealth falls below a certain threshold on the DCI indigence policy, the patient is eligible for reductions to their patient responsibility balance. Hr. Tr. 225-229, TC Supp. 183-84.

In summary, according to DCI’s own written indigence policy, and the corroborating testimony of General Counsel Zylstra, DCI’s indigence policy is not charity care. Ex. 6, at 2, TC Supp. 317; Hr. Tr. 178-179, TC Supp. 172. Furthermore, DCI reserves the right to refuse care based upon a patient’s ability to pay, presumably in situations where DCI would not be reimbursed for patient bad debt through Medicare. Ex. 6, at 2, TC Supp. 317.

In all cases, patients learn of the DCI indigence policy within the first month of dialysis treatments, and usually before the first treatment. Hr. Tr. 276-277, TC Supp. 196-97. Through a review of the policy with a social worker, patients learn of the collection efforts that they may face, as well as the possibility that they will be denied treatment, even prior to beginning treatment with DCI or after treatment has begun. Hr. Tr. 276-277 TC Supp. 196-97. As a consequence, some patients may self-select out of DCI and pursue other options for ESRD treatment without DCI ever expressly denying care.

Still, in an attempt to support DCI’s assertion that it provides charity care, General Counsel Zylstra and Admin. Mazon testified that DCI has an *unwritten* policy to provide charity

care in addition to its written indigence policy. When asked at hearing, however, General Counsel Zylstra deferred to Admin. Mazon to explain the policy. Hr. Tr. 142-143, TC Supp. 163. But Admin. Mazon likewise provided little guidance, explaining only that the policy provides charity care entirely within his discretion and the discretion of another person in DCI management. Hr. Tr. 231-232, TC Supp. 185. To say the least, the *unwritten* and *discretionary* DCI charity care policy, which may be inconsistent with DCI's *written* indigence policy (Ex. 6), does not substantiate RHC Realty's claim to charitable exemption.

4. The DCI Seaman Clinic incurred losses for uncompensated care of \$4,587 in 2006, which is an immaterial amount that constitutes roughly 1% of DCI total service revenue for 2006.

Situated on a two acre parcel, the DCI clinic in Seaman, Ohio is a one-story building used exclusively for dialysis operations. As Admin. Mazon testified, the Seaman Clinic averages 18 patients at any given time. Hr. Tr. 199, 281, TC Supp. 177, 197.

The DCI patients at the Seaman Clinic have a variety of different types of health care coverage, which greatly affects the amount that DCI charges them for dialysis care. Hr. Tr. 283, 291, TC Supp. 198, 200. During 2006, Medicare compensated DCI roughly \$90 per dialysis treatment and another amount for administering the drug Epogen. Hr. Tr. 282-283, TC Supp. 198. Given that the Medicare reimbursement constitutes 80% of the charge, patients with Medicare as their primary insurer were charged roughly \$108 per treatment during 2006. Hr. Tr. 212, 221, TC Supp. 180, 182 (Mazon testimony explaining Medicare rates). Patients with commercial insurers as their primary insurance, by contrast, paid much higher amounts, depending on the agreement that DCI reached with the patient's commercial insurance carrier. Hr. Tr. 285, TC Supp. 198. On average, patients with commercial coverage were charged

several hundred dollars per treatment in 2006, usually \$600-\$700 or more. Hr. Tr. 285, TC Supp. 198.

Since DCI writes-off patient balances on a “charge basis” rather than a “cost basis,” and patient charges depend on insurance type, the amount that DCI writes off turns largely upon the patient mix at the Seaman Clinic. To show the “Seaman Patient Mix,” RHC Realty and DCI produced Ex. 13, a document prepared for this litigation. Ex. 13, however, shows only primary insurers, not secondary insurers. Hr. Tr. 281, 287, TC Supp. 197, 199. And RHC Realty and DCI did not provide information regarding secondary insurance for the primary insurance copays. Still, upon review of Ex. 13, all patients at the Seaman Clinic were covered by a primary insurer during DCI fiscal year end 2006 (October 1, 2005 to September 30, 2006). Ex. 13, TC Supp. 379-80; Hr. Tr. 210, TC Supp. 180.

RHC Realty and DCI further produced Ex. 14, another document prepared for this litigation, to show the patient balances written off at the Seaman Clinic. In other words, Ex. 14 shows the alleged amount of “charity care” that DCI provided at the Seaman Clinic during 2006. As explained below, the \$4,785 in charity care that DCI provided at the Seaman Clinic during 2006 constitutes an immaterial amount of the total care provided there.

The key column on this chart, Exhibit 14, is the column labeled “Non-Mcr Charity W/O.” At hearing, Admin. Mazon explained that the amounts in the “Non-Mcr Charity W/O” column on Ex. 14 are unpaid amounts written off and not reimbursed through Medicare. Hr. Tr. 246, 299-300, TC Supp. 189, 202. That is, according to Admin. Mazon, DCI actually incurred losses for the amounts in the “Non-Mcr Charity W/O” column on Ex. 14.

When Ex. 14 is reduced to the “Non-Mcr Charity W/O” for calendar year 2006, the period relevant to this appeal, the amounts written off and not reimbursed are clearly immaterial.

Since the first column on Ex. 14 shows the dates of service, amounts in the “Non-Mcr Charity W/O” column corresponding to 2006 dates in the first column are the aggregate amounts written off during the time period at issue here. That total amount of “Non-Mcr Charity W/O” for calendar year 2006 is \$4,785.32, as shown in the following table drawing data from Ex. 14:

<u>Service Date</u>	<u>"Non-Mcr Charity W/O"</u>
1/31/2006	\$ 80.12
2/28/2006	\$ 137.74
3/31/2006	\$ 153.47
	\$ 466.25
4/30/2006	\$ 498.52
	\$ 151.76
5/31/2006	\$ 575.60
	\$ 184.69
6/30/2006	\$ 537.48
	\$ 161.56
7/31/2006	\$ 513.31
	\$ 143.26
8/31/2006	\$ 461.47
	\$ 97.85
9/30/2006	\$ 442.26
10/31/2006	\$ 42.98
11/30/2006	\$ 50.47
12/31/2006	\$ 86.53
Total	\$ 4,785.32

Taking the \$4,785 write-off for 2006 as a percentage of total DCI service revenue for fiscal year 2006 (an approximation for calendar year 2006), which was \$454,159, DCI wrote-off non-reimbursable charges constituting *only 1%* of its total service revenues for the Seaman Clinic during the 2006 calendar year relevant to this appeal.⁸ Ex. 15, at 1, TC Supp. 387-89 (service revenue listed as “In Center Tx”). Taken in this light, DCI’s claim to use the Seaman

⁸ 2006 write-off amount (\$4,785.32) ÷ total DCI service revenue (“In Center Tx” on Ex. 15) for fiscal year end 2006 (\$454,159) = 1.05%.

property “exclusively for charitable purposes” is particularly tenuous because the overwhelming majority of the dialysis care provide there is not provided on a charitable basis.

* * *

In summary, RHC Realty is a real estate holding entity that seeks charitable exemption for property where the immensely profitable DCI entity operates a dialysis clinic that provided only an immaterial amount of uncompensated care during the 2006 tax year at issue, as a result of an indigence policy that discriminates against those who cannot pay.

ARGUMENT

Proposition of Law No. I:

Under Dialysis Clinic v. Levin, real property is not entitled to charitable exemption where it is used by a non-charitable institution such as Dialysis Clinic, Inc. to provide non-charitable dialysis care pursuant to an indigence policy that discriminates against those who cannot pay.

Dialysis Clinic, Inc. v. Levin, 127 Ohio St.3d 215, 2010-Ohio-5071, ¶¶ 31-37.

This Court already explained in *Dialysis Clinic, Inc.* that a DCI dialysis clinic is not entitled to charitable exemption. There, this Court held that DCI, *the same exact legal entity with the same exact indigence policy as in this case*, was not entitled to exemption because the property is not used exclusively for charitable purposes pursuant to R.C. 5709.121. 127 Ohio St.3d 214, 2010-Ohio-5071, ¶¶ 24, 31-35. The *Dialysis Clinic* Court focused its analysis on DCI’s status as a charitable institution and core activities of providing non-charitable dialysis care. 127 Ohio St.3d 214, 2010-Ohio-5071, ¶¶ 31-35. Since property must be held by a “charitable institution” under R.C. 5709.121 in order to qualify for exemption, DCI’s non-charitable status defeated exemption.

But the *Dialysis Clinic* Court maintained proper focus on the use of the property. The Court cited the long and uniform body of Ohio Supreme Court precedent holding that charitable exemption turns upon the use of the property, not activities of its owner that occur elsewhere. *Id.* at ¶ 33 (“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.”), citing *Hubbard Press v. Tracy*, 67 Ohio St.3d 564, 566 (1993), *Wehrle Found. v. Evatt*, 141 Ohio St. 467 (1943).

Thus, having determined that DCI is not a charitable institution, the Court extended its holding to the use of the property. The *Dialysis Clinic, Inc.* Court specifically held that “[n]othing about the operation of the clinic in West Chester differs from the core activities of DCI that were reasonably and lawfully found not to qualify DCI as a charitable institution.” *Id.* at ¶ 36-37. In other words, the use of a loss-generating dialysis clinic in West Chester, Ohio is materially the same as DCI’s core activities that render it a non-charitable institution. For that reason, a loss-generating DCI dialysis clinic, such as the Seaman Clinic here, is not used exclusively for charitable purposes.

In reversing the Commissioner to find the property exempt, the BTA brushed aside this Court’s controlling precedent due to the presence of a lease. *BTA Decision and Order*, at 4. Here DCI leases the property from RHC Realty, whereas DCI owned the property outright in *Dialysis Clinic, Inc.* According to the BTA, “the focus in this matter is whether RHC is a charitable institution, not DCI.” But the presence of a lease does not change the non-charitable use of the property by a non-charitable institution, namely DCI. If that were the case, it would allow DCI a simple end-run around *Dialysis Clinic, Inc.* through a “shell game” of sorts involving a sale-leaseback for the West Chester clinic with a real estate holding entity.

This case is the same in all material respects as *Dialysis Clinic* and the result should be the same. *First*, DCI is a non-charitable institution during the 2006 tax year here just as it was in *Dialysis Clinic, Inc.* for the 2004 tax year. *Second*, DCI's non-charitable core activities extend to the non-charitable use of the Seaman Clinic in this case just as they extended to the West Chester clinic in *Dialysis Clinic, Inc.*

“In reviewing a BTA decision, this Court looks to see if that decision was “reasonable and lawful.” *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, ¶ 14 (internal citation omitted). “The court ‘will not hesitate to reverse a BTA decision that is based on an incorrect legal conclusion.’” *Id.* (internal citation omitted). Since, contrary to *Dialysis Clinic, Inc.*, the property is used by a non-charitable institution for non-charitable purposes, the BTA must be reversed here and exemption denied.

A. DCI is not a charitable institution because its core activities of providing fee-for-service dialysis care are non-charitable activities.

As an initial matter, an organization's federal 501(C)(3) status under the Internal Revenue Code is not dispositive, or even compelling, evidence that the organization is a “charitable institution” under R.C. 5709.121. *Dialysis Clinic, Inc.*, at ¶ 26. Consequently, entities qualifying for exemption from federal income taxation under I.R.C. 501(C)(3) must still prove that they provide charitable goods and/or services in order to qualify as “charitable institutions” under Ohio law. *Id.* at ¶ 27.

Just as DCI failed to show that it was a charitable institution in *Dialysis Clinic, Inc.* during 2004, RHC Realty here has not shown that DCI is a charitable institution during 2006.

First, as the Court found instructive in *Dialysis Clinic, Inc.*, DCI earns large revenues in excess of expenses from charging ESRD patients for dialysis services. *Id.* at ¶¶ 5, 32. In 2003 and 2004, respectively, DCI earned \$6,306,492 and \$32,167,517 in excess revenues over

expenses. *Id.* at ¶ 5. Those figures have swelled greatly in recent years, with DCI earning \$60 million in excess revenues over expenses in 2013 and \$57 million in excess revenues over expenses in 2012. Ex. O, at 4, TC Supp. 567 (DCI audited financial statements); Hr. Tr. 309, TC Supp. 204 (testimony of Admin. Mazon). Moreover, Medicare and Medicaid reimbursement policies for health care providers remained substantially similar from the 2004 tax year in *Dialysis Clinic, Inc.* to the 2006 tax year at issue here. *Dialysis Clinic, Inc.* at ¶ 6 (explaining Medicare and Medicaid reimbursement).

Further, according to DCI Public Information Coordinator Jessica Emmler and General Counsel Zylstra, DCI policies regarding its “mission,” “value,” and “vision” have remained unchanged from the 2004 tax year at issue in *Dialysis Clinic, Inc.* to the 2006 tax year at issue in the present appeal. Hr. Tr. 132, 180, TC Supp. 160, 172; Ex. 3, TC Supp. 303-07 (DCI information brochure). Thus, little has changed from 2004 to 2006 in the way DCI operates, provides dialysis care, and annually earns hefty amounts of excess revenue over expenses, all as a non-charitable institution.

Second, DCI may not base its claim to charitable institution status upon donations to kidney research. *Dialysis Clinic, Inc.* at ¶ 33. Such a claim constitutes a “vicarious exemption” that the Court has repeatedly rejected. *Id.* at ¶ 33, citing *OCLC Online Computer Library Ctr., Inc. v. Kinney*, 11 Ohio St.3d 198, 201 (1984). It is the use of the property, not proceeds from the property, that determine whether property is exempt. *Dialysis Clinic, Inc.* at ¶ 33.

As Admin. Mazon testified, none of the DCI funded research is performed at the Seaman Clinic. Hr. Tr. 312-314, TC Supp. 205-06. Nor could profits from the Seaman Clinic be applied towards research, because the Seaman Clinic does not turn a profit. Ex. 15, at 2, TC Supp. 387-

89 (summary Seaman finance chart); Hr. Tr. 266, TC Supp. 194 (testimony of Admin. Mazon). Thus, DCI is not a charitable institution due to donations made to ESRD research.

Third, DCI's non-charitable nature is exposed through its indigence policy that discriminates against those who cannot pay. The policy expressly states that the indigence policy is "not a charity or gift to patients [and that] DCI retains all rights to refuse to admit and treat a patient who has no ability to pay." Ex. 6, TC Supp. 315-31 (DCI indigence policy); *Dialysis Clinic, Inc.* at ¶ 34. DCI's indigence policy is the *same exact* policy that the Court found discriminatory and non-charitable in *Dialysis Clinic, Inc.* Compare Ex. 6, at 2, TC Supp. 317 (DCI indigence policy) with *Dialysis Clinic, Inc.* at ¶ 11 (reciting the DCI indigence policy).

Because DCI has a policy that allows it to deny care based upon inability to pay, DCI does not satisfy the nondiscrimination requirement for charitable health care under *Vick v. Cleveland Mem. Med. Found.* 2 Ohio St.2d 30, 31 (1965). In quoting from *Vick* with approval, the *Dialysis Clinic* Court held that "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." *Dialysis Clinic, Inc.* at ¶ 34, quoting *Vick* at 31.

Just as DCI argued in *Dialysis Clinic, Inc.*, RHC Realty here argues that this Board should disregard the indigence policy due to self-serving statements that patients are not actually turned away due to inability to pay. But this Board must soundly reject that claim just as the Court did in *Dialysis Clinic, Inc.* at ¶¶ 34-35 ("We are not persuaded, however, that this evidence required the BTA to find that DCI satisfied the nondiscrimination requirement, given that DCI's own policy statement explicitly reserved the right to refuse to treat indigent patients.").

Like DCI in *Dialysis Clinic, Inc.*, RHC Realty has cited no Medicare statutes or regulations that actually *require* DCI to adopt the disclaimer of charity set forth in its indigence

policy. *Dialysis Clinic, Inc.* at ¶ 35. Even if federal statutes did so require (they do not), the Court has repeatedly held that federal law does not establish or excuse non-compliance with elements of charitable tax exemption under Ohio law. *Dialysis Clinic, Inc.* at ¶ 35; *NBC-USA Hous., Inc.-Five v. Levin*, 125 Ohio St.3d 394, 2010-Ohio-1553, ¶20 (“[T]ying charitable use so tightly to Congress’s policy goals is wrong because Congress does not define the scope of charitable use under Ohio law.”).

And even if DCI does not actually reject any patients in Seaman and nationwide based upon inability to pay (which is far from established on this record), patients may still self-selectively not choose DCI once seeing the indigence policy that may result in collection efforts and abruptly discontinued service. Indeed, Admin. Mazon testified that all patients would learn of the DCI indigence policy, and potential for adverse action, within a month of beginning dialysis treatments, usually before the first treatment. Hr. Tr. 276-277, TC Supp. 196.

Still further, RHC Realty did not present evidence about DCI’s patient mix nationwide. The record is lacking evidence regarding the insured status of DCI patients nationwide or a nationwide charity care figure. Consequently, RHC Realty has not satisfied its burden to show that DCI is a charitable institution based upon DCI’s core activities. *Dialysis Clinic, Inc.* at Subheading B (“An institution is ‘charitable’ under R.C. 5709.121 only if its core activities qualify as charity under the standards for determining the charitable use of property pursuant to R.C. 5709.12(B)”).

B. The DCI Seaman Clinic is used to provide non-charitable fee-for-service dialysis care just as the DCI West Chester Clinic in *Dialysis Clinic, Inc.*

***Dialysis Clinic, Inc. v. Levin*, 127 Ohio St.3d 214, 2010-Ohio-5071, ¶¶ 35-36 (“[n]othing about the operation of the clinic in West Chester differs from the core activities of DCI that were reasonably and lawfully found not to qualify DCI as a charitable institution.”).**

The DCI Seaman Clinic in 2006 is materially the same as the DCI West Chester Clinic in 2004 and must likewise be denied exemption. Both loss-generating clinics operated consistently with DCI’s core non-charitable activities and the discriminatory DCI indigence policy. Moreover, the losses for each clinic for the relevant tax year are strikingly similar. In *Dialysis Clinic, Inc.*, the West Chester Clinic lost \$250,000 during the 2004 tax year at issue. *Id.* at ¶ 5. Here, the Seaman Clinic lost \$313,420 during the 2006 tax year. Ex. 15, at 2, TC Supp. 389.

More fundamental than the parallels to *Dialysis Clinic, Inc.* is that these activities do not constitute “charity” under well-settled Ohio law. Again, this Court held that “charity” for non-profit health care service providers is “the provision of medical or ancillary healthcare services qualifies as charitable if those services are provided on a nonprofit basis to those in need, with regard to race, creed, or ability to pay.” *Dialysis Clinic, Inc.* at ¶ 26, citing *Church of God in Northern Ohio, Inc. v. Levin*, 124 Ohio St.3d 36, 2009-Ohio-5939, ¶ 19, in turn citing *Vick v. Cleveland Mem. Med. Found.*, 2 Ohio St.2d 30, 31 (1965).

In *Dialysis Clinic, Inc.*, this Court held that “[an] institution need not show a particular percentage of care that is unreimbursed if it proves its commitment to providing care on a nondiscriminatory basis.” *Dialysis Clinic, Inc.* at Subheading E, ¶ 40. This language reiterates that the inquiry into exclusive charitable use is a fact intensive one dependent upon the totality of the circumstances. *See, e.g., Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St. 3d 420, 2004-Ohio-1749, ¶ 39 (“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.”).

Without question, non-profit health care institutions need not show a “threshold level” of charity care in order to qualify for property tax exemption. *Dialysis Clinic, Inc.* at ¶ 32. But the “threshold level” language in *Dialysis Clinic, Inc.* simply reflects the Court’s cognizance of the realities of modern-day health care, not a fundamental shift in Ohio real property tax exemption law away from the focus on the *use of the property*. *Dialysis Clinic, Inc.* at ¶ 33, citing *Hubbard Press v. Tracy*, 67 Ohio St.3d 564, 566 (1993) and *Wehrle Found. v. Evatt*, 141 Ohio St. 467 (1943) (“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.”); *Seven Hills Schools v. Kinney*, 28 Ohio St.3d 186, 187-88 (1986); *Ohio Masonic Home v. Bd. of Tax Appeals*, 52 Ohio St.2d 127, 130 (1977); *Lutheran Book Shop v. Bowers*, 164 Ohio St. 359, 361-62 (1955).

“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.” *Dialysis Clinic, Inc.* at ¶ 40. “In the age of Medicare and Medicaid, the usual and ordinary indigent patient may have access to government benefits, and the modern healthcare provider is not required to forgo the pursuit of those benefits to qualify for charitable status.” *Id.*

While there is no “threshold level” of charity care that is required, the charity care that must be provided in order to be deemed charitable depends upon the insured status of the patient mix that health care provider serves, whether insured by Medicare, Medicaid, a commercial insurer, or no insurer at all. As the Court stated in *Dialysis Clinic Inc.*, the “decision to serve [Medicare and Medicaid] patients to some extent qualifies as the provision of care to persons

who otherwise lack the means to afford it.” *Id.* at ¶ 38 (emphasis added). To what extent in any particular instance simply depends on the insured status of the patients served.

Here, there is plentiful evidence to show that the Seaman Clinic is not operating charitably. Defeating exemption here even more clearly than in *Dialysis Clinic, Inc.*, DCI wrote off non-reimbursable charges constituting **only 1%** of total dialysis service revenues for the Seaman Clinic during the 2006 year relevant to this appeal. Indeed, all patients at the Seaman Clinic were covered by a primary insurer during fiscal year end 2006 (October 1, 2005 to September 30, 2006). Ex. 13, TC Supp. 379-80; Hr. Tr. 210, TC Supp. 180 (testimony of Admin. Mazon).

According to RHC Realty Ex. 14, a document prepared for litigation to show patient balances that DCI wrote off, DCI had unreimbursed write-offs of only \$4,785.32 for 2006. At hearing, Admin. Mazon explained that the amounts in the “Non-Mcr Charity W/O” column on Ex. 14 are the total unpaid amounts written off and not reimbursed through Medicare. Hr. Tr. 246, 299-300, TC Supp. 189, 202. That is, according to Admin. Mazon, DCI actually incurred losses for the amounts in the “Non-Mcr Charity W/O” column on Ex. 14.

Summing the amounts in the “Non-Mcr Charity W/O” column for service dates during 2006, the total amount of “Non-Mcr Charity W/O” for calendar year 2006 is \$4,785.32. Taking the \$4,785 write-off for 2006 as a percentage of total DCI service revenue for fiscal year 2006 (an approximation for calendar year 2006), which was \$454,159, DCI had non-reimbursable off **only 1%** of its total service revenues for the Seaman Clinic during the 2006 year relevant to this appeal.⁹ Ex. 15, at 1, TC Supp. 387-89.

⁹ 2006 write-off amount (\$4,785.32) ÷ total DCI service revenue (“In Center Tx” on Ex. 15) for fiscal year end 2006 (\$454,159) = **1.05%**.

This 1% charity care figure should be reviewed together with Court's holding regarding the West Chester Clinic in *Dialysis Clinic, Inc.* In this light, DCI's claim to use the Seaman property "exclusively for charitable purposes" is particularly tenuous.¹⁰ The property is not used exclusively for charitable purposes and exemption must be denied.

* * *

In summary, under the authority of controlling precedent including *Dialysis Clinic, Inc.* and the longstanding definition of "charity" in Ohio, exemption must be denied because DCI is not a charitable institution and the Seaman Clinic is not used exclusively for charitable purposes.

Proposition of Law No. II:

A property owner is not a charitable institution and exemption is defeated under R.C. 5709.121 where the owner's only longstanding activity is leasing property to a health care provider and the owner does not itself provide health care services.

Northeast Ohio Psychiatric Institute v. Levin, 121 Ohio St.3d 292, 2009-Ohio-583, ¶¶ 11-20; *Joint Hospital Services, Inc. v. Lindley*, 52 Ohio St.2d 152, 153 (1977).

The general exemption for "exclusive charitable use of property," as set forth under R.C. 5709.12(B), provides that the *owner's use*, not a lessee's use, determines whether the property should be exempt. *Northeast Ohio Psychiatric Institute v. Levin*, 121 Ohio St.3d 292, 2009-Ohio-583, ¶ 11, citing *First Baptist Church of Milford, Inc.*, 110 Ohio St.3d 496, 2006-Ohio-4966, ¶12. Under that principle, property used for leasing, rather than the provision of

¹⁰ In his final determination, the Commissioner made findings regarding the number of patients receiving reduced rate dialysis care at the Seaman Clinic. S.T. 1, TC Supp. 3. These findings were based upon RHC Realty's representations during the proceedings before the Commissioner. However, at hearing, Admin. Mazon clarified that the "reduced rate figures" were actually just the number of patients who had filed out financial assistance forms (FAFs), not the number of patients receiving reduced rate care. Hr. Tr. 317, TC Supp. 206. Thus, the figures do not advance RHC Realty's claim that charity care is provided at the Seaman Clinic.

health care, “plainly would not qualify for exemption.” *Id.* There can be little doubt that RHC Realty does not qualify for charitable exemption pursuant to R.C. 5709.12(B) alone.

Because leased property may not qualify for exemption under R.C. 5709.12 alone, the analysis in this case turns upon another statutory provision, namely R.C. 5709.121. The Ohio General Assembly enacted R.C. 5709.121 in 1969 to provide for charitable exemption in certain situations where ownership and claimed exempt use do not coincide in the same entity. *First Baptist Church of Milford, Inc.*, at ¶13, ¶16; *Dialysis Clinic, Inc.*, at ¶23-24. In other words, R.C. 5709.121 provides a definition of “exclusive charitable use” that may apply to the use of leased property, even though R.C. 5709.12(B) historically barred exemption for leased property.

For leased property to qualify for exemption pursuant to R.C. 5709.121, however, it must be held by a “charitable institution.” An institution qualifies as a “charitable institution” under R.C. 5709.121 *only if* its core activities are charitable. *Dialysis Clinic, Inc.* at Subheading B. Further, vicarious exemption is not allowed. “An entity that leases property to another must establish its charitable status based on the range of *its own activities* and may not rely upon the activities of a particular lessee.” *Northeast Ohio Psych.* at ¶ 14 (emphasis in original).

In *Northeast Ohio Psych.*, a nonprofit lessor of property sought charitable exemption for property that it leased to another entity that provided “behavioral health psychiatric services to the residents of Summit County who otherwise would not be able to afford such services.” *Id.* at ¶7. But the *Northeast Ohio* Court did not need to address whether the lessee’s psychiatric services were charitable because, as a threshold matter, the lessor was not a charitable institution. The lessor was not a charitable institution because its core activities of leasing property providing staffing services were not charitable. *Id.* at ¶¶ 15-20, citing *OCLC Online Computer Library Center, Inc. v. Kinney*, 11 Ohio St.3d 198 (1984).

Similarly in *Joint Hospital Services, Inc. v. Lindley*, a consortium of hospitals organized to provide laundry services was not entitled to charitable sales tax exemption. 52 Ohio St.2d 152, 153 (1977). There, the consortium claimed that “its relationship to the health care functions of the institution it serves is so immediate, intertwined and necessary, that it effectively engages in the alleviation of illness, disease or injury.” *Id.* at 155. But the Court rejected the invitation to grant vicarious exemption, instead holding that the consortium’s “laundry and linen service in itself neither improves health through alleviating illness, disease or injury, nor constitutes managing a home for the aged.” *Id.*

RHC Realty does not qualify for charitable exemption in this case for much the same reason that the lessor in *Northeast Ohio* and the hospital consortium in *Joint Hospital Services* did not qualify for exemption. That is, RHC Realty does not itself provide health care and its core activity of leasing property is not a charitable one. In other words, even if the dialysis care provided at the Seaman Clinic were found charitable contrary to controlling precedent in *Dialysis Clinic, Inc.*, RHC Realty cannot claim to be a charitable institution, or to use property exclusively for charitable purposes, vicariously based upon DCI’s activities.

A. RHC Realty’s core activity is leasing the subject property to DCI in order for DCI, not RHC Realty, to manage the Seaman Clinic.

Since RHC Realty’s only longstanding activity is leasing the subject property to DCI, its core activity is just that. For each of 2011, 2012, and 2013, RHC Realty’s revenue was limited nearly exclusively to revenue obtained as lease payments for the subject property from DCI. Ex. 11, TC Supp. 374-75 (RHC Realty Statement of Activities and Changes in Net Assets); Hr. Tr. 44, TC Supp. 138 (testimony that “Dialysis operations” on Ex. 11 refers to lease payments). Each year, DCI pays RHC Realty roughly \$60,000 in rent pursuant to a market rate lease agreement. Ex. 10, at Second Addendum, TC Supp. 372-73.

In fact, RHC Realty does little more than hold realty. At BTA hearing, RHC Realty CFO Lennartz testified that “[t]he dialysis clinic is very easy to manage, so there’s not a lot of time spent on that.” Hr. Tr. 70, 72, TC Supp. 145. RHC Realty has no employees. Hr. Tr. 16-17, TC Supp. 131. Member organizations instead assign their staff to work on RHC Realty related matters, but even that takes very little time. Hr. Tr. 17, TC Supp. 131. As CFO of RHC Realty, Mr. Lennertz testified that he spends only two hours per month on RHC Realty. Hr. Tr. 17, TC Supp. 131. Similarly, Kim Patton, who is currently Vice Chair of the RHC Realty Board of Directors and previously served as President of RHC Realty from 2008 to 2010, testified that she spends only about two hours per month on RHC Realty matters. Hr. Tr. 407, TC Supp. 276; Ex. C, at 7; Ex. D, at 7; Ex. E, at 12 (RHC Realty IRS Forms 990 for 2008 through 2010), TC Supp. 435, 464, 499.

In the past, *i.e.* prior to 2012, RHC Realty occasionally applied for and obtained grants for health related activities. At hearing, President Patton and CFO Lennartz could collectively recall four such grants, a Health Resources and Services Administration grant, a tobacco grant, a diabetic grant, and a managed care grant. Hr. Tr. 50-51, 401, TC Supp. 140, 274. Indeed, just three grants are expressly listed on Ex. 11, a summary financial statement, though others may be consolidated under other line items.

When asked at hearing, President Patton and CFO Lennartz also knew little about *applications* for grants. Despite identifying RHC Realty as “a vehicle in which we can go out and apply for things and represent the three providers at this point in time,” CFO Lennertz could not recall any grants applied for and not received. Hr. Tr. 72, TC Supp. 145. Likewise, President Patton had no recollection of RHC Realty applying for a grant in the past three years. Hr. Tr. 402, TC Supp. 274.

In addition, RHC Realty holds conference calls every other month where RHC Realty board members discuss health related issues. Hr. Tr. 398, TC Supp. 273. But these phone calls do not require a separate legal entity and the member hospitals could just as easily communicate through phone calls with or without the existence of RHC Realty.

All other activities that President Patton identified at hearing were put into practice through the RHC Realty member hospitals, not RHC Realty itself. For example, President Patton testified that member hospitals discussed coordinating care for patients exposed to rabies. As a result of the discussions, member hospital Health Source Ohio, a primary care facility, stopped carrying the rabies vaccine because the vaccine is needed in other RHC Realty members' emergency rooms more so than in Health Source's primary care offices. Hr. Tr. 376-377, TC Supp. 268. In President Patton's other example, RHC Realty simply facilitated a discussion about replacing an orthopedic physician. Hr. Tr. 410, TC Supp. 276. Again, these activities merely require a telephone or other communication device, not a separate legal entity such as RHC Realty.

Thus, only rarely does RHC Realty itself implement these ideas discussed during these conference calls. As CFO Lennertz's and President Patton's testimony revealed, the one activity that RHC Realty actually performs—*its core activity*—is leasing the subject property to DCI operate a dialysis clinic. Hr. Tr. 385-390, TC Supp. 270-71.

B. RHC Realty is not a charitable institution because its core activity of leasing the subject property to DCI under a lease is not charitable.

***Northeast Ohio Psychiatric Institute v. Levin*, 121 Ohio St.3d 292, 2009-Ohio-583, ¶ 15-20.**

The BTA erroneously held that “RHC is a charitable institution whose purpose is to benefit the community by providing improved health care.” *BTA Decision and Order*, at 5,

Appx. 5. In so holding, the BTA identified three RHC Realty activities that allegedly support its holding: one, allegedly “establishing the subject dialysis clinic”; two, “fil[ing] applications for grants”; and three, “discuss[ing] community health needs.” *Id.* The BTA failed to expressly hold that these are charitable activities and surely they are not.

First, “establishing the subject dialysis clinic” is not a charitable activity because it is just another way to describe RHC Realty’s non-charitable lease of the Seaman Clinic to DCI. This Court already held in *Northeast Ohio Psych.* that a lessor leasing property to a healthcare provider “plainly would not qualify for exemption” due to leasing activities. *Northeast Ohio Psychiatric Institute v. Levin*, 121 Ohio St.3d 292, 2009-Ohio-583, ¶ 11. Similarly in *Joint Hospital Services*, a consortium of hospitals organized to provide laundry service was not entitled to charitable sales tax exemption based upon health care provided by member hospitals. 52 Ohio St.2d 152, 153 (1977). In *OCLC*, the Court likewise foreclosed a vicarious exemption for a computer services provider claiming exemption based upon the activities of its client, a library. *OCLC Online Computer Library Center, Inc. v. Kinney*, 11 Ohio St.3d 198, 200-01 (1984).

If the BTA’s broad interpretation were permitted, it would result in an impermissible vicarious exemption, on the most absurd basis possible: predicated on the *non-charitable* dialysis care that DCI, a *non-charitable* institution, provides at the Seaman Clinic. *Northeast Ohio Psych.* at ¶ 14 (“An entity that leases property to another must establish its charitable status based on the range of *its own activities* and may not rely upon the activities of a particular lessee.”). Certainly RHC Realty, which has no employees, does not provide the “free, unreimbursed care constitut[ing] an essential part of a tax-exemption claim for a health care provider.” *Dialysis Clinic, Inc. v. Levin*, 127 Ohio St.3d 215, 2010-Ohio-5071, ¶ 32. Again,

even if a vicarious exemption were somehow allowed, the dialysis care that DCI provides on the property is non-charitable in any event. *Id.* at ¶¶ 36-37.

Moreover, RHC Realty's leasing activities do not provide the giving to "benefit to mankind" or to those with a "particularized need" that is required to fall within the definition of "charity" set forth in *Planned Parenthood v. Tax Commissioner*, 5 Ohio St.2d 117 (1966). RHC Realty makes the subject property available to DCI. In exchange, DCI pays roughly \$60,000 per year in rent to RHC Realty. If DCI did not pay, RHC Realty would not provide the property, and if RHC Realty did not provide the property DCI would not pay. Each party benefits from the private quid pro quo transaction.

As with the claimant in *Northeast Ohio Psychiatric*, RHC Realty has not carried its burden to show that its activities are charitable. *Northeast Ohio Psychiatric*, at ¶ 19 ("none of the services that Northeast provides has been shown to be charitable in character."); R.C. 5715.271 ("the burden of proof shall be placed on the property owner to show that the property is entitled to exemption.").

For the tax year at issue, RHC Realty even turned a surplus in revenue over expenses greater than \$10,000. Ex. 11, TC Supp. 374-75 ("change in net assets"). RHC Realty has not attempted to show that the \$60,000 per year lease is below market or to what extent it is below-market. The record is devoid of any evidence of market rate rent for comparable properties, or other determination of value for the subject property, that might show whether the lease is at market rates.

Documentary evidence is simply lacking to support the BTA's erroneous holding that RHC Realty is a charitable institution for allegedly "establishing the subject dialysis clinic." *BTA Decision and Order*, at 4, Appx. 4.

Second, “filing applications for grants” does not render RHC Realty a charitable institution because it is not RHC Realty’s core activity or even a charitable one. Of course it is the use of the property, not the proceeds from the property, that determines whether property is entitled to charitable tax exemption. *Dialysis Clinic, Inc.* at ¶ 33, citing *Hubbard Press v. Tracy*, 67 Ohio St.3d 564, 566 (1993).

And, it can hardly be said that RHC Realty’s “core activity” is applying for grants. President Patton and CFO Lennartz could collectively recall receiving only four grants and, further, could not recall applying for any other grants individually. Hr. Tr. 72, 402, TC Supp. 145, 274. In fact, President Patton could not recall any grant applications in the past three years. Hr. Tr. 402, TC Supp. 274. There is no need for a separate legal entity such as RHC Realty to apply for these grants either, as the member hospitals that make up RHC Realty could just as easily apply for grants. In short, RHC Realty is not a charitable institution due to these few grants.

Third, the BTA erroneously held that RHC Realty is a charitable institution because it “discusses community health needs.” Here the BTA is referring to the conference calls that RHC Realty board members hold every other month to discuss health related issues. Hr. Tr. 398, TC Supp. 273. The conference call discussions do not result in action steps taken by RHC Realty; instead, if any action is taken, it is by member hospitals individually. These phone calls do not require a separate legal entity, but simply a phone or other communication device. Certainly holding six phone calls every year does not make RHC Realty a charitable institution, else any organization could easily qualify as a charitable institution.

Against this background, RHC Realty is a non-charitable institution because its core activity of leasing the subject property to DCI is a non-charitable activity. *Northeast Ohio*

Psychiatric Institute v. Levin, 121 Ohio St.3d 292, 2009-Ohio-583, ¶¶ 11, 15-20. RHC Realty may not claim vicarious exemption. Consequently, exemption is defeated under R.C. 5709.121.

Proposition of Law No. III:

To qualify leased property for charitable exemption pursuant to R.C. 5709.121, the property must be leased to and from a “charitable institution” in accordance with division (A)(1) of R.C. 5709.121, not the mutually exclusive division (A)(2). Further, leased property qualifies for charitable exemption only if it satisfies a strict standard for “exclusive charitable use.”

The longstanding charitable exemption statute in Ohio, R.C. 5709.12, requires that ownership and the claimed exempt use coincide in the same entity for property to achieve tax exempt status. *First Baptist Church of Milford, Inc.*, at ¶12 (quoting *Zangerle v. State ex rel. Gallagher*, 120 Ohio St. 139, (1929) and *Lincoln Mem. Hosp., Inc. v. Warren*, 13 Ohio St.2d 109, (1968)). R.C. 5709.121 is a definitional section that defines “exclusive charitable use” to provide for charitable exemption in situations where ownership and claimed exempt use of the property do not coincide in the same entity.

R.C. 5709.121(A) provides as follows:

(A) 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:

(1) It is used by such institution, the state, or political subdivision, or by one or more other such institutions, the state, or political subdivisions under a lease, sublease, or other contractual arrangement: * * *

(b) For other charitable, educational, or public purposes.

(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 the view to profit.

The provision that is specifically applicable to the leased property in this case is division (A)(1) for property used “under a lease, sublease, or other contractual arrangement.” Division (A)(2), on the other hand, provides exemption for property “made available” to non-owners under the “direction or control” of the owner but not under a lease. As a result, if the leased property in this case is to qualify for exemption, it must do so pursuant to division (A)(1) of R.C. 5709.121 rather than under the mutually exclusive division (A)(2). Unfortunately for RHC Realty, division (A)(1) requires the property to be leased to and from a “charitable institution.” That requirement defeats exemption because DCI and RHC Realty are not charitable institutions. See discussion, Propositions of Law I and II.

The BTA should have examined this case under division (A)(1) rather than under division (A)(2). The inapplicability of division (A)(2) is readily apparent upon review the requirement under division (A)(2) that property be “made available under the direction or control of [the owner.]” Due to the lease that transfers possession of the property, RHC Realty does *not* maintain “direction or control” over the property, which is a necessary element for “exclusive charitable use” under R.C. 5709.121(A)(2). *See* R.C. 5321.02(B) (transfer of possession under a lease).

In erroneously holding that the Seaman Clinic is exempt pursuant to R.C. 5709.121(A)(2), the BTA further erred by failing to consider whether the property is under RHC Realty’s “direction or control” and ignoring the Commissioner’s arguments that it is not. There is no evidence whatsoever in the record, because none exists, that Randy Lennertz, Kim Patton, or any other RHC Realty representative have ever directed or controlled the DCI activities at the Seaman Clinic. RHC Realty has no employees and no right to direct DCI employees working on the property.

Thus, the BTA erred in holding that RHC Realty “primarily seeks exemption under R.C. 5709.121(A)(2)” and further erred by finding that the property was used exclusively for charitable purposes pursuant to that provision. *BTA Decision and Order*, at 3-8, Appx. 3-8.

Even assuming, *arguendo*, the applicability of division (A)(2), exemption still fails because the BTA did not apply a “strict construction” standard to R.C. 5709.121. In fact, the BTA’s decision and order does not even recognize the strict construction standard for tax exemption statutes.

Tax exemption statutes must be strictly construed because they are provided as a matter of legislative grace and in derogation of the rights of all other taxpayers. *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 16 (tax exemption statutes are to be strictly construed against the claim of exemption). To be sure, it is the taxpayer’s burden to show entitlement to exemption. R.C. 5715.271 (“the burden of proof shall be placed on the property owner to show that the property is entitled to exemption.”); *Northeast Ohio Psychiatric*, at ¶ 19 (“none of the services that Northeast provides has been shown to be charitable in character.”). This Court must be mindful to construe R.C. 5709.121(A)(2) *against* exemption where there is any doubt as to whether the taxpayer has satisfied its burden.

To broadly construe R.C. 5709.121 not only runs counter to this bedrock principle, but also runs the risk that a broad interpretation will swallow up other statutory language and tax exemption statutes that the General Assembly intended to have applied. In other words, when applying a strict construction standard to division (A)(2), the statute must be harmonized with the entire statutory scheme for real property exemption to give effect to all statutory language. R.C. 1.47(B), Appx. 16; *Church of God in N. Ohio, Inc.*, 124 Ohio St.3d 36, 2009-Ohio-5939, at

¶ 30 (“a property owner may not evade the limitations imposed with respect to a specific tax exemption by claiming exemption under a broad reading of other exemption statutes.”).

If the phrase “in furtherance of or incidental to” were read as broadly as the BTA suggests, then R.C. 5709.12 would forbid exemption for use by a property owner, but the same use would be the basis for exemption under R.C. 5709.121 if carried out by a third party instead. Through a shell game of sorts, landowners could secure exemption by simply organizing legal entities to hold their property and apply for exemption. This absurd result would hold form over substance and, more fundamentally, contravene the strict construction principles underlying Ohio real property tax exemption law.

To qualify for exemption under division (A)(2) of R.C. 5709.121, property must be made available under the direction or control of a charitable institution for a “use in furtherance or incidental to” the owner’s charitable purpose. But it is not just “any” “use in furtherance or incidental to” the owner’s charitable purpose that is required to qualify for exemption. A strict standard must be applied. In the present case, the 1% of total service revenues that potentially constitute charity care does not rise to the level of exempt charitable use under a strict construction standard.

* * *

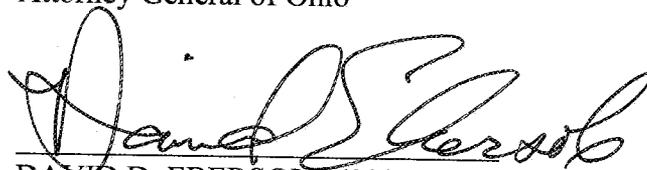
In summary, the provision that the BTA applied, division (A)(2) of R.C. 5709.121, is inapplicable to this case. Instead, division (A)(1) is specifically applicable to the leased property in this case. Under division (A)(1), exemption is defeated, among other reasons, because DCI, as lessee, is not a charitable institution. Even if this case is examined under division (A)(2), exemption is defeated because DCI is not under the “direction or control” of RHC Realty and the non-charitable activity at the Seaman Clinic does not satisfy a strict standard for exempt use.

CONCLUSION

The facts of the present case are the same in all material respects as in *Dialysis Clinic, Inc. v. Levin*. As a consequence, this Court should apply *Dialysis Clinic, Inc.* and the body of uniform case law upon which it rests to deny charitable exemption for the DCI Seaman Clinic. Therefore, the Court should reverse the BTA's decision and order, which unreasonably and unlawfully failed to uphold the Commissioner's denial of exemption.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellant Tax Commissioner's Merit Brief was served upon the following by U.S. regular mail on this 21st day of October, 2014:

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A handwritten signature in black ink, appearing to read "David Ebersole", written over a horizontal line.

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