

In the
Supreme Court of Ohio

RURAL HEALTH COLLABORATIVE
OF SOUTHERN OHIO, INC.,

Appellee,

v.

JOSEPH W. TESTA,
TAX COMMISSIONER OF OHIO

Appellant.

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:
: Case No. 2014-0963
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: Appeal from Ohio Board of Tax Appeals
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: BTA Case No. 2012-3421
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APPELLANT TAX COMMISSIONER'S REPLY BRIEF

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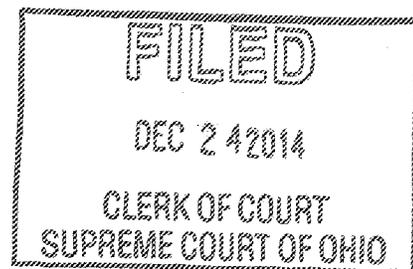


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INTRODUCTION

Discriminating against those who cannot pay is not “charitable” under Ohio law. “[T]he 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. v. Levin*, 127 Ohio St.3d 215, 221, 2010-Ohio-5071, ¶ 26. Denying health care to those who cannot pay is a discriminatory practice that defeats exemption. *Id.* at ¶ 34.

The dialysis services that Dialysis Clinic, Inc. (“DCI”) provides at its Seaman, Ohio clinic are not “charitable” because they may be denied based upon inability to pay. This is abundantly clear from the DCI indigence policy, which expressly provides 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.” Indeed, this Court addressed DCI’s indigence policy once before and held that “[t]his statement contradicts the assertion that DCI is committed to providing services on a nondiscriminatory basis, which is an essential prerequisite for a healthcare provider to qualify for exemption.” *Dialysis Clinic, Inc.* at ¶ 34. Exemption is therefore defeated.

To no avail, Rural Health Collaborative of Southern Ohio, Inc. (“RHC Realty”) struggles mightily to complicate, but not overrule, this simple premise. To RHC Realty, *Dialysis Clinic, Inc.* is inapposite because RHC Realty owns the clinic at issue and leases it to DCI, whereas in *Dialysis Clinic, Inc.* DCI both owned and operated the clinic at issue. As the argument progresses, RHC Realty tap dances around an odd juxtaposition of: (a) DCI’s dialysis operations on the property do not matter; and (b) the dialysis care provided on the property is essential to RHC Realty’s allegedly charitable purpose and the claimed “exclusive charitable use” of the property. A sure rhetorical flourish, RHC Realty simply switches from (a) to (b) when convenient.

This Court must cut through the rhetoric. RHC Realty does not dispute that the written DCI indigence policy discriminates against those who cannot pay or that *Dialysis Clinic, Inc. v. Levin* remains good law. Accordingly, *Dialysis Clinic, Inc.* defeats exemption in this case.

Without question, DCI's non-charitable operations *do* matter. The statute at issue, R.C. 5709.121(A)(2), requires property to be used exclusively for charitable purposes to qualify for exemption. RHC Realty argues that its charitable *use* of the property is "establishing the clinic [to] enhance[] the quality, availability, and efficiency of a comprehensive health service[.]" RHC Realty brief, at 16. By invoking "health service," RHC Realty readily admits that DCI's operations are at issue. DCI is the only entity providing health services on the property. Later in its brief, RHC Realty simply contradicts itself when it argues that "[DCI's] operations are not an issue under R.C. 5709.121(A)(2)." RHC Realty brief, at 23.

Moreover, RHC Realty cannot show exclusive charitable *use* of the property based upon its own activities either. RHC Realty asserts that it acted charitably in "establishing the clinic," but what this really refers to is leasing the Seaman clinic to DCI. Leasing activity, in and of itself, "plainly [does] not qualify for exemption." *Northeast Ohio Psychiatric Institute v. Levin*, 121 Ohio St.3d 292, 2009-Ohio-583, ¶ 11. The non-charitable nature of the lease is particularly evident in this case due to the "Commercial Lease Agreement" where DCI pays \$60,000 per year to RHC Realty in rent. Exhibit 10, TC Supp. 363 (lease agreement). Since neither RHC Realty nor DCI *use* the Seaman clinic for charitable purposes, exemption is defeated.

There is also a second independent ground for denying exemption, namely RHC Realty's failure to qualify as a "charitable institution" under R.C. 5709.121. *Northeast Ohio Psych.*, 121 Ohio St.3d, at ¶¶ 11-20. R.C. 5709.121(A)(2) provides exemption only for property held by a "charitable institution," as determined by an owner-institution's "core activities." *Dialysis*

Clinic, Inc. at Subheading B. Here, RHC Realty's longstanding and regular activity of leasing the Seaman clinic to DCI is its "core activity." As discussed, since leasing activity "plainly [does] not qualify" as charitable, RHC Realty is not a charitable institution. *Northeast Ohio Psych.*, at ¶¶ 11, 14. The result does not change merely because the BTA and RHC Realty refer to leasing activity as "establishing the clinic."

Further, RHC Realty cannot vicariously claim "charitable institution" status based upon the activities of another institution. *Northeast Ohio Psych.*, at ¶ 14. That means that RHC Realty could not attain "charitable institution" status even if DCI's operations were somehow deemed charitable. This is a corollary to the well-settled rule that vicarious exemptions are disallowed. In *Joint Hospital Services, Inc. v. Lindley*, for example, this Court rejected a claim to exemption where a hospital consortium organized to provide non-charitable linen services and claimed exemption based upon the charitable health care services of its member hospitals. 52 Ohio St.2d 152, 153 (1977). RHC Realty chose to ignore *Joint Hospital Services* in its brief to avoid a discussion of vicarious exemption, which is fatal to its claim here.

Masterful in its level of abstraction, RHC Realty instead recasts the BTA's incorrect legal conclusions as "factual findings supported by the record." RHC Realty brief, at 2, 7-8, 18-19, 27. This is a legal tactic that must be rejected. Of course "the BTA is responsible for determining factual issues and, if the record contains reliable and probative support for [] BTA determinations', this court will affirm them." *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, ¶ 14. But the essential facts are not in dispute.

The Commissioner is challenging the BTA's clearly unreasonable and unlawful *legal conclusions* that RHC Realty is a "charitable institution" and that its "core activities" accord with the standard of "charity" under Ohio law. *Rural Health Collaborative v. Testa*, BTA Case No.

2012-3421 (May 8, 2014), at 5 (“*BTA Decision and Order*”). When the undisputed facts are applied to the law, it leads to the necessary conclusion that RHC Realty fails to qualify as a “charitable institution.” That is, RHC Realty is not a charitable institution because its core lease activity is not a charitable activity.

RHC Realty maintains that it is a charitable institution due to its non-core ancillary activities. RHC Realty first argues that it pursues health care grants, but fails to mention that it has only received four grants since 2006. Hr. Tr. 50-51, 401, TC Supp. 140, 274. At BTA hearing, RHC Realty officers testified that they could not recall applying for a grant in the past three years. Hr. Tr. 72, TC Supp. 145; Hr. Tr. 402, TC Supp. 274. Even if sporadic grant applications were somehow RHC Realty’s “core activity,” fundraising generally is not charitable in any event. *Dialysis Clinic, Inc.* 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.”).

Undeterred, RHC Realty next asserts charitable institution status because it “brought its members together to address health issues.” RHC Realty brief, at 12. This is merely a reference to conference calls with RHC Realty board members that occur every other month. Hr. Tr. 398, TC Supp. 273. RHC Realty officers and directors spend, at most, a few hours on the entity each month. Hr. Tr. 17, TC Supp. 131. These discussions, in and of themselves, are not charitable because there are no goods or services provided to anyone without regard for ability to pay.

RHC Realty finally claims that it “sponsored or hosted events” on a charitable basis. But RHC Realty does not conduct activities because it has no employees. Hr. Tr. 16-17, TC Supp. 131. The activities it claims to “host” are really conducted through its member organizations. Hr. Tr. 410, TC Supp. 276. This claim is an impermissible vicarious claim to charitable institution status. *Northeast Ohio*, at ¶ 14; *Joint Hospital Services*, 52 Ohio St.2d at 153.

Against this background, RHC Realty's attempt to circumvent the holding of *Dialysis Clinic, Inc.* through two entities instead of one cannot stand. Charitable exemption must be denied for at least three reasons: (1) the dialysis care rendered on the property is not provided on a charitable basis; (2) RHC Realty is not a charitable institution; and (3) RHC Realty does not satisfy the strict construction standard for "exclusive" charitable use under R.C. 5709.121(A)(2).

ARGUMENT

I. Under *Dialysis Clinic, Inc. v. Levin*, the use of property to provide dialysis services pursuant to a policy that discriminates against those who cannot pay does not constitute "exclusive" charitable use.

There is no question that this case requires an inquiry into the dialysis care that DCI renders at the Seaman clinic. R.C. 5709.121(A)(2).¹ DCI's discriminatory indigence policy coupled with its large profits, to the tune of tens of millions of dollars in annual profits, defeats exemption. *Dialysis Clinic* at ¶¶ 31-37. In *Dialysis Clinic, Inc.*, this Court disallowed exemption for a loss-generating DCI clinic in West Chester, Ohio in 2004 that is materially the same as the loss-generating DCI Seaman clinic at issue here in 2006. The result here should be no different. The Seaman clinic is not "used exclusively for charitable purposes" and the inquiry ends in denial of exemption. RHC Realty makes several futile efforts to dodge this inevitable result, but each of these arguments is unavailing, as each is rebutted below in turn.

A. Charitable exemption is defeated where, as here, a non-profit health care provider discriminates against those who cannot pay.

As discussed in the introduction, providing health care under a policy that discriminates against those who cannot pay is not charitable under Ohio law. *Dialysis Clinic, Inc.* at ¶¶ 31-37.

¹ The Commissioner has continuously argued throughout these proceedings that the subject property is not exempt pursuant to R.C. 5709.12 and/or R.C. 5709.121, even though RHC Realty suggests otherwise in its brief. RHC Realty brief, at 35. RHC Realty also quarrels with whether the parties conducted discovery during the BTA proceedings. RHC Realty brief, at 6. The parties engaged in informal discovery where RHC Realty produced tax returns to the Commissioner. Exhibits A-C; TC Supp. 390-456.

Nearly fifty years ago in *Vick v. Cleveland Mem. Med. Found.*, this Court set forth the controlling definition of “charity” where property is used to provide health care service:

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.**

2 Ohio St.2d 30, 31 (1965) (emphasis added); *Dialysis Clinic, Inc.* at ¶ 26. To qualify as “charitable,” goods and services must be provided on a *nondiscriminatory* basis. *Id.* at ¶ 34.

The DCI indigence policy clearly fails the nondiscrimination requirement for charitable health care services under *Vick*. The policy expressly states that the 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. Exemption fails because health care services rendered pursuant to this policy are not charitable.

RHC Realty attempts to salvage its claim to exemption by alleging that DCI has never turned away a patient due to inability to pay. But this Court already rejected this exact same argument once in *Dialysis Clinic, Inc.* There, this Court expressly held that:

We are not persuaded, however, that [evidence that DCI never turned a patient away] 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.

Dialysis Clinic, Inc. at ¶¶ 34-35. The DCI indigence policy was discriminatory then just as it is discriminatory now.

As a practical matter, the discriminatory indigence policy matters because it discourages indigent patients from seeking dialysis care in the first place. Patients presented with the DCI indigence policy must reach one inescapable conclusion: dialysis care is conditional on their ability to pay for it and may be abruptly stopped if they cannot. DCI patients nearly always learn

of the indigence policy before the first treatment, and in all cases within the first month of treatment. Hr. Tr. 276-277, T.C. Supp. 194. As a consequence, prospective patients may pursue more even-handed options for dialysis treatment without DCI ever expressly denying care.

RHC Realty argues that there is no evidence that the DCI indigence policy discourages patients from seeking treatment at the Seaman clinic. RHC Realty brief, at 30. To the contrary, RHC Realty's own exhibits show that DCI is very effective in limiting uncollectable amounts that must be written off. That is, the indigence policy likely reduces bad debts by discouraging indigent patients from seeking treatment at DCI and incurring unpaid balances in the first place.

As the Commissioner explained through his opening brief, RHC Realty Exhibits 14 and 15 show that *only 1%* of total dialysis service revenue was written off for 2006 as uncollectible and non-reimbursable under Medicare. Commissioner's opening brief, at 21-22, 31-32. That figure is consistent with this Court's finding with regard to DCI entity-wide in *Dialysis Clinic, Inc.*, at ¶ 14. For the Seaman clinic, non-reimbursable and uncollectible amounts have only risen at the margin since 2007, to slightly more than 2% of dialysis service revenues.² Contrary to RHC Realty's assertions, then, the evidence is highly suggestive that the indigence policy discourages indigents who may case DCI to incur bad debts from seeking care at DCI.

B. The economic conditions in Southern Ohio do not distinguish this case from *Dialysis Clinic, Inc.* for purposes of determining charitable exempt status.

Any suggestion that the location of the DCI clinic in Seaman, Ohio lends itself to charitable exemption is wholly unsupported by the record. See, RHC Realty brief, at 1. *First*, the losses incurred at the Seaman clinic are overwhelmingly due to factors other than

² Uncollectible amounts for the Seaman clinic from 2006 through 2013 (\$147,344) ÷ total DCI service revenue for the Seaman clinic for 2006 through 2013 (\$5,963,716) = 2.47%. See, the "Non-Mer Charity W/O" column on Exhibit 14, at TC Supp. 386, for uncollectable and non-reimbursable amounts. For testimony explaining the exhibit, see Hr. Tr. 246, 299-300, TC Supp. 189, 202. Total DCI service revenue is derived from adding the "In Center Tx" row on Exhibit 15 for 2006 through 2013. TC Supp. 388.

uncollectible and non-reimbursable bad debt. RHC Realty directly attributes the Seaman clinic's losses to uncollectible amounts for indigent care. RHC Realty brief, at 6 ("As a result [of indigent care], DCI has lost over \$1.2 million on its operations at Seaman since the clinic opened in 2006."). But the record belies this claim. Exhibit 14 shows that the Seaman clinic has only had \$147,344 in non-reimbursable and uncollectible amounts since 2006.³ That amount is well shy of the roughly \$1.28 million operating loss that the Seaman clinic has incurred since 2006.⁴

Second, dialysis services are the only condition-based entitlement under Medicare. RHC Realty suggests that the high percentage of Medicare and Medicaid patients at the Seaman clinic reflects the state of the economy in Southern Ohio, but that is far from self-evident. RHC Realty brief, at 5. All dialysis patients are eligible for Medicare, no matter how affluent or poor.⁵ If anything, the poor economic conditions in Southern Ohio *cut against* exemption by amplifying the effect of the DCI indigence policy that discriminates against those who cannot pay.

Incidentally, the uniquely universal coverage of dialysis patients presents a very narrow legal issue. RHC Realty clings to the *Dialysis Clinic, Inc.* Court's holding that there is no "threshold level" of charity care that is required to qualify for exemption. *Dialysis Clinic, Inc.*, at ¶ 32. But that just means that the charity care required to qualify for exemption depends upon the totality of the circumstances in each case. *See, e.g., Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St. 3d 420, 2004-Ohio-1749, ¶ 39.

³ See, the "Non-Mcr Charity W/O" column on Exhibit 14, at TC Supp. 386, for uncollectable and non-reimbursable amounts. For testimony explaining exhibits, see Hr. Tr. 246, 299-300, TC Supp. 189, 202.

⁴ According to Exhibit 15, the sum of the "Net Income" for the Seaman clinic from 2006 through 2013 is a loss of \$1,284,151. Exhibit 15, TC Supp. 389.

⁵ RHC Realty asserts that only 75-80% of patients have Medicare or Medicaid, but that is most likely because commercial group insurance plans are the primary insurer of dialysis services for the first 36 months of care. Hr. Tr. 172, TC Supp. 170. Thereafter, Medicare takes over as primary insurer and the commercial insurer reverts to secondary insurance. Hr. Tr. 172-173, TC Supp. 170.

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” health care constitutes charity in any given case depends upon the insured status of the patient mix served, whether by Medicare, Medicaid, a commercial insurer, or no insurer at all.

Universal coverage for dialysis patients thus takes on special significance. Because all dialysis patients are eligible for Medicare and/or Medicaid, potential for charity care where dialysis services are provided is greatly diminished. Under the Medicare reimbursement scheme, dialysis providers are reimbursed for 80% of a dialysis patient’s bill. For Medicare patients that also meet Medicaid eligibility requirements, Medicaid covers the remaining 20%. Hr. Tr. 216, TC Supp. 181. Given high federal reimbursement for dialysis, there is a lesser opportunity for a dialysis provider to render unreimbursed care. Thus, charitable exemption for dialysis care is a narrow issue, one that likely does not hinge on a clinic’s location.

Third, the DCI West Chester clinic at issue in *Dialysis Clinic, Inc.* incurred annual operating losses of roughly \$250,000 even though it was located in a relatively affluent area. The losses generated at the West Chester clinic are approximately the same as the annual losses the Seaman clinic, which RCH Realty describes as located in an economically depressed area. RHC Realty brief, at 1.

Thus, the record does not support the conclusion that the location of the clinic in Seaman, Ohio supports a finding of “exclusive” charitable use in this case.

C. Medicare rules and regulations do not justify DCI's written indigence policy that discriminates against those who cannot pay. The spirit and letter of Medicare rules and regulations do not require a discriminatory policy.

RHC Realty next attempts to defend its discriminatory indigence policy on the basis that it is merely designed to comply with Medicare rules and regulations. As an initial matter, RHC Realty readily admits that Medicare regulations do not actually *require* an indigence policy that refuses to provide care due to patients' inability to pay. RHC Realty brief, at 31.

RHC Realty nevertheless insists that its policy is just a thorough belt and suspenders approach to ensuring that those who pay, do, while still providing reduced-cost or free care to those who cannot pay. RHC Realty brief, at 33 (posing a rhetorical question to the Commissioner). But this goal can be achieved without reserving the right to refuse care based upon ability to pay. There are other ways. Indeed, the Medicare Provider Reimbursement Manual, as recited on the very first page of the DCI indigence policy, reveals as much: "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." Ex. 6, at 1, TC Supp. 316. Inquiries into a patients' financial condition thusly provide an avenue to Medicare reimbursement for bad debts that stops short of threatening the denial of care to indigent patients or actually doing so.

D. The allegedly *unwritten* and *discretionary* DCI indigence policy is highly dubious and unclear in meaning and application.

DCI asserts that it provides dialysis care on a charitable basis due to a supposed *unwritten* indigence policy, which ostensibly runs contrary to its discriminatory written policy. RHC Realty brief, at 5, 30. Despite testimony elicited at hearing, the BTA made no finding that DCI actually has an *unwritten* policy, instead recognizing DCI's written policy that discriminates against those who cannot pay. *BTA Decision and Order*, at 7. The *unwritten* policy is highly dubious for several reasons, and cannot support "exclusive" charitable use of the Seaman clinic.

First, DCI curiously failed to raise the alleged unwritten policy during years of litigation in *Dialysis Clinic, Inc.* Had DCI actually maintained a policy to provide dialysis without regard for ability to pay, it likely would have mentioned it at some point during those proceedings. Moreover, such a policy likely would have resulted in far greater than 1-2% of bad debt as a percentage of dialysis operation revenue. See, Exhibits 14 and 15.

Second, the details of the unwritten policy remain unclear still today. Through its brief, RHC Realty argues that it “has an [unwritten] entity-wide policy of providing service to all patients who need it without regard to their ability to pay for it.” RHC Realty brief, at 5. RHC Realty further asserts that the administrator of the Seaman clinic, Andy Mazon, “has complete authority in that regard.” RHC Realty brief, at 30.

The details of the alleged unwritten policy were not so evident at BTA hearing however. When asked at BTA hearing about the unwritten policy, DCI General Counsel Zylstra did not know the details of the policy and deferred to Admin. Mazon to explain it. Hr. Tr. 142-143, TC Supp. 163. But Admin. Mazon could provide little guidance, explaining only that the policy allows indigent care within his discretion and the discretion of another DCI manager. Hr. Tr. 231-232, TC Supp. 185. The details of the unwritten policy are highly uncertain.

Third, the applicability of the unwritten policy likewise remains unclear. RHC Realty argues through its briefing that the policy applies only to non-Medicare and non-Medicaid patients. But General Counsel Zylstra and Admin. Mazon already gave sworn testimony that the written and discriminatory DCI indigence policy is applicable to all DCI patients. Admin. Mazon testified that “[i]n our clinics we use [the written indigence policy] for all of our patients.” Hr. Tr. 224, T.C. Supp. 183. Ms. Zylstra likewise testified that “[the written

indigence policy] actually is applied to any patient that has a patient responsibility balance and that might need assistance.” Hr. Tr. 158, T.C. Supp. 167.

Fourth, missing from the evidentiary record is any indication that patients are informed of the alleged unwritten policy. By contrast, DCI patients nearly always learn of the written indigence policy before the first treatment, in all cases within the first month of dialysis treatment. Hr. Tr. 276-277, T.C. Supp. 194. The discriminatory written policy may therefore deter prospective patients, by contrast to the unwritten policy allegedly spread by word of mouth.

Consistent with the BTA’s findings, DCI’s written indigence policy that discriminates against those who cannot pay is the policy that actually governs the dialysis care rendered at the Seaman clinic. RHC Realty’s attempt to invoke an unwritten policy contrary to its written policy is simply an unconvincing attempt to recast the nature of the services provided on the property.

E. *Dialysis Clinic, Inc.* has strong precedential value, particularly in the face of legislative inaction. The Commissioner has not asserted collateral estoppel.

To be sure, *Dialysis Clinic, Inc. v. Levin* is controlling precedent that disallows exemption for the Seaman clinic. The legally significant facts for the Seaman clinic in 2006 are materially the same as those surrounding the DCI West Chester clinic that failed to qualify for exemption for tax year 2004 in *Dialysis Clinic, Inc.* at ¶¶ 31-37. Legislative inaction in the years since the *Dialysis Clinic, Inc.* only strengthens its value as decisional law precedent. *Maitland v. Ford Motor Co.*, 103 Ohio St. 3d 463, 2004-Ohio-5717, ¶ 26 (“legislative inaction in the face of long-standing interpretation suggests legislative intent to retain the existing law.”); *General Electric Co. v. DeCourcy*, 60 Ohio St.2d 68, 70 (1979).

RHC Realty devotes nearly three pages of its brief to the false supposition that the Commissioner has asserted collateral estoppel. RHC Realty brief, at 24-26. However, the Commissioner simply has not asserted collateral estoppel.

Based upon the foregoing, the DCI Seaman clinic is not exempt as “used exclusively for charitable purposes” under R.C. 5709.12 and R.C. 5709.121. *Dialysis Clinic, Inc.* at ¶¶ 31-37.

II. Independently, charitable exemption pursuant to R.C. 5709.121 is defeated because RHC Realty is not a “charitable institution.” RHC Realty does not provide health care itself and its core activity of leasing the Seaman clinic to DCI is not charitable.

Because RHC Realty, as owner of the subject property, is not a “charitable institution,” exemption is defeated pursuant to R.C. 5709.121. Lacking a basis in the spirit or letter of the law, RHC Realty attempts to establish itself as a charitable institution through heavy reliance on the BTA’s decision and order below. So the argument goes, the Commissioner is challenging “factual findings,” which must be upheld because they are supported by the record. RHC Realty brief, at 2, 7-8, 18-19, 27; *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, ¶ 14.

The essential facts are not in dispute and necessarily result in denial of exemption. RHC Realty does not identify the specific “factual findings” that the Commissioner allegedly challenges. The Commissioner is challenging the BTA’s clearly unreasonable and unlawful *legal conclusions* that RHC Realty is a “charitable institution” and that its “core activities” are “charitable” under Ohio law. As explained below, this Court should reverse the BTA’s decision and order below because its incorrect legal conclusions are clearly unreasonable and unlawful.

A. RHC Realty is not a charitable institution because its core activity is leasing the Seaman clinic to DCI, which is not a charitable activity.

R.C. 5709.121(A)(2) provides exemption only for property held by a “charitable institution,” as determined by an owner-institution’s “core activities.” *Dialysis Clinic, Inc.* at Subheading B. In *Northeast Ohio Psychiatric v. Levin*, this Court held that an entity that leased property to a health care service provider could not claim charitable institution status based upon the health care services rendered by a lessee. 121 Ohio St.3d 292, 2009-Ohio-583, ¶¶ 11-20.

In a similar vein to *Northeast Ohio Psych.*, RHC Realty's only significant longstanding and regular activity, *i.e.* its "core activity," is leasing the Seaman clinic to DCI. Under that lease, RHC Realty charges DCI a substantial sum, \$60,000 per year, to use the Seaman clinic. Since leasing activity "plainly [does] not qualify for exemption," RHC Realty is not a charitable institution and exemption is defeated under R.C. 5709.121. *Northeast Ohio Psych.* at ¶ 11.

RHC Realty's other activities are all ancillary to its core leasing activity and non-charitable in any event. In fact, nearly all of RHC Realty's revenue since 2011 is the rental revenue from the Seaman clinic lease. Ex. 11, TC Supp. 374-75 (RHC Realty Statement of Activities and Changes in Net Assets).

The BTA nonetheless held that RHC Realty is a charitable institution in large part due to its ancillary activities. In so holding, the BTA specifically identified three RHC Realty activities as "congruent with its purpose": one, allegedly "establishing the subject dialysis clinic"; two, "fil[ing] applications for grants"; and three, "discuss[ing] community health needs." *BTA Decision and Order*, at 4. But the undisputed factual record shows that these activities are not charitable and/or occur too irregularly to qualify as RHC Realty's "core activities."

First, what the BTA described as "establishing the subject dialysis clinic" is tantamount to non-charitable leasing activity. *Northeast Ohio Psych.*, at ¶¶ 11,14. If, instead, "establishing" the clinic refers to providing dialysis care, then RHC Realty is unlawfully claiming charitable institution status vicariously based upon DCI's activities rather than its own. *Northeast Ohio Psych.*, at ¶ 14; *Joint Hospital Services, Inc. v. Lindley*, 52 Ohio St.2d 152, 153 (1977). In either case, RHC Realty is not a charitable institution for "establishing" the dialysis clinic.

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. At BTA

hearing, RHC Realty Director Kim Patton and CFO Randy Lennartz could collectively recall receiving only four grants and, further, could not recall applying for any other grants recently. Hr. Tr. 72, 402, TC Supp. 145, 274. And even if RHC Realty regularly sought out grants, fundraising generally is not charitable in any event. *Dialysis Clinic, Inc.* 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.”); *Hubbard Press v. Tracy*, 67 Ohio St.3d 564, 566 (1993).

Third, “discussing community health needs” is not a charitable activity because it does not encompass the provision of any charitable goods or services. The “discussions” that the BTA is referring to are conference calls that RHC Realty board members hold every other month. Hr. Tr. 398, TC Supp. 273. These phone calls do not result in action steps taken by RHC Realty that could even potentially be charitable.

Instead, if any action is taken, it is vicariously through member hospitals. *Joint Hospital Services, Inc.*, 52 Ohio St.2d at 153. RHC Realty claims that its members “volunteer” to conduct activities for the collaborative, but the record does not reflect volunteer activity. RHC Realty brief, at 20. The BTA testimony is clear that member hospitals conduct activities on their own (assign their staff people) or in at least one instance are compensated for services provided to RHC Realty. Hr. Tr. 17-19, T.C. Supp. 131; Hr. Tr. 410, T.C. Supp. 276. RHC Realty is not charitable due to activities that its members may conduct.

Finally, RHC Realty suggests that it may have some educational pursuits or that the property may be used for educational purposes. At BTA hearing, however, RHC Director Kim Patton could not identify any actual educational programs or events at the Seaman Clinic. Hr. Tr. 396, 407-408. To the extent RHC Realty claims to provide educational services itself, these activities again are conducted vicariously through its member organizations.

Based upon the undisputed facts, then, RHC Realty is not a “charitable institution” and the BTA’s unreasonable and unlawful holding to the contrary should be reversed.

B. RHC Realty also cannot establish that it is a “charitable institution” through novel definitions of the word “charity” under Ohio law.

Ohio law provides a unique definition of “charity” for the provision of health care services, one this Court has set forth nearly fifty years ago. *Dialysis Clinic, Inc.* at ¶ 26; *Vick v. Cleveland Mem. Med. Found.*, 2 Ohio St.2d 30, 31 (1965). In non-health care situations, a similar definition of “charity” set forth in *Planned Parenthood Ass’n v. Tax Commissioner* is controlling. 5 Ohio St.2d 117 (1966). Under either definition, a necessary but not sufficient condition is providing goods or services *without regard for ability to pay*.

RHC Realty, on the other hand, favors of a novel definition of “charity.” Other than parroting language in *Planned Parenthood*, RHC Realty does not recognize that charity must be provided *without regard for ability to pay*. RHC Realty brief, at 10-12, 19-20.

The “without regard for ability to pay” requirement matters here because the Seaman clinic lease, self-titled a “Commercial Lease Agreement,” is not provided without regard for ability to pay. RHC Realty makes the Seaman clinic available to DCI in exchange for \$60,000 in year rent. Exhibit 10, TC Supp. 363. 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. Contracts may be renegotiated from time to time, but that does not change their essential nature. The parties are the primary beneficiaries and each party benefits from the private quid pro quo transaction.

This type of relationship is not a charitable one. *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.”) (emphasis added).

Armed with its novel definition of charity, RHC Realty accuses the Commissioner of arguing “that establishing the clinic, or bringing in DCI to operate the clinic, do not benefit the poor and ill specifically, or people in general.” RHC Realty brief, at 22. This suggestion relies on the false premise that unidentified and unquantified benefits to the public generally are somehow paramount to the benefits that each party to the lease receives. Or, if RHC Realty is instead suggesting it provides health care with these statements, that is a vicarious claim to non-charitable activity. *Dialysis Clinic, Inc.*, at ¶¶ 31-37; *Northeast Ohio Psych.*, at ¶¶ 10-17.

The Commissioner never denied that the Seaman clinic or lease may provide a general “benefit” secondary to those that RHC Realty and DCI realize. Instead, the Commissioner explained and continues to explain that RHC Realty does not provide the “giving” *without regard for ability to pay* necessary to qualify as charitable activity. *See, e.g.*, Commissioner brief, at 38. RHC Realty is unable to cite a single case where this Court held that an institution was charitable despite denying goods or services to those who could not pay. RHC Realty cannot establish charitable activity by distorting the word “charity.”

III. RHC Realty does not satisfy the strict construction standard for “exclusive” charitable use under R.C. 5709.121(A)(2).

R.C. 5709.121(A)(2) provides charitable exemption for property held by a charitable institution and “made available **under the direction or control** of such institution * * * **for use in furtherance of or incidental to** its charitable, educational, or public purposes and not with a view to profit.” (emphasis added). RHC Realty fails to satisfy two statutory requirements.

First, RHC Realty plainly does not “direct or control” DCI’s use of the property to render dialysis care. There evidentiary record is devoid of any evidence that Randy Lennertz, Kim

Patton, or any other RHC Realty representative have any ability, right, or desire to direct or control the DCI activities at the Seaman clinic. The situation is analogous to a recent BTA decision where a church that provided office and rehearsal space to a theatre company did not “direct or control” the theatre company’s use of the property. *Christian Ministires [sic] v. Testa*, BTA Case No. 2012-2213 (Mar. 13, 2014), Appx. 1-4.

In an attempt to satisfy the direction or control argument, RHC Realty argues that *mutually agreed-upon* lease covenants give it “direction or control” over DCI. RHC Realty brief, at 13-14. But obligations negotiated *ex ante* under a lease and between parties hardly amounts to one party directing or controlling another party’s current use of the property. A lease is a contractual agreement between parties, not direction from one party to another.

RHC Realty nevertheless insists that lease agreements necessarily satisfy the “direction or control” requirement. For support, it curiously relies upon *Community Health Professionals, Inc. v. Levin*, 113 Ohio St.3d 432, 2007-Ohio-2336 (2007) and *Cincinnati Community Kolliel v. Testa*, 135 Ohio St.3d 219, 2013-Ohio-396. Neither case includes a discussion of the direction or control requirement. The *Kolliel* case does not even involve a lease agreement. RHC’s citation to a statement of pure dicta in *Case Western Res. Univ. v. Wilkins* is equally unavailing. 105 Ohio St.3d 276, 2005-Ohio-1649, ¶ 30.

To be sure, *Community Health Professionals* finds exemption under division (A)(2); however, the lease agreement in that case is between parent and subsidiary entities that were formerly one entity and divided only in order to comply with Medicaid regulations. 113 Ohio St.3d 432, at ¶ 2. In other words, the common ownership among the lessor and lessee in *Community Health Professionals* lent itself to a finding that the lessor controlled the lessee. The situation is far different here between RHC Realty and DCI, which are unrelated parties.

RHC Realty lastly argues that estoppel precludes the Commissioner from enforcing the statutory “direction or control” requirement. RHC Realty brief, at 36. But estoppel generally does not bind the State. *Gen. Motors Corp. v. Limbach*, 67 Ohio St.3d 90, 92 (1993). RHC Realty asserts that there is a longstanding administrative practice to allow a lease to satisfy the “direction or control” requirement, but that is *not* the case and RHC Realty has not provided any evidence to support its naked assertion. Thus, the “direction or control” requirement of R.C. 5709.121(A)(2) is not satisfied and charitable exemption is defeated for this reason alone.

Second, RHC Realty has failed to show that the property is used “in furtherance of or incidental to” RHC Realty’s allegedly charitable purpose. As discussed in the Commissioner’s opening brief, at pages 42-43, the “in furtherance of or incidental to” language, like any tax exemption statute, must be strictly construed to give meaning to the entire statutory scheme. R.C. 1.47(B); *Church of God in N. Ohio, Inc.*, 124 Ohio St.3d 36, 2009-Ohio-5939, at ¶ 30. If R.C. 5709.121(A)(2) were read as broadly as RHC Realty suggests, then another charitable exemption, R.C. 5709.12, would be swallowed-up and rendered a nullity.

Still, RHC Realty argues that any use of property that bears a “substantive relationship” to the owner’s purposes satisfies the “in furtherance or incidental to” requirement. To RHC Realty, the statutory term “exclusive” use does not include a requirement for frequency or duration of charitable use of property. So RHC Realty argues, just “any” “use in furtherance or incidental to” the owner’s charitable purpose qualifies for exemption.

Unfortunately for RHC Realty, a strict standard for “exclusive” charitable use must be applied. *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 16. In *Bethesda Healthcare, Inc. v. Wilkins*, for example, a health club that offered free scholarships did not provide a sufficiently high number of scholarships to qualify for exemption. 101 Ohio St. 3d

420, 2004-Ohio-1749, ¶ 39. “Any” *de minimus* amount of charitable activity was insufficient to satisfy the strict “exclusive” use standard under R.C. 5709.121.

To argue differently, RHC Realty, once again, relies on the *Kollel* case. But that case does not even apply the “in furtherance of or incidental to” requirement or even decide exemption, instead remanding the case to the BTA to apply the correct standard. *Kollel* certainly does not stand for relaxing the strict construction standard of “exclusive” charitable use.

As discussed, the 1% of total DCI service revenues written off that potentially constitute charity care for 2006 does not rise to the level of “exclusively” charitable. RHC Realty’s core leasing activity and ancillary activities likewise fail the “exclusive” charitable use standard. To the extent RHC Realty conducts any charitable activity at all, it is *de minimus* in nature and fails to satisfy a strict construction standard for “exclusive” charitable use.

For these reasons, RHC Realty’s use of the property does not satisfy the requirements for “exclusive” charitable use pursuant to R.C. 5709.121(A)(2).

CONCLUSION

Based upon the foregoing, this Court should reverse the BTA’s clearly unreasonable and unlawful decision holding that RHC Realty’s property is entitled to charitable exemption. Under this Court’s well-established precedent, most notably *Dialysis Clinic, Inc.*, the subject property fails to qualify for charitable exemption pursuant to R.C. 5709.12 and R.C. 5709.121.

Respectfully submitted,



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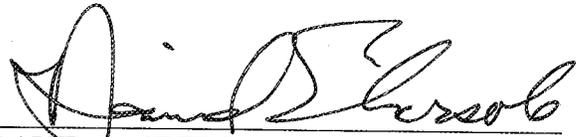
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Appellant Tax Commissioner's Reply Brief* was served upon the following by U.S. regular mail on this 24th day of December, 2014:

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

DAVID D. EBERSOLE (0087896)
Assistant Attorney General

OHIO BOARD OF TAX APPEALS

Christian Ministires, Inc.,)	CASE NO. 2012-2213
)	
Appellant,)	(REAL PROPERTY TAX EXEMPTION)
)	
vs.)	DECISION AND ORDER
)	
Joseph W. Testa, Tax Commissioner)	
of Ohio,)	
)	
Appellee.)	

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Entered **MAR 13 2014**

Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

Appellant appeals from a final determination of the Tax Commissioner in which he denied exemption to certain real property, i.e., parcel numbers 233-0002-0045-00 and 233-0002-0094-00, located in Hamilton County, Ohio. We proceed to consider the matter upon the notice of appeal, the statutory transcript certified by the commissioner, the record of the hearing before this board, and the parties' briefs.

The subject property is owned by appellant, Christian Ministries, Inc., and used by the Cincinnati Black Theatre Company (CBTC) pursuant to a contractual arrangement. CBTC uses the property to house its administrative offices, and to practice and build sets for its theatrical productions, which are held at various other locations, and for various arts classes. Appellant applied for exemption from real property taxation under R.C. 5709.12, which provides that "[r]eal *** property belonging to institutions that is used exclusively for charitable purposes shall be

exempt from taxation” and R.C. 5709.121,¹ which provides that “[r]eal property *** belonging to a charitable *** institution *** shall be considered as used exclusively for charitable or public purposes by such institution *** if***:

“(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:

“(a) As a community or area center in which presentations in music, dramatics, the arts, and related fields are made in order to foster public interest and education therein;

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

“(2) It is made available under the direction and 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.”

The commissioner denied exemption under those sections, stating:

“Although the applicant may participate in many charitable and worthwhile activities, it is a religious institution, and therefore is not an eligible lessor under the terms of this statute. The Ohio Supreme Court recently reaffirmed this interpretation in *First Baptist Church of Milford v. Wilkins* (2006), 110 Ohio St.3d 496, in which it held that the exemption under R.C. 5709.121 is not available to religious organizations. Therefore, although the building may be used for a charitable purpose, it could not qualify for exemption because it is owned by Christian Ministries, Inc., a religious organization not contemplated under the lease provisions of R.C. 5709.121.”

Appellant thereafter appealed to this board, arguing that the commissioner misreads *First Baptist Church*, supra; instead, it asserts, the court in that case held that religious

¹ Appellant also applied for exemption under R.C. 5709.07, which exempts “[h]ouses used exclusively for public worship.” The commissioner denied exemption thereunder, and appellant has not raised any error with that determination on appeal.

institutions may qualify for exemption under R.C. 5709.12. At this board's hearing, appellant presented the testimony of Reverend O'Neal, administrator of Christian Ministries, Inc., and Eddy Sherman, a member of CBTC's advisory board, who testified about the relationship between the two entities and the use of the subject property.

In our review of this matter, we are mindful that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. Consequently, it is incumbent upon a taxpayer challenging a determination of the commissioner to rebut the presumption and to establish a clear right to the requested relief. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. In this regard, the taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

The court in *First Baptist Church*, supra, considered an application for exemption under circumstances similar to those in this matter. There, First Baptist Church of Milford, a religious institution, owned property that was used by another entity – Bearing Precious Seed – Milford, Inc. (“BPS”) – to operate a print shop. The court acknowledged that “[o]wnership by a religious institution does not disqualify property from being considered for exemption under R.C. 5709.12,” and, if the religious institution used the property exclusively for charitable purposes, then the property could be exempt under R.C. 5709.12. *Id.* at 498. However, where a religious institution seeks exemption based on the use of the property by a separate institution, it is not entitled to exemption under R.C. 5709.12, and, instead, the owner must justify exemption under one of the situations described in R.C. 5709.121. It is clear in this case that appellant does not use the subject property. The property therefore cannot qualify for exemption under R.C. 5709.12, and we turn to R.C. 5709.121.

Because appellant appears to have no direction or control over CBTC's use of the property, we are limited in our analysis to R.C. 5709.121(A)(1). Although appellant and CBTC do not have a formal, written lease agreement, it is clear from the

record that they have a verbal contractual agreement whereby CBTC pays the mortgage and utilities in exchange for its exclusive use of the property. Upon review of the limited evidence before us regarding the actual use of the subject property, however, we do not find that the use of the property meets the requirements of either R.C. 5709.121(A)(1)(a) or R.C. 5709.121(A)(1)(b). Reverend O'Neal and Mr. Sherman testified at this board's hearing that none of CBTC's productions are held at the subject property, and that few of the fee-based classes are held there. While Mr. Sherman testified generally that fees could be waived based on need, he was not familiar with any specific policies or circumstances. It appears that the property is mainly used for practices of its productions, set building, storage, and administration. Given the limited use of the property and the lack of evidence regarding any "charitable" use, we find that the property is not entitled to exemption under R.C. 5709.121.²

Based upon the foregoing, we find that appellant has failed to satisfy its burden to prove that the commissioner's determination was in error. Accordingly, the final determination must be, and hereby is, affirmed.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



A.J. Groeber, Board Secretary

² We acknowledge that, in one instance, this board previously found that a community arts center was entitled to exemption under R.C. 5709.121(A). In *Arts Collinwood v. Testa* (Aug. 9, 2013), BTA No. 2012-Q-1009, unreported, the property at issue was used for "an after-school arts program, for community groups' meetings at no cost, rehearsals, theatrical performances, *** volunteer activities," and art exhibitions. *Id.* at 2-3. Here, the record indicates that few of CBTC's arts classes are held at the property and, even those that are held on the property are fee-based.