2004-18

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hon. Michael J. Smolenski, Presiding Justice

WEXFORD MEDICAL GROUP,

Petitioner-Appellant,

v

CITY OF CADILLAC,

Respondent-Appellee.

Supreme Court No. 127152
Court of Appeals No. 250197
MTT No. 276304

BRIEF ON APPEAL OF AMICI CURIAE MICHIGAN MUNICIPAL LEAGUE AND MICHIGAN TOWNSHIPS ASSOCIATION IN SUPPORT OF RESPONDENT-APPELLEE

(ORAL ARGUMENT REQUESTED)

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BASIS OF JURISDICTION

Amici Curiae accepts and incorporates the Jurisdictional Statement of Respondent-Appellee. Further, Amici state that this Court has jurisdiction and authority to consider this Brief pursuant to MCR 7.306(D) and the Order of this Court entered May 12, 2005.

STATEMENT OF QUESTIONS PRESENTED

I. **DID THE MICHIGAN TAX TRIBUNAL AND THE MICHIGAN COURT OF APPEALS ERR IN HOLDING THAT PETITIONER-APPELLANT WAS NOT EXEMPT FROM AD VALOREM TAXATION?**

Petitioner-Appellant answers "yes."

Respondent-Appellee answers "no."

Michigan Tax Tribunal answers "no."

Court of Appeals answers "no."

Amici Curiae Municipal League and Michigan Townships Association answer, "no."

II. **DID THE MICHIGAN TAX TRIBUNAL AND THE COURT OF APPEALS IMPERMISSIBLY CREATE A THRESHOLD TEST CONCERNING THE MEANING OF THE PHRASES "CHARITABLE INSTITUTION" AND "FOR PUBLIC HEALTH PURPOSES" AS USED IN MCL 211.7o, 211.9(a), AND 211.7r?**

Petitioner-Appellant answers "yes."

Respondent-Appellee answers "no."

Michigan Tax Tribunal answers "no."

Court of Appeals answers "no."

Amici Curiae Municipal League and Michigan Townships Association answer, "no."

COUNTER-STATEMENT OF FACTS

Amici Curiae accepts and incorporates the Counter-Statement of Facts set forth in the Brief of Respondent-Appellee.

INTRODUCTION

The Michigan Municipal League ("League") is a Michigan non-profit corporation whose purpose is the improvement of municipal government through cooperative effort. Michigan Municipal League membership includes 515 of the 533 cities and villages in Michigan, 83 percent of which are members of the Michigan Municipal League Legal Defense Fund. The Fund represents members in litigation of statewide significance.

The Michigan Townships Association ("Association") is a Michigan non-profit corporation that consists of 1,235 Michigan townships (including both general law and charter townships). The Association provides education, information, and guidance to township officials for the more efficient and knowledgeable administration of township government.

The League and Association requested leave to file a Brief in this matter because the exemption sought in this case from property tax granted for property under MCL § 211.7r; and MCL § 211.7o, involve claims for tax exemption which are of great importance to municipalities throughout the state of Michigan.

Petitioner-Appellant seeks to extend these exemptions to the otherwise taxable real and personal property owned by a fairly typical family medical practice. If this expansion were accepted, it could easily, by judicial action, be further expanded to the property of not only private doctor's offices, but to dentists, opticians, chiropractors, fitness centers and perhaps even law offices and other service providers who work for less than they would like to charge. Such an expansion goes well beyond original

legislative intent. Amici urge this Court to reject the arguments of Petitioner-Appellant and affirm the Michigan Tax Tribunal and Court of Appeals.

ARGUMENT

I. THE MICHIGAN TAX TRIBUNAL AND THE MICHIGAN COURT OF APPEALS DID NOT ERR IN DENYING AD VALOREM TAX EXEMPTION TO THE PROPERTY OF PETITIONER-APPELLANT.

A. Standard of Review.

Appellate review of Tax Tribunal decisions is limited. *Meadowlanes Ltd Dividend Housing Ass'n* v *City of Holland*, 437 Mich 473; 473 NW2d 636 (1991). When fraud is not alleged, appellate courts are limited to determining whether the Tribunal has made an error of law or adopted a wrong principle. *Meadowlanes, supra*, at 482-3. Const 1963, art 6, § 28. *Michigan Bell Telephone* v *Dep't of Treasury*, 445 Mich 470; 518 NW2d 808 (1994). All factual findings are final and are upheld on appeal if supported by competent, material, and substantial evidence. *Meadlowlanes, supra*; *Georgetown Place Co-op* v *City of Taylor*, 226 Mich App 33; 572 NW2d 232 (1997).

Competent, material, and substantial evidence is more than a scintilla of evidence, although it may be substantially less than a preponderance of evidence. *Jones & Laughlin Steel Corp* v *City of Warren*, 193 Mich App 348; 483 NW2d 416 (1992). This standard requires only evidence "which a reasonable mind would accept as adequate to support a decision." *McBride* v *Pontiac School Dist (On Remand)*, 218 Mich App 113, 123; 553 NW2d 646 (1996) *lv den*. "Under this test, it does not matter that the contrary position is supported by more evidence, that is, which way the evidence preponderates, but only whether the position adopted by the agency is supported by evidence from which legitimate and supportable inferences were drawn." *Id.*; *Sweepter, Inc* v *Scio Twp*, 225 Mich App 497, 502; 571 NW2d 553 (1997).

The weight to be accorded to particular evidence is within the discretion of the Tax Tribunal. *Great Lakes* v *Ecorse*, 227 Mich App 379; 576 NW2d 667 (1998) at 404. It is not an error of law for the Tribunal to reject the evidence of a petitioner. *Id. Jones & Laughlin, supra.*

Moreover, as to issues of statutory interpretation, courts generally defer to the Michigan Tax Tribunal's interpretation of a statute which it is delegated to administer. *Thrifty Royal Oak, Inc* v *Royal Oak*, 208 Mich App 707; 528 NW2d 205 (1995).

Tax exemption statutes are strictly construed in favor of the taxing authority. *Michigan United Conservation Clubs* v *Lansing Twp*, 423 Mich 661; 378 NW2d 737 (1985)*; St. Paul Lutheran Church* v *City of Riverview*, 165 Mich App 155; 418 NW2d 412 (1987) *lv den.* Courts have often quoted the following passage from 2 Cooley on Taxation (4th ed), § 672, pp 1403-1404, in relation to this strict construction requirement:

> An intention on the part of the legislature to grant an exemption from the taxing power of the state will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used, for it is a well-settled principle that, when a specfic [sic] privilege or exemption is claimed under a statute, charter or act of incorporation, it is to be construed strictly against the property owner and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly contrued [sic] and cannot be made out by inference or implication but must be beyond reasonable doubt. Cited by *Detroit* v *Detroit Commercial College*, 322 Mich 142, 148-49; 33 NW2d 737 (1948).

The entitlement of a particular class of property to exemption based upon a specific statute must be proved beyond reasonable doubt. However, whether the property of a particular petitioner is within a tax exempt classification of property must

be established by a preponderance of the evidence. See *Holland Home* v *City of Grand Rapids*, 219 Mich App 384; 557 NW2d 118 (1996). Therefore, in this case, Petitioner-Appellant was obligated to establish by a preponderance of the evidence that the property used in what is essentially a private practice physicians' office is within the category of exempt property recognized by the public health or charitable purposes exemptions.

B. <u>The overriding premise of ad valorem taxation is uniformity</u>.

The Michigan Constitution, by Const 1963, art 9, § 3, requires that the legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property. Uniformity as used in the Michigan Constitution guarantees equality of the tax burden. *Plymouth Twp* v *Wayne Co*, 137 Mich App 738; 359 NW2d 547 (1984). Under the uniformity of taxation clause, the controlling principle is one of equal treatment of similarly situated taxpayers. *Armco Steel Corp* v *Dep't of Treasury*, 419 Mich 582; 358 NW2d 839 (1984). Even the legislature's power over exemption from taxation is limited in that the legislature may not make clear and hostile discriminations between particular persons and classes of persons. *U.S. Cold Storage* v *Detroit Bd of Assessors*, 349 Mich 81; 84 NW2d 487 (1957).

Granting exemption to the property of a private family medical practice would violate the mandate of uniformity of taxation. Similarly situated taxpayers, i.e. other private family practices, merely by virtue of their corporate ownership, would be disparately taxed even though the nature of their activities is similar, if not identical.

Any provider in prevention or treatment of health conditions and/or providing care to persons for whom payment received is less than the physician would like to charge, including opticians, chiropractors, dentists, even fitness centers, could, with corporate non-profit filing, seem to qualify for ad valorem tax exemption. This clearly was not the intent of the legislature and should be rejected by this Court.

II. THE MICHIGAN TAX TRIBUNAL AND THE MICHIGAN COURT OF APPEALS DID NOT IMPERMISSIBLY CREATE A THRESHOLD TEST.

A. It is the task of the Michigan Tax Tribunal to administer the property tax laws.

The standard used by the Tribunal and Court of Appeals was not an error of law or a wrong legal principle. In granting leave, this Court asked, "whether the Tax Tribunal or judiciary may impose a threshold level of charitable care or public health services when the legislature has not done so." In other words, have prior courts and the Tax Tribunal construed the phrases "charitable institution" and "for public health purposes" to include requirements not contemplated by the General Property Tax Act.

A statute that provides rights to some individuals, while excluding others, often requires judicial determination as to who meets the threshold of inclusion. The basic task of interpreting the threshold that the legislature set for a taxpayer to receive either charitable institution or public health exemption status is for the Tax Tribunal and the judiciary. Determining the legislative threshold for inclusion within a statutory framework is a common judicial undertaking. For example, this Court recently examined the Michigan No-Fault Insurance Act, at MCL § 500.3135(1), to determine whether an individual attempting to obtain the rights granted by that act satisfied the

"serious impairment of bodily function" threshold. *Kreiner* v *Fischer*, 471 Mich 109; 683 NW2d 611 (2004). Under the No-Fault Act, the court has been told by the legislature that the phrase "'serious impairment of bodily function' contains the following components: an objectively manifested impairment, of an important body function, and that affects the person's general ability to lead his or her normal life." *Id.* at 121. The court in *Kreiner,* therefore, had to construe the terms "general ability" and "lead" so as to give effect to the legislature's intent. *Id.* at 130. In considering the definition of the modifier *general*, the court stressed that the word *general* connotes the phrase "for the most part." *Id.* at 130. In considering the definition of *lead*, the court noted its meaning - "to conduct or bring in a particular course." *Id.* at 130-31. From that, the court determined the legislative intent is to be carried out by setting the threshold for receipt of rights under the act thusly: "the objectively manifested impairment of an important body function must affect the *course* of a person's life." *Id.* at 130-31.

The court must, when interpreting a statute, ascertain the legislative intent that may reasonably be inferred from the statutory language itself. *Sotelo* v. *Grant Twp*, 470 Mich 95, 100; 680 NW2d 381 (2004). When the language of a statute is unambiguous, the legislature's intent is clear and judicial construction is neither necessary nor permitted. *Koontz* v *Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Further, the court accords undefined statutory terms their plain and ordinary meanings and may consult dictionary definitions in such situations. *Halloran v. Bhan,* 470 Mich 572, 578; 683 NW2d 129 (2004). If the legislature has acquiesced over a period of years with the court's own interpretation of a statute, then the judicial power to

reinterpret the statute ought to be exercised with great restraint. See *Dean v Chrysler Corp*, 434 Mich 655, 664; 455 NW2d 699 (1990); *Smith* v *Lawrence Baking Co*, 370 Mich 169, 177; 121 NW2d 684 (1963).

B. <u>The Tribunal's threshold for receipt of exemption under MCL § 211.7o and § 211.9(a) comports with legislative intent</u>.

MCL § 211.7o(1) states, in relevant part:

> Real or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which it was incorporated is exempt from the collection of taxes under this act.

MCL 211.9(a) states, in relevant part, that the following property is exempt:

> The personal property of charitable, educational, and scientific institutions incorporated under the laws of this state.

The phrase "charitable institution" is not defined in this statutory section; the legislature gives no more specific guidance other than that a "charitable institution" has the right to tax exempt status if its property is used solely for its non-profit corporate purposes.

The Tribunal and the Court of Appeals determined that, *taken as a whole*, the Petitioner-Appellant's activities did not rise to the level of charity that would justify classification as a *charitable institution*. (Michigan Tax Tribunal Op & Judgment, July 17, 2003; Michigan Court of Appeals Op, August 24, 2004.) Michigan courts have long held that the proper focus in a case construing the phrase charitable institution is whether the institution's "activities, ***taken as a whole,*** constitute a charitable gift for the benefit of the general public without restriction or for the benefit of an indefinite number of persons." *Michigan United Conservation Clubs* v *Lansing Twp*, 423 Mich 661, 673;

378 NW2d 737 (1985) (emphasis added).[1] The judiciary's interpretation implicitly treats the phrase *charitable institution* as compound – like the compound phrases nursing home, bus depot, or maternity ward.

This threshold test to determine whether a taxpayer is a *charitable institution*, call it the taken-as-a-whole test, requires the fact finder to determine whether it is charity which characterizes a petitioner's institution. This test comports with basic principles of statutory interpretation:

(1) The legislative intent to be served by statute is instructive in giving a phrase in the statute its intended import. *Dean v Chrysler Corp*, 434 Mich 655, 644; 455 NW2d 699 (1990).[2]

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[1]*OCLC Online Computer Library Center, Inc.* v *City of Battle Creek*, 224 Mich App 608, 615; 569 NW2d 676 (1997); *Chauncey and Marion Deering McCormick Foundation* v *Wawatam Twp*, 196 Mich App 179, 183; 492 NW2d 751 (1992); *Moreland* v *Ravenna Conservation Club, Inc.*, 183 Mich App 451, 458; 455 NW2d 331 (1990); *Promed Health* v *Kalamazoo*, 249 Mich App 490, 499; 644 NW2d 47 (2000); *Traffic Safety Ass'n of Macomb Co, Inc.* v *City of Fraser*, unpublished opinion per curiam of the Court of Appeals, decided July 19, 2005 (Docket No. 252269); *Great Lakes Community Nonprofit Housing Corp* v *City of Howell*, unpublished opinion per curiam of the Court of Appeals, decided June 16, 2005 (Docket No. 254247); *Healthlink Medical Transportation Services, Inc.* v *City of Taylor*, unpublished opinion per curiam of the Court of Appeals, decided February 15, 2005 (Docket No. 249969); *Lutheran Social Services of Michigan* v *Bloomfield Twp*, unpublished opinion per curiam of the Court of Appeals, decided September 11, 2003 (Docket No. 239460); *Michigan Wildlife and Forest Preservation Foundation* v *Dover Twp*, unpublished opinion per curiam of the Court of Appeals decided June 25, 1999 (Docket No. 209573); *Mt. Zion Temple* v *Waterford Twp*, unpublished opinion per curiam of the Court of Appeals, decided March 3, 1998 (Docket No. 197707); *Pierce* v *Baltimore Twp*, unpublished opinion per curiam of the Court of Appeals, decided November 2, 2004 (Docket No. 247422, 247425).

[2]"In the interpretation of statutes, the legislative will is the all-important or controlling factor. Indeed, it is frequently stated in effect that the intention of the legislature constitutes the law. Accordingly, the primary rule of construction of statutes is to ascertain and declare the intention of the legislature, and to carry such intention into effect to the fullest degree. A construction adopted should not be such as to nullify,

(2) The legislature intended to give exemptions to some but not all taxpayers. It is not plausible that the legislature wrote the phrase charitable institution to mean "an institution that does any charity" rather than an institution that, taken as a whole, is engaged in its charitable activities.

(3) The purpose was to signal the type of institution that qualifies for exemption, not to signal to an organization what it must do to earn an exemption.

Since Tax exemption statutes are strictly construed in favor of the taxing authority, (*Michigan United Conservation Clubs* v *Lansing Twp*, 423 Mich 661; 378 NW2d 737 (1985)), it is proper to look to the facts of the taxpayer's practice, taken as a whole, not incidental activities in which it may partake. To put it another way, a taxpayer must be a charitable institution and not an institution that happens to participate in some charity.

The doctrine of *noscitur a sociis* is helpful in discerning the meaning of the term charitable institution in this statute. This doctrine is premised on the notion that "the meaning of statutory language, plain or not, depends on context." *King* v *St. Vincent's Hosp* , 502 US 215, 221; 112 S Ct 570; 116 LEd2d 578 (1991) [FN9]. Thus, under the doctrine of *noscitur a sociis,* "a word or phrase is given meaning by its context or setting." *Koontz* v *Ameritech Services, Inc*, 466 Mich 304, 318; 645 NW2d 34 (2002), (citations omitted). As a general matter, "words and clauses will not be divorced from those which precede and those which follow." *Sanchick* v *State Bd of Optometry,* 342

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destroy, or defeat the intention of the legislature." *Dean*, *supra*, quoting 73 Am Jur 2d, Statutes, § 145, p 351.

Mich 555, 559; 70 NW2d 757 (1955). When construing a series of terms such as "care, recovery, or rehabilitation," we are guided by the principle "that words grouped in a list should be given related meaning." *Third Nat'l Bank in Nashville* v *Impac Ltd, Inc,* 432 US 312, 322; 97 S Ct 2307, 53 L Ed 2d 368 (1977). Charitable, scientific, and educational are listed together as modifiers for the compound phrases they make with the word "institution" – charitable institution, educational institution, scientific institution. Like the compound phrases, law office or gas station, these phrases describe a specific type of institution whose essential purpose, taken as a whole, is provided in the modifier of the phrase. Such compound phrases take their meaning from the nature of the entity described, not incidental activities in which it might partake.

Moreover, as to issues of statutory interpretation, deference should be afforded to the Michigan Tax Tribunal's interpretation of the General Property Tax Act. *Thrifty Royal Oak* v *Royal Oak*, 208 Mich App 707; 528 NW2d 205 (1995). The Tribunal looks to the nature of an organization as a whole, not its incidental activities to ascertain whether a taxpayer is a *charitable institution.*

Long acquiescence by the legislature in the judiciary's definition of a phrase should not be overturned. *Dean, supra*, at 644. Courts have been analyzing entitlement to tax exemption by examining the institution's nature, taken as a whole, for many years because this is the only way to effect legislative intent.

C. The Tribunal's threshold for receipt of exemption under MCL § 211.7r comports with legislative intent.

MCL § 211.7r states in pertinent part:

The real estate with the buildings and other property located on the real

estate on that acreage, owned and occupied by a nonprofit trust and used for hospital or public health purposes is exempt from taxation under this act . . .

The Tribunal and the Court of Appeals did not err as a matter of law in determining that the legislative threshold has been provided in the plain language of the statute. The phrase to be construed is "for public health purposes." As ever, the role of the court is to accord undefined statutory terms their plain and ordinary meanings, and not to reinterpret the terms. *Griffith* v *State Farm Mutual Automobile Ins Co*, 472 Mich 521; 697 NW2d 895 (2005).

The Tribunal and the Court of Appeals rely on the following definition of "public health"-- "The art and science of protecting and improving community health by means of preventative medicine, health education, communicable disease control, and the application of the social and sanitary sciences." *Rose Hill Center, Inc* v *Holly Twp*, 224 Mich App 28, 33; 568 NW2d 232 (1997). Purpose, according to Webster, is defined as "the object for which something exists or is done." *Webster's New 20th Century Dictionary, Unabridged*, 2nd Ed (1957).[3] This definition implies that the nature of the organization is determined by that which is its purpose. To qualify for exemption then, the purpose (defining characteristic) of the taxpayer seeking exemption must be public health.

The Tribunal found as fact in this case:

> While it does treat a great variety of medical conditions, this commitment to preventative medicine cannot be characterized as for public health purposes. The treatment of patients is inherent to the medical profession.

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[3]*The American Heritage Dictionary of the English Language*, 1969, defines purpose as, "The object to which one strives or for which something exists."

. . . (Tribunal Op, p 30)

> Likewise, the Tribunal cannot grant a public health exemption based on the health clinics and education classes it offers. While undoubtedly valuable to those taking advantage of the opportunity, they are not a substantial part of practitioner's practice. (Tribunal Op, p 30)

Incidental benefits to the public health which result from a doctor treating his or her patients do not make public health the *purpose* of the doctor's work or the purpose of the doctor's use of real and personal property. As a factual, not legal, matter, the Tribunal can find that a fairly typical family medical practice exists for health purposes to be sure, the health of the patients, but not for public health purposes. Had the legislature meant for a fairly typical family medical practice to qualify for exemption, or any other organization whose activities incidentally affect public health, it would not have needed to include the word "public" in the statute. It is a cardinal rule of interpretation that statutes are not to be interpreted to make any word superfluous. *Robertson* v *Daimler Chrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002).

As noted earlier, the public health purposes exemption was examined in the case of *Rose Hill Center, Inc.* v *Holly Twp*, 224 Mich App 28; 568 NW2d 232 (1997). The *Rose Hill* petitioner was a licensed mental health care provider operating a 24-hour inpatient treatment facility for approximately 30 persons on the property for which exemption was sought.

The *Rose Hill* court noted there was no definition of "public health purposes" in the exemption statute and looked to The American Heritage Dictionary: Second College Edition, the following definition of "public health":

> [t]he art and science of protecting and improving community health by

means of preventative medicine, health education, communicable disease control, and the application of the social and sanitary sciences. *Id.* at 33.

The Court affirmed the Tribunal's finding that the facility was operating for public health purposes.

Petitioner-Appellant contends that, under the *Rose Hill* holding, it should be found to be serving a public health purpose. However, the Tribunal in this case found there were significant dissimilarities between Petitioner-Appellant and the Rose Hill facility. Petitioner-Appellant, unlike *Rose Hill*, does not provide 24-hour inpatient care and instead is conducted as a typical private family practice. Moreover, as noted in *Wellness Plan* v *City of Oak Park*, 2003 WL 21517766 (Michigan Tax Tribunal), the Rose Hill facility was run as an in-patient "asylum" for mental health patients. Such facilities, akin to hospitals, have long been construed to operate for public health purposes in light of their round-the-clock care services. *Id.* citing 71 Am Jur 2d § 391.

Therefore, although serving a *health* purpose, Petitioner-Appellant does not serve a *public health* purpose. Additionally, providing services to patients insured through Medicare or Medicaid does not transform the purpose for which a medical practice uses its property into use for public health purposes. After all, the services it provides are paid for according to known payment terms meant to approximate cost and budgeted into Petitioner-Appellant's business operations as such. Medicare/Medicaid patients are simply a component of Petitioner-Appellant's medical practice.

At page 17 of Petitioner-Appellant's brief, the claim is made, "Nor is there any dispute as to the amount of free charity care or the almost $2 million that Wexford lost

because of the below cost care Wexford provided indigent and elderly Medicaid and Medicare patients during 1991 through 2001 alone. App at 9a. 76a-77a, 115a." This is an interesting claim. The only record cite included in Appellant's Appendix is page 77a (p 44 of the transcript) which contains testimony that Petitioner-Appellant lost $575,000 in 1999, $731,000 in 2000, $673,000 in 2001 and $75,000 January through March, 2002. The witness did not say that the loss was caused by Medicaid and Medicare. The witness said that, in his opinion, the loss would have been "smaller" if Medicaid and Medicare had paid more. There is no evidence that Medicaid and Medicare caused Petitioner-Appellant's alleged losses. A business loss can be caused by many factors including, but not limited to, excessive overhead expenses, ineffective management, overcompensation of executives and physicians, excessive rent, inadequate patient numbers, caused by poor location or lack of community acceptance. From this witness's testimony it can be pointed out with equal or greater certainty that but for Medicare and Medicaid, Petitioner-Appellant's business losses would have been larger.

The amount of fees for services paid by Medicaid and Medicare are calculated based upon objective standards which are continually updated. The formula for computing Medicare Part B payments is set forth in 42 CFR § 414.20 which provides:

> The fee schedule amount for a participating supplier for a physician service as defined in § 414.2 is computed as the product of the following amounts:
>
> (1) The RVUs [relative value units] for the service.
> (2) The GAF [geographic area factor] for the fee schedule area.
> (3) The CF [conversion factor].

Relative value units are defined in 42 CFR 414.22 which provides that practice expense RUVs are based entirely on relative practice expense resources and include,

beginning in the year 2000, relative malpractice insurance resources. The geographic area factor is defined in 42 CFR 414.26, which attempts to balance the relative value a physician's work effort in each of the different fee schedule areas and the national average of that work effort. The methodology underlying Medicare and Medicaid's continually updated established fee schedules is explained in the Federal Register, Volume 69, Number 219, page 66240, which provides in part:

> Further legislation affecting resource-based practice expense RVUs was included in the Medicare, Medicaid and State Child Health Insurance Program (SCHIP) Balance Budget Refinement Act of 1999 (BBRA) (Pub. L. 106-113) enacted on November 29, 1999. Section 212 of the BBRA amended section 1848(c)(2)(C)(ii) of the Act by directing us to establish a process under which we accept and use, to the maximum extent practicable and consistent with sound data practicies, data collected or developed by entities and organizations. These data would supplement the data we normally collect in determining the practice expense component of the physician fee schedule for payments in CY 2001 and CY 2002. (The 1999 and 2003 final rules (64 FR 59380 and 68 FR 63196, respectively, extended the period during which we would accept supplemental data.)
>
> * * * * * * * *
>
> The methodology was based on an assumption that current aggregate specialty practice costs are a reasonable way to establish initial estimates of relative resource costs for physicians' services across specialties.

The assertion that Medicare and Medicaid patients are charity cases is clearly wrong. Simply because Medicare and Medicaid pay less than the amount which the physician would like to charge, he or she is not providing charity. In fact, Petitioner-Appellant testified that even private health insurance providers pay less than the physicians would like to charge. For example, for self-pay patients, Petitioner-Appellant budgets 83% recovery of what it would like to charge, and for Blue Cross patients, only 79% recovery of what the physicians would like to charge. (Op & Judgment, p 5). The

notion that Petitioner-Appellant's doctors have as their primary purpose the emulation of Mother Teresa could be humorous were it not so egregiously disingenuous.

D. The holdings of the Tax Tribunal and the Court of Appeals concerning the claim for charitable purposes exemption are appropriate.

Non-profit Section 501(c)(3) status is not determinative of ad valorem tax exemption. In *Ladies Literary Club* v *City of Grand Rapids*, 409 Mich 748; 298 NW2d 422 (1980), the Michigan Supreme Court stated, at p 753:

> Nevertheless, we note in passing that the Tax Tribunal was correct in refusing to make a presumption in favor of exemption based on the Internal Revenue Service ruling. M.C.L. 211.7(d); M.S.A. 7.7(d) is narrower in scope that s [sic] 501(c)(3). Therefore no presumption may be drawn. See American Concrete Institute v State Tax Comm., 12 Mich. App. 595, 606, 163 NW2d 508 (1968).

To carry its burden of proof, a petitioner must establish that its organization and activities, taken as a whole, constitute a charitable gift for the benefit of the general public without restriction or for the benefit of an indefinite number of persons. *Ladies Literary Club, supra.*

The charitable purpose exemption under MCL § 211.7o was examined in *Holland Home* v *City of Grand Rapids*, 219 Mich App 384; 557 NW2d 188 (1996). The Court defined charity, at page 389, as follows:

> [C]harity . . . [is] a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.

In *Holland Home*, the petitioner, which was a Michigan non-profit association

owning licensed homes for the aged, argued that its "gift" was continuing care for elderly persons even when their financial resources were exhausted. The court rejected this argument and affirmed the Tribunal's denial of exemption holding that, if the services were rendered pursuant to a contract of care, the definition of charity would not apply. They concluded that a "gift" required no pecuniary consideration. Further, the court noted that the facilities had not been shown by petitioner to be operated for indigent or infirm who had no means of support. There was no gift for an indefinite number of persons for the benefit of the general public. *Id.* In this case, as in *Holland Homes*, the charity policy of Petitioner-Appellant seems to require pecuniary consideration in that it calls for Petitioner-Appellant to accept Medicaid, Medicare and health insurance reimbursement. Petitioner-Appellant's "charity", like that in *Holland Homes*, seems to be a contract for care with pecuniary consideration. Therefore, as in *Holland Homes*, Petitioner-Appellant's claim to a charity exemption should be rejected.

The *Ladies Literary Club* v *City of Grand Rapids*, 409 Mich 748; 298 NW2d 422 (1980) holding also discussed the adequacy of charitable activities as a pre-condition of tax exemption holding that such activities must be conducted at a level which sufficiently relieves the government of burden in order to warrant exemption. The petitioner in that case was essentially a social club which happened to engage in some charitable activities. *Id* at 756. Similarly in this case, Petitioner-Appellant is essentially a private physicians' office which happens to engage in some incidental alleged charitable activities. This is not sufficient to warrant exemption. Petitioner-Appellant has not met its burden of proof in showing factually that it has relieved the government

of a burden. A couple thousand dollars of charity over a two year period, out of an annual budget of $10,000,000.00 does not allow a medical practice to be characterized as a charitable institution.

E. <u>The holdings of the Tax Tribunal and the Court of Appeals are consistent with the case law of other states.</u>

The application of the "public health/hospital" and "charitable" ad valorem tax exemption to the property of what is essentially a private family practice physician's office has been considered in other states. Therefore, it may be of assistance to this Court to consider how similar issues have been resolved by the appellate courts of these states.

In *Crittenden Hospital Ass'n* v *Crittenden County*, 330 Ark 767; 958 SW2d 512 (1997), the Supreme Court of Arkansas was faced with the issue of whether property used for a physicians' office was exempt from ad valorem taxation. In Arkansas, as in Michigan, there was a strong presumption in favor of taxing power and exemptions are strictly construed. In *Crittenden*, it was contended, as here, that the physicians' office served a public health and charitable purpose. The owner of the property was a non-profit corporation leasing the premises to physicians in private practice. The court held that there was no exemption from property taxation. The court recognized a charitable purpose exemption but found that a physicians' office building was not a "charitable enterprise". Further, the court rejected the argument that the public health purpose of the hospital which owned the office building could not function one without the other. Therefore, it was reasoned that the property did not serve a hospital or public health purpose.

In *Midwest Physician Group* v *Department of Revenue*, 304 Ill App 3d 939; 711 NE2d 381 (1999), the Illinois Appellate Court was asked to determine whether the property of a physicians' group used for administrative purposes was entitled to tax exemption. The physicians' group argued that they were entitled to a charitable purposes exemption. The appellate court affirmed the trial court which found that the organization, although organized as a Section 501(c)(3) corporation, was not a "charitable" organization for purposes of tax exemption. The court recognized that it was primarily a group of physicians charging for their services and paid compensation by the corporation.

As in Michigan, the Illinois court strictly construed exemption statutes. The court held that the case was distinguishable from those in which exemption had been found for hospitals and outpatient clinics where physicians were paid salaries below market levels, and care was dispensed to all regardless of ability to pay. The court also focused on the fact that the physicians at issue billed for their services and pursued collection of delinquent billings.

In *Grand Prairie Hospital Authority* v *Dallas Appraisal Dist*, 730 SW2d 849 (Texas, 1987), the Texas Court of Appeals was asked to review whether a medical office building, located adjacent to and owned by a hospital was exempt from property taxation. The building was in part leased to physicians who were on the hospital staff. The Court focused on the fact that a physician's private practice is by nature a commercial enterprise and not a use exclusively for the benefit of the public and held that it was taxable property.

In *St. Clare Hospital of Monroe Wisconsin, Inc.* v *City of Monroe*, 209 Wis 2d

364; 563 NW2d 170 (1997), the Wisconsin Court of Appeals considered a case similar to instant case. Petitioner was a non-profit corporation which purchased the assets of a clinic. Petitioner constructed a new building to house the clinic. The physicians working at the clinic did so pursuant to an employment contract. The court held that the medical building was taxable because it was essentially being used as a doctor's office. Doctor's offices were not within the statutory exemption allowed in Wisconsin to hospital property. Interestingly, the court held that the manner by which the medical building was owned was not determinative, stating that "a patient has no reason to know whether the medical practice is a for profit practice owned by the physicians or part of a non profit corporation. Rather whether a building is 'used as a doctor's office' depends on the nature of services provided and the manner in which these services are delivered. " *Id.* at 373. The court went on to observe, "We acknowledge that competitive pressures lead health care providers to consolidate and integrate their services. However, if the property tax exemption were extended to clinics owned and operated by nonprofit hospitals, similar privately owned-operated facilities would be at a competitive disadvantage." *Id* at 375. The Court refused to extend tax exemption when such an extension was a question for the legislature rather than the courts.

In *North Shore Medical Center, Inc.* v *Bystrom*, 461 So 2d 167 (Fla, 1984), the Court of Appeals for Florida considered whether a "charitable" tax exemption from ad valorem taxation should be granted to medical office building constructed by a hospital on its grounds. The court rejected the requested exemption noting that private physicians leased office space therein to conduct their private medical practices. The fact that the physicians were on staff at the hospital or that the office building benefitted

the hospital was not determinative.

In *City of Long Branch* v *Monmouth Medical Center*, 138 NJ Super 524; 351 A 2d 756 (1976), the New Jersey Supreme Court denied tax-exempt status to a medical/dental office building stating, even though owned by a non-profit hospital, that "[u]tilization of these buildings for the private practice of medicine and dentistry is purely and simply a private profit making activity and is in direct competition with the privately owned commercial rental buildings . . . " *Id* at 535. See also *Genesee Hospital* v *Wagner*, 47 AD 2d 37; 364 NYS 2d 934 (1975) for similar reasoning.

In *Milton Hospital and Convalescent Home* v *Bd of Assessors of Milton*, 360 Mass 63; 271 NE2d 745 (1971), the Supreme Court of Massachusetts held that the portion of the hospital building leased to and used as private physicians' offices was not entitled to a "charitable purposes" exemption from ad valorem taxation.

In the case of *Chisago Health Services* v *Comm'r of Revenue*, 462 NW2d 386 (Minn, 1990), the Minnesota Supreme Court considered whether an office building and outpatient clinic were entitled to ad valorem tax exemption. The property was owned by a non-profit hospital which had merged with a physician's group. The court seemed to base its decision to deny exemption in part on the fact that the outpatient facility did not have an open door policy, i.e. the clinic did not generally accept patients when they were unable to pay for services. In addition, the court was concerned about granting exemption due to the concept of uniformity of taxation, opining that such an exemption would tend to give an unfair competitive advantage to the exempted facility over similar facilities privately operated. The court found that the facility did not lessen the burden

of government in the overall field of health care in that it was operated essentially in the same manner as any private medical clinic, furnishing outpatient service at market level fees. Consequently, the court concluded that the property was not exempt under a "charitable purpose" analysis.

The authors of this brief have been able to locate only one case in which an appellate court has held that a medical office building was entitled to ad valorem tax exemption. In the case of *Rhode Island Hospital* v *City of Providence*, 693 A2d 1040 (RI, 1997), the medical building was owned by two non-profit hospitals. Approximately two-thirds of the office building was used for hospital purposes, and the remainder was leased to tenants including private physicians. The court in that case focused on the fact that the building was used predominately for hospital purposes.

Although case law precedent from other states is dependent upon construction of the statutory authority of that state, it is useful in that such cases are concerned with many of the same concerns that must necessarily interest this court, among them: (1) "charitable" activities as merely incidental to the primary activities of rendering services for pecuniary consideration; (2) providing an unfair competitive advantage to some healthcare providers and the implications for uniformity of taxation; and (3) private practice versus public health delivery.

F. <u>The Tax Tribunal's findings of fact are supported by the evidence in the record.</u>

The Tax Tribunal established the following:

Petitioner-Appellant is a non-profit corporation owned by Munson Healthcare and Trinity Health Care (Op & Judgment, pp 1, 2). Petitioner-Appellant acquired the subject

practice and property from Medical Arts Group, P.C., a for-profit corporation consisting of private physicians who provided private medical services to patients (O & Judgment, p 8). The nature of patient services provided by the practice remained substantially the same after its change to non-profit status (Op & Judgment, p 21-23 [covering testimony of Dr. Betts-Barbus]).

As to its charitable activities, the Tribunal found that the Petitioner-Appellant provided $2,400 worth of services during the relevant two year period (Op & Judgment, p 4, ¶ 13). During those same years Petitioner-Appellant had an annual budget of approximately $10,000,000.00 (Op & Judgment, p 4, ¶ 14). Petitioner-Appellant also accepts Medicare and Medicaid patients for which it is reimbursed for services provided (Op & Judgment, p 4, ¶ 15).

Based upon these facts, the Tribunal found that Petitioner-Appellant's use was not for a "public health purpose." The Tribunal found that the property was used primarily to conduct a "typical family medical practice, examining, consulting and treating patients." As such, the office was used for the private practice of family medicine and not for public health purposes (Op & Judgment, pp 30-31).

As to the charitable purpose exemption, the Tribunal found that Petitioner-Appellant's charitable acts were minimal when taken as a whole (Op & Judgment, p 25).

The Tribunal also found that the inherent affect upon public health of the treating physicians' practice does not make public health the purpose of the practice. Because the legal standard, the threshold, used by the Tribunal is not erroneous, the only way to set aside the rulings would be to conclude that these findings of facts were not supported by material, competent, and substantial evidence. The Petitioner-Appellant

does not claim the findings are wrong, it only disagrees with the conclusions drawn therefrom.

The Tribunal's findings of fact are supported by competent, material and substantial evidence in the record, and should be upheld by this court.

CONCLUSION

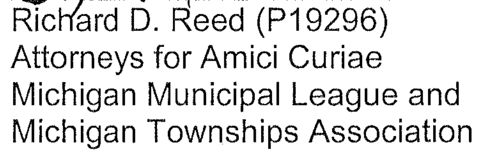
The factual findings of the Michigan Tax Tribunal are supported by competent, material and substantial evidence. The denial of exemption, pursuant to the charitable purposes and public health exemptions, is consistent with the language of the exemption statutes and longstanding consistent interpretation. Further, to expand exemption to include the property of what is essentially the office of private practice physicians would violate uniformity of taxation. The only way to avoid this would be to include the property of all private practice physicians, dentists, opticians, chiropractors and other similarly-situated taxpayers as exempt under the General Property Tax Act. Such an expansion would have devastating consequences for Michigan municipalities and would be well beyond legislative intent.

RELIEF REQUESTED

The decision of the Michigan Tax Tribunal and the Court of Appeals to deny exemption should be affirmed.

Respectfully submitted,

LEWIS REED & ALLEN, P.C.

DATED: August 10, 2005 By: 

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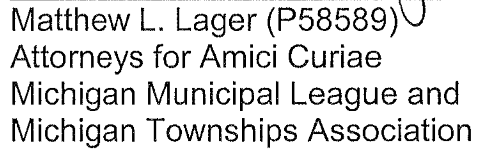
DATED: August 10, 2005 By: 

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