STATE OF MICHIGAN

IN THE COURT OF APPEALS

TRINITY HEALTH-WARDE LAB LLC,

Petitioner/Appellee,

v

PITTSFIELD CHARTER TOWNSHIP,

Respondent/Appellant.

Court of Appeals No. 328092

MTT Docket No. 455553

AMICI CURIAE BRIEF OF THE MICHIGAN TOWNSHIPS ASSOCIATION AND MICHIGAN MUNICIPAL LEAGUE IN SUPPORT OF APPELLANT PITTSFIELD CHARTER TOWNSHIP

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Dated: January 18, 2016

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STATEMENT OF APPELLATE JURISDICTION

Amici Curiae, Michigan Townships Association and Michigan Municipal League, concur with Appellant, Pittsfield Charter Township's Statement of Order Appealed From, Jurisdiction and Standard of Review contained in Appellant's Brief on Appeal. This Amici Curiae Brief is submitted pursuant to MCR 7.212(H) upon motion granted by this Honorable Court in its Order dated December 29, 2015.

This is an appeal from the June 4, 2015 Michigan Tax Tribunal (MTT or Tax Tribunal) Order Granting Petitioner's Motion for Partial Summary Disposition under MCR 2.116(C)(10), Order of Partial Dismissal, and Final Opinion and Judgment (MTT Opinion or Tax Tribunal Opinion).

STATEMENT OF QUESTIONS PRESENTED

1. WHETHER THE MICHIGAN TAX TRIBUNAL MISAPPLIED THE LAW AND ADOPTED WRONG PRINCIPLES IN DETERMINING THAT TRINITY HEALTH-MICHIGAN, AN ALLEGED NON-PROFIT CHARITABLE ENTITY, DOMINATED THE MANAGEMENT AND OPERATION OF THE FOR-PROFIT PETITIONER/APPELLEE TRINITY HEALTH-WARDE LAB, LLC TO SUCH EXTENT THAT THE TWO COMPANIES WERE ESSENTIALLY THE SAME ENTITY FOR PROPERTY TAX PURPOSES AND SUBSEQUENTLY THAT THE REAL PROPERTY OWNED BY TRINITY HEALTH-WARDE WAS EXEMPT FROM AD VALOREM REAL PROPERTY TAX PURSUANT TO MCL 211.7o(1), MCL 211.7o(3) AND MCL 211.7r THROUGH TRINITY HEALTH-MICHIGAN'S CHARITABLE NON-PROFIT EXEMPT STATUS?

The Tax Tribunal answered:	"No".
Appellee answered:	"No".
Pittsfield Charter Township answered:	"Yes".
Amici Curiae answers:	"Yes".

STATEMENT OF FACTS

Amici Curiae Michigan Townships Association and Michigan Municipal League concur with and hereby adopt Appellant Pittsfield Charter Township's Statement of Facts and Proceedings as contained in Appellant's Brief on Appeal.

STATEMENT OF INTEREST OF AMICI CURIAE

The Michigan Townships Association (MTA) is a Michigan non-profit corporation whose membership consists of in excess of 1,235 townships within the State of Michigan joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws of the State of Michigan. The MTA, established in 1953, is widely recognized for its years of experience and knowledge with regard to municipal issues. Through its Legal Defense Fund, the MTA has participated on an amicus curiae basis in numerous state and federal cases presenting issues of statewide significance to Michigan townships.

The Michigan Municipal League (MML) is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 524 Michigan local governments, of which 478 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates its Legal Defense Fund through a board of directors. The purpose of this Legal Defense Fund is to represent the member local governments in litigation of statewide significance. This brief amici curiae is authorized by the Legal Defense Fund's Board of Directors.[1]

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[1] The Board of Directors' membership includes: the President and Executive Director of the Michigan Municipal League and the officers and directors of the Michigan Association of Municipal Attorneys; Lori Grigg Bluhm, City Attorney, Troy; Clyde J. Robinson, City Attorney, Kalamazoo; Randall L. Brown, City Attorney, Portage; Catherine M. Mish, City Attorney, Grand Rapids; Eric D. Williams, City Attorney, Big Rapids; James O. Branson, III, City Attorney, Midland; James J. Murray, City Attorney, Boyne City and Petoskey; Robert J. Jamo, City Attorney, Menominee; John C. Schrier, City Attorney, Muskegon; Thomas R. Schultz, City Attorney, Farmington and Novi; and William C. Mathewson, General Counsel, Michigan Municipal League.

Proper resolution of this case is of major importance to municipal property tax administration, property tax levying entities, and jurisprudence in this state. The General Property Tax Act (GPTA)[2] provides a comprehensive system for the assessment of real and personal property for ad valorem tax purposes, for the exemption of certain types of properties, for the collection of property taxes, and for administration of such laws. Within this system, each township and city assessor is charged with annually establishing the assessment of all parcels of property in the municipality[3] and, in doing so, must determine the taxable status.[4] An assessor must annually determine the assessment and taxable status of thousands of properties in their municipality each year.

The erroneously decided Tax Tribunal Opinion greatly impacts claims for property tax exemptions under the GPTA and more specifically with regard to this case, non-profit charitable and non-profit health care real property tax exemption claims pursuant to MCL 211.7o(1),(3) and MCL 211.7r. The Tax Tribunal Opinion goes well beyond the statutory intent of these property tax exemption statutes and sets forth a framework for abuse by for-profit claimants. Without any statutory basis, the Tax Tribunal Opinion would allow property tax exemptions to be claimed by for-profit companies where such companies are solely owned by a charitable non-profit entity that has at least one of its employees on the Board of Directors of the claimant and that has appointment power over the Board of Directors.[5] No case before has extended a property tax exemption reserved by statute for non-profit charitable property owners to a for-profit owner of the property. There are many legal errors in this determination which will be addressed in the argument herein.

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[2] MCL 211.1 et seq.
[3] MCL 211.10(1).
[4] MCL 211.2(2).
[5] Tax Tribunal Opinion, p 7.

It is important for this Honorable Court to weigh in on this issue and correct the misguided course of jurisprudence espoused in the Tax Tribunal Opinion. This case stands to create significant property tax revenue loss affecting all tax levying entities and the citizens they serve. It further makes for an administrative nightmare requiring tax analysis of the shareholders/owners of for-profit claimants. The MTA and MML are hopeful that when this Honorable Court reviews the relevant statutory language in light of the proper interpretive principles and case law, it will reverse the Tax Tribunal Opinion. The legal significance of this case will be further apparent from the argument herein.

ARGUMENT

1. THE MICHIGAN TAX TRIBUNAL MISAPPLIED THE LAW AND ADOPTED WRONG PRINCIPLES IN DETERMINING THAT TRINITY HEALTH-MICHIGAN, AN ALLEGED NON-PROFIT CHARITABLE ENTITY, DOMINATED THE MANAGEMENT AND OPERATION OF THE FOR-PROFIT PETITIONER/APPELLEE TRINITY HEALTH-WARDE LAB, LLC TO SUCH EXTENT THAT THE TWO COMPANIES WERE ESSENTIALLY THE SAME ENTITY FOR PROPERTY TAX PURPOSES AND SUBSEQUENTLY THAT THE REAL PROPERTY OWNED BY TRINITY HEALTH-WARDE WAS EXEMPT FROM AD VALOREM REAL PROPERTY TAX PURSUANT TO MCL 211.7o(1), MCL 211.7o(3) AND MCL 211.7r THROUGH TRINITY HEALTH-MICHIGAN'S CHARITABLE NON-PROFIT EXEMPT STATUS.

A. INTRODUCTION

This case involves application of the ad valorem real property tax exemptions for real property owned and occupied by non-profit charitable institutions pursuant to MCL 211.7o(1) and MCL 211.7o(3), and real property owned and occupied by a non-profit corporation and used for hospital or public health purposes pursuant to MCL 211.7r. In direct conflict with the plain language of these statutory exemption provisions, the Tax Tribunal Opinion exempted from real property tax the 50,000 sq. ft. building on approximately 8.34 acres owned by for-profit company Petitioner/Appellee, Trinity Health-Warde Lab, LLC (Warde Lab). Although the plain language of these exemption statutes require as one of the criteria for exemption that the owner of the property be non-profit, the Tax Tribunal Opinion ignored the for-profit status of the property owner Warde Lab and instead determined that Trinity Health-Michigan (Trinity), sole owner of Warde Lab, was essentially the same entity for property tax exemption purposes (but not necessarily for all purposes). The Tax Tribunal determined Trinity to be a non-profit charitable institution and imputed this status on the for-profit separate legal entity Warde Lab. The Tax Tribunal determined that:

> ". . . Petitioner's separate corporate identity should be ignored since Trinity so dominates the management and operation of Petitioner that Trinity and Petitioner are, for purposes of this case, one in the same."[6]

The Tax Tribunal Opinion erroneously blazes a new and treacherous jurisprudential path by determining that a properly established for-profit company owning real property may claim and receive a real property tax exemption reserved by statute for property owned by certain non-profit companies due to the fact that the for-profit company is solely owned by the non-profit company, that it has authority to appoint the Board of Directors and that it has one employee on the three person Board.[7] This determination violates the plain language of the relevant exemption statutes, fails to apply correct principles regarding corporate form and piercing the corporate veil, and misapplies well established case law. The following briefly sets forth a number of the errors in the Tax Tribunal Opinion:

1. The Tax Tribunal Opinion violates basic concepts in corporate entity law whereby a properly established and operating company is a separate legal entity from shareholders or member interest holders. Simply because there is an owner with 100 percent interest in the company does not automatically cause the entity to be the same as its shareholder/member. Generally speaking every 100% owner of a company has ultimate operations and management control over the company through control of the Board and ability to control the Articles of Incorporation or LLC Agreement. Obviously, normal ownership control cannot be enough to merge an owner with a corporation or no company would be a separate entity from its owners.

2. In general, separate corporate legal status from shareholders/members can be abrogated by piercing the corporate veil upon a showing that the company was

[6] Tax Tribunal Opinion, p 7.
[7] Tax Tribunal Opinion, p 7.

established for improper purposes, as a sham or operated without respect to corporate formalities (i.e., the commingling of debt and obligations as an alter ego or mere instrumentality). This is not the case herein, as Warde Lab was properly established to carry out its separate corporate purpose from Trinity with an intended separation of liabilities.[8] To wit, Trinity is not responsible for payment of the real property taxes incurred by Warde Lab. There is no ability for a corporation to pick and choose for what purposes the corporate veil is pierced. The corporate veil is either pierced, or it is not.

3. The Tax Tribunal failed to recognize that the claimant for the tax exemption must be Trinity, which is not a party to the suit, if Trinity is to really be considered the owner of the property. Trinity must be a party to the suit to support the claim that its separate corporate status should be ignored, thereby affording Warde Lab a property tax exemption. The Michigan Supreme Court in City of Ann Arbor[9] found this to be a very important factor.

4. The Tax Tribunal can't ignore the concept expressed by the Michigan Supreme Court in City of Ann Arbor, supra, namely, that one can't "run with the hare and hunt with the hounds".[10]This concept is further supported in later case law and restricts taxpayers from intentionally selecting a corporate structure and then ignoring it selectively to suit the occasion.[11] This is precisely what the Tax Tribunal Opinion erroneously endorsed. Trinity can't set up Warde Lab to hold the real property separately as a for profit entity for financing purposes, liability protection, bankruptcy protection,

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[8] See Appellee Brief on Appeal, Exhibit 1, Limited Liability Company Agreement of Warde Lab (LLC Agreement).

[9] City of Ann Arbor v University Cellar, Inc., 401 Mich 279, 289; 258 NW2d 1 (1977)

[10] Id p 291-292

[11] Czars, Inc., v Michigan Department of Treasury, 233 Mich App 632, 640-642; 593 NW2d 209 (1999).

and unregulated compensation (non-profit compensation is different and must be reasonable)[12] and then only claim the separation does not exist for payment of property tax or exemption therefrom. Trinity can't have it both ways.

5. The Tax Tribunal Opinion misapplied National Music Camp[13] as distinguished by analysis in Czars.[14] The Court of Appeals in Czars found it important that the entities, treated as a single entity, were all tax exempt entities. Warde Lab is not an exempt nonprofit entity.

6. Last, but certainly not least, the Tax Tribunal did not properly apply the rules of interpretation with regard to property tax exemptions. The plain language of the relevant property tax exemptions require that the property be owned by a non-profit entity. The property in this case is owned by a for-profit entity which does not have to behave in a non-profit charitable manner. As will be discussed, tax exemption is the opposite of tax equality and the exemption statutes were required to be construed in favor of the taxing authority.

These errors in the Tax Tribunal Opinion will be explained in more detail later in this brief. This misdirected course of law which has set sail with the Tax Tribunal Opinion is of great concern to local government. If left unchecked, it will result in property tax exemption statutes that are vulnerable to abuse and misuse. This erroneous opinion will undoubtedly create havoc in the administration of the assessing function (having to analyze the tax status and relationship of all owners of exemption claimants) and will create substantial loss in tax revenue affecting

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[12] With regard to compensation disparity see the difference in the Trinity Articles of Incorporation, (Appellees Exhibit 3) Article II G. and Warde Lab LLC Agreement, Sections 9 (g) and 11 (a).

[13] National Music Camp v Green Lake Township, 76 Mich App 608; 257 NW2d 188 (1977).

[14] Czars, supra at 640-643

municipal budgets throughout the state. Amici Curiae concur with the argument set forth by Pittsfield Charter Township in their Brief on Appeal. The within argument is intended to further enlighten this Honorable Court regarding the erroneous nature of the Tax Tribunal Opinion.

B. STANDARD OF REVIEW

The Michigan Supreme Court in Briggs Tax Service, LLC v Detroit Public Schools, et al, 485 Mich 69; 780 NW2d 753 (2010) expressed the standard of review in Tax Tribunal cases as follows:

> "The standard of review of Tax Tribunal cases is multifaceted. If fraud is not claimed, this Court reviews the Tax Tribunal's decision for misapplication of the law or adoption of a wrong principle. We deem the Tax Tribunal's factual findings conclusive if they are supported by 'competent, material, and substantial evidence on the whole record'. But when statutory interpretation is involved, this Court reviews the Tax Tribunal's decision de novo." (Footnotes omitted).[15]

Since statutory interpretation of MCL 211.7o(1) and (3) and MCL 211.7r is involved, this matter is reviewed de novo.[16] Further, Amici Curiae contends that the Tax Tribunal Opinion misapplies the law and adopts wrong principles.

C. GENERALLY APPLICABLE RULES REGARDING PROPERTY TAX EXEMPTIONS DO NOT SUPPORT THE TAX TRIBUNAL OPINION

The General Property Tax Act provides that "all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation." MCL 211.1. It is undisputed that the subject property would be subject to property tax if the claimed exemptions are not applicable. *Exemption statutes are subject to a rule of strict construction in favor of the taxing authority.* Retirement Homes of the Detroit Annual Conference of the United Methodist

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[15] Briggs, supra, at 75.

[16] Toll Northville Ltd v Township of Northville, 480 Mich 6 at 10-11; 743 NW2d 902 (2008).

Church, Inc v Sylvan Twp, 416 Mich 340, 348; 330 NW2d 682 (1982). "The rule to be applied when construing tax exemptions was well summarized by Justice Cooley as follows:

> [I]t is a well-settled principle that, when a specific 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 construed and cannot be made out by inference or implication but must be beyond reasonable doubt. In other words, since taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing it is upon him who claims it. Moreover, if an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the State has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be extended beyond what was meant." Michigan Bell Telephone Company v Department of Treasury, 229 Mich App 200, 207; 582 NW2d 770 (1998), quoting Detroit v Detroit Commercial College, 322 Mich 142, 149; 33 NW2d 737 (1948), quoting 2 Cooley, Taxation (4th ed.), § 672, p 1403.

Justice Cooley's summarization has often been cited and should be accorded more than mere judicial gloss. The exemption statutes in this case, MCL 211.7o(1),(3) and MCL 211.7r, should be strictly construed in favor of Respondent/Appellant Pittsfield Charter Township, because an exemption removes the burden on the exempt property owner to share in the support of local government. Golf Concepts v Rochester Hills, 217 Mich App 21, 26; 550 NW2d 803 (1996). A tax exemption is the antithesis of tax equality. Id.

Rather than applying these strict rules of interpretation in favor of the Township, the Tax Tribunal Opinion opted for strained or contorted construction in allowing for-profit Warde Lab to claim a charitable non-profit property tax exemption through its member owner. The intention to allow this type of exemption cannot be inferred; certainly the legislature could have expressed this type of relationship if it intended. "The primary goal of statutory interpretation is to give

effect to the intent of the Legislature."[17] "The first step in that determination is to review the language of the statute itself."[18] "If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning expressed and judicial construction is neither required nor permissible."[19] The Tax Tribunal had no authority to enlarge the relevant unambiguous exemptions to include a for-profit entity.

The Tax Tribunal Opinion found that the subject property was exempt under MCL 211.7o(1) and (3) which provide that:

> (1) 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 that nonprofit charitable institution was incorporated is exempt from the collection of taxes under this act.
>
> ***
>
> (3) Real or personal property owned by a nonprofit charitable institution or charitable trust that is leased, loaned, or otherwise made available to another nonprofit charitable institution or charitable trust or to a nonprofit hospital or a nonprofit educational institution that is occupied by that nonprofit charitable institution, charitable trust, nonprofit hospital, or nonprofit educational institution solely for the purposes for which that nonprofit charitable institution, charitable trust, nonprofit hospital, or nonprofit educational institution was organized or established and that would be exempt from taxes collected under this act if the real or personal property were occupied by the lessor nonprofit charitable institution or charitable trust solely for the purposes for which the lessor charitable nonprofit institution was organized or the charitable trust was established is exempt from the collection of taxes under this act."

Clearly, from the above exemption language it is apparent that the Legislature intended Section (1) to only be applicable when the property owner is a nonprofit charitable institution. Interestingly Section (3) above provides for alternate users separate from the owner but in such cases they all must be nonprofit/charitable entities and the owner/lessor must still qualify for the property tax exemption as if it was the exempt user. In Section (3) the legislature was apparently

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[17] In re: MCI Telecommunications, 460 Mich 396, at 411; 596 NW2d 164 (1999).
[18] In re: MCI Telecommunications, supra, 411.
[19] In re: MCI Telecommunications, supra, 411.

addressing National Music Camp, supra, in which the owner and user may be different entities but both must still be exempt nonprofits. In no way are for-profit entities allowed to be the owner. The statutory language could have easily allowed a for-profit entity to own the property and lease it to a charitable nonprofit, but it does not. The Legislative intent is clear in not allowing for the circumstance erroneously approved for exemption by the Tax Tribunal Opinion. The Tax Tribunal inappropriately expanded the property tax exemption to a for-profit owner.

Additionally, the controlling test for determining whether Warde Lab qualifies for the tax exemption under MCL 211.7o(1) was restated in Wexford Med Group v City of Cadillac, 474 Mich 192, 203; 713 NW2d 734 (2006), at 203 as follows:

> "(1) The real estate must be owned and occupied by the exemption claimant;
>
> (2) The exemption claimant must be a nonprofit charitable institution; and
>
> (3) The exemption exists only when the buildings and other property thereon are occupied by the claimant solely for the purposes for which it was incorporated."

These criteria clearly are not applicable to Warde Lab as a for-profit company. Also it is interesting to note that the criteria above are requirements of the exemption claimant. In this case Trinity is not the exemption claimant even though the Tax Tribunal Opinion considered the property exemption through Trinity. The issue of Trinity not being a party is important and will be discussed further in this brief.

In Wexford, at 214 the Supreme Court recognized the definition of charity as follows:

> "[Charity] *** [is] a gift, to be applied consistently with existing law, 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." (citations and comments omitted)

The Supreme Court in Wexford, at 215 continued, stating that:

> "In light of this definition, certain factors come into play when determining whether an institution is a 'charitable institution' under MCL 211.7o and MCL 211.9(a). Among them are the following:
>
> (1) A 'charitable institution' must be a nonprofit institution.
>
> (2) A 'charitable institution' is one that is organized chiefly, if not solely, for charity.
>
> (3) A 'charitable institution' does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a "charitable institution" serves any person who needs the particular type of charity being offered.
>
> (4) A 'charitable institution' brings people's minds or hearts under the influence of education or religion; relieves people's bodies from disease, suffering, or constraint; assists people to establish themselves for life; erects or maintains public buildings or works; or otherwise lessens the burdens of government.
>
> (5) A 'charitable institution' can charge for its services as long as the charges are not more than what is needed for its successful maintenance.
>
> (6) A 'charitable institution' need not meet any monetary threshold of charity to merit the charitable institution exemption; rather, if the overall nature of the institution is charitable, it is a "charitable institution" regardless of how much money it devotes to charitable activities in a particular year." (Emphasis added.)

Warde Lab is a separate limited liability company operating for profit. It is not, as required, a nonprofit institution and it certainly has nothing charitable required in its LLC Agreement. The actual ownership and use of the property by Warde Lab has nothing to do with operating as nonprofit or for charitable purposes. Nothing in any of the Wexford criteria could possibly lead to the conclusion that Warde Lab could selectively claim an exemption through Trinity. Moreover, these issues are equally applicable under MCL 211.7r.

MCL 211.7r provides in pertinent part that:

> 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, but not including excess acreage not actively utilized for hospital or public health purposes and real estate and dwellings located on that acreage used for dwelling purposes for resident physicians and their families.

Under MCL 211.7r, owned and occupied by a nonprofit trust includes a nonprofit corporation[20]. In any case, the for-profit property owner Warde Lab does not qualify for the exemption pursuant to the plain language of the statute. Further there is nothing in the language used to suggest that the exemption may be claimed through another entity including Trinity as the membership owner of Warde Lab.

D. WARDE LAB IS A SEPARATE LEGAL ENTITY FROM TRINITY

Appellee Warde Lab's arguments that Trinity and Warde Lab are one in the same company violates basic concepts in corporate entity law. A company such as Warde Lab which is properly established and operates pursuant to the LLC Agreement is a separate legal entity from its sole member (owner) Trinity. There is no evidence in the record that Warde Lab has failed to follow corporate formalities or that it was formed for any improper purpose. The United States Court of Appeals, 6th Circuit has indicated that:

> "[T]he general principle in Michigan is that separate corporate identities will be respected, and thus corporate veils will be pierced only to prevent fraud or injustice" (Citations omitted)[21]

In Bodenhamer, the Court further indicated that:

> "If separate corporate entities are employed and incorporated to perpetuate a fraud, the court may consider them a single legal entity." (Citations omitted)[22]

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[20] Oakwood Hosp. Corp. v. State Tax Comm, 385 Mich. 704, 708, 190 N.W.2d 105 (1971).
[21] Bodenhamer Building Corporation v Architectural Research Corporation, 873 F2d 109, 111; 13 Fed.R. Serv. 3d 1144 (1989).
[22] Bodenhamer, supra at 112.

The LLC Agreement of Warde Lab in fact does a very nice job of creating a separate entity. It was clearly not set up as a fraudulent endeavor.

One of the main purposes of Warde Lab is to

> "To acquire, own, develop, improve, hold, sell, lease, transfer, exchange, assign, dispose of, operate, manage or otherwise deal with the real property located at State Street Business Park, 300 W. Textile Road, Ann Arbor, Michigan (the "Property")".[23]

Warde Lab was also to assume a mortgage, and under certain circumstances may refinance the property.[24] From the purpose contained in the LLC Agreement, it is clear that Warde Lab was intended to own and operate the subject property as a separate entity. Section 9 of the LLC Agreement provides for the business and affairs of Warde Lab to be managed under the direction of a Board of Directors. Although the sole member, (herein Trinity), appoints the Board, this authority does not somehow subvert the corporate entity and cause it to be treated the same as the member. If the standard for disregarding corporate identity were an owner's control over a company's board, then every corporate entity would be disregarded and treated the same as its owner. It is further understood from the facts in this case that there is one employee of Trinity who is on the Board of Directors of Warde Lab. This situation is quite unremarkable and would do nothing, in and of itself, to pierce the corporate veil.

It is interesting that the LLC Agreement, Sections 9(g) and 11(a), provide for the fixing of compensation without limit. Whereas in Exhibit 3 of the Appellee's Brief on Appeal, Trinity has a limitation in its restated Articles of Incorporation, Article II G, that compensation must be reasonable. This should be noted as a significant (or telling) difference between separate operations of a non-profit charitable corporation and Warde Lab being operated for profit.

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[23] LLC Agreement 1, p 2.
[24] LLC Agreement 1, p 3.

Importantly, the LLC Agreement of Warde Lab provides a number of requirements on the Board specifically applicable to the issue at hand. Section 9(j) provides limitations on the company's activities and includes restrictions on the Board that it shall not

> ". . . fail either to hold itself out to the public as a legal entity separate and distinct from any other entity or Person or to conduct its business solely in its own name in order not (i) to mislead others as to the identity with which such other party is transacting business, or (ii) to suggest the company is responsible for the debts of any third party (including any Member, principal or affiliate of the Company or any partner, Member, principal or affiliate thereof)."[25]

The Agreement further provides that the Board shall not:

> ". . . share any common logo with or hold itself out as or be considered as a department or division of (i) any principle, Member or affiliate of the company, (ii) any affiliate of a principal Member or affiliate of the Company or (iii) any other person or allow any person to identify the Company as a department or division of that Person."[26]

Further, Section 9 (j) (iv) of the LLC Agreement provides that:

> "Failure of the Company, or the Member or Board on behalf of the Company, to comply with any of the foregoing covenants or any other covenants contained in this Agreement shall not affect the status of the Company as a separate legal entity or the limited liability of the Member or the Directors"

As can be seen from these provisions and others in the LLC Agreement, there has been great care taken to assure that Warde Lab will be treated as a separate legal entity. Additionally, there are many other provisions in the LLC Agreement requiring Warde Lab to pay its own debts and liabilities solely from its own assets.[27] Likewise there are many other provisions in the LLC Agreement intended to shield Trinity and others from debts, obligations and liabilities of Warde Lab. It is astounding that with all of the effort to separate Warde Lab from Trinity by way of the LLC Agreement that Warde Lab would actually contend that the companies are one in the same

[25] LLC Agreement Section 9 (j) (iv)(L).
[26] LLC Agreement of Warde Lab, Section 9 (j) (iv)(P).
[27] LLC Agreement, Section 9 (j) (iv)(E).

for the purposes of paying property tax on the subject property. This certainly is not what the documentation provides for. Moreover, nothing in the record suggests that Warde Lab is not operating properly under the LLC Agreement.

E. THERE IS NO BASIS TO PIERCE THE CORPORATE VEIL OF WARDE LAB

The Michigan Supreme Court in City of Ann Arbor, supra, was clearly contemplating the concept of piercing of the corporate veil in considering whether to treat the property of the University Cellar as belonging to another entity.[28]

A limited liability company is subject to the same rules regarding piercing of the corporate veil.[29] In Michigan the courts have stated that:

> "In order for a court to order a corporate veil to be pierced, the corporate entity (1) must be a mere instrumentality of another individual or entity, (2) must have been used to commit a wrong or fraud, and (3) there must have been an unjust injury or loss to the plaintiff."[30]

The fact that Trinity is the sole owner of Warde Lab or that it has one of its employees on the Board of Directors does not transform Warde Lab into a mere instrumentality of Trinity. Relevant to this issue the Court in Maki v Copper Range Co, 121 Mich App 518, 524; 328 NW2d 430 (1982) stated that:

> "To hold a parent corporation responsible for injuries to employees of the subsidiary merely because of the control inherent in the parent-subsidiary relationship would destroy the long established protection afforded shareholders by incorporation. The parent-subsidiary relationship, by definition, includes the same elements which plaintiffs argue show 'retained control' by the parent. In such relationship, the parent, as owner of all or most of the subsidiary stock, is able to exert control over the subsidiary. To protect its investment and control of the subsidiary, the parent and the subsidiary frequently share directors or officers

[28] City of Ann Arbor, supra, at 293.
[29] Lakeview Commons Ltd. Partnership v Empower Yourself, LLC, 290 Mich App 501, 510 N1; 802 NW2d 712 (2010).
[30] Florence Cement Co v Vettraino, 292 Mich App 461, 469; 807 NW2d 917 (2011).

and the parent may monitor the subsidiary's physical activities and dealings". (Citations omitted).

In Maki the Court goes on to indicate that:

> "For these reasons, courts have recognized that majority stock ownership and common directors and officers, alone, will not provide a sufficient basis for disregarding the fiction of these corporations' separate existence. A subsidiary corporation must become 'a mere instrumentality' of the parent before its corporate entity will be disregarded." (Citation omitted)[31]

The Tax Tribunal Opinion disregarded Warde Lab as a separate entity in direct contravention of the above-referenced propositions. The Tax Tribunal Opinion improperly held as deciding factors that Trinity was the sole owner, Trinity appointed the Board of Directors and one of Trinity's employees was a Director. These factors do not point to operation of Warde Lab as a mere instrumentality. The hallmark of being an instrumentality/alter ego is when there is no distinction between the debts between the parties and where the members do not treat the company as separate from themselves.[32]As noted above, that is not the case between Warde Lab and Trinity.

F. TRINITY MUST BE AN EXEMPTION CLAIMANT AND PARTY TO THE SUIT TO BE CONSIDERED THE ACTUAL OWNER OF THE PROPERTY

Warde Lab has no justification nor right to claim on its own that the LLC Agreement of Warde Lab should be ignored and that Warde Lab should be considered the same entity as Trinity. In such case, it should have been Trinity that sought the exemption or at least as a party to the exemption request as a claimant. Notably, as cited above, the Supreme Court found it quite significant that the University did not seek the property tax exemption for University Cellar in City of Ann Arbor, supra. The Michigan Supreme Court indicated that:

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[31] Maki, supra, at 524.
[32] See Florence Cement, supra, at 469, 470.

> "It is significant that the University is not seeking an exemption for the Cellar. Its counsel declined to enter an appearance or participate in these proceedings although invited to do so by the State Tax Commission. One can understand that the Regents would be reluctant to increase the University's exposure by arguing in effect that the Cellar is the alter ego of the University when a precondition of the Cellar's establishment was that the University not have any exposure beyond the contributed capital."[33]

These statements by the Michigan Supreme Court are extremely impactful with regard to the case at bar. Similarly, Trinity is not a party seeking the exemption for Warde Lab as they would basically have to argue that the LLC Agreement is meaningless with regard to the separation of liability and exposure for operations. It is quite understandable that Trinity would not want to argue that Warde Lab is its alter ego, otherwise such a finding would destroy the purpose and intent of the separate entities. It would be nonsensical to argue that Warde Lab is the alter ego of Trinity simply for the purposes of property taxes. The significance of Trinity not being a party herein cannot be understated and further directly undermines the ability of Warde Lab to claim a property tax exemption through them.

G. THE PROPOSITION THAT WARDE LAB AND TRINITY CANNOT RUN WITH THE HARE AND HUNT WITH THE HOUNDS IS APPLICABLE AND PREVENTS APPLICATION OF THE PROPERTY TAX EXEMPTION

Trinity specifically set up Warde Lab to hold and operate the subject property separately from Trinity pursuant to the LLC Agreement of Warde Lab. Warde Lab was admittedly set up as a for-profit entity for financing purposes, and liability protection. This Agreement also seems to provide for a number of other separations such as bankruptcy protection and the ability to provide compensation different than the reasonable compensation required for Trinity as a non-profit tax exempt entity. This situation falls within a very significant concept for determining whether Warde Lab's separate corporate status can be disregarded and, instead, Warde Lab be

[33] City of Ann Arbor, supra, at 291.

treated as the alter ego of Trinity for property tax purposes. This concept was first raised in City of Ann Arbor, supra, and further analyzed in Czars, supra. The Michigan Court of Appeals in Czars indicated that:

> "In addition to the control issue, the majority in Ann Arbor, supra, at 291-292, 258 N.W2d 1 also found it significant that the University incorporated the University Cellar to protect itself from liability:
> 'To disregard the corporate entity and treat the Cellar as the alter ego of the University for tax exemption purposes, and yet regard it as a separate entity for purposes of determining whether the University is subject to liability to unpaid suppliers or to customers who are injured on the premises or by defective products would be to run with the hare and hunt with the hounds."[34]

Above similar objections by the Petitioner/Appellee in this case, the Court in Czars indicated that:

> "Furthermore, we cannot, as petitioner desires, simply ignore the Ann Arbor Court's 'hare and hounds' pronouncement. The Ann Arbor court clearly intended that taxpayers not be able to assert or disregard arbitrarily their chosen corporate structures to suit the occasion. Having created separate corporate entities in the belief that his business would save money, Cheema cannot expect us to undue his efforts merely because, in hindsight, the creation of separate corporate entities has proved disadvantageous. Our consistency in this matter is not, as petitioner insinuates, 'punishment' for tax planning"[35]

The "hare and hounds" pronouncement is directly applicable to this case. Trinity and Warde Lab cannot select a corporate structure shielding Trinity from liabilities and requiring Warde Lab to operate as a separate and distinct legal entity while at the same time attempting to ignore this corporate structure for the select purpose of the attempt to avoid payment of property tax. As previously noted, the LLC Agreement of Warde Lab requires them to satisfy their own liabilities. Trinity and Warde Lab cannot have it both ways, disregarding their corporate structure when it suits their purposes, but claiming it when such corporate structure is of benefit.

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[34] Czars, supra, at 641.
[35] Czar, supra, at 642.

It is inappropriate and offensive to any sensibility to on one hand claim liability protection and financing opportunities while simultaneously arguing that the separate corporation really does not exist.

H. NATIONAL MUSIC CAMP WAS MISAPPLIED

The Tax Tribunal Opinion and Petitioner both rely on the Court of Appeals case of National Music Camp, supra. This reliance is actually misplaced as pointed out in Czars, supra. The Court of Appeals in Czars indicated that:

> "Petitioner also relies on Nat'l Music Camp v Green Lake Twp., 76 Mich App 608, 257 NW2d 188 (1977). There, the National Music Camp, one of four corporate entities comprising the Interlochen Educational Complex, owned property that is used for educational purposes during its summer music program. Another of the four corporations, the Interlochen Arts Academy, used the property during the regular school *643 year. Id at 612, 257 NW2d 188. The township assessing property tax claimed that the camp could not rely on its educational exemption, because it did not exclusively use the property as required by the pertinent statute. Id at 613, 257 NW2d 188. This Court rejected the argument, however, and held that the camp and the academy, which were both components of the Interlochen Educational Complex, could be considered one institution for property tax purposes. Id at 61e-614, 257 NW2d 188.
>
> National Music Camp is not relevant or analogous here. That case did not involve a nonexempt entity asserting an exempt entity's tax exemption. Rather, it involved two exempt entities, using the same property for a common educational purpose. In contrast, Grand Aire and petitioner were formed for distinct purposes, the former to operate a cargo business, the latter to act as registered owner of aircraft. The Nat'l Music Camp Court's language that a contrary result would 'exalt[ ] form over substance' has no applicability in the present case."[36]

The Czars analysis is directly applicable herein as this case involves similarly a non-exempt entity asserting an exempt entity's tax exemption. For-profit entity, Warde Lab, is asserting Trinity's presumed property tax exempt status. Similar to Czars, denial of exempt status for Warde Lab is not form over substance because under no circumstance could a for-profit entity ever receive a charitable nonprofit property tax exemption. On the other hand, MCL 211.7o(3)

[36] Czars, supra, at 642, 643.

was enacted in 1980, after the National Music Camp case, and appears to codify this case by allowing the claimed exemption where both owner and user are exempt entities.

CONCLUSION

Trinity, the non-profit alleged charitable institution is afforded the same protections and benefits of any other shareholder or member of a company. Accordingly, the MTT erred when finding that for profit Warde Lab and Trinity could pick and choose when to assert the protections of their corporate formations and when to eschew them. Statute and case law prohibit this approach. Moreover, Trinity is not even a party herein. The MTT erred and this Honorable Court should reverse the Tax Tribunal Opinion based on the above arguments.

Dated: January 18, 2016

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