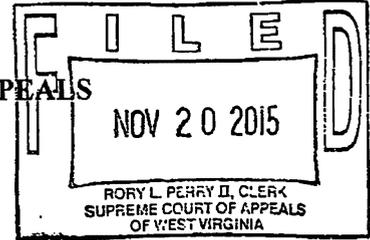


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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS  
DOCKET NUMBER 15-0597 and 15-0599



MARK W. MATKOVICH,  
STATE TAX COMMISSIONER, and  
LARRY A. HESS, ASSESSOR OF BERKELEY  
COUNTY, WEST VIRGINIA

Respondents Below, Petitioners.

v.

UNIVERSITY HEALTHCARE FOUNDATION, INC.  
f/k/a CITY HOSPITAL FOUNDATION, INC.,

Petitioner Below, Respondent.

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WEST VIRGINIA STATE TAX DEPARTMENT'S REPLY BRIEF

---

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TABLE OF CONTENTS

|  | PAGE |
|--|------|
| I. INTRODUCTION  | 1    |
| II. ARGUMENT   | 3    |
| B. THE OFFICE BUILDING DOES NOT SATISFY<br>THE REQUIREMENTS TO BE EXEMPT FROM <i>AD VALOREM</i><br>TAXATION AND IS NOT USED EXCLUSIVELY<br>FOR CHARITABLE PURPOSES.  | 3    |
| B.1. The Foundation does not meet the requirements in<br>the statute and the legislative rules as set forth in<br>previous Supreme Court decisions to claim the exemption<br>from ad valorem property tax. | 3    |
| B.2. <i>Wellsburg Unity Apartments, Central Realty, and<br/>Maplewood</i> are key to resolving this case; albeit, for<br>different reasons.  | 8    |
| B.3. The Foundation's use of the office building does<br>not comply with the Supreme Court's Decision in<br><i>Appalachian EMS</i> and would expand the Court's holding.                                   | 11   |
| B.4. W. Va. Code § 11-3-9(d) has never been applied<br>by this Court as requested by the Foundation.   | 12   |
| C. THE FOUNDATION MISUNDERSTANDS THE<br>SUPREME COURT'S DECISION IN <i>UNITED HOSPITAL</i><br>AND READS THE DECISION IN AN OVERLY BROAD<br>MANNER.   | 13   |
| D. THE FOUNDATION HAS CONFLATED TWO<br>DIFFERENT STATUTORY EXEMPTIONS AND EXPANDED<br>THEIR SCOPE TO CREATE A "COMMON CHARITABLE<br>PURPOSE" DOCTRINE THAT DOES NOT EXIST UNDER<br>CURRENT LAW.            | 16   |
| E. THE TAX DEPARTMENT IS APPYING W. VA. CODE<br>§ 11-3-9(a)(12) IN A RATIONAL MANNER.  | 18   |
| III. CONCLUSION  | 19   |

**TABLE OF AUTHORITIES**

**PAGE**

**Cases**

*Appalachian Emergency Medical Services v. State Tax Commissioner*, 218 W. Va. 550 at 553, 625 S.E. 2d 312 at 315 (2005).....11, 12

*Appalachian Power Company v. State Tax Commissioner*, 195 W. Va. 573 at 586, 466 S. E. 2d 424 at 436 (1995).....4

*Central Realty Co., v. Martin*, 126 W. Va. 915, 30 S.E. 2d 720 (1944).....*passim*

*Fountain Place Cinema 8, LLC., v. Morris*, 227 W. VA. 249 at 255, 707 S.E. 2d 859 at 865 (2011).....19

*Maplewood Community, Inc., v. Craig*, 216 W. Va. 273 at 281, 607 S.E. 2d 379 at 387 (2004).....*passim*

*State ex rel. Farr v. Martin*, 105 W.Va. 600, 143 S.E. 356 (1928).....15

*State v. McDowell Lodge No. 112 A .F. & A.M.*, 96 W. Va. 611, 123 S.E. 561 (1924).....10, 11, 19

*United Hospital Center, Inc., v. Romano*, 233 W. Va. 313, 758 S.E. 2d 240 (2014).....*passim*

*Wellsburg Unity Apartments, Inc. v. County Commission of Brooke County*, 202 W Va. 283, 503 S. E. 2d 851 (1998).....*passim*

**State Statutes**

W. Va. Const. Art. 10, § 1.....2

W. Va. Code § 11-3-9(a)(12).....*passim*

W. Va. Code § 11-3-9(a)(17).....8, 16, 18

W. Va. Code § 11-3-9.....4, 6, 7, 12

W. Va. Code § 11-3-9(d).....12, 13

**Rules**

W. Va. St. R. § 110-3-2.48.1.....7

W. Va. St. R. § 110-3-2.48.2.....4, 7

W. Va. St. R. § 110-3-24.19.3.....8, 17

W. Va. St. R. §110-3-24.6.1.....17

W. Va. St. R. § 110-3-24.6.3.....17, 18

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**WEST VIRGINIA STATE TAX DEPARTMENT'S REPLY BRIEF**

Who should decide whether property is exempt from *ad valorem* property tax—private entities or the West Virginia Legislature? That is the question at the very heart of this entire case. The Supreme Court's answer to this underlying question will affect every county in West Virginia that has a major hospital, large churches, a college or university, as well as other Section 501(c)(3) or 501(c)(4) entities. The test has always been -- What is the property being used for? If the Supreme Court adopts the Foundation's argument that fostering a charitable purpose is the new test, then private entities are free to exempt property from taxation for related purposes not contemplated by the Legislature. Every Section 501(c)(3) entity performs socially useful and desirable goals; neither the Tax Department nor Assessor Hess has ever questioned the necessity of quality health care to our society. However, this Court ruled long ago that more is required in order to exempt property from taxation than simply fostering a laudable purpose and has always focused on actual use of the property. Once private entities are empowered to expand statutory exemptions through conflation by simply fostering a charitable purpose which

no longer ties the exemption to actual use of the property, then the bobsled truly is off and running.

The West Virginia Constitution requires that taxation shall be equal and uniform. W. Va. Const. Art. 10, § 1. University Healthcare Foundation, (hereinafter, the “Foundation” or “Taxpayer”), argues that it should be able to exempt an entire office building from *ad valorem* property tax. The Foundation argues that the entire office building should be exempt under W. Va. Code § 11-3-9(a)(12) as “[p]roperty used for charitable purposes and not held or leased out for profit[.]” Both the Tax Department and Assessor Hess disagree because the use of the office building did not comply with the requirements clearly enunciated by this Court.

The critical facts are not in dispute by the parties; although, the parties seriously disagree regarding the application of the law to the facts before the Court. All parties have stipulated that Ambergris and Dr. Robert Bowen, MD, LLC, are not exempt from federal taxes pursuant to Internal Revenue Code § 501(c)(3). The Foundation’s own witness testified that both Ambergris and Dr. Robert Bowen operate for-profit medical practices in Suites 1100 and 2400 in the office building. In order to claim the exemption under W. Va. Code § 11-3-9(a)(12), this Court has ruled that the property must be used exclusively for charitable purposes. The charitable use of the property must be primary and immediate and not secondary or remote. *See Central Realty Co., v. Martin*, 126 W. Va. 915, 30 S.E. 2d 720 (1944) and *Wellsburg Unity Apartments*, argued *infra*. The operation of two for-profit medical practices is not a primary and immediate use of the property for charitable purposes as claimed by the Foundation. Clearly, Ambergris and Dr. Bowen use the leased offices for private purposes. In addition, the operation of a health club by Berkeley Medical Center in Suite 1200 of the office building is not a charitable use of the property leased from the Foundation.

The West Virginia Legislature and the West Virginia State Constitution should determine the requirements to be exempt from *ad valorem* property tax. This Court should prohibit private entities from determining the boundaries of statutory exemptions.

## **I. ARGUMENT**

The Tax Department will address the numerous objections raised by the Foundation in its Supreme Court Brief.

### **A. STANDARD OF REVIEW**

The Foundation argues that the Tax Department has misstated the standard of review applicable to business court cases on appeal to the Supreme Court. *See* Foundation's Brief at Argument A, p. 12. The Tax Department did, in fact, state that factual findings made by the Tax Department or any other administrative agency receive deference upon judicial review. *See* Tax Department's Supreme Court Brief at p. 12. The Foundation correctly pointed out that Judge Wilkes presiding in the Business Court Division was the initial fact finder in this case. Regardless of whether the initial fact finder in a tax case is the circuit court, the business court division of the circuit court, or a board of equalization and review, findings of fact receive deference on review before the Supreme Court.

### **B. THE OFFICE BUILDING DOES NOT SATISFY THE REQUIREMENTS TO BE EXEMPT FROM *AD VALOREM* TAXATION AND IS NOT USED EXCLUSIVELY FOR CHARITABLE PURPOSES.**

#### **B.1. The Foundation does not meet the requirements in the statute and the legislative rules as is reflected in decisions of this Court.**

The primary focus in deciding this case must be the statutory language employed by the West Virginia Legislature. The specific exemption before the Court is W. Va. Code § 11-3-9(a)(12) which exempts "[p]roperty used for charitable purposes and not held or leased out for

profit[.]” As the Tax Department argued below in Business Court, the West Virginia Supreme Court of Appeals has frequently addressed this statutory exemption by stating:

In order for real property to be exempt from *ad valorem* taxation, a two-prong test must be met: (1) the corporation or other entity must be deemed to be a charitable organization under 26 U.S.C. § 501 (c)(3) or 501 (c)(4) as is provided in 110 C.S.R. § 3-19.1; and (2) **the property must be used exclusively for charitable purposes** and must not be held or leased out for profit as is provided in W. Va. Code § 11-3-9.

*Wellsburg Unity Apartments, Inc. v. County Comm'n.*, 202 W. Va. 283; 503 S.E.2d 851 at Syl. Pt. 3, (1998)(emphasis added). See also *United Hospital Center, Inc., v. Romano*, 233 W. Va. 313, 758 S.E.2d 240 at Syl. Pt. 2 (2014)(quoting *Wellsburg*); and *Maplewood, infra*, at Syl. Pt. 1(quoting *Wellsburg*). Both *Wellsburg* and *Maplewood* specifically addressed whether real property should be exempt under W. Va. Code § 11-3-9(a)(12), the same exemption before this Court today, and ruled that exclusive use was mandatory in order to properly claim the exemption from tax. Additionally, the legislative rules support the requirement of exclusive use.

Legislative rules have the full force and effect of law in this state. See *Appalachian Power Company v. State Tax Commissioner*, 195 W. Va. 573 at 586, 466 S.E.2d 424 at 436 (1995). The legislative rules regarding *ad valorem* property tax state that the charitable use of the property must be primary and immediate and not secondary, remote or ancillary. W. Va. St. R. § 110-3-2.48.2. The Supreme Court has long applied the principle that the charitable use of the property must be primary and immediate. However, the Foundation’s use of the office building for rental property for private purposes does not meet the primary and immediate requirement under the law. Any claimed charitable use of the office suites by Ambergris and Dr. Bowen would be secondary and remote. The Foundation has argued that Ambergris and Dr. Bowen allow Berkeley Medical Center to provide better healthcare to residents of the Eastern

Panhandle. Similarly, the argument that Suite 1200 which is leased to the Wellness Center promotes healthier living also would be a secondary and remote charitable use of the property.

Nevertheless, the Foundation fails to understand the Tax Department's argument in this case. *See* Foundation's Brief at p. 14, Argument B.1; *see* also, Argument C, p. 17. The Tax Department readily agreed that the Foundation meets the first prong. All parties to this case have stipulated that the Foundation, the owner of the property at issue, is exempt from federal income taxes pursuant to IRC § 501(c)(3). *See* Stipulation 1 at AR 1158. However, both the Tax Department and Assessor Hess refused to stipulate that the office building is used exclusively for charitable purposes.

The Foundation argues that the "entirety" of the office building was being used to provide essential support to the hospital in furtherance of the Foundation's charitable purpose of supporting Berkeley Medical Center. *See* Foundation's Brief at pp. 14-15, Argument B.2. However, the stipulations agreed to by the Foundation and the testimony from the Foundation's own witness contradict this assertion. The Foundation clearly stipulated that Ambergris, LLC, and Dr. Bowen, MD, Ltd, are not Section 501(c)(3) entities under the Internal Revenue Code.

16. Ambergris, LLC, Patient Transportation, and Robert E. Bowen, MD, Ltd, have not been designated as exempt from federal income taxes pursuant to Internal Revenue Code § 501(c)(3). AR 1161.

Furthermore, Susan Snowden, a member of the Board of Directors for the Foundation, testified for the Foundation at the bench trial. Ms. Snowden confirmed that Ambergris and Dr. Bowen are for-profit businesses. *See* AR at 420; 429-431; 440. There is no debate that Ambergris provides cancer treatment to patients on a for-profit basis and that Dr. Bowen treats patients who are ill on a for-profit basis. Medical care is essential for life. But, Ambergris uses Suite 1100 in a for-profit business and Dr. Bowen uses Suite 2400 in a for-profit business.

In order to adopt the Foundation's position, the Supreme Court must conclude that leasing suites in an office building to two for-profit business entities in the field of medicine constitutes a charitable use of the property. Admittedly, Ambergris being next door to Berkeley Medical Center allows Berkeley Medical Center to develop the business of treating cancer patients. Similarly, having Dr. Bowen close to the 800 square foot cardiac rehab center allows Berkeley Medical Center to develop its cardiac care business. However, at the end of the debate, Ambergris and Dr. Bowen are still for-profit business entities that utilize Suites 1100 and 2400 to conduct for-profit businesses for private purposes. The fundamental question is squarely before this Court. Does conducting a for-profit business in the field of medicine at the office building constitute a charitable use of the property? Under West Virginia law the answer is no.

The Foundation argues that in order to claim the exemption found in W. Va. Code § 11-3-9(a)(12) the property is **not** required to be used exclusively for charitable purposes. See Foundation's Brief at p. 28. The Foundation's argument ignores the precise language employed by this Court in *Maplewood, supra*. In *Maplewood*, the Supreme Court addressed the *ad valorem* property tax exemption set forth in W. Va. Code § 11-3-9(a)(12); the same exemption before the Court today. *Maplewood* at 279-280, 385-386. In *Maplewood* this Court stated:

This Court had the opportunity to apply the statutory exemption at issue in *Wellsburg Unity Apartments, Inc. v. County Commission*, 202 W.Va. 283, 503 S.E.2d 851 (1998). In affirming the exemption of a charitable organization that owned and operated an apartment complex providing subsidized housing to elderly or low income individuals, we held that:

In order for real property to be exempt from *ad valorem* property taxation, a two-prong test must be met: (1) the corporation or other entity must be deemed to be a charitable organization under 26 U.S.C. § 501(c)(3) or 501(c)(4) as is provided in 110 C.S.R. § 3.19.1; and (2) the property **must be used exclusively for charitable purposes** and must not be held or leased out for profit as is provided in W. Va. Code § 11-3-9.

202 W.Va. at 284, 503 S.E.2d at 852, syl. pt. 3.

*Maplewood* at 281, 387 (boldface emphasis added); *see also Maplewood* at Syll. Pt. 2. Furthermore, this Court based its decision in *Wellsburg* on the stipulations that the apartments were rented to tenants who met the HUD guidelines and used exclusively for charitable purposes. *Wellsburg* at 289, 857. There is no stipulation of exclusive use for charitable purposes in this case. In addition, the Foundation's argument that exclusive use is **not** required contradicts the Foundation's own table of test for elements for exemption. *See* Foundation's Brief at pp. 8-9, block [2].

Furthermore, the Foundation attempts to conflate two separate sections of the legislative rule much like it attempts to conflate two separate statutory exemptions. The Foundation argues that an ancillary use which fosters a primary use is sufficient to claim the exemption and quotes W. Va. St. R. § 110-3-2.48.1. *See* Foundation's Brief at p. 28-29. However, the precise rule quoted by the Foundation applies to property that is "used" for a "**stated purpose**". The applicable legislative rule is the rule found in the immediately following section.

2.48.2. Whenever property is required to be "**used exclusively**" for stated purposes in order to qualify for exemption under West Virginia Code § 11-3-9, the stated purposes must be the primary and immediate use, and not a secondary or remote use. The property may not be used for purposes which are ancillary to the stated purpose.

W. Va. St. R. § 110-3-2.48.2 (emphasis added). Since the Supreme Court has ruled that under W. Va. Code 11-3-9(a)(12) the property must be used exclusively for charitable purposes, the property cannot be used for ancillary purposes and still qualify for the exemption before the Court. Ambergris' and Dr. Bowen's use of the two suites for the private purposes of operating for-profit medical offices are secondary, remote, and ancillary, to any alleged charitable use of the office suites. Because the Wellness Center has 2,800 dues-paying members, any charitable use would not be a primary and immediate use of the property for charitable purposes. Simply

stated, any charitable use would be ancillary and at least one-step removed. Any charitable use of the Wellness Center would be secondary, remote, and ancillary in violation of the legislative rules.

Contrary to the Foundation's allegations, the Business Court has conflated two separate tax exemptions in order to expand the separate exemptions beyond their respective statutory parameters. See Foundation's Brief at pp. 30-31. As argued *supra*, the Foundation cannot exempt under W. Va. Code § 11-3-9(a)(12) what Berkeley Medical Center cannot exempt under W. Va. Code § 11-3-9(a)(17). Since the Wellness Center does not qualify as a charitable use of the property under the applicable legislative rules in W. Va. St. R. 110-3-24.19.3, regarding recreational facilities owned by charitable hospitals, the Foundation cannot conflate the legislative rules to expand the exemption found in W. Va. Code 11-3-9(a)(12).

**B.2. *Wellsburg Unity Apartments, Central Realty, and Maplewood* are key to resolving this case; albeit, for different reasons.**

The Foundation argues that the Supreme Court's decision in *Wellsburg Unity Apartments, Inc. v. County Commission of Brooke County*, 202 W Va. 283, 503 S.E. 2d 851 (1998) supports its argument. See Foundation's Brief at pp. 19-23, Argument D. However, the Foundation's argument fails based on a careful reading of this Court's decision. Contrary to the Foundation's assertions, the Supreme Court's decision in *Wellsburg* was not based on furthering the stated goals of the charitable entity, Wellsburg Unity Apartments, but on the actual use of the apartment building as set forth in the stipulated facts of the case.

The Supreme Court has always utilized the same starting point for any *ad valorem* property tax appeal. What is the property being used for? Contrary to the Foundation's argument, the key point for this Court in deciding the *Wellsburg* case was the actual use of the property by the owner as stated in the stipulations agreed to by the parties. As the Tax

Department argued below, the *Wellsburg* case was decided based upon the stipulated facts. *See* Tax Department's Circuit Court Brief at p. 14, AR 157; *see also* Tax Department's Supreme Court Brief at pp. 14-15. In its decision the Supreme Court listed the stipulations agreed to by the parties; specifically, stipulations three and seven are dispositive.

WUA [Wellsburg Unity Apartments] is organized and operated *exclusively for charitable purposes*. (Emphasis added.) and

By contracting with entities like WUA, the federal government provides charity housing to impoverished individuals.

*Wellsburg* at 288, 851 (emphasis in Supreme Court decision); *see also* 285, 853 (summary of facts). *See also* *Maplewood Community, Inc., v. Craig*, 216 W. Va. 273 at 281, 607 S.E. 2d 379 at 387 (2004) (The Supreme Court noted that *Wellsburg* was limited in its guidance since the parties had stipulated to the critical issue of whether the property was used exclusively for charitable purposes.). In addition, the stipulations stated that Wellsburg Unity Apartments occupancy was limited to elderly and handicapped individuals who qualified under the Housing and Urban Development guidelines. *Wellsburg* at 288, 851. Clearly, the Wellsburg apartments were used for charitable purposes. Furthermore, the Foundation's argument that charging rent to the HUD tenants who occupied Wellsburg Unity Apartments is no different from charging rent to Ambergris and Dr. Bowen is nonsense. *See* Foundation's Brief at p. 20. There is a clear difference in renting to the poor at a reduced market rate and renting to for-profit businesses.

The Supreme Court concluded that based upon the uncontroverted, stipulated facts of the *Wellsburg* case, the property was being used exclusively for charitable purposes as required by State law. According to these three undisputed stipulations, there was no doubt that the Wellsburg apartments were used to provide affordable housing to low-income elderly and handicapped individuals which was a charitable use of the real property. Based upon the

uncontroverted stipulations in this case, Ambergris and Dr. Bowen have not been designated as exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code. Furthermore, Susan Snowden testified that both are for-profit businesses. Neither business entity resembles an elderly or handicapped tenant under HUD guidelines. Therefore, *Wellsburg* does not support the Foundation's argument that renting to Ambergris and Dr. Bowen is a charitable use of the real property at issue before the Court.

Contrary to the Foundation's assertion in Footnote 10 of its Supreme Court Brief, *Maplewood, supra*, is applicable to the case at bar as argued by the Tax Department. See Foundation's brief at p. 21; see also AR 159-160. The Foundation argues that the rents from Ambergris and Dr. Bowen will be used to support the Foundation's charitable purpose. The Supreme Court specifically observed in *Maplewood* that the critical issue before the Court was whether the charitable entity was using the property exclusively for charitable purposes; the *Maplewood* court specifically rejected the Foundation's argument that the application of rent from the property to upkeep of the building and to support the charitable purposes of the organization qualified for the property tax exemption. *Maplewood* at 282, 388.

The Foundation also argues that *Central Realty* and *McDowell Lodge* support its expanded theory since neither charity was organized for the purpose of promoting hotel chains or supporting printing offices, respectively. See Foundation's Brief at pp. 20-23. But, the Foundation overlooks the obvious. The Supreme Court denied the *ad valorem* property tax exemptions in both cases because the two charities leased real property to for-profit business entities. Both charities argued that any profits would be used for charitable activities and endeavors. *Central Realty* at \_\_\_, 723; *McDowell Lodge* at \_\_\_, 563, respectively. As the Tax Department argued before the Business Court, this Court has already rejected the Foundation's

argument in the *Central Realty* decision. See AR 157-159. The *Central Realty* Court succinctly stated the prevailing rule:

The cases of *In re Masonic Society, supra*, and *State v. McDowell Lodge, supra*, and *State v. Martin, supra*, taken in the composite, state what we believe to be the correct rule; that **where real estate is used solely by an organization for educational and charitable purposes and such use is immediate and primary** the constitutional exemption from taxation applies, and the statute enacted in pursuance thereof inhibits any assessment for taxation; **but real estate is not exempt where owned by a like organization and is leased for private purposes, notwithstanding the application of the income from rentals to charitable and benevolent purposes and upkeep of the premises.**

*Central Realty* at \_\_\_, 725 (emphasis added in bold; italics in original). Clearly, the for-profit businesses of Ambergris and Dr. Bowen's private medical practice use the leased Suites 1100 and 2400 for private purposes and not charitable purposes. To circumvent the rule, the Foundation argues that Ambergris' and Dr. Bowen's for-profit businesses further the charitable purpose of Berkeley Medical Center by promoting better health and a healthier society. But, any such charitable purpose is secondary and remote. The primary and immediate use of Suites 1100 and 2400 are as rental property for the operation of two uncontroverted for-profit businesses.

The Tax Department has always argued that the term "profit" must be consistent with the Supreme Court's decisions in *Central Realty* and *State v. McDowell Lodge*, contrary to the Foundation's assertions. See Foundation's Brief at p. 16, Argument C, at p. 33-35, Argument H.1. Contrary to representations on the Foundation's table of elements for exemption, the facts before this Court prove that the office building is held or leased out for profit to Ambergris and Dr. Bowen.

**B.3. The Foundation's use of the office building does not comply with the Supreme Court's Decision in *Appalachian EMS* and would expand the Court's holding.**

Furthermore, despite the Foundation's assertions, the Supreme Court's two recent cases of *Appalachian EMS*, discussed *infra*, and *Wellsburg Unity Apartments, infra*, support the Tax

Department's position. See Foundation's Supreme Court Brief at pp. 18-19. The significant factual differences between *Appalachian Emergency Medical Services, Inc., v. State Tax Commissioner*, 218 W. Va. 550, 625 S.E.2d 312 (2005), and the Foundation's situation support the Tax Department's argument. In *Appalachian EMS*, the Court ruled that, where an IRC § 501(c)(3) organization occupied a building which it owned, and leased space in that building to a second IRC § 501(c)(3) organization, and both parties used the building to provide emergency ambulance services, the use of the building was deemed to be charitable within the meaning of W. Va. Code § 11-3-9. As the Tax Department argued below, only Appalachian EMS and West Virginia Emergency Medical Services Technical Support Network (TSN) were involved in the use of the building. See AR 160. In the case before the Court today, the Foundation has leased a portion of the office building to Ambergris and Dr. Bowen which are two for-profit business entities as well as for ancillary use in a commercial exercise business at the Wellness Center. *Appalachian EMS* clearly stands for the proposition that when a Section 501(c)(3) entity leases a building to another Section 501(c)(3) entity and the two entities utilize the entire building for charitable purposes, then the building is used for charitable purposes. *Appalachian EMS* does not stand for the proposition that when a Section 501(c)(3) entity leases part of an office building to two for-profit businesses that the building is used for charitable purposes as required in order to properly claim the exemption set forth in W. Va. Code § 11-3-9(a)(12).

**B.4. W. Va. Code § 11-3-9(d) has never been applied by this Court as requested by the Foundation.**

The Foundation argues that it can rely on W. Va. Code § 11-3-9(d) as a basis for leasing the office building to for-profit tenants and still claim the exemption. See Foundation's Supreme Court Brief at pp. 17-18. The statute says:

(d) Notwithstanding any other provisions of this section, this section does not exempt from taxation any property owned by, ... charitable corporations or organizations, ... unless such property, or ... rents ... derived therefrom, is used primarily and immediately for the purposes of the corporations or organizations.

The Foundation's argument fails.

The Foundation has cited no West Virginia cases interpreting W. Va. Code § 11-3-9(d) and stating that operating multiple rental properties leased to a mix of for-profit businesses and Section 501(c)(3) entities constitutes a charitable use of the property. Counsel for the Tax Department has found no such cases supporting the Foundation's position. In addition, the Supreme Court should note that the language currently codified in W. Va. Code § 11-3-9(d) has been included in the statute since at least 1973. *See* Michie's 1983 Replacement Volume.

**C. THE FOUNDATION EXPANDS THE SUPREME COURT'S DECISION IN *UNITED HOSPITAL* BY READING THE DECISION IN AN OVERLY BROAD MANNER.**

The Foundation ignores the Supreme Court's fundamental focus in every *ad valorem* property tax case—the actual use of the property. The Foundation argues that leasing office suites to Ambergris and Dr. Bowen “*does not constitute a non-charitable*” use of the real property.

The fact that UHF leases suites in the McCormack Center to three taxable entities does not mean that UHF is using those suites **for non-charitable purposes**. This is so because the determinative inquiry *is not* the federal income tax status of the tenant but, instead, whether the act of leasing to a particular tenant **furtheres the charitable goals of the owner of the property**.

*See* Foundation's Brief at p. 20, Argument D (italics emphasis in original; boldfaced emphasis added). The key points under West Virginia law are whether the property is used exclusively for charitable purposes as required by W. Va. Code § 11-3-9(a)(12) and whether the asserted

charitable use of the property is primary and immediate as this Court has required consistent with the legislative rules or is secondary and remote as with the Foundation.

Instead, the Foundation argues that *United Hospital v. Romano* supports its argument. See Foundation's Brief at p. 21. The Foundation is attempting to stretch the language in *United Hospital* beyond its facts to encompass alleged secondary or even tertiary benefits as a charitable use. See Foundation's Brief at p. 22; see also Argument I, p. 39. The Supreme Court stated in Syll. Pt. 4:

A healthcare corporation, qualified as a charitable organization under federal law, whose construction of a replacement hospital facility is substantially complete on the legal date of assessment and who **has significant departmental staff on site working to fulfill the organization's charitable purposes, comes within the spirit, purpose, and intent of the constitutional framers** for purposes of entitlement to exemption from ad valorem property taxation pursuant to West Virginia Code § 11-3-9(a)(12) (2013).

*United Hospital Center, Inc., v. Romano*, 233 W. Va. 313, 758 S.E. 2d 240 at Syll. Pt. 4 (2014)(emphasis added). Certainly, the Court's syllabus point spoke in generalities of "working to fulfill the organization's charitable purpose" and "comes within the spirit, purpose and intent... of entitlement to the exemption...." *Id.* However, the Court's decision focused on the actual use of the new hospital building. The critical factor for the Court in *United Hospital* was the fact that United Hospital was using the parts of the new building to provide essential hospital services to patients. This Court correctly noted that no hospital today can operate as a hospital without information technology services (IT services), building security and housekeeping services. The Court's analysis focused on the use of the property and the activities of its employees. United Hospital had located the IT Department in the new building and IT was integral to providing patient care to United Hospital patients in the old building. There was no expansion of the charitable purpose because the hospital was using the IT services to provide

patient care. United Hospital was not promoting a charitable purpose from the new building; United Hospital was using the new building to provide patient care. The Foundation is attempting to expand the general language in Syllabus Point 4 to revoke the Court's long held position that the charitable use of the property must be primary and immediate and cannot be secondary or remote. See *United Hospital* at Syll. Pt. 2; see also W. Va. St. R. § 110-3-24.8.2 and *Central Realty* at \_\_\_\_, 725, quoted *supra*, and *State ex rel. Farr v. Martin*, 105 W.Va. 600, 143 S.E. 356 at Syllabus (1928). The Foundation's argument would expand the boundaries of the exemption beyond any rational construction of the primary and immediate requirement under West Virginia law contrary to the Foundation's argument. See Foundation's Brief at p. 27; 31, Argument G.

The Tax Commissioner's construction of the Court's decision in *United Hospital* is supported by the Court's analysis of the primary definition of "immediate" in that decision. The Court analyzed the term "immediate" and stated "This comports with the primary definition of "immediate" provided by the dictionary, which is "acting or being without the intervention of another object, cause, or agency: DIRECT." Merriam Webster's Collegiate Dictionary, p. 579 (10th ed.1994)." *United Hospital* at 320, 247.

Based upon the Court's long held position, the question becomes whether Ambergris, Dr. Bowen, and the Wellness Center use Suites 1100, 2400, and 1200 directly for charitable purposes. The answer is simply no. Yet, the Foundation argues that having these two for-profit businesses serves the charitable purpose of supporting Berkeley Medical Center. The primary and immediate use—the direct use—of the office suites is for private purposes of operating for-profit businesses. Any charitable use of the property would necessarily be one step removed and be remote or secondary. The Foundation has improperly used Syllabus Point 4 from *United*

*Hospital* as a vehicle to conflate the exemptions in W. Va. Code § 11-3-9(a)(12) with W. Va. Code § 11-3-9(a)(17) for charitable hospitals. As a result, the Business Court erroneously conflated two different exemptions to create a “common charitable purpose” doctrine that does not exist under our law.

The Foundation’s proffered determinative test is simply wrong. The exemption set forth in W. Va. Code § 11-3-9(a)(12) is not dependent upon “...furthering the goals of the owner of the property” as argued by the Foundation. The Foundation is attempting to replace the actual use requirement with a new theory of fostering charitable purposes. The Foundation is asking this Court to conclude that the Court overruled *Wellsburg* by implication.

The Supreme Court should clarify the limitation of Syllabus Point 4 in *United Hospital* to retain the long-held position that the determinative factor is the actual use of the property at issue by the taxpayer and not whether the charity is generally serving some charitable purpose. Failure to impose a reasonable constraint on Syllabus Point 4 would allow private entities to rely on broadly stated charitable purposes such as promoting public health and welfare or improving social conditions of humankind as a basis for obtaining and exemption from *ad valorem* property taxation. This would displace the proper role of the Legislature in making such fiscal decisions. Contrary to the Foundation’s position, the West Virginia Legislature and the West Virginia Constitution should determine the boundaries of tax exemptions and not private charities. Private charities are not in a position to ensure that taxation is equal and uniform. If private charities can determine the breadth of the exemptions from tax, the new test will simply be whether the charity is a Section 501(c)(3) entity. Actual use of the property has been a solid boundary for almost a century and should be retained by this Court.

**D. THE FOUNDATION HAS CONFLATED TWO DIFFERENT STATUTORY EXEMPTIONS AND EXPANDED THEIR SCOPE TO CREATE A**

**“COMMON CHARITABLE PURPOSE” DOCTRINE THAT DOES NOT EXIST UNDER CURRENT LAW.**

Contrary to the Foundation’s argument, the Wellness Center is an ancillary use and is not a charitable use of the property. *See* Foundation’s Brief at pp. 23-25, Argument E. The Foundation is attempting to claim an exemption from *ad valorem* property tax that Berkeley Medical Center could not claim on its own. According to the legislative rules for the *ad valorem* property tax, charitable hospitals, such as Berkeley Medical Center, can utilize charitable property for tennis courts, playgrounds, and parks, etc., provided that the activities are reasonably necessary for the rehabilitation of hospital patients or people identified as being at risk for disease, such as heart attack or stroke. *See* W. Va. St. R. § 110-3-24.6.1. However, the legislative rules do not give *carte blanche* to hospitals to operate health clubs.

24.19.3. Recreational facilities shall not be considered property used primarily and immediately for charitable purposes unless such facilities are **designed for and primarily and immediately used by patients of the hospital.**

W. Va. St. R. 110-3-24.19.3 (emphasis added). The Wellness Center includes among other amenities, a sauna. *See* Foundation’s Supreme Court Brief at p. 23. Was the sauna designed for treating hospital patients? Is the primary and immediate use of the sauna located in the Wellness Center to treat hospital patients? The same question could be asked about the other exercise equipment at the Wellness Center outside the 800 square feet dedicated to the cardiac rehab unit before five o’clock.

Furthermore, the legislative rules restrict the use of recreational facilities to patients and not the general public.

24.6.3. The primary and repeated use of facilities for mere recreational reasons by the general public, **charged for such utilization**, is not consistent with charitable use.

W. Va. St. R. § 110-3-24.6.3. Mr. Zelenka was unable to state how many cardiac rehab patients utilized the cardiac rehab center; yet, he freely admitted that the Wellness Center had approximately 2800 dues-paying members. AR 483-484. The breadth of the facilities available at the health club operated by Berkeley Medical Center, the number of dues-paying members, and the amount of revenue earned by the Wellness Center, proves that the Wellness Center was not designed for and primarily and immediately used by hospital patients as required by the clear language of the legislative rule. Therefore, Berkeley Medical Center cannot claim the exemption found in W. Va. Code § 11-3-9(a)(17). This Court should not allow the Foundation to claim an exemption under W. Va. Code § 11-3-9(a)(12) that Berkeley Medical Center cannot qualify for under W. Va. Code § 11-3-9(a)(17).

The taxpayer before the Supreme Court is the Foundation and not Berkeley Medical Center. As the Tax Department argued before the Business Court, the Foundation is attempting to utilize a new theory of “common charitable purposes” to conflate two different tax exemptions that are based on different statutory language and have different requirements, in order to expand the breadth of the exemptions beyond the statutory parameters. *See* AR 164-165. As argued *supra*, the Foundation is attempting to give Syllabus Point 4 from *United Hospital* an overly broad reading to create a “common charitable purposes” doctrine that does not exist.

**E. THE TAX DEPARTMENT IS APPLYING W. VA. CODE § 11-3-9(a)(12) IN A RATIONAL MANNER.**

Contrary to the Foundation’s assertions, the Tax Department is applying the statutory exemptions found in W. Va. Code § 11-3-9(a)(12) in a rational manner. *See* Foundation’s Brief at pp. 31-33, Argument H. This Court has specifically observed that the Tax Department is charged with protecting the State’s fisc when reviewing claims for exemptions from tax. In the case at bar, the Tax Department has applied the legislative rules on point and the clear statutory

language to narrowly interpret tax exemptions as directed by this Court. *See Fountain Place Cinema 8, LLC, v. Morris*, 227 W. VA. 249 at 255, 707 S.E. 2d 859 at 865 (2011). The Tax Department has always attempted to follow the decisions of the Supreme Court and the statutory directions from the West Virginia Legislature regarding tax exemptions.

In addition, the Tax Department disagrees that there is a fundamental difference between leasing office suites to two for-profit businesses, like Ambergris and Dr. Bowen, than renting the Boy Scout Reservation in Fayette County to ESPN for the “X-Games”. *See* Foundation’s Brief at p. 25-26. Using property for the private purposes of operating a for-profit business, be that business Ambergris, Dr. Bowen or ESPN, is not a charitable use the property under the applicable legislative rules and law. The Supreme Court has ruled that in order to qualify for the exemption in W.Va. Code § 11-3-9(a)(12), the property must be used exclusively for charitable purposes. Any claimed charitable use cannot be secondary, remote or even ancillary. *See Wellsburg and Central Realty*, argued *supra*. As the Tax Department argued to the Business Court below, the Foundation should have sought a constitutional amendment to expand the exemption and authorizing the use of the office building the same as the Boy Scout property in Fayette County. *See* AR 164-165.

In addition, the Foundation argues that the term “for profit” should be restricted to the accounting definition of “profit” meaning that income exceeds expenses. The Foundation argues that the office building is not held or leased out for profit in violation of W. Va. Code 11-3-9(a)(12). *See* Foundation’s Brief at pp. 33-35, Argument H.1. However, this argument overlooks the very clear decision of this Court in *State v. McDowell Lodge No. 112 A.F. & A.M.*, 96 W. Va. 611, 123 S.E. 561 at Syll. (1924), as argued below.

## **II. CONCLUSION**

The decision from the Business Court Division of the Circuit Court does not meet the statutory requirements that are necessary in order to qualify for the exemption under W. Va. Code § 11-3-9(a)(12) and does not comply with the very clear directions from the Supreme Court's numerous decisions on *ad valorem* property tax. The Circuit Court decision conflates two different statutory exemptions and the respective legislative rules and has unduly expanded the scope of the exemption before this Court. The Foundation has read the Supreme Court's ruling in Syllabus Point 4 of *United Hospital* in an overly broad manner that will substitute private charities in the role of the Legislature in setting the boundaries of exemptions from tax. Private charities will not meet the Constitutional requirement that taxation must be equal and uniform on all property within this State. The Supreme Court should reverse the Business Court decision.

Respectfully submitted,

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS  
DOCKET NUMBER 15-0597 and 15-0599

MARK W. MATKOVICH,  
STATE TAX COMMISSIONER, and  
LARRY A. HESS, ASSESSOR OF BERKELEY  
COUNTY, WEST VIRGINIA

Respondents Below, Petitioners.

v.

UNIVERSITY HEALTHCARE FOUNDATION, INC.  
f/k/a CITY HOSPITAL FOUNDATION, INC.,

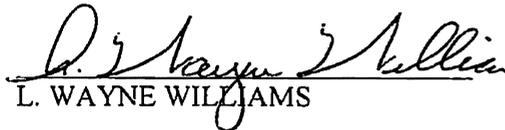
Petitioner Below, Respondent.

CERTIFICATE OF SERVICE

I, L. Wayne Williams, Assistant Attorney General, do hereby certify that the foregoing *Tax Department's Supreme Court Reply Brief* was served upon counsel for the Plaintiff and counsel for Defendant by mailing a true copy thereof in the United States Mail, first-class postage prepaid, this 20<sup>th</sup> day of November, 2015, addressed as follows:

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