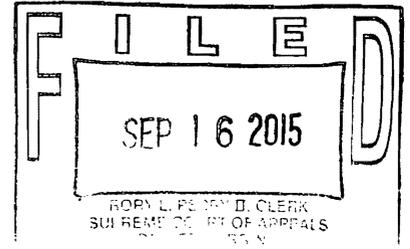


**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS  
DOCKET NUMBER 15-0597**

**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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**TAX DEPARTMENT'S SUPREME COURT BRIEF**

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## TABLE OF CONTENTS

	<b>PAGE</b>
I. ASSIGNMENTS OF ERROR	1
II. STATEMENT OF THE CASE	2
III. SUMMARY OF ARGUMENT	10
IV. STATEMENT REGARDING ORAL ARGUMENT	12
V. STANDARD OF REVIEW	12
VI. ARGUMENT	13
A. The Circuit Court Decision Erroneously Failed To Properly Apply Numerous Supreme Court Decisions Requiring That Property Must Be Used Exclusively For Charitable Purposes In Order To Be Exempt Pursuant To W. Va. Code § 11-3-9(A)(12).	13
B. Contrary To The Circuit Court’s Decision The Foundation Uses The Office Building As Rental Property And Does Not Use The Office Building For Charitable Purposes As Required By W. Va. Code § 11-3-9(A)(12).	22
B.1. The Office Building is Used as Rental Property for Private Medical Offices and a Wellness Center, Primarily, Used by Dues-Paying Members of the General Public.	22
B.2. The Office Building Is Being Held and Leased Out For Profit.	27
C. The Circuit Court Has Conflated And Expanded Two Existing Statutory Exemptions To Create A New Exemption From <i>Ad Valorem</i> Property Tax For “Common Charitable Purposes” Which Does Not Exist Under Current Law.	29
VII. CONCLUSION	32

## TABLE OF AUTHORITIES

**PAGE**

### Cases

<i>Wellsburg Unity Apartments, Inc. v. County Comm'n.</i> , 202 W Va. 283; 503 S.E. 2d 851 (1998).....	10, 15, 16, 17
<i>Central Realty Co., v. Martin</i> , 126 W. Va. 915, 30 S.E. 2d 720.....	<i>passim</i>
<i>Tax Assessment Against American Bituminous Power Partners, L.P.</i> , 208 W. Va. 250, 539 S.E.2d 757 (2000).....	12
<i>CB&amp;T Operations Co., Inc. v. Tax Commissioner of State</i> , 211 W. Va. 198, 564 S.E.2d 408 (2002).....	12
<i>Hillcrest Memorial Gardens</i> , 146 W. Va. 337, 119 S.E.2d 753.....	13, 14
<i>Reynolds Memorial Hospital, et al., v. County Court of Marshall County</i> , 78 W. Va. 685, 90 S.E. 238.....	13
<i>State v. Kittle</i> , 87 W. Va. 526, 105 S.E. 775 (1921).....	14
<i>State v. McDowell Lodge No. 112 A.F. &amp; A.M.</i> , 96 W. Va. 611, 123 S.E. 561 (1924).....	14, 19, 27, 28, 29, 32
<i>United Hospital Center, Inc., v. Romano</i> , 233 W. Va. 313, 758 S.E. 2d 240.....	15, 16
<i>Maplewood Community, Inc., v. Craig</i> , 216 W. Va. 273, 607 S.E. 2d 379 (2004).....	15, 16, 20, 21, 22
<i>Appalachian Emergency Medical Services, Inc., v. State Tax Commissioner</i> , 218 W. Va. 550, 625 S.E, 2d 312 (2005).....	17, 18
<i>Appalachian Power Company v. State Tax Commissioner</i> , 195 W. Va. 573 at 586, 466 S. E. 2d 424.....	19, 31

### Statutes

W. Va. Const. Art. X, § 1.....	13
W. Va. Code § 11-3-9(a)(12).....	<i>passim</i>
W. Va. Code § 11-3-24a.....	2
W. Va. Code § 11-3-9.....	14, 17, 19, 30
W. Va. Code § 11-3-9(a)(17).....	30, 31
W. Va. Code § 11-3-9(a)(16).....	19

**Rules**

W. Va. Code St. R. §110-3-24.8.2.....19  
W. Va. Code St. R. § 110-3-24.19.3.....26  
W. Va. Code St. R. §110-3-24.15.1.....26  
W. Va. Code St. R. §110-3-19.....31

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TAX DEPARTMENT'S  
SUPREME COURT BRIEF

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I.

ASSIGNMENTS OF ERROR

- A. THE CIRCUIT COURT DECISION ERRONEOUSLY FAILED TO PROPERLY APPLY NUMEROUS SUPREME COURT DECISIONS REQUIRING THAT PROPERTY MUST BE USED EXCLUSIVELY FOR CHARITABLE PURPOSES IN ORDER TO BE EXEMPT PURSUANT TO W. VA. CODE § 11-3-9(a)(12).
- B. CONTRARY TO THE CIRCUIT COURT'S DECISION, THE FOUNDATION USES THE OFFICE BUILDING AS RENTAL PROPERTY AND DOES NOT USE THE OFFICE BUILDING FOR CHARITABLE PURPOSES AS REQUIRED BY W. VA. CODE § 11-3-9(a)(12).
- C. THE CIRCUIT COURT HAS CONFLATED AND EXPANDED TWO EXISTING STATUTORY EXEMPTIONS TO CREATE A NEW EXEMPTION FROM *AD VALOREM* PROPERTY TAX FOR "COMMON CHARITABLE PURPOSES" WHICH DOES NOT EXIST UNDER CURRENT LAW.

## II.

### STATEMENT OF THE CASE

The procedural history is fairly straight-forward. University Healthcare Foundation, Inc., (hereinafter sometimes referred to as “Foundation” or “Taxpayer”) challenged the taxability of real property for *ad valorem* tax purposes for the 2014 tax year pursuant to W.Va. Code § 11-3-24a. Appendix Record at 787-830 (hereinafter “AR \_\_\_\_”).

Assessor Larry A. Hess (hereinafter referred to as “Assessor”) determined that the office building commonly referred to as the Dorothy McCormack Center is subject to property tax. AR 765-766. By letter dated December 18, 2013, Assessor Hess denied the *ad valorem* property tax exemption based upon three reasons. First, the office building is not used exclusively for charitable purposes as required by law. Second, the “charitable” use of the property must be the primary and immediate use of the property and the property cannot be held or leased out for profit. Third, several office suites were leased as private offices to physicians in private practice which was not a charitable use of the property. AR 779. Consequently, Assessor Hess denied the Foundation’s request for an exemption from *ad valorem* property tax and certified the question of taxability to Mark W. Matkovich, State Tax Commissioner. AR 765-856.

On February 22, 2014, the Tax Commissioner issued Property Tax Ruling 14-01 (PTR 14-01) which affirmed the Assessor’s treatment of the real property for *ad valorem* tax purposes. Tax Commissioner Matkovich based PTR 14-01 on the information provided by Assessor Hess and the Foundation. In PTR 14-01, the Tax Department noted that approximately 72% of the office building was used in for-profit business ventures including the 31% of the office building being used as The Wellness Center which sold memberships to the general public. AR 759. The Tax Department concluded that only 28% of the office building was being used for charitable

purposes. Based upon the information provided by the Foundation, the Tax Department concluded that the office suite leased to the American Cancer Society, the Foundation's corporate office suite, and the suites leased to the Berkeley Medical Center and used for the radiology lab, oncology treatment, storage, classrooms and diabetic education, were being used for charitable purposes. AR 759. However, since the office building was not used exclusively for charitable purposes, the Tax Commissioner determined that the office building is subject to *ad valorem* property tax.

Subsequently, the Foundation appealed Property Tax Ruling 14-01 to the Circuit Court of Berkeley County in Civil Action No.: 14-AA-1. AR 29-84.<sup>1</sup>

On January 9, 2015, the Circuit Court conducted a bench trial. At the bench trial, the parties agreed to and submitted 16 relevant stipulations of fact for the Circuit Court to consider in deciding the case. The entire *Joint Stipulation of Uncontested Facts* can be found in the record as Tax Department's Exhibit 5. AR 1158-1162.

Stipulations 15 and 16 in the Joint Stipulation of Uncontested Facts are critical to the Supreme Court's analysis and are set forth below in their entirety.

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.

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<sup>1</sup> At the request of the Honorable Christopher C. Wilkes, the parties agreed to refer the case to the Business Court Division. Pursuant to an order entered July 30, 2014 the Honorable Robin Jean Davis ordered the case to be transferred to the Business Court Division. AR 97.

Stipulation 15 is critical as well.

15. University Healthcare Foundation, Inc., City Hospital, Inc., West Virginia University Hospitals - East, Inc., and University Healthcare Physicians, Inc., are all separate legal entities. AR 1161.

The four corporate entities in Stipulation 15 have been designated as Section 501(c)(3) entities by the Internal Revenue Service. *See* Stipulation 1, 4, 7 and 9 at AR 1158.

The facts necessary to decide this case are summarized below from the joint stipulations and the evidence from the trial. The Taxpayer, University Healthcare Foundation, Inc., was designated as exempt from federal income taxes pursuant to the Internal Revenue Code § 501(c)(3) in 1984. *See* Stipulation 1, AR 1158. Berkeley Medical Center is the registered trade name for City Hospital which was designated as a Section 501(c)(3) entity in 1940. *See* Stipulations 3-5, AR 1158-1159. Berkeley Medical Center operates the Wellness Center as a department of City Hospital, Inc. Stipulation 6, AR 1159. University Healthcare Physicians, Inc. was designated as exempt from federal income taxes on August 28, 2014 and the designation was made retroactive by the IRS to October 1, 2012. Stipulation 9, AR 1159.

The Taxpayer, University Healthcare Foundation, owns the real property commonly referred to as the Dorothy McCormack Center located in Martinsburg in Berkeley County, West Virginia. Stipulation 11, AR 1160. The office building includes the following 18 office suites which were rented to the listed tenants as of July 1, 2013.

- a. Suite 1100 (4,973 ft.2): Ambergris, LLC
- b. Suite 1101 (315 ft.2): American Cancer Society
- c. Suite 1200 (19,100 ft.2): City Hospital, Inc.
- d. Suite 1300 (1,971 ft.2): City Hospital, Inc.
- e. Suite 2100 (168 ft.2): Patient Transportation
- f. Suite 2200 (2,800 ft.2): University Healthcare Physicians, Inc.
- g. Suite 2310 (4,644 ft.2): West Virginia University Hospitals - East, Inc.
- h. Suite 2400 (2,200 ft.2): Robert E. Bowen, MD Ltd.

- i. Suite 2600 (7,420 ft.2): City Hospital, Inc.
- j. Suite 3100 (3,200 ft.2): University Healthcare Physicians, Inc.
- k. Suite 3200 (3,450 ft.2): University Healthcare Physicians, Inc.
- l. Suite 3300 (1,728 ft.2): University Healthcare Physicians, Inc.
- m. Suite 3500 (1,933 ft.2): University Healthcare Physicians, Inc.
- n. Suite 3600 (1,292 ft.2): West Virginia University Hospitals - East, Inc.
- o. Suite 3650 (1,140 ft.2): University Healthcare Physicians, Inc.
- p. Suite 3650 (183 ft.2): Vacant
- q. Suite 3700 (2,800 ft.2): University Healthcare Physicians, Inc.
- r. Suite 3800 (1,100 ft.2): City Hospital, Inc.

Stipulation 13, AR1160-1161.

Suite 1100 is leased to Ambergris, LLC, for use as a “private medical office”. Specifically, the lease between the Foundation and Ambergris states that “[t]he Lessee shall use the leased premises to operate a private medical office and for no other purpose whatsoever.” AR 869-870. Similarly, Dr. Robert E. Bowen, MD, leases Suite 2400 for use as a “private medical office.” AR 889-890. Finally, Patient Transportation<sup>2</sup> leases Suite 2100 from the Foundation for use as “patient transportation.” AR 899-900. The tax year at issue before the Court is the 2014 tax year and the assessment date for the 2014 tax year was July 1, 2013.

Stipulation 14, AR 1161.

In addition, it was argued before the Circuit Court that the following uncontested facts found in the evidentiary record, in addition to the stipulations, supported the property’s taxability. The additional facts provide a complete picture of the use of the office building and the profit earned by the Foundation.

1. Tamera Edgar, Commercial Appraiser for the Berkeley County Assessor, testified regarding how the assessment for the office building was prepared. AR 148; 531-540.

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<sup>2</sup> Patient Transport leases 168 square feet out of 60,417 square feet in the office building. AR at 759. The portion of the office building leased to Patient Transport is minimal, at best. The Tax Department’s argument is directed toward Ambergris, LLC, and Dr. Bowen as the two significant tenants that utilize the rented suites in for-profit business ventures. If Patient Transport were the only for-profit business entity renting office space from the Foundation, the case would not be on appeal.

2. Ms. Edgar testified that Dana Weller, Accounting Specialist for University Healthcare Accounting and Finance, provided a table indicating which office suites should be taxable, which suites should be tax exempt, and the square footage of each unit. AR 148; 535-538; Table at 772.

3. Ms. Edgar testified that the Berkeley County Assessor accepted the designation of taxable and tax exempt as provided by Dana Weller with one exception. AR 148; 536-538.

4. The Berkeley County Assessor exempted half of the Wellness Center from *ad valorem* property tax since a small percentage of the Wellness Center is used for cardiac rehab patients. AR 148; 538. *See* Additional Fact 10, *infra*.

5. Ms. Edgar testified on cross-examination by the Tax Department that she asked Dana Weller which parts of the office building should be taxable, which parts should be exempt from property tax, and proceeded to tax the office building as instructed by Mr. Weller. AR 148-149; 539:24-540:12.

6. Mr. Anthony Zelenka, President and Chief Operating Officer for Berkeley County Medical Center testified on behalf of the Foundation. AR 149; 447-495.

7. Mr. Zelenka testified that the Wellness Center had approximately 2,800 paid memberships for the 2014 calendar year. However, Mr. Zelenka admitted that he did not know the number of cardiac rehab patients who were treated at the Wellness Center. AR 149; 483-484. Thus, he could not provide any evidence as to the percentage of the facility that was used by patients.

8. Mr. Zelenka admitted that the general public could buy a membership in the Wellness Center and that you do not have to be a hospital patient to join the Wellness Center. AR 149; 485-486.

9. Mr. Zelenka admitted that anybody could use the cardiac rehab portion of the Wellness Center after five o'clock. AR 149; 486:16-24.

10. Mr. Zelenka testified that the Wellness Center utilizes approximately 19,000 square feet; but, the cardiac rehab portion only comprises 800 square feet. AR 486-487. The cardiac rehab portion "... would be smaller than this courtroom." AR 149; 487:4-11. The portion of the Wellness Center dedicated to Cardiac rehab is only 4.2%

11. University Healthcare Foundation, Inc., files a Form 990 with the Internal Revenue Service. AR 146; 1169; 1203; 1239.

12. According to the most recent Form 990's available at the time of trial, the Foundation realized a net profit on the rental properties it owns in Berkeley County.

2012 \$298,508.00 Net Profit

2011 \$281,648.00 Net Profit

2010 \$379,298.00 Net Profit

AR 146-147; 1177; 1211; 1247.

13. According to UHF Exhibit 26, the Foundation's Projected Profit and Loss Statement for 2013, the Foundation projected a loss of \$25,460.00. AR 147; 754.

14. According to UHF Exhibit 27, the *Pro Forma* Income Statement for the 2013 calendar year, the Foundation incurred an operating loss of \$323,583.00. AR 147; 755.

15. Kathleen Quinones, Vice President of Finance, testified regarding the Foundation.<sup>3</sup> AR 147-148; 495-514.

16. On cross-examination, Ms. Quinones testified:

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<sup>3</sup> Ms. Quinones testified that she is the Vice President of Finance for Berkeley Medical Center "...as well as...University Healthcare Foundation..." (Tr. P. 101-102). Ms. Quinones' exact position with the Foundation is, somewhat, unclear.

MR. WILLIAMS: Can you tell me how these two numbers relate to the profit and loss reported on the Form 990 for the calendar year 2013?

MS. QUINONES: Without the 990 in front of me I'm going to have to make a – I don't know exactly what the numbers look like on the 990. **I do believe it did show a profit for rental operations around a couple hundred thousand for the year.** How it would relate to that number on the 990 is these operational numbers for the Dorothy McCormack Center would roll up into and be included in the numbers for rental operations in total under University Healthcare because there were other buildings that also – that they received rent from so this would be part and parcel of that total.

MR. WILLIAMS: Can you tell me, if you know, what the number was that was reported on the 990 for 2013?

MS. QUINONES: That I do not know for just the Dorothy McCormack Center because we don't prepare it by building for the 990. We prepare it in total.

MR. WILLIAMS: For the overall Foundation?

MS. QUINONES: For the overall Foundation.

AR 147-148; 512:20-513:16(emphasis added).

17. According to UHF Exhibit 26, the Projected Profit and Loss Statement for 2013, Suite 3700 labelled "Cardiologist" was vacant for the 2013 calendar year. Suite 3700 contains 2,800 square feet. AR 148; 754.

18. According to UHF Exhibit 26, Suite 2200 was leased to UHP Surgical Services for \$51,184.00 for the 2013 calendar year. Suite 2200 contains 2,800 square feet. AR 148; 754.

19. For the 2012 Tax Year, the Foundation reported that a related organization paid a combined compensation of \$949,376.00 to Christina Coad, Teresa McCabe, Anthony Zelenka and Christopher Knight. AR 149; 1175, Line 1a, Column (E); 1176, Line 1d Column (E); and, 1195. The taxpayer provided no evidence that this compensation represented fair market value.

20. For the 2011 Tax Year, the Foundation reported that a related organization paid a combined compensation of \$796,651.00 to Christina Coad, Teresa McCabe, Anthony Zelenka and Christopher Knight. AR 149-150; 1209, Line 1a, Column (E); 1210, Line 1d, Column (E); and, 1230.

21. For the 2010 Tax Year, the Foundation reported that a related organization paid a combined compensation of \$754,186.00 to Christina Coad, Teresa McCabe, Anthony Zelenka and Christopher Knight. AR 150; 1245, Line 1a, Column (E); 1245-1246, Line 1d, Column (E); and, 1265.

22. All four individuals are designated as "WVU-EAST Staff" on the Federal Forms 990 listed above. AR 150; 1175; 1209; and 1245-1246.

23. University Healthcare Physicians, Inc., disclosed the following five highest compensated independent contractors in its Application for Recognition of Exemption, IRS Form 1023, filed with Internal Revenue Service on December 31, 2013. UHP compensated Timothy Orphanides, M.D., Gastroenterologist, the sum of \$490,377.36 in 2013. UHP compensated William Kao, M.D., Urologist the sum of \$397,377.36 in 2013. UHP Nyagon Duany, M.M., Orthopedist, the sum of \$360,000.00 in 2013. UHP compensated Phillip Agulta, M.D., Pulmonologist, the sum of \$357,924.53 in 2013. UHP compensated Sohrab Shahab, M.D., Otolaryngologist, the sum of \$328,222.04. AR 150; 990; 994; 996; 1134; 1008.

24. University Healthcare Physicians, Inc., projected total revenue of \$21,033,765 and total expenses of \$29,108,324 for the 2013 calendar year in its Application for Recognition of Exemption. AR 150; 1002.

25. The Wellness Center earned total other operating revenues of \$782,447.00 for the 2012 calendar year and \$794,201.00 for the 2011 calendar year. The Wellness Center reported zero total gross patient revenues for both years. AR 150-151; 756.

The parties submitted legal briefs and proposed final orders for the Circuit Court to consider. On May 15, 2015 the Honorable Christopher C. Wilkes entered an Order granting the relief requested by the Foundation and reversing the Tax Commissioner's decision in PTR 14-01. On June 15, 2015, the State Tax Department timely appealed the Circuit Court's decision to the West Virginia Supreme Court of Appeals. AR 316-357.

### III.

#### **SUMMARY OF ARGUMENT**

Either the law means what it says or it doesn't. University Healthcare Foundation, Inc. owns an office building which it argues should be exempt from property tax. W. Va. Code § 11-3-9(a)(12) exempts from tax property used for charitable purposes and not held or leased out for profit.

Long ago the West Virginia Supreme Court of Appeals required two criteria to qualify for this exemption. First, the property must be owned by a Section 501(c)(3) or Section 501(c)(4) entity. Second, the property must be used exclusively for charitable purposes and the property must not be held or leased out for profit. *See Wellsburg Unity Apartments, Inc. v. County Comm'n.*, 202 W Va. 283; 503 S.E. 2d 851 at Syl. Pt 3, (1998). The Foundation is a Section 501(c)(3) entity under the Internal Revenue Code. AR 1158, Stipulation 1. However, the Foundation has stipulated that three tenants who lease approximately 12% of the office building are for-profit business entities. AR 1161, Stipulation 16. Since the Foundation leases the office

building to three for-profit businesses, the real property is not used exclusively for charitable purposes.

The Supreme Court has ruled that exclusive use also requires the property to be used primarily and immediately for charitable purposes; the charitable use of the property cannot be secondary or remote. *See Central Realty Co., v. Martin*, 126 W. Va. 915, 30 S.E. 2d 720 at Syll. Pt. 1 (1944). The Foundation has stipulated that Ambergris, LLC, uses Suite 1100 in a for-profit cancer treatment business and that Dr. Bowen uses Suite 2400 in his for-profit private medical practice. In addition, Berkeley Medical Center uses thirty-two percent of the office building to operate a Wellness Center which has 2800 dues-paying members of the general public. Significant portions of the office building at issue before this Court are used in two undisputed for-profit businesses and a commercial business venture.

In addition, the Foundation made a profit of approximately \$298,508 in the 2012 calendar year from its rental of three office buildings located in Berkeley County. AR 1177, line 6c. As noted above, the 2012 tax year was the most recent federal income tax return available from the Foundation at the time the bench trial occurred.

The Tax Department properly denied the claimed property tax exemption in Property Tax Ruling 14-01 and the Circuit Court decision should be reversed since the ruling is erroneous.

#### IV.

#### **STATEMENT REGARDING ORAL ARGUMENT**

The Tax Department requests a Rule 20 Oral Argument, pursuant to the Revised Rules of Appellate Procedure, in this case because it involves fundamental issues regarding the scope of the exemption found in W. Va. Code § 11-3-9(a)(12) which exempts property used for charitable

purposes. In addition, the expansion of the property tax exemption by the Circuit Court of Berkeley County, contrary to the law and purpose of the charitable exemption, has the potential to significantly reduce county property tax revenues statewide in future years. Furthermore, a memorandum decision is not appropriate because the Tax Department seeks the reversal of the Circuit Court decision. *See* Rev. R.A.P. 21(d).

## V.

### STANDARD OF REVIEW

The standard of review on appeal is well-settled. Legal questions before the Supreme Court are subject to *de novo* review. *See* Syl. pt. 1, *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E.2d 757 (2000). On the other hand, factual findings made by the Tax Department or any other administrative agency receive deference. *See* Syl. pt. 2, *CB&T Operations Co., Inc. v. Tax Commissioner of State*, 211 W. Va. 198, 564 S.E.2d 408 (2002).

## VI.

### ARGUMENT

#### **A. THE CIRCUIT COURT DECISION ERRONEOUSLY FAILED TO PROPERLY APPLY NUMEROUS SUPREME COURT DECISIONS REQUIRING THAT PROPERTY MUST BE USED EXCLUSIVELY FOR CHARITABLE PURPOSES IN ORDER TO BE EXEMPT PURSUANT TO W. VA. CODE § 11-3-9(a)(12).**

The fundamental starting point must be the West Virginia Constitution which outlines the powers of our government and specifically addresses the power to tax.

§1. Subject to the exceptions in this section contained, taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law...**but property used for educational, literary, scientific, religious, or charitable purposes...may by law be exempted from taxation...**

W. Va. Const. Art. X, § 1 (emphasis added). The Constitution does not of itself exempt any property from taxation; rather, the Constitution simply authorizes the legislature to provide an exemption in certain situations. *See In re Hillcrest Memorial Gardens*, 146 W. Va. 337, 119 S.E.2d 753 at Syll. Pt. 1(1961); *Reynolds Memorial Hospital, et al., v. County Court of Marshall County*, 78 W. Va. 685, 90 S.E. 238 at Syll. Pt. 1 (1916). According to the Constitution, it is the use of the property and not the status of the property owner which determines exemption. Therefore, while the Foundation's tax exempt status under Internal Revenue Code Section 501(c)(3) is one factor to consider, it is not the sole factor on the issue of whether the property qualifies for an exemption from *ad valorem* property tax.

Taxation of all property, both real and personal, is the general rule fixed by constitutional mandate while exemption from taxation constitutes the exception. *Hillcrest Memorial Gardens* at Syll. Pt. 1. The constitutional and statutory provisions exempting property from taxation are strictly construed. *See Hillcrest Memorial Gardens* at Syll. Pt. 2; *see also State v. Kittle*, 87 W. Va. 526, 105 S.E. 775 at Syll. Pt. 3 (1921). If any doubt arises as to exemption, that doubt must be decided against the person who claims the exemption. *State v. McDowell Lodge No. 112 A .F. & A.M.*, 96 W. Va. 611, 123 S.E. 561 (1924); *Central Realty Co. v. Martin*, 126 W. Va. 915, 30 S.E.2d 720 (1944). The logic is obvious; all exemptions negate the general principle that taxation should be equal and uniform, so as to place the public burdens, as nearly as may be, upon all property and citizens alike. *Hillcrest Memorial Gardens*, *supra*; *State v. Kittle*, 87 W. Va. 526, 105 S.E. 775 (1921).

The Supreme Court's analysis in this case must focus on the language used in the exemption at issue. The Foundation claimed that the entire office building should be exempt from *ad valorem* property tax pursuant to W. Va. Code § 11-3-9(a)(12) which states:

(a) All property, real and personal, described in this subsection, and to the extent limited by this section, is exempt from taxation: .... (12) Property used for charitable purposes and not held or leased out for profit;

In order to claim the exemption from *ad valorem* property tax, the Foundation must meet the requirements of the exemption.

The issue before this Court is whether an office building owned by one Section 501(c)(3) entity and leased to a mix of for-profit businesses, other Section 501(c)(3) entities, and a Section 501(c)(3) entity engaged in commercial business ventures, may be exempt from *ad valorem* property taxation under W. Va. Code §11-3-9(a)(12) as "property used for charitable purposes and not held or leased out for profit." 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 Syll. Pt. 2 (2014)(quoting *Wellsburg*); and *Maplewood, infra*, at Syl. Pt. 1(quoting *Wellsburg*).

The first prong is met easily enough by the Foundation. 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, the Foundation fails the second prong because the office building is not used exclusively for charitable purposes. The Supreme Court is faced with one hurdle in the case that was not present in *Wellsburg* or *United Hospital*. In *Wellsburg*, the parties had stipulated

that the Wellsburg Unity Apartments, Inc., was “...organized and operated **exclusively for charitable purposes.**” *Wellsburg* at 287, 855 (emphasis in opinion). In contrast in this appeal, the parties have stipulated that three of the office suites are leased by for-profit business entities. According to the *Joint Stipulation of Uncontested Facts* for this case, Ambergris, LLC., Patient Transport, and Dr. Robert Bowen, MD, Ltd., have **not** been designated by the Internal Revenue Service as exempt entities pursuant to IRC §§ 501(c)(3). Stipulation 16, AR at 1161. In addition, Susan Snowden, a witness for the Foundation, admitted at the bench trial that Ambergris, Dr. Bowen, and Patient Transport, are all for-profit businesses. *See* AR at 420; 429-431; 440. There is no doubt in the evidentiary record that three tenants in the office building are for-profit entities and not Section 501(c)(3) entities under the Internal Revenue Code.

Suite 1100 is leased to Ambergris, LLC, for use as a “private medical office”. Specifically, the lease between the Foundation and Ambergris states that “[t]he Lessee shall use the leased premises to operate a private medical office and for no other purpose whatsoever.” AR 869-870. Similarly, Dr. Robert E. Bowen, MD, leases Suite 2400 for use as a “private medical office.” AR 889-890. In addition, Patient Transportation leases Suite 2100 from the Foundation for use as “patient transportation.” AR 899-900. Therefore, Ambergris and Dr. Bowen use their respective office suites in for-profit business activities and not for charitable purposes.

Ambergris leases approximately 4,973 square feet and Dr. Bowen leases approximately 2,200 square feet. AR 869 & 889. The combined total of the two office suites represent approximately 12% of the total rental space in the office building. Twelve percent of the office building is leased to for-profit medical providers; therefore, the real property owned by the

Foundation is not used exclusively for charitable purposes as required by the Supreme Court's decisions in *Wellsburg Apartments*, *United Hospital*, and *Maplewood Community, Inc.* The Circuit Court failed to properly apply this Court's decisions regarding W. Va. Code § 11-3-9(a)(12).

Additionally, the Circuit Court's reliance on *United Hospital* is misplaced. The Supreme Court's decision revolved around whether the new building located in Bridgeport was being used by United Hospital as a hospital. This Court concluded that the Information Technology Services department was operating from the new building and supporting medical services at the old building. See *United Hospital* at \_\_\_\_, 242. The key question in *United Hospital* was whether the new building was being used a hospital on July 1, 2010 by the Taxpayer. United Hospital was the only entity involved in the use of the new building. The Foundation presents a very different question for the Supreme Court. Does leasing 12% of the office building to two undisputed for-profit businesses qualify as using the real property exclusively for charitable purposes? Adopting the Foundation's argument would simply repeal the second prong of syllabus point 3 in *Wellsburg, supra*.

The Foundation premised its argument to a large extent on this Court's decision in *Appalachian Emergency Medical Services, Inc., v. State Tax Commissioner*, 218 W. Va. 550, 625 S.E. 2d 312 (2005). 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 which used the building for charitable purposes, the use of the building was deemed to be charitable within the meaning of W. Va. Code § 11-3-9. Furthermore, the Court specifically found that the building was used exclusively for charitable purposes. *Appalachian EMS* at 555, 317.

As the Tax Department argued below, *Appalachian EMS* is substantially different from the case before the Court. AR 160-161. Appalachian EMS owned the building and leased the entire building to another Section 501(c)(3) entity, West Virginia Emergency Medical Services Technical Support Network (TSN). TSN used the building to provide technical support to statewide emergency medical service units and for administrative purposes by TSN. Only Appalachian EMS and TSN were involved in the use of the building. AR at 160; *see Appalachian EMS* at 552, 314. Both Appalachian EMS and TSN were involved solely in providing emergency medical services in our State.

However, in the case before the Court today, the Foundation has leased a portion of its office building to Ambergris and Dr. Bowen which are for-profit business entities that use the property for private purposes. In addition, the Foundation leases one-third of the office building to Berkeley Medical Center to operate the Wellness Center which is a commercial business venture as discussed *infra*. As a result, the office building is not used exclusively for charitable purposes as required by Supreme Court decisions discussed herein.

Therefore, the Circuit Court has erroneously expanded the Supreme Court's decision in *Appalachian EMS* to include use of the office building by for-profit businesses as a charitable use of the property. Ambergris and Dr. Bowen which are both for-profit business ventures now fall within the definition of a charitable use according to Judge Wilkes. The expanded exemption creates a tautology of great magnitude. Of course, Ambergris and Dr. Bowen help Berkeley Medical Center relieve human suffering—every medical provider works to relieve human suffering, foster better health in our society, and promote healthier living in society. But, leasing office space to for-profit medical providers is not a charitable use of the property; it is simply a real estate transaction.

The Circuit Court decision has begun a bobsled ride down the slippery slope. Can every Section 501(c)(3) entity which owns valuable real property lease out property to for-profit business entities and still be exempt from *ad valorem* property tax as long as the owner will use any profits in its charitable activities? Can a charity own and operate a downtown parking lot and still be exempt from *ad valorem* property tax as long as it promises to use any profits to foster charitable purposes? Why should the charity be given a competitive business advantage vis-à-vis Acme Parking Lot? Can a town own and operate an office building which is leased to for-profit businesses still be exempt from *ad valorem* property tax as long as it uses any profits to help provide police protection? Why must other property owners be forced to pay additional *ad valorem* property tax or lose services in order to compensate Berkeley County for lost *ad valorem* property tax revenues from the Foundation?

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:

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. § 110-3-24.8.2. 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.

The Circuit Court erroneously rejected the Supreme Court's holding in *Central Realty* that required a finding in favor of taxation. AR 157-159. In *Central Realty Co., v. Martin*, 126

W. Va. 915, 30 S.E. 2d 720 at Syll. Pt. 1 (1944), the West Virginia Supreme Court determined that real property owned by a fraternal organization and used for commercial enterprises was not exempt from *ad valorem* property tax. The Court examined similar language to the exemption before the Court today. The specific statutory language at issue in *Central Realty* was "... all property belonging to benevolent associations, not conducted for private profit...shall be exempt." *Central Realty* at \_\_\_, 724.<sup>4</sup> Significantly, the Supreme Court denied the requested exemption despite the fact that the rental income was used for charitable and benevolent purposes. The Court stated:

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). The Supreme Court's decision spoke in terms of an "organization"; therefore, the decision should not be limited to fraternal organizations. *Central Realty* applies to any organization claiming to be exempt from *ad valorem* property tax because it is using the property for charitable purposes.

The *Central Realty* decision is particularly instructive in the case at bar. First, the Supreme Court specifically rejected the argument advanced by the Foundation that the use of the rental income for charitable purposes and for upkeep of the building would qualify as a sufficient use of the property to claim the exemption from *ad valorem* property tax. *Central Realty* at \_\_\_, 725. Second, in *Central Realty* the real property was owned by a benevolent organization but the

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<sup>4</sup> The exact language reviewed by the Court in *Central Realty* is currently found in W. Va. Code § 11-3-9(a)(16).

exemption was determined by the use of the property. In *Central Realty* the property included the Governor Cabell Hotel which operated in competition with other local hotels and three storerooms. *Central Realty* at \_\_\_\_, 722. In the case at bar, the Foundation leases two office suites which include 12% of the office building to Ambergris and Dr. Bowen for use as private medical offices; both are for-profit business entities. The sole purpose of Ambergris is to provide cancer treatment to patients in a for-profit business. Consequently, the primary and immediate use of Suite 1100 by Ambergris is to operate a for-profit cancer treatment center. Dr. Bowen uses Suite 2400 to provide for-profit medical treatment to his patients; notwithstanding an ancillary benefit to Berkeley Medical Center, the primary and immediate use of Suite 2400 by Dr. Bowen is to operate a for-profit medical practice.

Similarly, it was argued below that the Circuit Court should apply *Maplewood Community, Inc., v. Craig*, 216 W. Va. 273, 607 S.E. 2d 379 (2004). AR 159-160. In *Maplewood* the Supreme Court reviewed whether assisted living and independent living facilities owned and operated by two Section 501(c)(3) entities would be exempt from *ad valorem* property tax under W. Va. Code § 11-3-9(a)(12), the same exemption before the Court today. *Maplewood* was cash flow negative at the time the case was heard; however, *Maplewood* argued that if it ever earned a profit, the profit would be used to support the provision of services to the residents at the lowest cost possible. *Maplewood* at 276, 382. The Court found that the property was being used for private purposes and not for charitable purposes as required for the exemption despite being owned by a 501(c)(3) entity. *Maplewood* at 282, 388 (quoting, *Central Realty, supra*). Ambergris and Dr. Bowen use Suites 1100 and 2400 for the private purposes of operating for-profit businesses which the Court found to be a disqualification in *Maplewood*. Susan Snowden testified at the bench trial that Ambergris and Dr. Bowen are for-profit businesses. See AR at

420; 429-431; 440.

Both Maplewood and United Hospital did not lease real property to for-profit businesses; however, in the case at bar the Foundation has leased two suites to Ambergris and Dr. Bowen. Additionally, the Supreme Court observed in *Maplewood* that while a charitable organization may serve “socially constructive purposes,” such purposes alone are insufficient to warrant an *ad valorem* property tax exemption. *Maplewood* at 285, 391. The Tax Department agrees that promoting healthier living and treating cancer patients are “socially constructive purposes”; however, those purposes alone are insufficient to warrant the exemption from *ad valorem* property tax. Finally, to support the limitation of a charitable exemption to property exclusively used for a charitable purpose, the Supreme Court noted in *Maplewood* that granting a tax exemption to one party necessitates that other taxpayers must pay more in tax to compensate for the lost property tax revenues. *Maplewood* at 285, 391.

Simply put, leasing the real property to undisputed for-profit entities disqualifies the Foundation from claiming the charitable use exemption. Additionally, leasing out one-third of the property for use as a health club for dues-paying members of the general public further prohibits the Foundation from claiming that the property is used exclusively for charitable purposes and not held or leased out for profit. The Circuit Court decision is erroneous since it failed to properly apply the requirement set forth in the West Virginia Supreme Court decisions that the property must be used exclusively for charitable purposes.

**B. CONTRARY TO THE CIRCUIT COURT’S DECISION, THE FOUNDATION USES THE OFFICE BUILDING AS RENTAL PROPERTY AND DOES NOT USE THE OFFICE BUILDING FOR CHARITABLE PURPOSES AS REQUIRED BY W. VA. CODE § 11-3-9(a)(12).**

Under West Virginia law real property may be exempt from *ad valorem* property tax if it is used for charitable purposes and is not held or leased out for profit. However, the Circuit

Court erroneously concluded that the Foundation used the office building for charitable purposes. The Circuit Court overlooked the fundamental question-- What is the office building being used for?

**B.1. The Office Building is Used as Rental Property for Private Medical Offices and a Wellness Center, Primarily, Used by Dues-Paying Members of the General Public.**

The Foundation does not use the office building at all; rather, it is the landlord. The Foundation has executed twelve lease agreements covering over 60,334 square feet. Eleven Lease Agreements specifically state that the premises shall be used to operate a private medical office. The twelfth Lease Agreement states that the premises shall be used to operate patient transportation. *See* attached Lease Agreement Table 1.

As argued above, Ambergris and Dr. Bowen lease Suites 1100 and 2400 for use as private medical offices in for-profit businesses. Obviously, Suites 1100 and 2400 are used as rental property by two for-profit business tenants for private purposes.

The largest tenant in the office building is Berkeley Medical Center (fka, City Hospital) which leases four suites for a total of 29,591 square feet from the Foundation to operate the Wellness Center, operate the radiology lab, provide oncology services, and to provide diabetic education. Suite 1200 is used for the Wellness Center which is, primarily, an exercise facility for 2,800 dues-paying members. The Wellness Center alone is 19,100 square feet. AR 759. The Wellness Center includes approximately 32% of the total building space. Approximately 800 square feet of the Wellness Center is dedicated for use by an unknown number of cardiac rehab patients; however, the dedicated use expires at 5:00 pm daily according to Mr. Zelenka's testimony. *See* Facts 7, 9 & 10, *supra*. Additionally, Mr. Zelenka admitted at the trial, that the cardiac rehab portion of the Wellness Center is smaller than the courtroom. *See* Fact 10, *supra*.

There is no dispute that our society is far too sedentary. It is common knowledge that regular or even intermittent exercise will lead to better health and to healthier lives. However, operating an exercise facility with gross sales of more than \$794,000.00 in memberships is not a charitable use of the property. *See* Fact 25, *supra*. By opening the Wellness Center and recruiting 2,800 dues-paying members, Berkeley Medical Center has entered the exercise business which is not a charitable activity. Berkeley Medical Center, the largest tenant in the building, uses one-third of the office building for business activity.

The second largest tenant in the office building is University Healthcare Physicians, Inc., (hereinafter referred to as “UHP”) which uses approximately 17,000 square feet. *See* attached Table 2. UHP uses the leased premises as office space for physicians who provide the various medical specialties to treat cancer patients, to provide surgical services, pulmonology, urology, and gastroenterology care. *See* attached Table 1.

Although UHP is exempt from federal income taxes under IRC § 501(c)(3), UHP is still a business operation.<sup>5</sup> As noted above in Fact 23, the five highest compensated independent contractors associated with UHP earned between \$328,000.00 and \$490,000.00 for the year 2013. It is difficult to argue that 17,000 square feet is being used for charitable purposes when the property is used as doctors’ offices in a business which projects \$21,000,000.00 in annual revenues.

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<sup>5</sup> In PTR 14-01 the Tax Department concluded that approximately 72% of the office building was being used for taxable purposes since it was leased to for-profit entities. UHP leases approximately 28% of the building space and was included in the taxable portion of the building. UHP was designated as exempt from federal income taxes pursuant to IRC § 501(c)(3) on August 31, 2014; however, the effective date of its exemption is October 1, 2012. *See* AR 1156. Once the Internal Revenue Service granted Section 501(c)(3) status to UHP on August 31, 2014, then the percentage of the building leased to for-profit entities was reduced correspondingly. However, the Joint Stipulations and the testimony of Susan Snowden clearly show three for-profit businesses as tenants—Ambergis, LLC., Patient Transport and Dr. Bowen. The Tax Department continues to argue that the Wellness Center is a commercial business activity and not a charitable use of the property.

Finally, WVU Hospitals-East leases Suites 2310 and 3600 in the office building. Suite 2310 is used by WVU Hospitals-East for executive offices and a board room. However, there was no evidence that it was used to provide medical care. Suite 3600 is used for a computer training lab. Using office space for executive offices, a boardroom, and a computer lab is not a charitable use of the office building.

Furthermore, for the 2012 calendar year, it appears that WVU Hospitals-East paid total compensation of \$949,376.00 to Christina Coad, Teresa McCabe, Anthony Zelenka and Christopher Knight. *See* Fact 19, *supra*. Assuming for the sake of argument that WVU Hospitals-East was the taxpayer before this Court, there is no evidence in the record that the four salaries represent fair market value. These four individuals are highly educated and work very hard to earn their money. Nevertheless, it is difficult to argue that the Legislature intended to grant an exemption from *ad valorem* property tax for property being used in a business venture that pays four individuals almost one million dollars per year. While WVU Hospitals-East may be a Section § 501(c)(3) entity under the internal revenue code, it is, primarily, a business venture and is not using the office building for charitable purposes.

As argued *supra*, *Central Realty* requires that the charitable use of the property must be primary and immediate, not secondary or remote. *Central Realty* at \_\_\_\_, 724. The claimed charitable use of the property by the Foundation is remote or even tertiary, at best. For example, the Foundation argued that Dr. Bowen is required by federal law to have his office in close proximity to the cardiac rehab area of the Wellness Center. AR 464:2-465:17. However, the Foundation cannot meet the requirement that the charitable use of the property must be primary and immediate to be considered exclusive use. First, the Foundation leased office space to Dr. Bowen who operates his for-profit medical practice in Suite 2400. Second, the Foundation leased

approximately 32% of the building to Berkeley Medical Center (formerly known as City Hospital) for a Wellness Center. Third, the Wellness Center recruited 2,800 dues-paying members. Fourth, only 4.2% of the space leased for the Wellness Center is dedicated to cardiac rehab patients and the dedicated use only runs until 5:00 p.m. The alleged charitable use of the cardiac rehab center is three steps removed from Dr. Bowen's medical office in his for-profit practice.

At the Circuit Court, the Tax Department argued that the Foundation was conflating the legislative rules for different types of entities. AR 164-165. The Taxpayer before the Court today is the Foundation not, Berkeley Medical Center – a tenant. The fact that the Foundation is a landlord of an office building makes the legislative rules regarding hospitals irrelevant. Nevertheless, the legislative rules list a few ancillary services or non-medical activities that a hospital such as Berkeley Medical Center could provide for hospital staff, employees, patients and visitors, which would qualify as a primary and immediate use of the property for charitable purposes. Ancillary services include operating a parking facility, a pharmacy, cafeteria or coffee shop, and a gift shop. *See* W. Va. St. R. § 110-3-24.15.1. The list of ancillary services does not include any reference to operating a health club, workout facility, or gymnasium for dues-paying members of the general public, by a charitable hospital. Furthermore, the operation of recreational facilities by charitable hospitals is severely restricted:

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. As Mr. Zalenka testified at the bench trial, the portion of the Wellness Center dedicated to cardiac rehab patients was only 800 square feet out of a total of 19,000 square feet. *See* Additional Fact 10, *supra*. Mr. Zalenka testified that the Wellness

Center had 2800 dues-paying members but did not know the number of cardiac rehab patients who utilized the Wellness Center. *See* Additional Fact 7, *supra*. It defies logic to conclude that the Wellness Center which dedicates only 4.2% of its space to cardiac rehab patients prior to five o'clock was designed for and is primarily and immediately used by patients of the hospital. The facts in the record clearly refute the use of the Wellness Center by patients as being the primary and immediate use of Suite 1200 by Berkeley Medical Center.

In addition, the Foundation argued that CMS and Medicare have a requirement that Dr. Bowen be available at the site. Simply stated, the federal funding requirement can be satisfied without leasing the office suite to Dr. Bowen. For example, Dr. Bowen could be housed at property owned by Berkeley Medical Center. The federal requirement that Dr. Bowen must be close by does not pre-empt West Virginia's power to tax. If federal law pre-empted state *ad valorem* taxation, then under the Foundation's argument all activities of a 501(c)(3) entity would be exempt.

Similarly, the Foundation's second largest tenant, University Healthcare Physicians, Inc., uses seven office suites for private medical offices. *See* attached Tables 1 and 2. At the trial, Mr. Zelenka testified that an integral tool to recruiting quality physicians is for University Healthcare Physicians to offer nice office suites. AR 471:15-19. Although University Healthcare Physicians is a Section 501(c)(3) entity, it paid five physicians more than \$328,000.00 as listed on its Application For Recognition of Exemption. *See* Fact 23, *supra*. The availability of nice office suites as a recruiting tool for University Healthcare Physicians is clearly secondary and remote to the alleged charitable use of the seven office suites.

Based upon the evidence in the record, the office building is being used as private medical offices, to provide medical treatment to patients for fees, for executive offices, and as an

exercise facility for dues-paying members. The office space is not used exclusively for charitable purposes as required in order to claim the exemption.

**B.2. The Office Building Is Being Held and Leased Out For Profit.**

The Foundation argued to the Tax Department in its request for Property Tax Ruling 14-01 and at the Circuit Court, that the property is not leased or held out for profit because the Foundation has a net operating loss of either \$25,000 or \$323,000 for the Dorothy McCormack Center for the 2013 calendar year. The Supreme Court decision in the *McDowell Lodge* case, *supra*, is helpful. The Supreme Court stated:

Property of a lodge of Ancient Free and Accepted Masons, a charitable and benevolent organization, leased for profit, is not exempt from taxation under section 1, art. 10, of the Constitution, and section 57, c. 29, of the Code, although the rents are used for charitable and benevolent purposes and for the upkeep of the property rented and the discharge of a debt thereon.

*McDowell Lodge*, at syll.

The Supreme Court rejected the notion that whether a property is being held or leased out for profit will be determined by whether the owner has an accounting profit for the particular tax year. The Supreme Court focused on the use of the property by the owner—the act of renting the property for commercial purposes is what matters not whether the owner has an accounting profit for the year. In *McDowell Lodge*, the Masonic Temple had building rental income of \$5,459 and paid \$1,106 interest on the debt for the building and \$2,000 on the debt for the building. The Masonic Lodge had an accounting profit of \$2,353 for the year ( $\$5,459 - (\$1,106 + \$2,000) = \$2,353$ ). *McDowell Lodge* at \_\_\_\_, 562. If the Supreme Court had decided the taxability issue based on whether the Masonic Lodge earned an accounting profit, the Court would have simply stated that the Masonic Temple earned a profit and, therefore, the property is subject to tax. However, the Supreme Court proceeded further and stated:

“The clause, ‘not held or leased out for profit.’ is significant. It is difficult to see how the property of charitable and benevolent associations could be rented except for profit to the association.”

*McDowell Lodge* at \_\_\_\_, 563-564. Thus, the Supreme Court looks at the use of the property and not whether the owner claims an accounting profit for a particular tax year.

The Foundations’ argument for the use of the accounting term “profit” in its technical sense is contrary to the Supreme Court’s view of the word “profit”. In PTR 14-01, the Tax Department stated that the Supreme Court had construed the word "profit" in its plain meaning, i.e., as "An advantageous gain or return: benefit." *See Webster's II New Riverside University Dictionary* (1994); *see also The American Heritage College Dictionary, Third Edition* (2000) (same definition). However, the Foundation wants the word to be construed in the technical sense used by the professional accountant, as a net gain, after deduction for expenses. But this interpretation is contrary to the precedent of this Court and belies the plain meaning of the phrase so as to defeat the Constitutional mandate that "taxation shall be equal and uniform throughout the state." The rents paid by the tenants of the office building to the Foundation confer a very clear benefit upon the Foundation which constitutes a "profit" to the Foundation in the plain meaning of the word as this Court decided in *McDowell Lodge*.

The key question is whether the Foundation is actually using the office building exclusively for charitable purposes or renting the office building for profit. This Court has expressly rejected the Foundation’s legal argument in the syllabus point in the *McDowell Lodge* case in 1924. Property is not exempt from *ad valorem* property tax as being used for charitable purposes when the real property is rented for profit even though the rental income is being used to fund the charitable works of the owner. The Circuit Court erroneously disregarded the Supreme Court’s decision in *McDowell Lodge* and should be reversed.

**C. THE CIRCUIT COURT HAS CONFLATED AND EXPANDED TWO EXISTING STATUTORY EXEMPTIONS TO CREATE A NEW EXEMPTION FROM *AD VALOREM* PROPERTY TAX FOR “COMMON CHARITABLE PURPOSES” WHICH DOES NOT EXIST UNDER CURRENT LAW.**

In addition to lacking legal support, the conflation ignores the renting of a portion of the building to private businesses. The Foundation argued below and the Circuit Court found that the leases with Ambergris, Dr. Bowen, and the Wellness Center, are authorized under the legislative rules for *ad valorem* property tax. *See* Foundation’s Initial Brief at pp. 21-23; AR 120-122; *see* also Circuit Court Final Order at 311-313. The Foundation also argued below that hospitals can provide office space to physicians and pay hospital physicians market rates without running afoul of property tax law. *See* Foundation’s Initial Brief at pp. 22-23; AR 121-122; *see* also Circuit Court Final Order at 309-313. However, the legislative rules relied on by the Foundation are the legislative rules regarding charitable hospitals and the Foundation is not a charitable hospital. As argued below, the Foundation’s argument conflates two separate statutory exemptions along with the respective legislative rules in order to create an expanded exemption that does not exist under West Virginia law. *See* AR 164-165.

W. Va. Code § 11-3-9 does not contain any exemption for “common charitable purposes” which the Foundation is advocating. The legislative rules for *ad valorem* property tax do not contain any provisions creating an exemption for “common charitable purposes”. As a matter of fact, the phrase “common charitable purposes” cannot be found in the legislative rules. If a “common charitable purpose” exemption actually existed in W. Va. Code § 11-3-9, then this case would never have started. The Foundation is attempting to expand and conflate W. Va. Code § 11-3-9(a)(17) for charitable hospitals to encompass W. Va. Code § 11-3-9(a)(12); hence, the multiplicity of corporate characters with similar names. Additionally, the taxpayer’s attempts to utilize W.Va. Code § 11-3-9(a)(12) fail because the property is held or leased out for profit.

The legislative rules relied on by the Foundation are not applicable in light of the facts before the Court today. In addition to the conflation described herein, the leases to the non-profit entities and the establishment of what is primarily the private health club defeat the exemption sought. The Foundation conflates its existence with the existence of Berkeley Medical Center and the other corporate entities with similar names. According to the *Joint Stipulation of Uncontested Facts*, the property owner, University Healthcare Foundation, Inc., Berkeley Medical Center (fka, City Hospital), West Virginia University Hospitals—East, Inc., and University Healthcare Physicians, Inc., are separate legal entities. See Stipulation 15 at AR 1161. In addition, University Healthcare is a registered trade name of West Virginia University Hospitals—East, Inc. See Stipulation 8 at AR 1159. Nevertheless, University Healthcare Foundation, Inc., the Taxpayer before the Court, is a separate legal entity both from West Virginia University Hospitals—East and its trade name.

The Foundation can only premise its claim for exemption from *ad valorem* property tax on W. Va. Code § 11-3-9(a)(12) which applies to “... [p]roperty used for charitable purposes and not held or leased out for profit[.]” On the other hand, Berkeley Medical Center, as a hospital, can claim a broader exemption from property tax pursuant to W. Va. Code § 11-3-9(a)(17) which applies to “...[p]roperty belonging to ... any hospital not held or leased out for profit[.]” Obviously, the two exemptions have different statutory language and operate differently.

Legislative rules do 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). However, legislative rules much like statutes are required to stand on their own terms and the language employed in the legislative rule delineates its scope. Therefore, the Supreme Court must evaluate the use of the office building under the legislative rules applicable to

property used for charitable purposes which are set forth in W. Va. St. R. 110-3-19. Additionally, the legislative rule must be read in conformity with the Constitution and law which requires exclusive use of the property. The applicable legislative rule makes no mention of leasing office space to for-profit business entities such as Ambergris and Dr. Bowen as qualifying for a charitable use of the property. In addition, the applicable legislative rule makes no mention of leasing office space to physicians or health clubs for dues-paying members of the general public as qualifying for a charitable use of the property under W. Va. Code § 11-3-9(a)(12).

## VII.

### CONCLUSION

Either the law means what it says or it doesn't. The Foundation argues that it can lease out an office building for profit and still claim the exemption from *ad valorem* property tax found in W. Va. Code § 11-3-9(a)(12). The facts before the Supreme Court and the law regarding this exemption say otherwise. There is no doubt that the portions of the office building leased to Ambergris and to Dr. Bowen are used for private purposes in their for-profit businesses. Therefore, the office building is not used exclusively for charitable purposes as this Court has long required. In addition, the portions leased to Berkeley Medical Center for the Wellness Center and University Healthcare Physicians, Inc., are also used for private purposes; any claimed charitable benefits from these leases would be secondary and remote as opposed to primary and immediate as required. The record clearly shows that the Foundation leased the office building to numerous tenants for profit as this Court prohibits in *McDowell Lodge, supra*. The Supreme Court should not conflate two existing tax exemptions in order to create a new exemption from property tax that does not exist. The Tax Commissioner's decision in Property

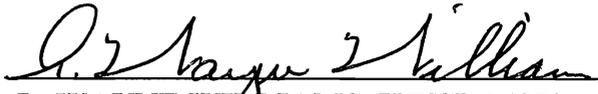
Tax Ruling 14-01 was correct. The Circuit Court decision was erroneous and contrary to well-settled legal principles from this Court and must be reversed.

Respectfully submitted,

MARK W. MATKOVICH,  
STATE TAX COMMISSIONER  
OF WEST VIRGINIA,

By counsel

**PATRICK MORRISEY  
ATTORNEY GENERAL**

A handwritten signature in black ink, appearing to read "L. Wayne Williams", is written over a horizontal line.

**L. WAYNE WILLIAMS (WVSB# 4370)  
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**TABLE 1  
LEASE AGREEMENTS**

UHF Exhibit No.	AR	Tenant	Use of Premises Paragraph 4	Type of Relationship Paragraph 22
13	625-634	Ambergris, LLC	Private Medical Office	Landlord-Tenant Only
14	635-644	City Hospital, Inc. (Wellness Center)	Private Medical Office	Landlord-Tenant Only
15	645-654	Robert E. Bowen, MD Ltd.	Private Medical Office	Landlord-Tenant Only
16	655-664	Patient Transportation	Operate Patient Transportation	Landlord-Tenant Only
17	665-674	University Healthcare Physicians (UHP) dba UHP Behavioral Health	Private Medical Office	Landlord-Tenant Only
18	675-684	University Healthcare Physicians (UHP) dba UHP Endocrinology	Private Medical Office	Landlord-Tenant Only
19	685-694	University Healthcare Physicians (UHP) dba UHP Ear, Nose & Throat	Private Medical Office	Landlord-Tenant Only
20	695-704	UHP - Gastroenterology	Private Medical Office	Landlord-Tenant Only
21	705-714	University Healthcare Physicians (UHP) dba UHP Pulmonology	Private Medical Office	Landlord-Tenant Only
22	715-724	University Healthcare Physicians (UHP) dba University Surgical Associates	Private Medical Office	Landlord-Tenant Only
23	725-735	University Healthcare Physicians (UHP) dba UHP Urology	Private Medical Office	Landlord-Tenant Only
24	736-745	WVU Hospitals - East	Private Medical Office	Landlord-Tenant Only
		American Cancer Society	Unknown	
		Storage	Unknown	

Source: Lease Agreements in Evidence. See Table 1 at AR 166.5-167.

**Paragraph 4: USE OF PREMISES.** The Lessee shall use the leased premises to operate a **private medical office** and for no other purpose whatsoever.....

Paragraph 22: **RELATIONSHIP OF PARTIES.** Nothing contained herein shall be treated or understood to indicate the existence of a relationship as between the parties other than as landlord and tenant. The parties hereto specifically deny the existence of any relationship such as a partnership, joint venture, master/servant, principal/agent, or employer/employee.

(emphasis in original documents.)

**TABLE 2**  
**LEASE AGREEMENTS**

UHF Exhibit No.	AR	Tenant	Premises	Square Footage
13	625-634	Ambergris, LLC	Suite 1100	4,973
14	635-644	City Hospital, Inc. (Wellness Center/Suite 1200)	Suites 1200, 1300, 2600, 3800	29,591
15	645-654	Robert E. Bowen, MD Ltd.	Suite 2400	2,200
16	655-664	Patient Transportation	Suite 2100	168
17	665-674	University Healthcare Physicians (UHP) dba UHP Behavioral Health	Suite 3500	1,850
18	675-684	University Healthcare Physicians (UHP) dba UHP Endocrinology	Suite 3100	3,200
19	685-694	University Healthcare Physicians (UHP) dba UHP Ear, Nose & Throat	Suite 3200	3,450
20	695-704	UHP - Gastroenterology	Suite 3700	2,800
21	705-714	University Healthcare Physicians (UHP) dba UHP Pulmonology	Suite 330	1,728
22	715-724	University Healthcare Physicians (UHP) dba University Surgical Associates	Suite 2200	2,800
23	725-735	University Healthcare Physicians (UHP) dba UHP Urology	Suite 3650	1,140
24	736-745	WVU Hospitals - East	Suites 2310 & 3600	5,936
		American Cancer Society	Suite 110	315
		Storage	Suite 3650	183

**Total Leased Space: 60,334 Square Feet**  
**Total Building: 60,417 Square Feet.**  
**See Table 2 at AR 168.**

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

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 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 16<sup>th</sup> day of September, 2015, addressed as follows:

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