

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

BARUCH SLS, INC.,

Petitioner-Appellant,

vs.

TOWNSHIP OF TITTABAWASSEE,

Respondent-Appellee.

Supreme Court Docket No. 152047

Court of Appeals Docket No. 319953

Michigan Tax Tribunal

Docket No. 0395010 & 0415093

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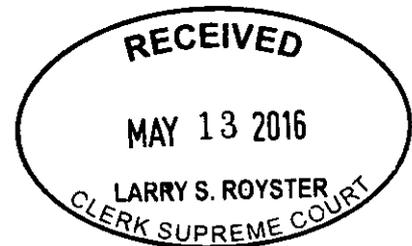
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**SUPPLEMENTAL BRIEF BY RESPONDENT-APPELLEE**

**ORAL ARGUMENT REQUESTED**

**PROOF OF SERVICE**



**TABLE OF CONTENTS**

INDEX OF AUTHORITIES ..... ii-iii

STATEMENT OF QUESTION PRESENTED..... 1

STATEMENT OF FACTS..... 2

ARGUMENT..... 6

THIS COURT IN WEXFORD HELD THAT AN INSTITUTION DOES NOT QUALIFY  
AS A "CHARITABLE INSTITUTION" IF IT OFFERS AS CHARITY A  
"DISCRIMINATORY BASIS."

A. BACKGROUND..... 7

B. THE MEANING OF "DISCRIMINATORY BASIS" ..... 9

C. AN INSTITUTION'S WRITTEN POLICIES VERSUS ITS ACTUAL  
DISTRIBUTION OF CHARITABLE RESOURCES .....15

D. BARUCH IS NOT ENTITLED TO A TAX EXEMPTION..... 25

RELIEF SOUGHT.....29

**INDEX OF AUTHORITIES**

**CASES**

*A.H. Robins Co. v. Dept. of Health*,  
59 Cal App 3d 903, 910; 130 Cal Rptr 901 (1976) .....10

*Auditor General v. R.D. Smith Memorial Hospital Association*,  
293 Mich 36; 391 N.W. 213 (1940)..... 11

*Baruch SLS, Inc. v. Township of Tittabawassee*,  
2015 Mich App LEXUS 801..... 26, 27

*Circle Pines Center v. Orangeville Township*,  
103 Mich App 593, 597; 302 NW2d 917 (1981),  
app den 417 Mich 929 (1983) .....25

*Comstock Village Ltd. Dividend Housing Ass'n v. Comstock Township*,  
168 Mich App 755, 759; 425 NW2d 702 (1988).....11

*Creative Beginnings Child Development Center, Inc. v Union Township*,  
M.T.T. Docket No. 14-002338..... 13

*Harmony Montessori Center v. City of Oak Park*,  
2014 Mich App LEXUS 300 ..... 13

*Holland Home v City of Grand Rapids*,  
219 Mich App 384, 400; 557 NW2d 118 (1986)..... 14, 22

*Karen's Helping Hands v. City of Riverview*,  
2011 Mich App LEXUS 787 .....10

*Michigan Baptist Homes & Development Co. v. City of Ann Arbor*,  
396 Mich 660; 242 NW2d 749 (1976) ..... 11, 12, 13

*ProMed Healthcare v. City of Kalamazoo*,  
249 Mich App 490, 492; 644 NW2d 47 (2002).....11

<i>Provena Covenant Medical Center v. Department of Revenue</i> , 384 Ill App 3d 734, 750; 894 N.E.2 <sup>nd</sup> 452 (2008), aff'd 236 Ill 2 <sup>nd</sup> 368; 925 N.E. 2d 1131 (2010).....	10
<i>Retirement Homes of the Detroit Annual Conference of the United Methodist Church, Inc. v. Sylvan Township</i> , 416 Mich 340, 348-349; 330 NW2d 682 (1982).....	7, 12, 13
<i>Telluride Association v. City of Ann Arbor</i> , 2013 Mich App LEXUS 1231.....	14
<i>Wexford Medical Group v City of Cadillac</i> , 474 Mich 192; 713 NW2d734 (2006) .....	1, 7, 8, 9, 10, 13, 15, 25

**STATUTES**

MCL 211.7o .....	1
MCL 211.7o(1).....	25
MCL 211.9 .....	1

## **STATEMENT OF QUESTION PRESENTED**

Petitioner-Appellant Baruch SLS, Inc. has filed an Application for Leave to Appeal the Michigan Court of Appeals' Opinion that Petitioner was not a charitable institution within the meaning of Wexford and that it was not entitled to the real property tax exemption for charitable institutions set forth in MCL 211.7o and MCL 211.9. Having reviewed the application briefs filed by the parties, this Court entered an Order on April 1, 2016, ordering that the parties file supplemental briefs within 42 days of the date of the Order addressing (1) whether Wexford Medical Group v City of Cadillac, 474 Mich 192 (2006), correctly held that an institution does not qualify as a "charitable institution" under MCL 211.7o or MCL 211.9 if it offers its charity on a "discriminatory basis"; (2) if so, how "discriminatory basis" should be given proper meaning; (3) the extent to which the relationship between the institution's written policies and its actual distribution of charitable resources is relevant to that definition; and (4) whether, given the foregoing, the petitioner is entitled to a tax exemption. The Court further directed that the parties should not submit mere restatements of their Application papers.

WHETHER THIS COURT IN WEXFORD MEDICAL GROUP V CITY OF CADILLAC CORRECTLY HELD THAT AN INSTITUTION DOES NOT QUALIFY AS A CHARITABLE INSTITUTION UNDER MCL 211.7o or MCL 211.9 IF IT OFFERS ITS CHARITY ON A DISCRIMINATORY BASIS?

Petitioner-Appellant answers, "No."

Respondent-Appellee answers, "Yes."

The Tax Tribunal answered, "Yes."

The Court of Appeals answered, "Yes."

## **STATEMENT OF FACTS**

Respondent-Appellee, Township of Tittabawassee ("Township") has stated the basic facts in its Counter-Statement of Material Proceedings and Facts to Petitioner's Application for Leave to Appeal. Rather than repeating those facts, the Township adds the following additional facts in support of its position.

Stonecrest is an assisted living facility that has 20 beds in Wing A and 20 beds in Wing B. The facility consists of all studio rooms. As Connie Clawson testified:

"We have all studio rooms, so by design of our buildings there is a selection process going on because we are not offering those same kind of assisted living homes that many of the for-profits – with little kitchenettes. Those aren't our buildings. We are building our buildings and buying buildings that accommodate those folks who don't have the money to live in those kind of buildings, so we're not restricting but they are restricting it by the buildings that they are choosing to live in."

(Tr. 134-136.)

Ms. Clawson estimated that the cost of a for-profit assisted living facility would be approximately \$3,700.00 whereas the cost at Stonecrest, a non-profit corporation, would be approximately \$3,000.00 to \$3,200.00 for a smaller room. (Tr. 102, 127.)

In regard to the rates, Ms. Clawson testified:

"The rooms all have a rate. We set our private pay rates based on the community that are in, the location they are in. Our rates are always less than what probably the competitors are because that's part of our mission also, and that even those who can afford to pay are paying less than the market value, at least by a small percentage, so the rooms do have a rate. It is – they are told this is our room rate. There are times when a family may say, well, you know, I don't have the funds to do that but because of our income-based program many times they can get family members to help them or other folks to help them to be able to make that 24 months or there are times when we are able to admit them straight in without them paying the 24 months but paying on what percentage of income-based people we have in our building at that time."

(Tr. 97-98.)

Although Stonecrest claims that it has never evicted anyone, it does submit a 30-day discharge letter in its collection process in order to get adult protective services involved to have the family pay the resident's bills. Ms. Clawson stated that Stonecrest is working with a couple people who are in that situation where a family member isn't paying the bill and they are stuck in between and Stonecrest makes the decision to take care of them "until it gets sorted out." (Tr. 99.)

Ms. Clawson testified that Stonecrest provides a lot of hospice care at its facility. Most of its discharges are "heavenly discharges." Hospice care is paid by Medicare.

(Tr. 104.)

The following conversation took place regarding the income-based program:

Q. . . . I took you to say that your tailoring the income upon the admission of a person to Stonecrest at the very outset and I don't see anywhere that says that in any kind of policy or admissions policy?

A. When we're talking to folks who are looking for possible admission at Stonecrest, we do not talk to them about their finances. We present to them the documents that are here, we talk to them about these are our room rates, this is either critical care or specialized care, these are the rates for those rooms. There are times when a family go, oh, no, Mom only has this money in the bank, what happens when . . . ? Then we would go into explaining and we do as part of our introduction, explain we are a nonprofit, we're here to take care of folks as their health declines and if they outlive their assets and have the ability to do that because we are a nonprofit. If the family approaches us and has more questions we will get into the details and how to make that happen.

Q. Would this be like you mentioned that time, that while we had this income-based program that there is after two years?

A. Yes."

(Tr. 148-149.)

In response to Answers to Respondent's Interrogatories and Requests for Production of Documents, Ms. Clawson testified:

"18. Does Stonecrest Assisted Living provide any free care to its residents? If so, please state in detail the free care provided and under what circumstances.

ANSWER: See attached Income-Based Program.

19. Does Stonecrest Assisted Living reduce its fees for any reasons? If so, please state in detail the basis for the reductions and the amount of reduction.

ANSWER: See attached Income-Based Program.

20. Does Stonecrest Assisted Living have a charity care policy? If so, please produce such policy.

ANSWER: See attached Income-Based Program.

21. Does Stonecrest Assisted Living have an "open access" policy for Medicare and Medicaid patients? If so, please state:

- a. A detailed description of the policy;
- b. Are there any limits on numbers of Medicare and/or Medicaid patients?
- c. Produce a copy of the policy.

ANSWER: See attached Income-Based Program."

(R.13)

Interrogatory 22 asked how the operation of Stonecrest Assisted Living was funded as well as how its operations are funded in regard to purchase, operation, and maintenance. Ms. Clawson answered in the interrogatories that the operations of Stonecrest were funded by payments from residents supplemented by the general funds of Baruch SLS, Inc. (R-13)

Christopher Murphy testified as the CFO for Leisure Living. He handles the services that Baruch has contracted with Leisure Living for accounting and accounts

payable, accounts receivable, and administrating the benefits and the insurance for Baruch. The services agreement between Baruch and Leisure Living provides that Leisure Living shall institute with the prior written consent of owner, in the name of the owner at the expense of the owner, any necessary legal actions or proceedings to collection obligations owing to Baruch or to cancel or terminate any contract with the facility for breach or default. (Tr. 18; R-4, Para. 2.4)

Leisure Living, a for-profit corporation, charges Baruch 3.25% of its gross revenues per month for the services that it provides. This monthly fee does not include the other accounting services that it provides. (Tr. 60.)

Mr. Murphy testified that legal action can be taken against a resident if the resident doesn't pay. (Tr. 59)

Mr. Murphy admitted that the Income-Based Program set forth the requirements for meeting the program. He testified that exceptions are made to the policy, but acknowledged that there are no written exceptions to the policy. (Tr. 67-71)

In regard to admission to Stonecrest, the following interchange occurred at the hearing:

"Q. Now, regarding admission to Stonecrest, am I correct in stating that if one is to be admitted to Stonecrest, they would have the ability to pay; is that correct?

A. Yes.

Q. As far as I am aware, and correct me if I am wrong, Stonecrest does not admit anyone to its facility who has not had the ability to pay?

A. No.

Q. Are you aware of any residents being asked to leave because of their inability to pay?

A. I am not aware of any that had been asked to leave.

Q. Now so as it stands now all the residents who are at the facility do pay whatever amount that is?

A. Well, aside from the \$120,000.00 in accounts receivable, for the most part.

Q. But those are still on the books as collectible, are they not?

A. Yes."

(Tr. 74-75.)

Mr. Murphy testified that Baruch files one tax return for all of its various operations, including Stonecrest. While he does separate financial statements for each facility in order to understand how a facility is doing, it all merges together into the single Baruch tax return ultimately. (Tr. 24-26.)

Baruch's tax returns submitted into evidence under Exhibits P-6 and P-7 do not show any losses to Baruch during the relevant time periods.

### **ARGUMENT**

THIS COURT IN WEXFORD CORRECTLY HELD THAT AN INSTITUTION DOES NOT QUALIFY AS A "CHARITABLE INSTITUTION" IF IT OFFERS ITS CHARITY ON A "DISCRIMINATORY BASIS."

The Court has ordered that the parties should not submit mere restatements of their Application papers. Therefore, the township shall rely upon the arguments that it made in its Response to Application for Leave to Appeal. This Supplemental Brief shall be limited to expanding on the arguments made in the response. The township

restates the standard of review set forth in its response.

A. BACKGROUND.

In Wexford Medical Group v City of Cadillac, 474 Mich 192; 713 N.W. 2<sup>nd</sup> 734 (2006), this Court addressed a tax exemption claim brought by Wexford which provides health care in a federally designated health professional shortage area. The Michigan Tax Tribunal and the Michigan Court of Appeals denied the tax exemption primarily because Wexford had focused on a dollar amount for free health care petitioner provided. This Court stated:

“The Tax Tribunal and the Court of Appeals focused exclusively on the dollar amount of free health care petitioner gifted as part of its charity care program, looking no further into the nature of petitioner’s organization. This was error because it is clear that both tribunals had in mind a monetary threshold that is not only not discernable from the statute, but that would be, by its very nature, quite arbitrary.”

Wexford, 474 Mich at 213.

This Court went on to state that the difficulties with formulating a monetary threshold illustrates why the issue is a legislative matter and not an issue for the court to determine. Wexford, 474 Mich at 214.

The Michigan legislature did not define “charitable institutions” in MCL 211.7o. This Court relied upon the case of Retirement Homes of Detroit Annual Conference of the United Methodist Church v Sylvan Township, 416 Mich 340, 348-349; 330 N.W. 2d 682 (1982) which stated a definition from an old Massachusetts case:

“[C]harity . . . [is] a gift, to be applied consistently with the existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from

disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.”

Based upon this definition, the Wexford court stated that certain factors came into play when determining whether an institution is a “charitable institution” under MCL 211.7o and MCL 211.9(a). This Court then stated:

“Among them are the following:

- (1) A “charitable institution” must be a nonprofit institution.
- (2) A “charitable institution” is one that is organized chiefly, if not solely, for charity.
- (3) A “charitable institution” does not offer its charity in a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a “charitable institution” serves any person who needs the particular type of charity being offered.
- (4) A “charitable institution” brings people’s minds or hearts under the influence of education or religion; these people’s bodies from disease, suffering, or constraints; assist people to establish themselves for life; erect or maintain its public buildings or works; or otherwise lessens the burdens of government.
- (5) A “charitable institution” can charge for its services as long as the charges are not more than what is needed for a successful maintenance.
- (6) A “charitable institution” need not meet any monetary threshold of charity to merit the charitable institution exception; rather, if the overall nature of the institution is charitable, it is a “charitable institution” regardless of how much money it devotes to charitable activities in a particular year.”

Wexford, 474 Mich at 214-215.

This Court then examined these six factors and determined that Wexford Medical Group was a charitable institution.

In regard factor 3 that a charitable institution not offer its charity on a discriminatory basis, the Wexford Court stated:

"A second indispensable principle is that the organization must offer its charitable deeds to benefit people who need the type of charity being offered. In the general sense, there can be no restrictions on those who are afforded the benefit of the institution's charitable deeds. This does not mean, however, that a charity has to serve every single person regardless of the type of charity offered or the type of charity sought. Rather, a charitable institution can exist to serve a particular group or type of person, but the charitable institution cannot discriminate within that group. The charitable institution's reach and preclusions must be gauged in terms of the type and scope of charity it offers."

Wexford, 474 Mich at 213.

In regard to the Wexford Medical Group, the Wexford Court found:

"Petitioner has a charity care program that offers free and reduced-cost medical care to the indigent with no restrictions. It operates under an open-access policy under which it accepts any patient who walks through its doors, with preferential treatment given to no one. Although Petitioner sustains notable financial losses by not restricting the number of Medicare and Medicaid patients it accepts, it bears those losses rather than restricting its treatment of patients who cannot afford to pay."

Wexford, 474 Mich at 216-217.

Wexford Medical Group did not offer its charity on a discriminatory basis. It did not have the contractual obligations that are imposed by Baruch in regard to Baruch's operation. The Court was correct in finding that Wexford provided its charity to all and did not discriminatorily dispense its charity to select persons within a group.

B. THE MEANING OF "DISCRIMINATORY BASIS"

Neither the legislature nor the Wexford court defined "discriminatory basis" in the exemption statute. Black's Law Dictionary, Fifth Edition, defines "discrimination" as "a

failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored." It defines "basis" as "a fundamental principle."

The court in A.H. Robins Co. v Department of Health, 59 Cal App 3<sup>rd</sup> 903, 910; 130 Cal Rptr 901 (1976) stated that "discriminatory" means unreasonable, unfair, and arbitrary. In citing Webster's New International Dictionary, (2<sup>nd</sup> ed. 1950), "discriminatory" means discriminatory or showing favoritism. Discrimination means an unfair or injurious distinction. It denotes a difference in treatment made between persons, localities, or classes of traffic, in respect of substantially the same service.

Although "discriminatory basis" is not specifically defined, the Wexford court generally described the nature of the discrimination in its opinion.

Wexford stated that it is an "indispensable principle" that an institution not provide its charity on a discriminatory basis. A charitable institution does not choose whom, among a group it purports to serve, deserves its services. Rather, it serves any person who needs the particular type of charity being offered. Wexford, , 474 Mich at 213, 215; Karen's Helping Hands v City of Riverview, 2011 Mich App LEXUS 787, p3.

The Illinois Appellate Court has stated that dispensing charity to all who need it and apply for it and placing no obstacles in their way, are more than guidelines, but are essential criteria. They go to the heart of what it means to be a charitable institution. Provena Covenant Medical Center v Department of Revenue, 384 Ill App 3d 734, 750; 894 N.E. 2<sup>nd</sup> 452 (2008), aff'd 236 Ill 2d 368; 925 N.E. 2d 1131 (2010).

In the Wexford case, this Court looked at various previous cases in order to determine the six criteria for determining whether an institution is a "charitable

institution.”

In ProMed Health Care v City of Kalamazoo, 249 Mich App 490, 499; 644 N.E. 2d 47 (2002), this Court stated that the proper focus of the definition of charity was “whether the organization’s activities, taken as a whole, constituted a charitable gift for the benefit of the general public without restriction or for the benefit of an indefinite number of persons. ProMed described the non-discriminatory nature of “charity.” Charity is to be provided to the general public without restriction and not be limited to a definite number of persons.

In Auditor General v R. D. Smith Memorial Hospital Association, 293 Mich 36; 391 N.W. 213 (1940), this Court adopted the generally accepted exception from taxation rule for charitable corporations found in 34 A.L.R. 365. The provision stated that any body not organized for profit, which has for its purpose the promotion the general welfare of the public and extending its benefits without discrimination, is a charitable or benevolent organization within the meaning of the tax exemption statutes. However, such tax exemptions are to be construed strictly. Auditor General, 293 Mich at 38-39.

In Michigan Baptist Homes & Development Company v City of Ann Arbor, 396 Mich 660; 242 N.W. 2d 749 (1976), the Court looked at two facilities that claimed property tax exemption. Hillside Terrace Home was funded entirely by loans, debentures, and resident fees. The residents paid a substantial up-front sum and monthly fees thereafter. Residents were hand-selected by the establishment after an application process that asked them to fully detail their financial status and their health. Those who could not show sufficient means or who were in less than reasonably good health were, in large

part, rejected. Because of its selection process and resident-funded mechanism, the Court concluded that Hillside Terrace did not serve the elderly generally, but rather provided an attractive retirement environment for those among the elderly who had the health to enjoy it and who could afford to pay for it.

The Court noted:

"With but few exceptions above noted, ability to pay all fees is a factor determining whether an applicant will be admitted to Hillside Terrace. Although it is plaintiff's policy not to evict anyone because of that person's financial reverses, plaintiff's rules state that there is a corresponding responsibility on all residents to care properly for financial resources. To determine whether these resources are sufficient to begin with, each applicant is asked to make a rather complete disclosure of assets and income."

Michigan Baptist Homes, 396 Mich at 668.

In Retirement Homes of the Detroit Annual Conference of the United Methodist Church, Inc. v. Sylvan Township, 416 Mich 340; 330 N.W. 2d 682 (1982), the residents were charged a monthly fee which was designed to cover utility and other direct costs and amortize the costs of construction. Construction of the apartments was financed entirely by gifts, donations, and bequests. The monthly charge to residents was set to recover only direct expenses and fund replacement, not payment of interest. A life care contract with forfeiture was not required, but a monthly fee was required. Retirement Homes claimed that no one was ever refused care or evicted because of inability to pay fee.

This Court concluded that there was no "gift" for the benefit of an indefinite number of persons or for the benefit of the general public without restriction in the operation of the apartments. While it did not appear that the apartments were operated

for a profit, neither did it appear that the residents received any significant benefit that they did not pay for. The residents were chosen on the basis of their good health, their ability to pay the monthly charge, and generally their ability to live independently. Retirement Homes, 316 Mich at 349-350.

A review of Baruch's Articles of Incorporation and Bylaws do not provide any statement regarding nondiscrimination. The only provision found is in the Stonecrest Assisted Living program statement which states under Contract Agreements, "a resident shall not be denied appropriate care or admission on the basis of race, religion, color, national origin, sex, handicap, marital status, or sexual preference." (R-8.) The Michigan Tax Tribunal stated in Creative Beginnings Child Development Center, Inc. v Union Township, M.T.T. Docket No. 14-002338:

"[T]he phrase "discriminatory basis" as used in Factor 3 is broader than the type of discrimination associated with violations of civil rights. Rather, it prohibits *any* discrimination among persons who needed the particular type of charity offered. For example, the Court in Wexford approvingly discussed the holding in Michigan Baptist Homes & Dev. Co. v City of Ann Arbor, involving the disparate treatment of two nursing homes. One nursing home (Hillside Terrace) screened applicants for good health and ability to pay, while the second (Bach Home) did no such screening. The Court in Wexford approved of its earlier decision finding that the granting an exception to the Bach Home, while Hillside Terrace to be taxable did not violate Michigan's Equal Protection Clause."

Creative Beginnings, p 15.

Discrimination appears to be viewed in the sense that an institution's charity is available to anyone. The Court in Harmony Montessori Center v City of Oak Park, 2014 Mich App LEXUS 300 stated:

"The consideration discussed in context in Wexford was whether the charity's services-whatever they might be- were available to anyone, in the context "of the

type and scope of charity it offers." [Citation omitted] The charity need not offer free services for free, but it must not discriminate within the group of "people who need the type of charity being offered."

Harmony Montessori, p5.

Another example is found in Telluride Association v City of Ann Arbor, 2013 Mich App LEXUS 1231. Telluride House is a self-governing scholarship house that houses between 20-30 students enrolled at the University of Michigan. Each year students are expected to design and implement a community service project aimed at improving public life in the Ann Arbor area.

While Telluride does not discriminate on the basis of any particular class, it does discriminate by choosing who, among those groups, will receive its charity. Telluride selects scholarship recipients through a highly subjective application process. Telluride House members conduct interviews and choose those to whom they may offer scholarships. Its members choose which community service projects they will engage. In regard to discrimination under the tax exemption, the discrimination does not involve an equal protection challenge, but rather a tax exemption. The standard is that it is discriminatory to choose who, among the group it purports to serve, deserve the services.

There is no authority to grant a tax exemption to a facility simply because it was "nice." Offering charity on a non-discriminatory basis means that a facility offers its charity without restriction and to an indefinite number of persons. Holland Home v City of Grand Rapids, 219 Mich App 384, 393; 557 N.W. 2d 118 (1996).

C. AN INSTITUTION'S WRITTEN POLICIES VERSUS ITS ACTUAL DISTRIBUTION OF CHARITABLE RESOURCES.

Factor 3 of Wexford's guidelines to determine whether an institution is a charitable institution states:

"A charitable institution" does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, "a charitable institution" serves any person who needs the particular type of charity being offered."

Wexford, 474 Mich at 215.

Baruch's sole charity program is found in its income-based program. The Income-Based Program states:

"The following factors must be met by a resident to become eligible for the Income-Based Program at Stonecrest Assisted Living;

1. A resident will have lived at Stonecrest Assisted Living and made a minimum of twenty-four (24) full monthly rent payments.
2. A resident will be required to apply for and be determined eligible for Medicaid. Michigan Department of Human Services (DHS) currently provides this benefit.
3. A resident will provide copies and information about all available income.
4. A resident will qualify for the Income-Based Program beginning the calendar month after the date of notification of eligibility for Medicaid to Stonecrest Assisted Living.
5. A maximum of twenty-five (25%) percent of the available rooms at Stonecrest Assisted Living may be used for the Income-Based Program at a given time."

(R-11; R-12, Response Exhibits G and H)

The Income-Based Program is found in the Stonecrest Assisted Living Resident Handbook. The Handbook must be signed by both the resident and designated

representative and states that "[t]he obligations and understanding of this handbook shall be that of the resident and/or designated representative jointly and severally, and shall bind the resident and/or designated representative and their heirs, personal representative, successors, and assigns." (P13; P 26; Exhibit G)

As was stated in the township's Response to the Application for Leave to Appeal, the Income-Based Program is more than merely a policy. It is a legal obligation or contract established by Baruch with its residents.

Christopher Smith was asked the following questions regarding the Income-Based Program:

"Q. Now – there are certain requirements, factors, involved in being eligible for this program; is that not correct?

A. Yes.

Q. A resident will have lived at Stonecrest Assisted Living and made a minimum of 24 full monthly rent payments; as the first requirement, is it not?

A. It is but that's not always the case of what happens because we don't require them to provide us with their financial statements and all other income, so there is – as our goal is and that's – that's what we ask of the resident or the resident's family but that's not always the case, that's not always what happens.

Q. I also asked if there is any documentation other than this one-page document that pertains to the Income-Based Program and I was informed there wasn't any.

A. Okay.

Q. Are you aware of any other documents that exist that explain or give exceptions to this program other than what's on this one sheet of paper?

A. Other than the direction that's been given to the facilities by the board on what we are looking because, for example, if somebody had said that they have the ability to pay 24 full monthly rent payments and we get to month 15 and

they notify us that, well, we thought we did, but now we don't, they are now in the Income-Based Program, we do not make them leave.

Q. That doesn't state that on the policy, does it?

A. No, it doesn't.

Q. The – number 2 it says that a resident will be required to apply for and be determined eligible for Medicaid; is that also a requirement of this plan?

A. The requirement – the reason for that, basically, Medicaid goes through and prequalifies the people showing whether or not they have the funding available or not and that's why that's on there.

Q. But there is a requirement listed here, is it not, for the Income-Based Program?

A. Yes, because that assures us that what we're being told is correct.

Q. Going to the point you raised a minute ago, number 3, it says a resident will provide copies and information about all available income. Now you just testified a little while ago that you don't require that?

A. It's my understanding that we don't.

Q. But that is in this Income-Based policy that the resident is required to sign along with his or her facility representative; is that not true?

A. That's what it says. Uh-huh.

Q. And in number 5 it says, a maximum of 25 percent of the available rooms at Stonecrest Assisted Living may be used for the Income-Based Program at a given time.

A. I believe we are currently over 40%

Q. But again, that under the policy you would have no obligation to go beyond 25 percent?

A. But in the spirit of the mission of Baruch's senior ministries this is the reality. The reality is that it's over for 40%.

Q. And do you have any written policy to that effect?

A. No."

(Tr. 67-70.)

In regard to admission to Stonecrest, Mr. Murphy testified:

"Q. Now, regarding admission to Stonecrest, am I correct in stating that if one is to be admitted to Stonecrest they are required to have the ability to pay; is that correct?

A. Yes.

Q. As far as I'm aware, and correct me if I'm wrong, Stonecrest has not admitted anyone to its facility who has not had the ability to pay?

A. No.

Q. Are you aware of any residents being asked to leave because of their inability to pay?

A. I am not aware of any that have been asked to leave.

Q. And also as it stands now all the residents who are at the facility do pay whatever amount that is?

A. Well, aside from the \$120,000.00 in accounts receivable, for the most part.

Q. But those are still on the books as collectible, are they not?'

A. Yes.

Q. But I'll phrase it another way? Every resident at the facility is charged a fee?

A. Yes.

Q. There is no one at the facility who pays nothing?

A. Not – well, from an accounting standpoint, no. From the AR standpoint I think you could look at that and say that there is some people that are not paying. . .

Q. I see. I'll phrase it another way. Are there those – anyone at the facility

who is not charged –

A. No.

Q. Anything for their stay? So if someone is – needs adult foster care assistance and are unable to pay anything, they would not be admitted to Stonecrest; is that not true?

A. They would not.”

(Tr. 73-75.)

Stonecrest is designated as an assisted living facility. Baruch has admitted that it is clearly not a nursing home. Medicaid does not pay for such services. (Tr 104, 126). However, Ms. Clawson testified that Stonecrest does “a lot of hospice” at the facility. Such hospice services are paid by Medicare, despite the fact that Medicare does not otherwise pay for assisted living services. Also, hospice is not an obligation or a duty of an assisted living facility.

Ms. Clawson also admitted that there are no written documents, other than the Income-Based Program itself that set forth exceptions to the Income-Based Program. There are no written exceptions to the program or contract.

Ms. Clawson stated:

“Q. So the things you testified to earlier are things you say that Baruch does but apparently there is nothing in writing; am I correct in that, there is nothing in writing on those things?

A. In a policy form there is not.

Q. And what we have, what the public sees or the residents see or the person who signs this document and acknowledges that I can be eligible for this program provided that one through five would not, you know – you know, you could – in other words, you could, if you wish, enforce this policy because they agreed to it and you would have every right in the world to enforce it as written;

would that be a fair statement?

A. Yes.

Q. And so by not having any written policies, you are saying this is left to the discretion of whomever at Baruch or Stonecrest to decide whether or not what they would do under the circumstances?

A. Well, it's not exactly left to whomever. There is a chain of command that needs to be followed and directors given, and its more exception processing, that is what we follow but there are times when there is exception decisions made following a chain of command to make those decisions."

(Tr. 140-141.)

In regard to the Income-Based Program, Ms. Clawson testified:

"Q. And I noted that, as you pointed out earlier, at the end of that handbook there is a last page which says that the obligations and understanding of this handbook shall be that of the resident and/or designated representative jointly and severally, and shall bind the resident and/or designated representative and their heirs, personal representative, successor and assigns, and that they are to sign off on that. The way you have developed this handbook is that the resident/resident's representative signs on that and is bound to the terms of that resident handbook and that was the intent, was it not?

A. Yes.

Q. And although you have testified today that while these are the things we put out in the public, these are things we require people to sign, these are the contracts that we require people to enter into, it sounds like you're saying now that there are certain unwritten policies that you will diverge from those depending on whether Baruch wishes to do so or not under a circumstance; is that correct?

A. Yes, at times there is exceptions that we are allowed to make."

(Tr. 147-148.)

Stonecrest has signed contracts with all of its residents. It has admitted that it has the ability to collect on the unpaid charges through collection. Mr. Murphy testified

that Baruch has the ability and right to collect on the outstanding resident receivables. Baruch did not produce any evidence showing an agreement between Baruch and a resident that it was reducing the resident's fees either temporarily or permanently. Despite testifying at the hearing that it made exceptions to the written Income-Based Program, Baruch admitted that it did not have any written policies showing how it determined to make such an exception nor did Baruch produce any documentation that supported the actual exceptions made.

It was clear from the testimony that Baruch made an exception to the written Income-Based Program on an individual *ad hoc* basis without any written authorized guidelines. Baruch made exceptions on an unspecified case by case basis without any legal or factual support for its decision. In order to be charitable, the gift must be a public, rather than a private gift. It must be "general benevolence" rather than "personal bounty to particular individuals." Provena Covenant Medical Center, 34 Ill App 3<sup>rd</sup> at 744.

The Court in Provena Covenant Medical Center v Department of Revenue, 236 Ill 2d 368, 401; 925 N.E. 2d 1131 (2010) stated:

"In exchange for agreeing to accept less than its "established" rate, the corporation receives a reliable stream of revenue and is able to generate income from hospital resources that might otherwise be underutilized. Participation in the program also enables the institution to qualify for favorable treatment under federal tax law, which is governed by different standards."

A contract signed by the resident binds the resident to the requirements of the agreement. In the present case, a resident of Stonecrest has contractually agreed to comply with the terms of the Income-Based Program. This program requires a

minimum of 24 full monthly rent payments, Medicaid eligibility, the production of all information regarding available income, and is limited to a maximum of 25% of the available rooms. This is a legal obligation that can be enforced by Baruch. Baruch has admitted that it has every right to collect on unpaid obligations. (Tr 74.)

While Baruch may provide exemptions from the contract, Baruch has no written policies in place and was unable to express the specific criteria that it used in granting an exemption. An exemption was based upon the decision of Baruch or Stonecrest administrators who provided no factual support for their decisions.

A contract is not a gift. Baruch's Income-Based Program is contained within a written agreement between it and its residents. As was stated in Holland Home v City of Grand Rapids, 219 Mich App 384, 400-401; 557 N.W. 2d 118 (1996):

"In this case, petitioner's continuing care plan is contained within the agreement between petitioner and its residents of REM I and REM II. The agreement is a contract because petitioner offers a resident a home and care under certain terms and conditions, the resident accepts the offer as extended, the resident pays the entrance fees and promises to pay the monthly fees, and petitioner promises to extend care even when the resident can no longer pay.

In addition, the continuing care plan is a legally enforceable, binding promise, imposing a duty on petitioner to provide its residents with care after the exhaustion of their residents' financial resources as long as the residents have applied for the available public assistance. [citation omitted] We therefore conclude that petitioner's continuing care plan cannot be a gift because a gift requires no pecuniary consideration."

Mr. Murphy testified at the hearing that Baruch had six to seven assisted living facilities at the time of the hearing. The township requests this Court to take judicial notice that Baruch currently has approximately 36 facilities. At the time of the hearing, Baruch filed one income tax report that included all of its facilities. Baruch produced its

Form 990 for the 2011 and 2012 tax years. (R-6 and R-7.) The tax returns do not separate the financial status of each of the facilities of Baruch, but consolidate the accounting into one. (Tr. 24-32.) The fund balances indicate that Baruch did not have any losses in 2011 and in 2012.

In Provena Covenant Medical Center, the Court stated that it would be illogical to say, on the one hand, that a charitable organization may enter into a contract and, on the other hand, to prevent the charitable organization from insisting on the performance of the contract. It went on to state:

"Just because Covenant never turned a patient away because of the patient's inability to pay, it does not follow that Covenant thereby provides charity. If, despite the patient's inability to pay, the patient is contractually liable to reimburse Covenant for the medical treatment, Covenant has extended no charity to that patient."

Provena Covenant Medical Center, 384 Ill App 3<sup>rd</sup> at 763-764.

Despite its claims of loss, Baruch's tax return does not show any loss. As illustrated in the Provena Covenant Medical Center case, the Court stated that the dollar amount of charity care can be measured by either the cost to the hospital or by the amount the hospital charged. If cost is used, it can be either average cost, which includes overhead, or it could be marginal cost. Actual costs of services is what the hospital pays. Marginal costs is the excess costs of treating an additional patient. For example, if treating ten patients costs the hospital \$10,000.00 but treating 11 patients costs the hospital \$10,500.00, the marginal cost of treating the 11<sup>th</sup> patient is \$500.00. The average cost of treating all 11 patients is \$10,500.00 divided by 11, or about \$954.00. Measuring charity care by charges yields a higher dollar figure than

measuring by cost. Measuring by average cost yields a higher dollar figure than measuring by a marginal cost. Provena Covenant Medical Center, 384 Ill App 3<sup>rd</sup> at 758-759.

Baruch only deals with his residents on a month to month basis. Ms. Clawson testified:

"We explained to the resident and their families when they move in that they – this becomes their home and they are renting a room and so it's like renting an apartment, you do have to pay in advance for that month. We don't put people on the hook for a lease, for a 12 month lease or a 24 month lease, we are really renting a month at a time. So it's just simply explaining our payment arrangement with them."

(Tr. 97.)

The facts are clear that Baruch made the subjective decision as to whom it would provide an exemption to its contractual Income-Based Program. Baruch did not serve any person who needed the particular type of charity being offered. Rather, Baruch specifically chose the persons whom it would provide such exemption. This was discriminatory. While it could be argued that the written policies or contracts should be ignored because Baruch made exceptions to the contract, Baruch chose whom would receive an exemption, did not document in writing that the person was entitled to an exemption, and reserved to itself the right to collect from the person the unpaid balance. The resident does not have the legal right to challenge the collection efforts. Mr. Murphy testified, they remain "on the books."

Baruch might explain that it would not collect on any future revenues, but it would have every legal right to do so. Baruch was, and is, able to pick and choose whom it wishes to exempt from the qualifications imposed by the Income-Based

Program. This is discriminatory.

D. BARUCH IS NOT ENTITLED TO A TAX EXEMPTION.

In reviewing MCL 211.7o(1), this court in Wexford found that it needed a set of criteria in order to determine what constituted a "charitable institution" under the statute. The legislature did not define the term charitable institution. The provision was vague and open to a wide interpretation. This court believed that a standard was required in order to assist the tax tribunal and the courts in determining whether a tax exemption should be granted.

Wexford wanted to establish a guideline for what a claimant must show in order to be granted a tax exemption as a charitable institution. Tax exemption statutes are a strictly construed in favor of the taxing unit. Circle Pines Center v Orangeville Township, 103 Mich App 593, 597; 302 N.W. 2d 917 (1981), ap den 417 Mich 929 (1983).

In Wexford, the petitioner had a charity care policy and an open-access policy for Medicare and Medicaid patients. The charity care policy provided free and discounted health care to anyone whose income was up to twice the federal poverty level. Under this open-access policy, patients were treated on a first-come, first-served basis, and petitioner placed no limit on the number of Medicare and Medicaid patients it would treat. This is not the case in regard to Baruch.

Baruch had a written contractual charity care policy solely under its Income-Based Program. Specific requirements were mandated for "residents" under the

contract. Baruch had no written policies, guidelines, or contractual exemptions to the contract. Baruch was able to pick and choose, without any qualifications, who it might or might not exempt from the contract.

If Baruch exempted a person from the requirements of the Income-Based Program, there was no contract or other written documents establishing the exemption or exempting the resident from any future charges. These charges remained "on the books as collectible." (Tr. 74.) Baruch has maintained every right to enforce the contract as written. (Tr. 140-141.)

The Michigan Tax Tribunal found that Baruch offered its charity on a discriminatory basis. The Tribunal found that Baruch placed obstacles in the way of those that needed charity. Baruch's charity was not freely available to the general public and aged population, but to a smaller subset, its existing residents who have first met certain conditions. Baruch SLS, Inc. v Township of Tittabawassee, MTT Docket Nos. 395010 & 415093, p 15.

The Tribunal further found that some measure of discrimination or self-selection occurred *ab initio*. The Tribunal found that Baruch was not able to provide reduced rent to every resident who applied for it and it was not offered on a first-come, first-served basis. Baruch required that a resident seeking participation in the Income-Based Program must meet the requirements of the program. The Tribunal found that there was no guarantee of its availability to all who seek it. The Tribunal found that Baruch went through a process of selecting residents who would receive reduced rent by choosing who, among the group it purported to serve, deserved the services. Baruch at

pp 15-16.

The Michigan Court of Appeals noted that Baruch's charity care policy was not broadly defined as offering a reduced rate to all applicants unable to pay the standard market costs for this type of facility. Baruch did not have any policy that stated it would offer a reduced rate to all applicants unable to pay the standard market costs. While Baruch now claims that it exempted persons from its Income-Based Program without meeting the requirements, Baruch still chose the exempt parties on an *ad hoc* basis. Baruch has not shown that it offered as charity care to all, but only to those whom it selected. Baruch SLS, Inc. v. Township of Tittabawassee, 2015 Mich App LEXIS 801, pp 10-12.

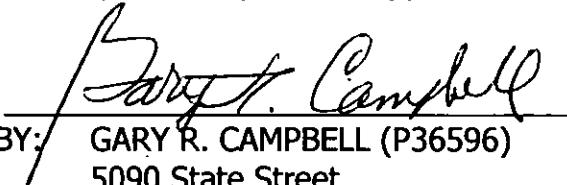
Baruch has not met the charitable institution requirement of Wexford because Baruch offers his charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Baruch does not serve any person who needs the particular type of charity being offered. Rather, Baruch offers its charity only to those whom it selects. Baruch's Income-Based Program specifically sets forth the requirements that are imposed upon its residents in contract form. Baruch did not explain how it makes any exception to the contract, nor did it provide any written exceptions to its income-based contract. This was discriminatory.

RELIEF SOUGHT

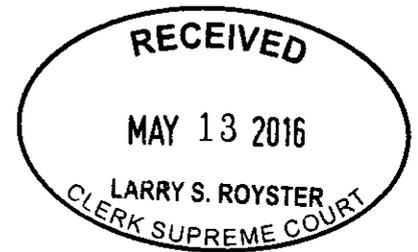
Respondent-Appellee, TOWNSHIP OF TITTABAWASSEE, requests this honorable court to deny the Application for Leave to Appeal filed by Petitioner-Appellant, BARUCH SLS, INC.

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Dated: May 13, 2016

  
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**STATE OF MICHIGAN  
IN THE SUPREME COURT**



BARUCH SLS, INC.,

Supreme Court Docket No. 152047

Petitioner/Appellant,

Court of Appeals Case No. 319953

vs.

MTT Docket No. 0395010 & 0415093

TOWNSHIP OF TITTABAWASSEE,

Respondent/Appellee.

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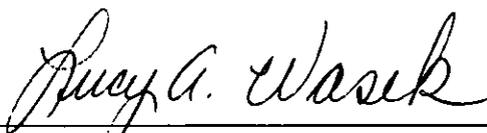
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**PROOF OF SERVICE**

Lucy A. Wasek, being duly sworn, deposes and says that on the 13th day of May, 2016, she mailed a copy of the following:

1. Supplemental Brief by Respondent-Appellee;
2. Proof of Service.

with respect to the above matter to: Gregory G. Timmer and Terry L. Zabel, Rhoades McKee, P.C., 55 Campau Ave., NW, Suite 300, Grand Rapids, MI 49503, by placing same in an envelope, with postage fully pre-paid thereon, addressed as above, and depositing same in a government receptacle.

  
\_\_\_\_\_  
Lucy A. Wasek