# STATE OF MICHIGAN

# COURT OF APPEALS

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| BOYNE AREA GYMNASTICS, INC,<br><br>Petitioner-Appellant, | UNPUBLISHED<br>May 15, 2012 |
| v | No. 303590<br>Michigan Tax Tribunal |
| CITY OF BOYNE CITY,<br><br>Respondent-Appellee. | LC No. 00-320068 |

Before: FITZGERALD, P.J., and MURRAY and GLEICHER, JJ.

PER CURIAM.

Petitioner appeals by right from an order entered by the Michigan Tax Tribunal denying it status as a charitable institution exempt from ad valorem property taxes under MCL 211.7o(1) and granting summary disposition in favor of respondent under MCR 2.116(I)(2). We affirm.

Petitioner is a non-profit Michigan corporation and is tax exempt under § 501(c)(3) of the Internal Revenue Code. In March 2005, petitioner requested that its property be deemed exempt from ad valorem taxation under MCL 211.7o(1) based on its assertion that it is a charitable institution. This request was denied by the Boyne City Board of Review and petitioner filed a petition with the Tax Tribunal on January 6, 2006. Petitioner asserted that it should be exempt from ad valorem taxation because "[t]he corporation exists for the sole purpose of educating children in all aspects of gymnastics, dance and fitness. In addition, the corporation provides scholarship funds to families unable to pay tuition fees." The corporation also exists to "provide[] classes for adults and students for additional activities such as ballroom dancing, karate, yoga, and step aerobics." At the direction of the tribunal, petitioner filed a motion for summary disposition asserting that no genuine issue of material fact existed as to its tax exempt status and that it had amended its articles of incorporation on February 25, 1994, so that its purpose would be consistent "with the purposes for a 501(c)(3) tax-exempt organization."[1] The amended articles are as follows:

[1] Petitioner's original articles of incorporation were filed on December 17, 1986. The original articles state that the purpose of the corporation is: "To organize gymnastics in the Boyne City Area and any other purpose allowed by law in the State of Michigan."

> The purpose or purposes for which the corporation is organized are:
>
> (1) To cultivate and nurture the physical, mental, and emotional development of children and young adults, to educate, promote, and advance the interest of physical fitness throughout one's life, and to provide the opportunity for self-expression and recreation through gymnastics and dance.
>
> (2) Said organization is organized exclusively for charitable, religious, educational, and scientific purposes, including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under section 501(c)(3) of the Internal Revenue Code . . . .
>
> (3) No part of the net earnings of the organization shall inure to the benefit of, or be distributable to its members, trustees, officers, or other private persons, except that the organization shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in the purpose clause hereof. . . .

Petitioner argued that it was a charitable institution because it provided scholarships at the start of every class session to children who could not afford the standard tuition rate. Eligibility for a scholarship was dependent upon whether the child was enrolled in the public school lunch program. According to petitioner, approximately 13 percent of the students in the gymnastics program receive a scholarship and scholarships are funded by conducting fundraisers and receiving grants and donations. The yearly "charity" amount between 2004 and 2007 was between $2,556 and $3,096. In its motion for summary disposition, respondent noted that petitioner's scholarship policy is not in any written format, that petitioner does not provide scholarships for adults that take classes, and that scholarships are not mentioned in petitioner's articles of incorporation or by-laws.

On April 22, 2008, an Administrative Law Judge (ALJ) provided a proposed order that would have granted petitioner's motion for summary disposition on the ground that petitioner satisfied the factors under *Wexford Med Group v City of Cadillac*, 474 Mich 192, 215; 713 NW2d 734 (2006), to establish that it was a charitable institution exempt from ad valorem taxation. Although respondent objected to the proposed order based on then-pending cases, *North Ottawa Rod & Gun Club, Inc v Grand Haven Charter Twp*, unpublished opinion per curiam of the Court of Appeals, issued August 21, 2007 (Docket No. 268308); *Involved Citizens Enterprises, Inc v East Bay Twp*, unpublished opinion per curiam of the Court of Appeals, issued October 29, 2009 (Docket No. 284706), respondent later signed a proposed consent judgment on July 1, 2008, stipulating that petitioner was a charitable institution exempt from ad valorem property taxes. The tribunal later informed the parties that the proposed consent judgment had not been entered because the petitioner in *Involved Citizens* had filed for leave to appeal to the Michigan Supreme Court and the tribunal was waiting until that case was resolved.

After the petitioner in *Involved Citizens* was denied leave to appeal, the tribunal rejected the ALJ's proposed order because the order did not comport with the reasoning of previous charitable exemption cases decided by Michigan courts. The tribunal concluded that petitioner did not meet the second, third, fourth, and sixth *Wexford* factors. As to the second factor, the

tribunal found that petitioner was "organized primarily for the purpose of promoting gymnastics, dance and physical fitness." As to the third factor, the tribunal found that petitioner did not offer its charity indiscriminately because petitioner's unwritten scholarship policy "fails to take into consideration other children who may not qualify for the public school lunch program, but whose families are unable to pay the $72.00 per hour fee." She also noted that the scholarships are not offered to adults who take classes. With regard to the fourth factor, the tribunal found that there was nothing in the record to indicate that petitioner relieved anything, "as would a hospital, nursing home, etc." Finally, with regard to the sixth factor, the tribunal found that petitioner's overall nature was not charitable, but "is that of a recreational organization, just like any of the other many dance and gymnastic organizations." Accordingly, the tribunal granted summary disposition in favor of respondent.

On appeal, petitioner contends that it meets all six *Wexford* factors. Petitioner asserts that the tribunal relied too much on form over substance, focusing its attention on whether petitioner's scholarship policy was in written form, and that the tribunal's reliance on *Involved Citizens* and *North Ottawa* was error because neither case involved scholarships. Petitioner further contends that the tribunal recreated the test for a charitable organization, disregarded portions of the *Wexford* facts and holding, and that any ambiguity in the *Wexford* test and its definition of charity must be strictly construed in favor of the taxpayer. Finally, petitioner contends that the proposed consent judgment should have been entered by the tribunal.

In the absence of fraud, this Court reviews the tribunal's decision for misapplication of the law or adoption of a wrong principle. *Wexford*, 474 Mich at 201. The tribunal's factual findings are deemed conclusive if they are supported by competent, material, and substantial evidence on the whole record. *Id.* at 476, citing Const 1963, art 6, § 28.

When statutory interpretation is at issue, appellate review of the tribunal's decision is de novo. *Liberty Hill Housing Corp v Livonia*, 480 Mich 44, 49; 746 NW2d 282 (2008). "[T]he construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons." *Superior Hotels, LL v Mackinaw Twp*, 282 Mich App 621, 629; 765 NW2d 31 (2009), (citations and internal quotation marks omitted).

A motion for summary disposition under MCR 2.116(C)(10) should be granted if there is no genuine issue of material fact when the evidence and all reasonable inferences from the evidence are viewed in the light most favorable to the nonmoving party. *Walgreen Co v Macomb Twp*, 280 Mich App 58, 62; 760 NW2d 594 (2008). The court may enter a judgment in favor of the opposing party under MCR 2.116(I)(2) if it appears the opposing party is entitled to judgment. *Id.* at 62.

The tribunal did not misapply the law when it concluded that petitioner was not a charitable institution exempt from ad valorem taxation under MCL 2.117o. MCL 211.7o(1) creates an exemption for ad valorem property taxes for "[r]eal or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which that nonprofit charitable institution was incorporated." Exemption from taxation results in the unequal removal of the burden generally placed on all landowners to share in the support of the local government. Thus, tax exemption

statutes are to be strictly construed in favor of the taxing unit. *Michigan Baptist Homes & Dev Co v Ann Arbor*, 396 Mich 600, 669-700; 242 NW2d 749 (1976). This was echoed by the Michigan Supreme Court in *Wexford*:

> [W]e bear in mind the time-honored rules of statutory construction, under which our paramount concern is identifying and effecting the Legislature's intent. *And where a tax exemption is sought, we recall that because tax exemptions upset the desirable balance achieved by equal taxation, they must be narrowly construed.* [*Wexford*, 474 Mich at 204 (emphasis added; citation omitted).]

The Legislature did not define the term "charitable institution." However, the Michigan Supreme Court, in *Wexford*, adopted the definition of "charity" set forth in *Retirement Homes of the Detroit Annual Conference of the United Methodist Church, Inc v Sylvan Twp*, 416 Mich 340, 348-349; 330 NW2d 682 (1982):

> "[Charity] *** [is] a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government." [*Wexford*, 474 Mich at 214 (citations omitted; emphasis omitted by *Wexford*; alterations in original).]

Consistent with this definition, the *Wexford* Court established a six-factor test to determine whether an institution is a "charitable institution" within the meaning of this statute:

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

> money it devotes to charitable activities in a particular year. [*Wexford*, 474 Mich at 215.]

*Wexford* explained that "the inquiry pertains more to whether an institution could be considered a 'charitable' one, rather than whether the institution offers charity or performs charitable work." *Id.* at 212-213.

Here, the tribunal erred when it held that petitioner did not meet the third *Wexford* factor, but was correct in concluding that petitioner did not meet the second, fourth, and sixth factors.

Petitioner provides scholarships to children and young adults who cannot afford its classes. The scholarships cover either the full amount of the class or provide a discount for the class. Petitioner determines eligibility for these scholarships based on the individual's participation in the public school lunch program. The Court in *Wexford* said:

> In a 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. . . .* [*Wexford*, 474 Mich at 213 (emphasis added).]

In *Wexford*, the petitioner had a

> "charity care" and an "open access" policy for Medicare and Medicaid patients. The charity care policy provide[d] free and discounted health care to anyone whose income [was] up to twice the federal poverty level. Under its open-access policy, patients [were] treated on a first-come, first-served basis, and petitioner place[d] no limit on the number of Medicare and Medicaid patients it [would] treat. [*Id.* at 197.]

The petitioner also had self-pay patients and Blue Cross Blue Shield patients. *Id.* at 217. The fact that its free care was restricted to those at twice the poverty level did not render the charitable care discriminatory. The group that petitioner is purporting to serve is the children and young adults who are eligible for the public school lunch program; as among that group, petitioner does not discriminate as to who will receive the scholarships.

It was error for the tribunal to hold that petitioner did not meet the third *Wexford* factor based on the fact that its scholarship policy did not take into account children who did not meet the requirements of the public school lunch program or adults who took classes at petitioner's facility. "[A] nonprofit corporation will not be disqualified for a charitable exemption because it charges those who can afford to pay for its services as long as the charges approximate the cost of the services." *Retirement Homes*, 416 Mich at 350 n 15. There is nothing to indicate that petitioner, a nonprofit corporation, charged for more than the approximate cost of services.

With regard to the second factor, the tribunal properly looked at petitioner's articles of incorporation, constitution, and lack of a written scholarship policy to determine that petitioner

was not organized chiefly, or solely, for charity. In *McLaren Regional Med Ctr v City of Owosso (On Remand)*, 275 Mich App 401, 413; 738 NW2d 777 (2007), the petitioner, a non-profit medical center and corporate medical management company, provided evidence that it had organized exclusively for a charitable purpose because of consistent statements in its articles of incorporation and by-laws "to provide medical services and to 'operate[] exclusively for charitable, scientific, and educational purposes.'" Similarly, the petitioner's articles of incorporation in *Pheasant Ring v Waterford Twp*, 272 Mich App 436; 726 NW2d 741 (2006), overruled on other grounds in *Liberty Hill Housing Corp*, 480 Mich 44; 746 NW2d 282 (2008), stated that its organizational purpose was "to carry on exclusively educational and other charitable activities" relative to a transitional community for persons with autism. *Id.* at 440. The respondent had not produced any evidence that the petitioner had "failed to actively pursue its stated mission or any other reason or basis for its existence." *Id.* at 441.

Petitioner's articles are consistent with *McLaren* and *Pheasant Ridge* in that they state petitioner was "organized exclusively for charitable, religious, educational, and scientific purposes."[2] However, it also states that one of its purposes was "to provide the opportunity for self-expression and recreation through gymnastics and dance."

Here, petitioner's articles of incorporation and its by-laws do not state that petitioner is organized chiefly for a charitable purpose. Rather, they generally state that petitioner was organized to teach gymnastics, dance, and physical fitness. Petitioner provides classes to anyone who wishes to participate in them and will waive or discount the fee for those students who participate in the school lunch program. The petitioner here happens to provide use of its facilities either at a discount or no charge to some members of the public and was not organized primarily to provide charitable services. At most, the waiving of fees to some members of the public is incidental to the primary purpose for organizing. As such, the tribunal was correct in finding that petitioner was not organized chiefly or solely for charity.

As to the fourth *Wexford* factor, petitioner states that its classes provide physical fitness and confidence-building primarily to children and young adults and relieves these students' bodies from disease, suffering, or constraint, and lessen the burdens of government by providing training outside of Michigan's strained public school system. However, petitioner has failed to cite any evidence that it is the government's burden to provide physical fitness and gymnastics

[2] These cases do not stand for the proposition that the organizational purpose can only be determined based on the articles. Petitioner takes exception with the tribunal's "focus" on the fact that its scholarship policy is not in written form. However, the tribunal's order only mentions this once, which is hardly focusing on it. And petitioner has the burden of proving its charitable works and must present relevant evidence of these works. *Wexford*, 474 Mich at 220. In *Wexford*, the Court looked at the group's articles of incorporation, by-laws, and its physicians' contracts in determining whether the group was organized for a charitable purpose. *Id.* at 196-197, 218. There was nothing to preclude the tribunal from looking at evidence besides the incorporating documents, and the absence of documentation was a proper consideration in making its determination.

classes to children and young adults. "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *Nat'l Waterworks, Inc v Int'l Fidelity and Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

Finally, petitioner's charitable endeavors, while laudable, appear to be incidental to its recreational purposes, so that petitioner's overall nature is not charitable. Although it was error to hold that petitioner did not meet the third *Wexford* factor, that error does not affect the outcome that petitioner is not a charitable organization exempt from ad valorem taxation under MCL 2.117o.

Petitioner also argues that the tribunal recreated the *Wexford* test for a charitable exemption from ad valorem property taxes by disregarding portions of the *Wexford* facts and holding, and by referring to irrelevant federal private foundation law. However, petitioner fails to articulate what part of the facts and holding the tribunal failed to account for and how this recreated the *Wexford* test. Again, "[a] party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *Nat'l Waterworks*, 275 Mich App at 265. Also, the tribunal must look at all relevant evidence to determine if petitioner is organized for a charitable purpose. Because petitioner is basing its claim for a charitable exemption on its offer of scholarships to low-income children, any evidence of this scholarship policy is relevant, including the fact that the policy is not in any written form.

Petitioner's argument that the tribunal failed to resolve any ambiguity in the *Wexford* definition of "nonprofit charitable institution" in favor of petitioner also fails. The *Wexford* opinion sets out a six-factor test to determine whether an institution is a charitable organization. *Wexford*, 474 Mich at 215. The Court also provides a definition of "charity," noting that this definition "sufficiently encapsulates, without adding language to the statute, what a claimant must show to be granted a tax exemption as a charitable institution." *Id.* at 214. Each of the factors is also expanded on with respect to their application to a given case. *Id.* at 215-221. What exactly petitioner finds ambiguous is unclear.

MCL 205.745 provides, "An order or decision may be entered by a member of the tribunal upon written consent of the parties filed in the proceeding or stated in the record." The use of the word "may" indicates that the tribunal is to use its discretion when deciding whether or not to enter a consent judgment and that it is not mandatory to do so. See *Warda v Flushing City Council*, 472 Mich 326, 332; 696 NW2d 671 (2005) (unqualified use of the term "may" in a statute provided for full discretion). The consent judgment was signed by petitioner on June 30, 2008, and by respondent on July 7, 2008. It indicated that the respondent was not contesting petitioner's claim that petitioner is a charitable institution exempt from ad valorem property taxes for specific years. The tribunal indicated in a letter dated December 22, 2009, that the parties' consent judgment had not yet been entered because the tribunal was awaiting the decision of the Michigan Supreme Court as to whether the Court would grant leave to appeal in the *Involved Citizens* case.

"A consent judgment is in the nature of a contract, and is to be construed and applied as such." *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008). "If no reasonable person could dispute the meaning of ordinary and plain contract language, the Court must accept and enforce contractual language as written, unless the contract is contrary to law or public policy."

*Id.* at 517. Here, there is no dispute that the consent judgment states that respondent was not contesting petitioner's claim to be a charitable institution exempt from ad valorem property taxes. However, until it was accepted by the tribunal it was a "judgment" in name only. Thus, the law applicable to consent judgments would not apply. Nonetheless, a settlement agreement will generally be enforced as a contract. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). However, petitioner has cited no case to suggest that this applies in this context and the statute, by virtue of the grant of discretion to enter a proposed consent judgment, suggest otherwise.

Even if the proposed consent judgment were viewed as a settlement agreement that might be enforceable, contracts that offend public policy should not be enforced. *Sands Appliance Serv, Inc v Wilson*, 463 Mich 231, 239; 615 NW2d 241 (2000). Here, the proposed consent judgment was contrary to both law and public policy. Petitioner does not meet the six-factor test in *Wexford* to be classified as a charitable institution.

The Uniform Taxation Clause, Const 1963, art 9, § 3, requires that general ad valorem taxation of real and personal property not exempt by law be uniform. This means that "the purpose of the uniformity clause was to ensure 'equal treatment to similarly situated taxpayers.'" *Taylor Commons v City of Taylor*, 249 Mich App 619, 626; 644 NW2d 773 (2002), quoting *Ann Arbor v Nat'l Ctr for Mfg Sciences, Inc*, 204 Mich App 303; 514 NW2d 224 (1994). Allowing petitioner consent to being a charitable institution when it does not qualify as a charitable institution under the law would violate the purpose of the uniformity clause to treat similarly situated taxpayers equally.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher