

COURT OF APPEALS OF WISCONSIN
DISTRICT IV

BEAVER DAM COMMUNITY
HOSPITALS, INC.,

Plaintiff-Respondent,

vs.

Appeal No. 2011-AP-1479

CITY OF BEAVER DAM,

Defendant-Appellant.

**RESPONSE BRIEF OF PLAINTIFF-RESPONDENT
BEAVER DAM COMMUNITY HOSPITALS, INC.**

Appeal from the Circuit Court for Dodge County
The Honorable Brian A. Pfitzinger, Presiding
Dodge County Circuit Court Case No. 2010-CV-690

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STATEMENT OF THE ISSUE

Whether property owned by a non-profit entity and exclusively used as a community-based residential facility licensed under Chapter 50, but not exceeding 10 acres of land necessary for location and convenience of the buildings while such property is not used for profit, constitutes property exempt from taxation pursuant to WIS. STAT. § 70.11(4)(a).

Answered by the circuit court: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent, Beaver Dam Community Hospitals, Inc. (“Hospital”), agrees with Defendant-Appellant, City of Beaver Dam (“City”), that oral argument is not necessary because the appellate briefs fully address the applicable law and legal theories of the litigants such that oral argument would only be of marginal value and not justify the expense of court time and costs to the parties. WIS. STAT. § 809.22(2)(b). Publication is merited because the Court’s decision will provide needed precedent for an issue of first impression that is of substantial and continuing public interest. *See* WIS. STAT. § 809.23(1)(a)5.

STATEMENT OF THE CASE

This is an appeal from a judgment entered May 16, 2011, in the circuit court for Dodge County, Brian A. Pfitzinger, Judge, granted the Hospital's motion for summary judgment and denied the City's motion for summary judgment. The court concluded that a community-based residential facility ("CBRF") known as "Eagle's Wings" constituted property exempt from taxation under WIS. STAT. § 70.11(4).

STATEMENT OF FACTS

The Hospital is a Wisconsin nonstock and nonprofit corporation exempt from taxes pursuant to § 501(c)(3) of the Internal Revenue Code. (R.3:1; R.17:1). Eagle's Wings is owned and exclusively used by the Hospital as a CBRF. (R.10:1-2; R.17:1-2). Licensed under Chapter 50 of the Wisconsin statutes, Eagle's Wings provides care for residents ranging in age from 70 to 98 years old who require assistance with activities of daily living, but do not yet require the skilled level of care offered in a nursing home setting. (R.10:1). In addition to offering individual assistance with activities of daily living, Eagle's Wings offers a safe and secure environment for its residents. (R.10:2). Approximately 94% of the revenues generated from Eagle's Wings provide for the services and care of

the residents, and the remainder is used for building and equipment repairs at the property. (R.10:2; R.17:2). Eagle's Wings comprises an area equal to 1.28 acres. (R.8:52; R.17:2).

On February 27, 2009, the Hospital submitted a Property Tax Exemption Request to the Assessor for the City, requesting property tax exemption under WIS. STAT. § 70.11(4). (R.1:4-5; R.3:2). The Hospital subsequently received real and personal property tax bills from the City. (*Id.*) On January 26, 2010, the Hospital filed a Notice of Claim and Claim for Recovery of Unlawful Taxes with the City pursuant to WIS. STAT. § 74.35. (R.1:5; R.3:2). The City took no action on the Hospital's claim. (*Id.*)

On July 19, 2010, the Hospital filed its Summons and Complaint seeking recovery of the unlawful taxes levied and collected by the City. (R.1:1-15). On April 8, 2011, the City conceded at the summary judgment hearing that WIS. STAT. § 70.11(4) was unambiguous. (R.16:7). Finding no issue of material fact, the circuit court granted the Hospital's motion for summary judgment and denied the City's motion. (R.17:3). The Final Judgment was entered on May 16, 2011. (R.20:1; Appellant's App. 1).

STANDARD OF REVIEW

This case involves the interpretation of the property tax exemption statute for facilities licensed, certified, or registered under Chapter 50, found in WIS. STAT. § 70.11(4)(a). Statutory interpretation is a question of law to be reviewed de novo “while benefiting from the lower court’s analysis.” *See Noffke ex rel. Swenson v. Bakke*, 2009 WI 10, ¶ 9, 315 Wis. 2d 350, 760 N.W.2d 156.

Likewise, summary judgment motions are reviewed de novo. *See H & R Block E. Enterprises, Inc. v. Swenson*, 2008 WI App. 3, ¶ 11, 307 Wis. 2d 390, 745 N.W.2d 421. The party opposing summary judgment defeats the motion only if the party can show by affidavits, or other proof, that there are “substantial issues of fact or reasonable inferences which can be drawn from the evidence.” *Jahns v. Milwaukee Mut. Ins. Co.*, 37 Wis. 2d 524, 530, 155 N.W.2d 674 (1968).

ARGUMENT

- I. **A FACILITY LICENSED UNDER CHAPTER 50 NEED ONLY MEET THE REQUIREMENTS FOUND IN THE PLAIN LANGUAGE OF WIS. STAT. § 70.11(4) TO BE EXEMPT FROM PROPERTY TAXES.**

The only issue in this case is whether property owned by a non-profit entity and exclusively used as a facility licensed under Chapter 50,

but not exceeding 10 acres of land necessary for location and convenience of the buildings while such property is not used for profit, constitutes property exempt from taxation pursuant to WIS. STAT. § 70.11(4) (2009–2010).

This Court “assume[s] that the legislature’s intent is expressed in the statutory language.” See *Progressive Northern Ins. Co. v. Romanshek*, 2005 WI 67, ¶ 59, 281 Wis. 2d 300, 697 N.W.2d 417. When acting within “constitutional limitations,” the legislature “settles and declares public policy,” not the court. *Id.* ¶ 60. When the legislature has acted, a court is “limited to applying the policy the legislature has chosen to enact,” and is prohibited from “impos[ing] its own policy choices.” *Id.* This practice of deferring to the policy choices enacted into law by the legislature requires that “statutory interpretation focus primarily on the language of the statute.” See *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Accordingly, this Court should uphold the express policy decisions of the legislature and apply the unambiguous language of WIS. STAT. § 70.11(4).¹ The City asks the Court

¹ (4) **EDUCATIONAL, RELIGIOUS AND BENEVOLENT INSTITUTIONS; WOMEN’S CLUBS; HISTORICAL SOCIETIES; FRATERNITIES; LIBRARIES.**
(a) Property **owned and used exclusively** by educational institutions offering regular courses 6 months in the year; or by churches or religious, educational or benevolent

to ignore the plain language of the statute and disregard the policy choices enacted by the legislature.

This Court should affirm the circuit court's grant of summary judgment because Eagle's Wings satisfies the unambiguous elements for a general property tax exemption found in the current version of WIS. STAT. § 70.11(4), and the plain language of the statute reveals the legislature's intent to exempt facilities meeting the elements of WIS. STAT. § 70.11(4)(a) from taxation.

associations, **or by a nonprofit entity that is operated as a facility that is licensed, certified, or registered under ch. 50,** including benevolent nursing homes but not including an organization that is organized under s. 185.981 or ch. 611, 613 or 614 and that offers a health maintenance organization as defined in s. 609.01(2) or a limited service health organization as defined in s. 609.01(3) or an organization that is issued a certificate of authority under ch. 618 and that offers a health maintenance organization or a limited service health organization and not including property owned by any nonstock, nonprofit corporation which services guaranteed student loans for others or on its own account, and also including property owned and used for housing for pastors and their ordained assistants, members of religious orders and communities, and ordained teachers, whether or not contiguous to and a part of other property owned and used by such associations or churches, and also including property described under par. (b); or by women's clubs; or by domestic, incorporated historical societies; or by domestic, incorporated, free public library associations; or by fraternal societies operating under the lodge system (except university, college and high school fraternities and sororities), **but not exceeding 10 acres of land necessary for location and convenience of buildings while such property is not used for profit.** Property owned by churches or religious associations necessary for location and convenience of buildings, used for educational purposes and not for profit, shall not be subject to the 10-acre limitation but shall be subject to a 30-acre limitation. Property that is exempt from taxation under this subsection and is leased remains exempt from taxation only if, in addition to the requirements specified in the introductory phrase of this section, the lessee does not discriminate on the basis of race.

Here, Eagle's Wings is statutorily exempt from taxation. At the circuit court, the City did not dispute any of the material facts and conceded that the statute was unambiguous. (R.16:7). Accordingly, Eagle's Wings should be granted a tax exemption because it satisfies each of the elements for a tax exemption under the unambiguous language of WIS. STAT. § 70.11(4)(a).

The legislature chose not to put the word "benevolent" before the phrase "nonprofit entity that is operated as a facility that is licensed, certified, or registered under ch. 50..." in the current version of WIS. STAT. § 70.11(4). Yet, the City contends that an organization "licensed, certified, or registered under ch. 50" is nonetheless required to show benevolence. This contention is not, however, supported by the language of the statute. Given the inclusion of the word "benevolence" in other places in the statute, the legislature certainly knew how to indicate when an organization must establish benevolence. *See, e.g.,* WIS. STAT. §§ 70.11(4a)m, 70.11(4d). The omission of "benevolence" from the above cited passage indicates that the legislature did not intend organizations "licensed, certified, or registered under ch. 50" to show benevolence. Alternatively, the legislature could have simply deemed that Chapter 50 facilities which

are owned and exclusively used by non-profit entities are benevolent. In any event, a facility that is “owned and used” exclusively by an organization “licensed, certified, or registered under ch. 50” that does not exceed ten acres is sufficient to establish the exemption from general property taxes under WIS. STAT. § 70.11(4)(a).

Furthermore, the interpretation of WIS. STAT. § 70.11(4) offered by the City is an absurd construction that disregards the unambiguous language of the statute. While acknowledging that the statute was substantially amended, the City curiously contends that the elements of the pre-amendment statute are controlling. (See Appellant’s Br. at pp. 13-14; R.11:7). This ill-gotten contention is rebutted by the fact that the current elements for a tax exemption are found in the current form of the statute. Indeed, it is unlikely that the legislature amended the statute while intending for the older version to be controlling. The interpretation offered by Eagle’s Wings allows the court to both apply the unambiguous language of the statute and affirm the policy decisions enacted by the legislature.

The City also asks this Court to find controlling case law that interpreted a prior version of the statute that no longer exists. The City relies exclusively on the elements for a tax exemption found in *Univ. of*

Wis. Med. Found., Inc. v. City of Madison, 2003 WI App. 204, 267 Wis. 2d 504, 671 N.W.2d 292. This approach is problematic because that particular decision provides elements that are no longer applicable as a result of the 2009 amendment. The City acknowledged that the statute had been substantially amended in 2009, (R.11:7), yet continues to premise its arguments on the out-dated version of the Wisconsin tax exemption statute cited by the court in *Univ. of Wis. Med. Found., Inc. v. City of Madison*.

The City's interpretation of WIS. STAT. § 70.11(4) eschews established rules of statutory construction and offers the following two impermissible courses of action: The Court could disregard the policy choices of the legislature and re-write the statute; or, the Court could make its own policy decision with regard to tax exemptions. Either course of action would ignore long standing principles of statutory construction and contravene the express policy decisions of the legislature.

The circuit court correctly concluded that Eagle's Wings qualified for a tax exemption under the unambiguous language of the statute because Eagle's Wings met each of the elements for a general property tax exemption and granted summary judgment to the Hospital. Moreover, the

City conceded during the summary judgment hearing that the statute was unambiguous. (R.16:7).

The City now argues for the first time on appeal that the statute is ambiguous and advances other arguments that were not presented or briefed at the court below. The Court should decline to consider these arguments because they are inadequately briefed and raised for the first time on appeal. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633, 642 (Ct. App. 1992) (stating that appellate courts will not address issues on appeal that are inadequately briefed); *State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577, 584 (1997) (arguments raised for the first time on appeal are generally deemed waived).

A. The Retention Of The Phrase “Benevolent Nursing Homes” Does Not Make The Statute Ambiguous.

The City argues for the first time that the “retention of the phrase ‘benevolent nursing homes’ makes the statute ambiguous.” (Appellant’s Br. at p. 15.) Wisconsin Act 28, passed June 2009, created WIS. STAT. § 70.11 (4)(a). When the legislature amended and renumbered WIS. STAT. § 70.11(4), it made a policy decision to exempt property owned and exclusively used “by a nonprofit entity that is operated as a facility that is

licensed, certified, or registered under ch. 50” when it inserted this quoted language between the phrases “benevolent associations” and “including benevolent nursing homes.” The City construes the insertion of this language to create ambiguity in the statute and argues that “there are at least two different interpretations of WIS. STAT. § 70.11(4)(a).” (Appellant’s Br. at p. 16.) The City merely posits that because the circuit court’s interpretation of the statute is at odds with the Department of Revenue’s interpretation in the WISCONSIN PROPERTY ASSESSMENT MANUAL, the statute is thereby rendered ambiguous. (*Id.* at pp. 8-9.) The City’s argument is without basis.

An agency’s interpretation of a statute is a question of law to be determined by the court. *Milwaukee Symphony Orchestra, Inc. v. Wisconsin Dept. of Revenue*, 2010 WI 33, ¶ 32, 324 Wis. 2d 68, 781 N.W.2d 674. Moreover, a reviewing court gives “no deference to an agency’s statutory interpretation when any of the following conditions are met: (1) the issue presents a matter of first impression; (2) the agency has no experience or expertise relevant to the legal issue presented; or (3) the agency’s position on the issue has been so inconsistent as to provide no real guidance.” *Id.* at ¶ 37.

In the present case, the issue presents a matter of first impression so the Court should not give any deference to the Department of Revenue's interpretation in the WISCONSIN PROPERTY ASSESSMENT MANUAL. This Court may benefit from the agency's analysis, but it should interpret the statute independent of the agency's interpretation and adopt an interpretation that the Court determines the most reasonable interpretation. *See id.*

Here, nothing has changed from the facts and issues presented in the circuit court and reference to the WISCONSIN PROPERTY ASSESSMENT MANUAL provides no assistance. The circuit court has already determined the most reasonable interpretation of the statute in question and concluded that WIS. STAT. § 70.11(4)(a) does not indicate that any further showing of benevolence is required by Eagle's Wings for it to be exempt from property taxation.

"The legislature is presumed to know the state of the law when it enacts or amends legislation." *Eau Claire County v. General Teamsters Union Local No. 662*, 228 Wis. 2d 640, 646, 599 N.W.2d 423 (Ct. App. 1999). When the legislature enacts a new statute, it is presumed to know the new statute's relationship with existing and contemporaneously created

statutory provisions, especially those directly affecting the statute. *City of Milwaukee v. Kilgore*, 193 Wis. 2d 168, 183-84, 532 N.W.2d 690 (1995). The legislature declared the public policy regarding the tax-exempt status of Community-Based Residential Facilities such as Eagle's Wings when it created WIS. STAT. § 70.11(4)(a).

The legislature chose to insert the relevant language where it did, and its insertion in front of the phrase "benevolent nursing homes" does not make the statute ambiguous. The word "benevolent" modifies "nursing homes" in the statute at issue and that is why the Department of Revenue interprets the statute to require that a nursing home "Must be Benevolent" in its "Nursing Home v. Retirement Home Comparison of Exemption Criteria" chart. WISCONSIN PROPERTY ASSESSMENT MANUAL at p. 22-15. The only criteria listed under CHAPTER 50 FACILITIES is found in the first sentence: "Sec. 70.11(4)(a) Wis. Stats., provides an exemption for property owned and used exclusively by a nonprofit entity licensed, certified, or registered under Ch. 50." *Id.* The manual does not contain any further discussion of exemption criteria for a Community-Based Residential Facility such as Eagle's Wings. The legislature did not insert the word "benevolent" in front of "non-profit entity" as it did for nursing homes.

The statute is not ambiguous; on the contrary, its plain meaning can be determined by the words the legislature chose when it created it.

B. If There Was Any Ambiguity, Then It Would Need To Be Resolved In Favor Of Taxation; However, The Meaning Of The Statute Is Plain.

It is assumed that the legislature's intent is expressed in the words that it used in the statute. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. When the meaning of the statute is plain, courts generally stop their inquiry. *Id.* “The presence of different ‘plain meaning’ interpretations by lawyers . . . does not authorize the court to skip this process, assume ambiguity, and begin searching for extrinsic sources of legislative intent.” *Bruno v. Milwaukee County*, 2003 WI 28, ¶ 21, 260 Wis. 2d 633, 660 N.W.2d 656. On the contrary, courts examine the language of the statute “to determine whether ‘well-informed persons’ *should have* become confused.” *Id.*

According to the explicit words of the statute, the property at issue in this case is exempt from taxation because it is “[p]roperty owned and used exclusively by . . . a non-profit entity that is operated as a facility that is licensed, certified, or registered under ch. 50, . . . but not exceeding 10 acres of land necessary for location and convenience of buildings while

such property is not used for profit.” WIS. STAT. § 70.11(4)(a). The City did not dispute the material facts found by the circuit court: (1) Eagle’s Wings is a Community-Based Residential Facility; (2) Eagle’s Wings is owned and exclusively used by the Hospital, a Wisconsin non-profit entity; (3) Eagle’s Wings is not used for profit as all of the revenue generated by the facility is used for resident care and maintenance; and (4) Eagle’s Wings does not exceed 10 acres for the location of its buildings. (R.17:1-2).

The facts here are undisputed, and well-informed persons should not become confused in applying that statute as presently written to the undisputed facts in this case. The legislature expressed its intent in the words it used in the statute to exempt property, such as Eagle’s Wings, from taxation. The language of the statute plainly reveals a legislative intent to include facilities licensed under Chapter 50 as property exempted from taxation.

C. Defendant’s Tortuous Interpretation Of The Statute Is Anything But Reasonable.

The City next contends that the “determination that a Chapter 50 facility does not need to meet the benevolence test renders the presence of the word ‘benevolent’ to describe nursing homes meaningless.”

(Appellant’s Br. at p. 19.) Without any further discussion or support, the City simply concludes that “[b]ecause Wis. Stat. § 70.11(4)(a) explicitly says that the exemption for Chapter 50 facilities includes ‘benevolent nursing homes,’ a reasonable interpretation is that any Chapter 50 facility must be benevolent to be exempt.” (*Id.*) Reliance on this language is unavailing.

Instead of focusing on the word “benevolent” in an attempt to create an ambiguity where none exists, the City should have focused on the word “including” which follows the pertinent part of the statute at issue in this case: “*or by a non-profit entity that is operated as a facility that is licensed, certified, or registered under ch. 50, **including** benevolent nursing homes.*” Generally, the courts give the word “includes” an expansive meaning, indicating that which follows is but a part of the whole. *Milwaukee Gas Light Co. v. Dept. of Taxation*, 23 Wis. 2d 195, 203 & n.2, 127 N.W.2d 64 (1964). Moreover, “the use of different words joined by the disjunctive connector ‘or’ normally broadens the coverage of the statute to reach distinct, although potentially overlapping sets.” *Pawlowski v. American Fam. Mut. Ins. Co.*, 2009 WI 105, ¶ 22, 322 Wis. 2d 21, 777 N.W.2d 67.

Defendant’s tortuous interpretation is anything but reasonable.

D. The Department Of Revenue's Property Assessment Manual Is Neither Instructive Nor Entitled To Any Deference Because The Interpretation Of WIS. STAT. § 70.11(4)(a) Is An Issue Of First Impression.

The City merely assumes that because the Department of Revenue interprets the statute to retain benevolence for nursing homes, then it should be the same for a Community-Based Residential Facility. (Appellant's Br. at pp. 20-22). The City, once again, attempts to avoid the plain language found in the statute.

The word "benevolent" modifies "nursing homes" in the statute at issue and that is why the Department of Revenue interprets the statute to require that a nursing home "Must be Benevolent" in its "Nursing Home v. Retirement Home Comparison of Exemption Criteria" chart. WISCONSIN PROPERTY ASSESSMENT MANUAL at p. 22-15. The only criteria listed under CHAPTER 50 FACILITIES is found in the first sentence: "**Sec. 70.11(4)(a) Wis. Stats., provides an exemption for property owned and used exclusively by a nonprofit entity licensed, certified, or registered under Ch. 50.**" *Id.* (emphasis added.) The manual does not contain any further exemption criteria for a Community-Based Residential Facility such as Eagle's Wings.

Furthermore, a court gives no deference to an agency's statutory interpretation when the issue presents a matter of first impression. *Milwaukee Symphony Orchestra, Inc. v. Wisconsin Dept. of Revenue*, 2010 WI 33, ¶¶ 32, 37, 324 Wis. 2d 68, 781 N.W.2d 674. In the present case, the issue presents a matter of first impression. Consequently, the Court should not give any deference to the Department of Revenue's interpretation in the WISCONSIN PROPERTY ASSESSMENT MANUAL. Here, nothing has changed from the facts and issues presented in the circuit court and reference to the WISCONSIN PROPERTY ASSESSMENT MANUAL is neither instructive nor entitled to any deference in this case.

E. The Title Of The Statute Is Neither Part Of The Statute Nor Is It Helpful Here Because There Is No Ambiguity To Resolve.

While the title of a statute may be helpful in resolving statutory ambiguities, here there is no ambiguity to resolve. "The titles to subchapters, sections, subsections, paragraphs and subdivisions of the statutes and history notes are not part of the statutes." WIS. STAT. § 990.001(6).

When a statute's language is unambiguous, as it is here, sound principles of statutory construction require that the Court not look to the

title for guidance or instruction. *State v. Smith*, 2010 WI 16, ¶ 27, 323 Wis. 2d 377, 780 N.W.2d 90. As a result, reliance on the title is not persuasive.

F. The Circuit Court’s Interpretation Is Neither Against Public Policy Nor Does It Focus On The Owner Of The Property And Ignore How The Property Is Used.

Statutes granting tax exemptions represent legislative policy decisions that dictate who is exempt from taxation. The legislature decides and settles matters of public policy. *Progressive Northern Ins. Co. v. Romanshek*, 2005 WI 67, ¶ 60, 281 Wis. 2d 300, 697 N.W.2d 417. It is not the role of the courts “to determine the wisdom or rationale underpinning a particular legislative pronouncement.” *Aicher v. Wisconsin Patients Compensation Fund*, 2000 WI 98, ¶ 57, 237 Wis. 2d 99, 613 N.W.2d 849.

Here, the City asserts that the circuit court’s construction of the statute “is contrary to public policy because it focuses on the tax-status of the property owner and ignores the actual use of the property.” (Appellant’s Br. at p. 25.) From this assertion, the City subsequently concludes that the circuit court’s interpretation is contrary to public policy because for a CBRF to qualify for an exemption under this analysis, it

simply must be owned and used exclusively by a non-profit entity and there are no limits on the actual use of the property. (*Id.*) Once again, the City has chosen to turn a blind eye to the plain language of the statute. As required by the statute, the property owned by the non-profit entity must be exclusively used by the entity and “operated as a facility that is licensed, certified, or registered under ch. 50.”

The legislature declared the public policy of the state when it exempted facilities such as Eagle’s Wings from taxation in WIS. STAT. § 70.11(4)(a). In addition, actual use of the property has not been ignored as claimed by the City. Eagle’s Wings meets the requirements for property tax exemption as found in the statute.

G. The Circuit Court’s Interpretation Of The Statute Is Neither Against Public Policy Nor Does It Put For-Profit Facilities At A Competitive Disadvantage.

The decision to exempt property from taxation, whether it is property owned either by a non-profit or by a for-profit entity, is a policy decision that has been made by the legislature when it amended WIS. STAT. § 70.11(4) and created § 70.11(4)(a) by 2009 Wisconsin Act 28. The language chosen by the legislature clearly indicates a change in meaning from the earlier version. Contrary to the City’s assertion, non-profit entities

are not required to operate at a loss in order to maintain their tax-exempt status. The difference between the two corporate structures is how the profits are distributed. For-profit entities are allowed to pass profits on to its officers, directors, and shareholders while non-profits are prohibited from doing so. Thus, there is not any competitive disadvantage. Any for-profit entity has the right to change its corporate status to non-profit and seek tax exemption for its facilities that are licensed under Chapter 50.

H. The Absence Of Legislative History Has No Bearing Whatsoever On The Circuit Court's Interpretation Because The Statute Is Not Ambiguous.

This is the most specious of all of the arguments presented by the City to avoid the plain language of the statute. Without any citation to authority to support the argument that an absence of legislative history somehow undercuts the circuit court's reasoning, the City simply concludes that this is somehow determinant in this case. Extrinsic sources, such as legislative history, are not consulted unless the statute is ambiguous. *Kalal*, 2004 WI 58 at ¶ 46. Even if legislative history were available, it would not have any bearing on this case because the statute is clear and unambiguous.

II. ASSUMING ARGUENDO THAT THE CITY'S INTERPRETATION OF THE STATUTE IS CORRECT, EAGLE'S WINGS WOULD STILL SATISFY THE CRITERIA FOR EXEMPTION PURSUANT TO WIS. STAT. § 70.11(4)(a).

Helping people of “moderate means” live out their days is a benevolent public service. See *Milwaukee Protestant Home for the Aged v. City of Milwaukee*, 41 Wis. 2d 284, 300, 164 N.W.2d 289 (1969). “Benevolent” activities are those that “benefit the public” and in some way “relieve the state from expense.” *Univ. of Wis. Med. Found., Inc. v. City of Madison*, 2003 WI App. 204, ¶ 21, 267 Wis. 2d 504, 671 N.W.2d 292. Importantly, it is not “the excess of income over outgo” that makes an organization benevolent. *Milwaukee Protestant Home*, 41 Wis. 2d at 296. Indeed, such a rigid and formulaic approach would be “illogical” and “extremely detrimental” to any incentive for good management. See *Duncan v. Steeper*, 17 Wis. 2d 226, 236, 116 N.W.2d 154 (1962). Rather than focusing on “red ink,” the determination of benevolence focuses on whether the organization is “completely free” from the “fact or even possibility of profits accruing to its founders, officers, directors or members.” See *Milwaukee Protestant Home*, 41 Wis. 2d at 294-96.

Historically, benevolent activities have included “caring for the sick, aged and infirm, educating young people, providing care for the poor, and

operating facilities to promote the moral and educational welfare of youth institutions for religious organizations.” *Int’l Found. of Employee Benefit Plans, Inc. v. City of Brookfield*, 95 Wis. 2d 444, 454–55, 290 N.W.2d 720 (Ct. App. 1980). Importantly, the Wisconsin Supreme Court has declared that helping people of “moderate means” live out their days is a benevolent public service. *See Milwaukee Protestant Home*, 41 Wis. 2d at 300. Furthermore, use that is “incidental to and promotive of” the benevolent activity “to which a specific property is primarily devoted” will not necessarily “disqualify” the property. *Univ. of Wis. Med. Found., Inc.* at ¶ 20. As a result, an important consideration is a fact-intensive determination of how “consequential” the incidental use was when compared to the “total activity on the property.” *See id.*

With regards to the “primarily and substantially use” element for classification as a benevolent organization, Eagle’s Wings is “primarily and substantially” used for benevolent purposes. Eagle’s Wings is an approximately 27,000 square foot facility. In the present case, it is undisputed that the Hospital uses all of the property for the operation of a 22-bed “Class C” CBRF with the sole exception of approximately 100 square feet in the basement as storage space for the back-up of the

Hospital's information services data. Using 100 square feet of a 27,000 square foot facility for the storage of information services data is an inconsequential use of property when compared to the total operations on the grounds. Indeed, using 26,900 square feet of a 27,000 square foot facility for the operation of a CBRF qualifies as "primarily and substantially" using the property. Furthermore, even if the inconsequential use of 100 square feet in the basement for the back-up of information services data was determined to be non-benevolent use, the Hospital would still be entitled to the exemption for the part of the property that is primarily and substantially devoted to the CBRF under the "Taxed in Part" statute found in WIS. STAT. § 70.11. As a result, the first element of benevolence is satisfied.

With regards to the "benevolent purpose" element, helping retired persons of moderate means to live out the remainder of their lives in comfort and safety is an act of benevolence. *See Milwaukee Protestant Home*, 41 Wis. 2d at 300. Recent years have changed the concept of "retirement" for many people—many older persons have an "assured income for their retirement years." *Id.* at 290. As a result of a guaranteed income after retirement, most people retire with "modest incomes" at their

disposal. *Id.* at 290-91. While not “sick, senile [or] penniless,” retirees face a variety of “personal and inter-personal” challenges. *Id.* As a result, an “increasing number” of retirees seek the type of “congregate living” and companionship, self-respect, and protection provided by organizations such as Eagle’s Wings. *See id.* at 291. The Wisconsin Supreme Court has stated that organizations similar to Eagle’s Wings are benevolent when it stated in no uncertain terms that “[t]o help retired persons of moderate means live out their remaining years is ‘benevolent’ whether or not it is also considered, as we would consider it to be ‘charitable.’” *Id.* at 300. As a result, the second element of benevolence is satisfied.

Furthermore, that Eagle’s Wings collects “occupancy charges” does not change the “basic purpose and character” of the organization. *See generally id.*; *see also* 37 A.L.R.3d 565 § 3[a]. Indeed, charging “pew rent” does not make a church “not a church.” *Milwaukee Protestant Home*, 41 Wis. 2d. at 297-98. This is particularly true where the charge is “reasonably required by the necessities of the situation” and “reasonably related to the maintenance of the institution and the extension of its services.” *Id.* The fact that Eagle’s Wings operates with a “present margin” does not militate against the “objectives for which” the

organization was formed, but “promotes” the benevolent objectives of helping aging citizens live out the remainder of their days in comfort and safety. *See id.* at 297.

Furthermore, approximately 94% of the revenues generated from Eagle’s Wings provide for the services and care of the residents. The remainder is used for building and equipment repairs at the property; none of its directors or officers profit from its operations. As the “profit . . . is payable to nobody,” but is “turned back into improving the facilit[y],” any “profit element” becomes immaterial. *Order of Sisters of St. Joseph v. Town of Plover*, 239 Wis. 278, 283-84, 1 N.W.2d 173 (1941). Most importantly, if the legislature had intended for a benevolent organizations such as Eagle’s Wings to provide “free admission or free services to all or some” residents, it would have indicated as much in the tax exemption statute. *See Milwaukee Protestant Home*, 41 Wis. 2d at 299.

Assuming that benevolence is somehow still required for a tax exemption under WIS. STAT. § 70.11(4)(a), this Court should find that Eagle’s Wings is benevolent for the following two reasons: (1) using 26,900 square feet of a 27,000 square foot facility to operate a CBRF qualifies as primarily and substantially using property, and (2) for the

pronounced benevolent purpose of helping an advanced aged client group to live out their remaining years in comfort and safety. Accordingly, this Court should grant summary judgment in favor of the Hospital.

In *Univ. of Wis. Med. Found., Inc. v. City of Madison*, the Court of Appeals considered whether the “reasonably necessary” standard for “exclusive use” found in WIS. STAT. § 70.11(4m) of the should apply to WIS. STAT. § 70.11(4) and (25). 2003 WI App. ¶ 14. In considering the issue, the court analyzed a pre-amendment version of the statute—a version that is markedly different than the version presently in force. *See generally id.* The court declined to extend the WIS. STAT. § 70.11(4m) “reasonably necessary” standard to subsections (4) and (25). *Id.* In granting summary judgment for the City of Madison, the court rejected the Foundation’s tenuous contention that the medical foundation was “benevolent” because it made recipients “better members of society by improving their physical and mental condition.” *Id.* at ¶ 25.

Making a similarly tenuous contention, the City claims that the case before this Court is similar to the case at issue *Univ. of Wis. Med. Found., Inc.* The only similarity in these cases is that the plaintiff, like the Hospital here, claimed that the use of the property fell within the exemption under

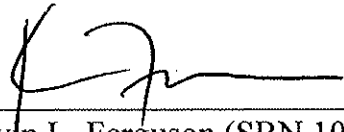
WIS. STAT. § 70.11(4). The City, without citing to any specific facts, attempts to link the two disparate cases by making the following unsubstantiated allegation: “Similar to what BDCH is claiming, the Foundation claimed that the provision of medical care is benevolent because it makes the recipients ‘better member of society by improving their physical and mental condition.’” (Appellant’s Br. at p. 32.) No such claim has been made by the Hospital in this case. On the contrary, the basis for the claim of exemption is grounded in the statutory language that grants a tax exemption for property that is owned and exclusively used by a nonprofit entity that is operated as a facility that is licensed, certified, or registered under Chapter 50, which occupies less than 10 acres of land. As a result, any attempt to liken the facts in this case to those in the *Univ. of Wis. Med. Found., Inc.* is specious and wholly without merit.

CONCLUSION

Based on the foregoing reasons, Beaver Dam Community Hospitals, Inc., respectfully requests that the circuit court’s judgment be affirmed.

Dated this 21st day of September, 2011.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. § 809.19 (8)(b) and (c) for a Plaintiff-Appellant's brief produced using the following font: Proportional serif font—minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text.

The length of this brief is 5,898 words.

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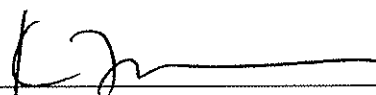
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I certify that on September 21, 2011, this Brief was delivered to a third-party commercial carrier (UPS) for delivery to the Clerk of Court of Appeals and all opposing counsel within one (1) calendar day. I further certify that the Brief was correctly addressed and served on the following via UPS delivery:

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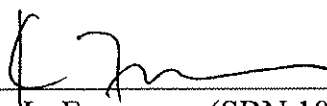
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I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of WIS. STAT. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief with the Court and served on all opposing parties.

Dated this 21st day of September, 2011.

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OF WISCONSIN**

COURT OF APPEALS OF WISCONSIN
DISTRICT IV

BEAVER DAM COMMUNITY HOSPITALS, INC.,

Plaintiff-Respondent,

v.

Appeal No. 2011-AP-1479

CITY OF BEAVER DAM,

Defendant-Appellant.

Appeal from Dodge County Circuit Court
The Honorable Brian A. Pfitzinger, Presiding
Dodge County Circuit Court Case No. 10-CV-690

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is a non-profit community-based residential facility or any other facility licensed under Chapter 50 (including adult family homes, nursing homes, and residential care apartment complexes) entitled to an exemption from property taxes regardless of whether it is used for benevolent purposes?

The circuit court answered: Yes

The City maintains the answer is: No

2. Did the plaintiff, Beaver Dam Community Hospitals, establish that it used the Eagle's Wings community-based residential facility for benevolent purposes?

The circuit court did not make a formal finding on this issue.

The City maintains the answer is: No

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case meets the criteria for publication in Wis. Stat. § 809.23. It presents a statutory construction issue of first impression that is of substantial public interest.

Oral argument may not be necessary in this case because the briefs will likely present and develop the relevant facts and legal issues.

STATEMENT OF THE CASE

This is a property tax exemption dispute between Beaver Dam Community Hospitals, Inc. (BDCH) and the City of Beaver Dam. The issue is whether a community-based residential facility called Eagle's Wings owned by BDCH is entitled to an exemption from property taxes.

Both parties filed motions for summary judgment. (R.9; R.11.) A hearing was held before the trial court on April 8, 2011. (R.16; App. 5-23.) One of the issues discussed during the hearing was whether a community-based

residential facility has to be used for benevolent purposes in order to qualify for an exemption from property taxes.¹

During the hearing, the trial court stated:

The matter gets very interesting as we look at the statute as amended and as it was in place in 2009, because in this Court's view there is a very significant change in what's going on here....

But to fall under 70.11 as it's presently constituted, has benevolence gone out the window?

(R.16 at 2-3; App. 6-7.)

It does meet – the Court is using the three elements or three requirements that are set forth and is not finding at this time that it is necessitated that in fact the Eagle's Wings be engaged in some type of benevolent activity.

¹ BDCH did not raise this issue in its summary judgment brief. (R.12.) In its summary judgment brief, BDCH stated that it needed to show: (1) that it is a benevolent organization, (2) that it owns and exclusively uses the property, and (3) that it uses the property for benevolent purposes. (R.12 at 4-10.) BDCH first raised this issue in its response brief: “a plain reading of the statute does not support Defendant's allegation that the property be used for benevolent purposes.” (R.12 at 2-3.)

And the Court does find that the statute would indicate that benevolence is not required....

(R.16 at 17; App. 21.)

While it is not clear, it appears as though the trial court made a distinction between nursing homes and community-based residential facilities even though they are both Chapter 50 facilities:

THE COURT: And Counsel, what do you think – I mean this including benevolent nursing homes language, I mean doesn't – Counsel has kind of posed the question. What – why would they – why would we have this language and not require CBRF's to be somehow or another under that same umbrella? I mean –

MR. FERGUSON: Because it –

THE COURT: Benevolent. Why are they not benevolent. Or why aren't they required to be benevolent, I guess?

....

MS. TRUPKE: Your Honor, just again reiterating exactly what Your Honor said. It would be an absurd construction to still hold that nursing homes have to meet the benevolence requirement, but not CBRF's, when CBRF's provide less nursing and medical

care and all around care to the elderly. So the word benevolent, it's still in play both for nursing homes and for CBRFs.

THE COURT: The Court has had the opportunity to read the statute, both pre-2009 and as it is presently constituted. It creates some – and I agree with counsel for the city; it does create an interesting set of circumstance...And I don't see where there is any language that appears to this Court to be – as I said, it creates some odd circumstance. But it doesn't appear that the Legislature was confused. ...

(R.16 at 9-11; App. 13-15.)

At the conclusion of the hearing, the trial court determined the BDCH was entitled to an exemption for the Eagle's Wings CBRF. (R.16 at 17; App. 21.) One of the trial court's conclusions of law was: "It is not necessitated that Eagle's Wings be engaged in benevolent activity because benevolence is not required." (R.17 at 3; App. 4.) The City appealed the trial court's decision.

STATEMENT OF FACTS

The material facts were not disputed. (R.17 at 3; App. 4.) Eagle's Wings is licensed by the State of Wisconsin as a 22-bed Class C community-based residential facility (CBRF). (R.17 at 2; App. 3.) The Eagle's Wings CBRF consists of 22 resident rooms, a kitchen, activity rooms, a dining room, office space, and a beauty salon. (R.8 at 29.)

Staff members provide 24-hour supervision and are available to assist Eagle's Wings residents with personal care, such as bathing, personal hygiene, and dressing. (R.17 at 2; App. 3.) The monthly fee for the room and services provided at Eagle's Wings ranges from \$3,200-\$3,300 per resident. (R.17 at 2; App. 3.) Eagle's Wings can discharge a resident for non-payment of the \$3,200-\$3,300 monthly fee. (R.8 at 8.)

There are no free services offered at Eagle's Wings. (R.17 at 2; App. 3.) BDCH does not provide financial

assistance to any of its residents for the monthly fees. (R.17 at 2 App. 3) Eagle's Wings conducts a market comparison to ensure that its rates are competitive within the community. (R.8 at 7.) This market comparison study is done on an annual basis. (R.8 at 66.) There are two residents who are funded by the State aid program Care Wisconsin. (R.17 at 2; App. 3.) Eagle's Wings is under no obligation or requirement to admit residents who receive Care Wisconsin benefits. (R.8 at 68.) During the fiscal year ending June 30, 2008, Eagle's Wings generated \$738,308 in revenue. (R.17 at 2; App. 3.)

The following services are included in the \$3,200-\$3,300 monthly fee:

1. 24 hour supervision
2. Three meals per day and snacks
3. Special diets as ordered by a physician
4. Assistance with bathing and personal hygiene
5. Assistance with dressing and undressing
6. Laundry and housekeeping
7. Supervision of self-administered medication by the resident
8. Assistance in arranging for transportation needs

9. Health and medication monitoring
10. Structured activities program
11. Information and referral regarding community services and activities
12. Assistance in arranging for spiritual needs including church services
13. Regular family contacts encouraged and assistance in maintaining contacts provided
14. Sheets, pillowcases, bedspread, blanket, towels, and washcloths

(R.8 at 72.)

The following services are not included in the monthly fee, and the Eagle's Wings residents must pay extra for these services:

1. Specialized medical transportation
2. Foot clinic services
3. Lab and x-ray services
4. Durable medical equipment
5. Physician services
6. Dental and optical services
7. Dry cleaning
8. Barber and beautician services
9. Private telephone
10. Daily or Sunday newspaper
11. Personal supplies including shampoo, toothpaste, incontinence products, etc.
12. Home health and hospice services
13. Medications

14. Copying services
15. Cost of transportation
16. Staff attendance at off site appointments

(R.8 at 72.)

Eagle's Wings is not a skilled nursing facility or nursing home. (R.8 at 8.) Eagle's Wings is unable to provide more than three skilled nursing care hours per week. (R.8 at 7.) In addition to the Eagle's Wings CBRF, approximately 100 square feet of the property is used as a storage space for backup copies of BDCH's information services data. (R.17 at 2; App. 3.)

STANDARD OF REVIEW

The first issue in this case is a question of statutory construction. The issue is whether a Chapter 50 facility such as a community-based residential facility must be used for benevolent purposes in order to qualify for an exemption from property taxes. Statutory construction presents a

question of law which is subject to *de novo* review. *Martine v. Williams*, 2011 WI App 68, ¶ 10, 333 Wis. 2d 203.

The statute to be construed in this case is a property tax exemption statute. Property tax exemption statutes are strictly construed in every instance. Wis. Stat. § 70.109; *Columbia Hospital Association v. City of Milwaukee*, 35 Wis. 2d 660, 668, 151 N.W.2d 750 (1967). Any ambiguity is resolved to favor taxation of the property in question. *Deutsches Land, Inc. v. City of Glendale*, 225 Wis. 2d 70, 81, 591 N.W.2d 583 (1999).

If the Court determines that Wis. Stat. § 70.11(4) requires that a community-based residential facility be used for benevolent purposes, the Court must determine whether Eagle's Wings met this test. This case was decided on summary judgment. The material facts were not disputed. The standard of review on this issue is also *de novo* review. *University of Wisconsin Medical Foundation, Inc. v. City of*

Madison, 2003 WI App 204, ¶ 9, 267 Wis. 2d 504, 671 N.W.2d 292. BDCH has the burden of proof on this issue: “[s]ince exemption from the payment of taxes is an act of legislative grace, the party seeking the exemption bears the burden of proving that it falls within a statutory exemption.” *Deutsches Land*, 225 Wis. 2d at 80-81, 591 N.W.2d 583.

ARGUMENT

I. A CHAPTER 50 FACILITY MUST BE USED FOR BENEVOLENT PURPOSES IN ORDER TO BE EXEMPT FROM PROPERTY TAXES.

The first issue before the Court is whether a Chapter 50 facility such as a community-based residential facility (CBRF)² has to be used for exempt or benevolent purposes in order to be exempt from property taxes. In addition to

² A “community-based residential facility” is defined in Chapter 50 as a place where five or more adults who are not related to the operator or administrator and who do not require care above intermediate level nursing care and receive care, treatment or services that are above the level of room and board but that include no more than three hours of nursing care per week per resident. Wis. Stat. § 50.01(1g).

community-based residential facilities, Chapter 50 facilities include adult family homes, nursing homes, and residential care apartment complexes. Wis. Stat. § 50.031; § 50.034; § 50.04.

There is no dispute that prior to the revisions to Wis. Stat. § 70.11(4) contained in 2009 Wis. Act 28 a Chapter 50 facility had to be used for benevolent purposes in order to be exempt. *University of Wisconsin Medical Foundation*, 2003 WI App 204, ¶ 18 (“In order to qualify for a total exemption under Wis. Stat. § 70.11(4), an organization must show three facts: (1) that it is a benevolent organization, (2) that it owns and exclusively uses the property, and (3) that it uses the property for exempt purposes.”)³

³ Exempt purposes and benevolent purposes are often used interchangeably in case law. *University of Wisconsin Medical Foundation*, 2003 WI App 204, ¶¶ 19-21.

Prior to the revisions contained in 2009 Wis. Act 28,
Wis. Stat. § 70.11(4) stated in relevant part:

Property owned and used exclusively by educational institutions offering regular courses 6 months in the year; or by churches or religious, educational or benevolent associations, including benevolent nursing homes and retirement homes for the aged but not including an organization that is organized under s. 185.981 or ch. 611, 613 or 614 and that offers a health maintenance organization as defined in s. 609.01 (2)....

2009 Wis. Act 28 amended §70.11(4) to state:

Property owned and used exclusively by educational institutions offering regular courses 6 months in the year; or by churches or religious, educational or benevolent associations, or by a nonprofit entity that is operated as a facility that is licensed, certified, or registered under ch. 50, including benevolent nursing homes but not including an organization that is organized under s. 185.981 or ch. 611, 613 or 614 and that offers a health maintenance organization as defined in s. 609.01 (2)....

The issue in this case is whether a Chapter 50 facility
now must meet the three factors required before 2009 Wis.

Act 28: (1) that it is a benevolent organization, (2) that it owns and exclusively uses the property, and (3) that it uses the property for exempt purposes.

Both before and after the revisions contained in 2009 Wis. Act 28, the statute contained the phrase “benevolent nursing homes.” 2009 Wis. Act 28 also created separate subsections for benevolent low-income housing in § 70.11(4a) and benevolent retirement homes for the aged in § 70.11(4d).

The question is whether Chapter 50 facilities, which include nursing homes, community-based residential facilities, adult family homes, and residential care apartment complexes, have to be used for benevolent purposes or whether they just need to be owned and operated by a non-profit entity in order to be exempt.

A. *The Retention of the Phrase “Benevolent Nursing Homes” Makes the Statute Ambiguous.*

Statutory interpretation begins with the text of the statute. *Klemm v. American Transmission Co., LLC*, 2011 WI 37, ¶ 18, 798 N.W.2d 223. Section 70.11(4)(a) specifically refers to “a non-profit entity that is operated as a facility that is licensed, certified, or registered under ch. 50, *including benevolent nursing homes....*” (Emphasis added.) The retention of the phrase “benevolent nursing homes” makes the statute ambiguous.

The word “benevolent” was included in the statute prior to 2009 Wis. Act 28. Had the legislature wanted to remove the benevolence requirement, it simply had to remove the word “benevolent.” The legislature did not do so. If the statute read: “a non-profit entity that is operated as a facility that is licensed, certified, or registered under ch. 50, including nursing homes,” the statutory meaning would be clear that

benevolence is no longer required. However, the statute still contains the word “benevolent.” This makes the statute ambiguous.

A statute is ambiguous if it is capable of being interpreted by reasonably well-informed persons in either of two or more senses. *Pulsfus Poultry Farms, Inc. v. Town of Leeds*, 149 Wis. 2d 797, 804, 440 N.W.2d 329 (1989). In this case, there are at least two different interpretations of Wis. Stat. § 70.11(4)(a). The circuit court interpreted the statute as not requiring benevolence for community-based residential facilities. This interpretation focuses solely on the words that were added to the statute: “a non-profit entity that is operated as a facility that is licensed, certified, or registered under ch. 50.” However, the circuit court’s interpretation does not explain the retention of the phrase “benevolent nursing homes.”

Another interpretation is that Chapter 50 facilities must be benevolent to be exempt because the phrase “benevolent nursing homes” was retained in the statute. This interpretation looks at both the words that were added as well as the words that were retained. The Department of Revenue has interpreted the statute in this way. WISCONSIN PROPERTY ASSESSMENT MANUAL at 22-15 (rev. 12/10). Specifically, the Property Assessment Manual’s discussion of Chapter 50 facilities states that nursing homes must be benevolent to be exempt. *Id.* Because reasonably well-informed persons – the circuit court and the Department of Revenue – have interpreted the statute in different ways, the statute is ambiguous.

B. If There Is Any Ambiguity, It Must Be Resolved In Favor of Taxation and Against the Party Seeking the Exemption.

If there is any ambiguity in a property tax exemption statute, it “*must* be resolved against the party seeking the

exemption” and in favor of taxation. *Deutsches Land*, 225 Wis. 2d at 81, 591 N.W.2d 583 (emphasis added).

The presumption in favor of taxability is motivated by the public interest in stemming the erosion of the municipal tax base. *University of Wisconsin Medical Foundation*, 2003 WI App 204, ¶ 11, 267 Wis. 2d 504, 671 N.W.2d 292. The more property tax exemptions allowed, the more inequitable becomes the apportionment of the tax burden. *Id.*

The continuous removal of real property from taxation thus imposes a particular hardship upon local government and the citizen taxpayer. *Id.* Accordingly, the legislature mandated that only certain institutions are relieved of their normal tax load. *Id.* In doing so, the legislature has recognized that some organizations actually serve a public rather than a private purpose and should be relieved of their tax burden. *Id.* It is clear under Wisconsin law that *any*

ambiguity *must* be resolved against BDCH and in favor of the City.

C. *Since the Statute Says That the Exemption for Chapter 50 Facilities Includes "Benevolent Nursing Homes," a Reasonable Interpretation is that Any Chapter 50 Facility Must Be Benevolent.*

Statutes are interpreted to give effect to each word and to avoid surplusage. *Klemm*, 2011 WI 37, ¶ 18. In this case, the word "benevolent" and the phrase "benevolent nursing homes" must be given effect. The circuit court's determination that a Chapter 50 facility does not need to meet the benevolence test renders the presence of the word "benevolent" to describe nursing homes meaningless. Because Wis. Stat. § 70.11(4)(a) explicitly says that the exemption for Chapter 50 facilities includes "benevolent nursing homes," a reasonable interpretation is that any Chapter 50 facility must be benevolent to be exempt.

D. *The Department of Revenue's Interpretation in the Property Assessment Manual is Entitled to Weight and Deference.*

The legislature charged the Department of Revenue, in light of its special expertise, with interpreting property tax exemption statutes. *Deutsches Land*, 225 Wis. 2d 70, 91, n.10, 591 N.W.2d 583, 592. Because of this, courts accord weight and deference to the Department's interpretation of exemption statutes contained in the *Property Assessment Manual*. *Id.* See also *Xerox Corp. v. Wisconsin Dep't of Revenue*, 2009 WI App 113, ¶ 55, 321 Wis. 2d 181, 772 N.W.2d 677.

In response to the revisions contained in 2009 Wis. Act 28, the Department added to the Manual section 22.2.5 entitled "Chapter 50 Facilities." As stated earlier, Chapter 50 facilities include both community-based residential facilities and nursing homes. Wis. Stat. § 50.01(1m). The Manual

contains the following comparison between nursing homes and retirement homes regarding exemption criteria:

	Nursing Home	Retirement Home
Must be Non-Profit	Yes	Yes
Must be Benevolent	Yes	Yes
Acreage limitation	10 acres for location/convenience of buildings	30 acres for location/convenience of buildings
Rent Use limitations	No	No
Other requirements	Registered, licensed or certified under Chapter 50	Value of unit less common area is 130% or less of average single family residential for county
Exemption Status	Exemption continues if property was exempt in previous year and use, occupancy or ownership did not change in a way that makes it taxable	Assessor evaluates each unit on an annual basis to determine if it meets the value limitations (no more than 130% or less of average single family residence in the county)

WISCONSIN PROPERTY ASSESSMENT MANUAL at 22-15 (rev. 12/10) (emphasis added).

Clearly, the Department of Revenue interprets Wis. Stat. § 70.11(4)(a) to retain the benevolence requirement for nursing homes – a Chapter 50 facility. The Department’s interpretation should be given great weight and deference due

to the Department's special expertise with the exemption statutes.

E. The Title of the Statute Supports the Benevolence Requirement.

Another rule of statutory construction looks at the title of the statute. "Although the title of a statute is not part of the law, it may help in resolving statutory ambiguities." *Pulsfus Poultry Farms*, 149 Wis. 2d at 805-06, 440 N.W.2d 329 (citing Wis. Stat. § 990.001(6)).

The title of Wis. Stat. § 70.11(4) before 2009 Wis. Act 28 was "Educational, Religious and Benevolent Institutions; Women's Clubs; Historical Societies; Fraternities; Libraries." The title of the statute did not change after 2009 Wis. Act 28 was enacted. Clearly, a Chapter 50 facility is not an educational or religious institution, or a woman's club, historical society, fraternity, or library. The only category a Chapter 50 facility can fit into is a benevolent institution.

Educational institutions and religious institutions have different exemption criteria than benevolent institutions have.⁴ Had the legislature intended to create an entirely new test for a Chapter 50 facility, the legislature would have added Chapter 50 facilities to the title. The legislature did not do so – further demonstrating that Chapter 50 facilities are a sub-category of benevolent institutions. The legislature’s use of

⁴ For a religious institution to qualify for an exemption, it must meet five statutory tests: (1) the taxpayer must be a bona fide church or religious association; (2) the property must be owned and used exclusively for the purposes of the church or religious association; (3) the property involved must be less than ten acres; (4) the property must be necessary for the location and convenience of the buildings; and (5) the property must not be used for profit. *Waushara County v. Graf*, 166 Wis. 2d 442, 457, 480 N.W.2d 16 (1992).

For an educational institution to qualify for an exemption, it must meet five statutory tests: (1) the taxpayer must be an educational association; (2) the property must be owned and used exclusively for the purposes of such association; (3) the property involved must be less than 10 acres; (4) the property must be necessary for location and convenience of buildings; and (5) the property must not be used for profit. *Janesville Community Day Care Center, Inc. v. Spoden*, 126 Wis. 2d 231, 235, 376 N.W.2d 78, 81 (Ct. App. 1985).

the word “benevolent” to describe nursing homes further illustrates this point.

F. The Circuit Court’s Interpretation is Against Public Policy, Focuses on the Owner of the Property, and Ignores How the Property is Actually Used.

In construing a statute, the entire section and related sections are to be considered in its construction or interpretation. *Pulsfus Poultry Farms*, 149 Wis. 2d at 804, 440 N.W.2d 329. In addition, any result that is absurd or unreasonable must be avoided. *Haferman v. St. Clare Healthcare Foundation, Inc.*, 2005 WI 171, ¶ 56, 286 Wis. 2d 621, 707 N.W.2d 853. Moreover, courts consider public policy in construing statutes. *Teschendorf v. State Farm Insurance Companies*, 2006 WI 89, ¶ 18, 293 Wis. 2d 123, 717 N.W.2d 258.

The circuit court agreed with BDCH that a CBRF must meet a three-part test to qualify for an exemption: (1) the

property must be owned and used exclusively by a non-profit entity; (2) the facility must be licensed, certified, or registered under Chapter 50; (3) and the property does not exceed ten acres of land. (R.16 at 4-7; 11; App. 8-11; 15.) This construction is contrary to public policy because it focuses on the tax-status of the property owner and ignores the actual use of the property.

The Supreme Court “has repeatedly stressed the need to focus on the *actual use* of the property in determining the eligibility for a property tax exemption, not on the nature of the business seeking the exemption.” *FH Healthcare Development, Inc. v. City of Wauwatosa*, 2004 WI App 182, ¶ 23, 276 Wis. 2d 243, 687 N.W.2d 532. Therefore, under established prior case law, the actual use of the property is more important than whether the property is owned by a for-profit or a non-profit entity. *Id.*, ¶¶ 23-24.

The circuit court's interpretation is contrary to this policy. Under the circuit court's interpretation, for a CBRF to qualify for an exemption, it simply must be owned and used exclusively by a non-profit entity.⁵ Under the circuit court's interpretation, there are no limits on the actual use of the property – meaning the property does not have to be used for benevolent or exempt purposes.

Eagle's Wings can operate its facility just like a for-profit entity, but still be exempt from taxes. Just like a for-profit entity, Eagle's Wings charges market rates. (R.8 at 7.) Just like a for-profit entity, Eagle's Wings does not provide any free care or services. (R.17 at 2; App. 3.) Just like a for-profit entity, Eagle's Wings can discharge a resident for non-payment of the \$3,200-\$3,300 monthly fee. (R.8 at 8.)

⁵ Established prior case law demonstrates that it is not enough that a non-profit entity owns the property – it must be used for benevolent purposes. *Deutsches Land*, 225 Wis. 2d at 85, 591 N.W.2d 583.

Moreover, Eagle's Wings can refuse admission to anyone. (R.8 at 68.) It is against public policy to ignore the actual use of the property and focus solely on the entity that owns the property.

G. The Circuit Court's Opinion is Contrary to Public Policy Because it Would Put For-Profit Chapter 50 Facilities at a Competitive Disadvantage.

There are additional public policy reasons as to why the circuit court's decision should be reversed. Both the courts and the legislature have acknowledged "the importance of competition in our free enterprise system." *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶ 33, 308 Wis. 2d 684, 748 N.W.2d 154. The legislature has stated: "It is the intent of the legislature to make competition the fundamental economic policy of this state." *Id.* (quoting Wis. Stat. § 133.01).

Courts have expressed concern about competition in exemption cases as well. In *St. Clare Hospital of Monroe Wisconsin, Inc. v. City of Monroe*, 209 Wis. 2d 364, 375-76, 563 N.W.2d 170 (Ct. App. 1997), the court stated: “However, if the property tax exemption were extended to clinics owned and operated by nonprofit hospitals, similar privately operated facilities would be put at a competitive disadvantage.”

The circuit court’s interpretation is against public policy because it would put privately operated Chapter 50 facilities at a competitive disadvantage. As discussed earlier, the circuit court’s interpretation puts no limit on the actual use of a CBRF. Under the circuit court’s interpretation, a CBRF does not have to be used for exempt or benevolent purposes. It can charge market rates, discharge residents for non-payment, and refuse to provide any free care or services. It just has to be owned and used by a non-profit entity. The

circuit court's decision puts privately operated Chapter 50 facilities at a competitive disadvantage because these facilities still have to pay property taxes even though both types of facilities can charge market rates, discharge residents for non-payment, and refuse admission to the poor.

H. The Absence of Legislative History Undercuts the Circuit Court's Interpretation, Which is a Significant Departure from Prior Law.

Another rule of statutory construction looks at legislative purpose and history. *Teschendorf*, 2006 WI 89, ¶ 18, 293 Wis. 2d 123, 717 N.W.2d 258. The circuit court interpreted the revisions to Wis. Stat. § 70.11(4) to make “a very significant change” in the law relating to the exemption criteria for CBRFs. (R.16 at 2; App. 6.) Surely, one would expect to find a great deal of legislative analysis, emails, drafts, and letters explaining the need for such a significant change and the fiscal impact of such an erosion of the municipal tax base. *Teschendorf*, 2006 WI 89, ¶¶ 49-54.

Despite the major implications of the revisions, there is no legislative history or documents indicating that the legislature intended to make such a drastic and significant change. Moreover, there is no legislative history that resolves the ambiguity in the statutory language.

If there is any ambiguity it must be resolved in favor of taxation and against exemption. In addition, numerous canons of statutory construction indicate that a CBRF must still meet the benevolence test. As discussed more fully below, BDCH failed to meet this test.

II. BEAVER DAM COMMUNITY HOSPITALS DID NOT ESTABLISH THAT IT USED EAGLE'S WINGS FOR BENEVOLENT PURPOSES.

A. *The Facts in University of Wisconsin Medical Foundation Are Very Similar to the Facts Here.*

In this case BDCH did not establish that it used Eagle's Wings for benevolent purposes. While the trial court

did not make a formal finding on this issue, the court appeared to agree with the City's position:

Just providing services to the elderly and housing in this case with some benefits, that as far as I'm concerned, that is not in and of itself a benevolent act. And so the Court doesn't see it that way.

(R.16 at 12.)

“Benevolent” activities are defined as those that benefit the public and relieve the State from expense. *University of Wisconsin Medical Foundation*, 2003 WI App 204, ¶ 21. This case is similar to *University of Wisconsin Medical Foundation*. In *University of Wisconsin Medical Foundation*, the University of Wisconsin Medical Foundation (“the Foundation”) claimed that its property was exempt under Wis. Stat. § 70.11(4), just as BDCH is claiming in this case. BDCH claims that it uses Eagle's Wings for benevolent purposes because it helps people “live out the remainder of their days in a safe and secure environment.” (R.12 at 8.)

Similar to what BDCH is claiming, the Foundation claimed that the provision of medical care is benevolent because it makes the recipients “better members of society by improving their physical and mental condition.” *University of Wisconsin Medical Foundation*, 2003 WI App 204, ¶ 25. The court correctly rejected the Foundation’s argument, noting that under “that standard, many enterprises would qualify as ‘benevolent.’” *Id.*

The court further noted: “Even though we conclude that the provision of outpatient medical care, per se, is not a ‘benevolent’ use, providing such care free or at greatly reduced cost to the poor might well be.” *Id.*, ¶ 26. The court noted: “approximately 98% of the patients whom the Foundation treated at the Madison clinics paid for their treatment either with personal funds or through private insurers or *government programs.*” *Id.* (Emphasis added.) The court continued: “The undisputed facts, however,

indicate that the Foundation priced its services at prevailing market rates.” *Id.*

The same facts are true of the services offered by Eagle’s Wings. (R.8 at 7.) (“Eagle’s Wings conducts a market comparison to ensure that its rates are competitive within the community.”). In this case, it is undisputed that Eagle’s Wings does not provide any of its services for free. (R.8 at 28.) All Eagle’s Wings can say is that some of its residents receive benefits through Care Wisconsin. (R.12 at 9-10.) This, however, is not enough to constitute benevolent use. In *University of Wisconsin Medical Foundation*, some of the Foundation’s patients paid for their treatment using government programs. 2003 WI App 204, ¶ 26. The court did not find that was enough to constitute benevolent use.

In *University of Wisconsin Medical Foundation*, the court concluded that the Foundation did not meet the criteria for exemption under Wis. Stat. § 70.11(4) because (1) the

Foundation priced its services at prevailing market rates; (2) approximately 98% of the Foundation's patients "paid for their treatment either with personal funds or through private insurers or government programs;" and (3) the Foundation did not provide free care or care at greatly reduced cost to the poor. *Id.*, ¶ 26.

The same facts are present in this case: (1) "Eagle's Wings conducts a market comparison to ensure that its rates are competitive within the community" (R.8 at 7); and (2) Eagle's Wings does not "provide free services." (R.8 at 28.) *University of Wisconsin Medical Foundation* is controlling in this case. It is a recent decision (2003) that analyzed the same statute at issue in this case: Wis. Stat. § 70.11(4).

The Eagle's Wings facility is not used for benevolent purposes. Just like the Foundation, Eagle's Wings charges market rates and does not offer free care to the poor. The fact that some Eagle's Wings residents pay for their care using

Care Wisconsin does not relieve the State of any expense. Indeed, the court in *University of Wisconsin Medical Foundation* assigned “little weight to the Foundation’s argument that its benevolent activities include patient care that would otherwise have to be provided at government expense.” 2003 WI App 204, ¶ 26, n. 9 (internal quotation marks omitted).

B. Milwaukee Protestant Home for the Aged v. City of Milwaukee Can Easily Be Distinguished.

BDCH has cited and will likely continue to cite *Milwaukee Protestant Home for the Aged v. City of Milwaukee*, 41 Wis. 2d 284, 164 N.W.2d 289. (R.12 at 5-6, 8.) *Milwaukee Protestant Home* can easily be distinguished from the facts here. Significantly, *Milwaukee Protestant Home* “did not decide whether the activity there under review (operating a retirement home whose residents paid occupancy charges and a founder’s fee) constituted a benevolent use

within the meaning of Wis. Stat. § 70.11(4).” *University of Wisconsin Medical Foundation*, 2003 WI App 204, ¶ 22.

In fact, the court in *Milwaukee Protestant Homes* plainly disavowed such an inquiry:

[T]he question before us is not whether operating a retirement home for the aged is a proper function of a benevolent institution. The legislature has answered that. The sole question here is whether the Milwaukee Protestant Home for the Aged meets the standards as to nonprofit operation set forth in the tax exemption statute.

Id. at 293, 164 N.W.2d 289.

As stated in *University of Wisconsin Medical Foundation*, “[t]he main focus of the court’s attention was thus on whether the property in question was, in whole or in part, being operated for pecuniary profit, and the analysis on which the Foundation [sought] to rely was directed to that question and not to whether the property was being put to a benevolent use.” 2003 WI App, ¶ 22 (internal quotation marks omitted).

The court continued: “Thus, while we agree that *Milwaukee Protestant Home* stands for the proposition that charging fees for services does not render a benevolent use of property ineligible for exemption under Wis. Stat. § 70.11(4), the case is of no assistance in determining whether a given use is ‘benevolent.’” *Id.*, ¶ 23. Instead, one must look to the standard set forth in *University of Wisconsin Medical Foundation* – a standard that BDCH fails to meet because (1) Eagle’s Wings prices its services at market rates and (2) Eagle’s Wings does not provide free services or services to the poor at greatly reduced rates. In this case BDCH did not establish that it used Eagle’s Wings for benevolent purposes.

CONCLUSION

For the reasons stated above, the circuit court's decision should be reversed.

Dated: August 23, 2011.

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CERTIFICATION

I certify that the foregoing brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. This brief contains 5,261 words, exclusive of the caption, Table of Contents and Authorities, and the Certifications.

Dated: August 23, 2011



Amie B. Trupke

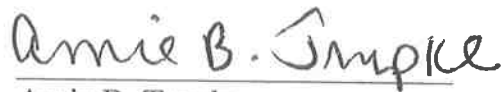
CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: August 23, 2011


Amie B. Trupke

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Amie B. Trupke

Amie B. Trupke

COURT OF APPEALS OF WISCONSIN
DISTRICT IV

BEAVER DAM COMMUNITY HOSPITALS, INC.,

Plaintiff-Respondent,

v.

Appeal No. 2011-AP-1479

CITY OF BEAVER DAM,

Defendant-Appellant.

Appeal from Dodge County Circuit Court
The Honorable Brian A. Pfitzinger, Presiding
Dodge County Circuit Court Case No. 10-CV-690

BRIEF OF DEFENDANT-APPELLANT,
CITY OF BEAVER DAM

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STATE OF WISCONSIN

CIRCUIT COURT
BRANCH I

DODGE COUNTY

BEAVER DAM COMMUNITY
HOSPITALS, INC.,

FILED
IN THE CIRCUIT COURT

Plaintiff,

vs.

MAY 16 2011

Case No. 10-CV-690

CITY OF BEAVER DAM,

DODGE COUNTY, WIS
LYNN M. HRON
CLERK OF COURTS

Defendant.

JUDGMENT

Based on the court's Order for Judgment dated April 21, 2011:

IT IS ADJUDGED THAT Plaintiff, Beaver Dam Community Hospitals, Inc., who resides at 707 South University Avenue, Beaver Dam, WI 53916, shall recover from Defendant, City of Beaver Dam, who resides at 205 South Lincoln Avenue, Beaver Dam, WI 53916, the sum of \$25,149.53, and costs of \$ 4,185.55, for a total judgment of \$ 29,335.08.

THIS IS A FINAL JUDGMENT FOR PURPOSES OF APPEAL UNDER WIS. STAT. § 808.03(1).

Dated: May 16, 2011.

BY THE COURT:



Honorable Brian A. Pfitzinger
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH I

DODGE COUNTY

BEAVER DAM COMMUNITY
HOSPITALS, INC.,

Plaintiff,

vs.

Case No. 10-CV-690

FILED
IN THE CIRCUIT COURT

APR 21 2011

CITY OF BEAVER DAM,

Defendant.

DODGE COUNTY, WIS
LYNN M. HRON
CLERK OF COURTS

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER FOR JUDGMENT**

On April 8, 2011, at 8:30 a.m. a hearing was held before the Court, the Honorable Brian A. Pfitzinger presiding, on Plaintiff's and Defendant's Cross-Motions for Summary Judgment. The Plaintiff appeared by its attorney, Kevin L. Ferguson, and the Defendant appeared by its attorney, Amie B. Trupke.

The Court, having reviewed and considered the pleadings and affidavits filed by the parties, having heard the arguments of counsel, and having been otherwise fully advised on the premises, makes the following:

FINDINGS OF FACT

1. Eagle's Wings is a Community-Based Residential Facility.
2. Eagle's Wings is owned and exclusively used by the Plaintiff, Beaver Dam Community Hospitals, Inc., a Wisconsin non-stock and non-profit corporation.
3. Eagle's Wings provides care for people aged 60 and older.

APR 28 2011

4. Eagle's Wings provides a myriad of services to its residents which include assistance with personal care; trained staff available 24 hours a day; coordinated transportation; routine health monitoring by an onsite licensed nurse; medications dispensed in a Registered Nurse supervised program; personal laundry and housekeeping services; on-site meal preparation; an activities program; and beautician services among others.
5. Eagle's Wings is operated as a 22-bed "Class C" Community-Based Residential Facility.
6. Approximately 100 square feet in the basement of the property is used for storage space for the back-up of Plaintiff's information service data.
7. The use of the basement storage space has no significant impact on this case.
8. The rates per resident at Eagle's Wings range from \$3,200 to \$3,300.
9. There are two residents at Eagle's Wings who are funded through Care Wisconsin.
10. There are no free services and Eagle's Wings charges a commercially reasonable rate based on a market analysis.
11. During the fiscal year ending June 30, 2008, Eagle's Wings generated \$738,308 in revenue.
12. All of the revenue generated by Eagle's Wings is used for resident care and facility maintenance.
13. Plaintiff's charity care does not provide financial assistance for Eagle's Wings bills.
14. The Survey Map placed in the record particularly describes Eagle's Wings by metes and bounds comprising an area equal to 55,937 square feet or 1.28 acres.

CONCLUSIONS OF LAW

1. Eagle's Wings does constitute a property eligible to receive exemption under Wis. Stat. § 70.11(4).
2. It is not necessitated that Eagle's Wings be engaged in benevolent activity because benevolence is not required.
3. There is no genuine issue of material fact.
4. Plaintiff is entitled to judgment as a matter of law, and defendant is not entitled to judgment as a matter of law.

ORDER FOR JUDGMENT

FILED
IN THE CIRCUIT COURT

APR 21 2011

DODGE COUNTY, WIS
LYNN M. HRON
CLERK OF COURTS

IT IS HEREBY ORDERED THAT:

1. Plaintiff's Motion for Summary Judgment is GRANTED.
2. Defendant's Motion for Summary Judgment is DENIED.
3. Judgment be entered for the Plaintiff and against the Defendant for \$25,149.53, the amount of the unlawful taxation, and interest from January 26, 2010, the date of the filing of the claim against the City of Beaver Dam, at the rate of 0.8% per month, and the costs of this action.

Dated this 21~~st~~ day of April, 2011.

BY THE COURT:



Honorable Brian A. Pfitzinger
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 1

DODGE COUNTY

BEAVER DAM COMMUNITY
HOSPITALS, INC.,

Plaintiff,

vs.

CITY OF BEAVER DAM,

Defendant.

SUMMARY JUDGEMENT MOTION

Case No. 10-CV-690

COPY

BEFORE: HONORABLE BRIAN A. PFITZINGER
Circuit Court Judge

DATE: April 8, 2011

PLACE: Dodge County Circuit Court, Branch I
Juneau, Wisconsin

APPEARANCES:

Mr. Kevin Ferguson, Attorney at Law,
appearing on behalf of the Plaintiff;

Ms. Amie B. Trupke, Attorney at Law,
appearing on behalf of the Defendant.

Geri Schrab, RMR
Official Court Reporter
210 West Center Street
Juneau, WI 53039

APR 18 2011

1 you have been in front of me for summary judgment type
2 motions. And I'll tell you that what I am interested in
3 is -- I'll tell you kind of what I'm looking at, and I
4 want argument on that. I don't -- unless you feel as
5 though you weren't complete in your written argument, I
6 don't honestly, and it's not to be rude, but I just don't
7 need to hear it again. I read it in some cases three,
8 four times.

9 So here's the question. Your interpretation -- and
10 this is sort of -- I think this is in your -- the brief
11 you filed March 14th. You start talking about -- and
12 Counsel, you addressed this in a footnote in your brief.
13 But I think it's of significance as I take a look at this
14 statute and read the text of the statute, and then when I
15 read the definitions section, if you read Chapter 50,
16 there is at 50.01(1g) and (3), there is definitions that
17 are provided for us of nursing home and a CBRF.

18 So, Counsel, to fall under -- and I'll address this
19 to the hospital first. But to fall under 70.11 as its
20 presently constituted, has benevolence gone out the
21 window? And because the -- the sentence goes -- it's --
22 it -- when it --

23 There is a sentence, and it says including
24 benevolent nursing homes. But it seems to me that it's
25 actually that's -- it's onto a different topic at that

1 point. Which is very difficult -- I can tell you was for
2 my -- as I was thinking through this, I mean the umbrella
3 of nursing home covers everything where elderly people
4 live. And just -- that's very rudimentary, but that's
5 kind of what goes on in your brain until you start to
6 break this down and look at the definitions.

7 Tell me what you think you need to prove under the
8 existing statute in order to qualify.

9 MR. FERGUSON: Yes, your Honor. I believe that the
10 elements under the current statute is that the property
11 has to be owned and used exclusively by a nonprofit entity
12 and there is no dispute that Beaver Dam Community
13 Hospitals, Incorporated is a nonprofit entity, and that it
14 operates a facility that is licensed, certified or
15 registered under Chapter 50. And in this case there's no
16 dispute that Eagle's Wings is licensed under Chapter 50.

17 And then the only other requirement is that it
18 doesn't exceed 10 acres of land, and it doesn't in this
19 case. There is no requirement that -- I believe that the
20 intent of the Legislature by amending the 70.11(4) was to
21 declare the public policy of Wisconsin, that all of these
22 facilities that are licensed under Chapter 50 do provide
23 some type of benevolent benefit; and therefore, they don't
24 even have to say that they -- just by operating them. But
25 the Court is right, there is no modifier that they have to

1 be facilities -- benevolent facilities or, you know, there
2 is no qualifier in the statute as currently written that
3 they provide any type of benevolent services.

4 THE COURT: So where do you see the protection for
5 the taxpayer? I mean, that -- you've read the cases. You
6 know that the Court is supposed to be jealous in guarding
7 this exemption because it obviously shifts the tax burden.
8 All of us in the state pay additional taxes because some
9 entity takes advantage of this exemption.

10 So where is -- I mean are you -- is it your
11 position that the Legislature is basically throwing out
12 any protection that says, look, if you are a CBRF you are
13 in? Where is the -- where do you see the protection for
14 the taxpayer?

15 MR. FERGUSON: Yes, I do. Because, your Honor,
16 it's for the Legislature to decide what property is going
17 to be taxed and what is exempt from taxation. And I think
18 that they've made the decision that facilities like
19 Eagle's -- and as the Court alluded to earlier, there's a
20 -- an entire range of facilities that fall under Chapter
21 50 that some people wouldn't qualify to be in a CBRF.

22 But it is a step on a continuum to, you know, some
23 type of skilled nursing facility or hospice care. And
24 again, I think that the Legislature has looked at it and
25 said these do provide a benefit to the local communities

1 that they are in, people are able to stay in the community
2 where their families are, where their friends are, or
3 where they want to be. And they've decided that is
4 something that is worthy of tax exemption.

5 THE COURT: All right. And I think, you know, I
6 guess my take on it is that if you look at the first part,
7 you recited really three elements for the Court, three
8 statutory things that need to be met by -- in this case.

9 Well, I guess the other protection, and that's my
10 word, is by seeing to it that it is in fact owned by a
11 nonprofit organization. All right.

12 Counsel, what do you see as the three elements?
13 And you know, the more interesting thing is if you -- if
14 you read this addition to the statute to require
15 benevolence, aren't you -- I mean, isn't this language a
16 meaningless addition to the statute? It was in already.
17 I mean we've all read cases from years and years ago. And
18 I got statute books that are -- we are starting to fall
19 apart here in the case law on this -- in dealing with
20 nursing homes and benevolence and -- but what does this
21 add to the discussion?

22 Because up to the point where Counsel starts to
23 address the 2009 change, I mean both of you were arguing
24 back and forth about whether this -- the activities of
25 Eagle's Wings falls under the umbrella of benevolence.

1 And whatever the definition of benevolence is, which
2 there's a lot of cases that sort of whittle away and they
3 try tell us what benevolence is. I don't think that --
4 and Counsel, your argument that you are a nursing home and
5 -- or CBRF to be precise; and therefore, you are
6 automatically benevolent. I'm not buying that. And I
7 don't think the case law says that.

8 And you pointed that out for me. What's your take
9 on it? What exactly does the statute tell us are the
10 requirements or elements, if you will, to be considered
11 under this statute?

12 MS. TRUPKE: Yes, your Honor. Thank you. As you
13 pointed out in your initial comments, property tax
14 exemption statutes are strictly construed in favor of
15 taxation. If there's any ambiguity at all, it has to
16 favor taxation of the property.

17 We don't think that it's ambiguous. Our position
18 is that the word benevolent is still in the -- this
19 portion of the statute that we are talking about.

20 When you compare CBRF's and nursing homes, nursing
21 homes require more care. There's nursing homes. So the
22 fact that benevolent nursing home, that's still in there
23 versus a CBRF, which is very limited in any nursing care.
24 If you are going by the interpretation of the hospital,
25 that means that any CBRF would qualify but only the

1 nursing homes have to be benevolent. And we think that's
2 an absurd construction because nursing homes provide more
3 care for the elderly.

4 We think that the proper test has remained under
5 70.11(4), that the taxpayer must prove they are a
6 benevolent organization, that they own and exclusively use
7 the property, and that they use the property for
8 benevolent purposes.

9 The statute adds a few other elements that being a
10 nonprofit entity that's operated under Chapter 50, and it
11 makes some exclusions. So we think that's really what the
12 Legislature wanted to do is make it clear what
13 organizations were not included. So we think benevolence
14 has not gone out the window, that -- and if you look at
15 the other sections that were added when the Legislature
16 made that change, they added benevolent low income housing
17 and benevolent retirement homes for the aged. There's
18 nothing to indicate that CBRFs are the only type of entity
19 that get a pass when everybody else has to meet the
20 benevolence test.

21 MR. FERGUSON: Well, your Honor, I think that's
22 reading more into it than a plain reading of the statute
23 says. The stuff that she's saying isn't in the current
24 statute. There is no requirement that qualifies
25 facilities that are licensed, certified or registered

1 under Chapter 50 as to the -- there is no word of
2 benevolence anywhere in there. And even if there was,
3 Eagle's Wings still would fall within the definition of
4 providing of benevolent service to the community because
5 one of the members that are at Eagle's Wings are above the
6 age of 70 years old. And as the Supreme Court had
7 pronounced in the Milwaukee Protestant Home case that
8 helping people of advanced age living live out the
9 remaining year is a benevolent activity.

10 MS. TRUPKE: Your Honor, just in response to what
11 Attorney Ferguson said, case law makes it very clear that
12 just providing care to the old is not enough. The
13 Milwaukee Protestant Home case did not determine whether
14 that was a benevolent use, and that's made clear in the
15 Wisconsin -- University of Wisconsin Medical Foundation
16 case, that that case is not on point for determining what
17 is benevolence.

18 So the City feels benevolence is still in play and
19 that Eagle's Wings does not meet the benevolence test
20 because they -- they do the same things as the foundation,
21 they price their services at market rates and don't give
22 any free or greatly reduced care to the poor.

23 THE COURT: And Counsel, what do you think -- I
24 mean this including benevolent nursing homes language, I
25 mean doesn't -- Counsel has kind of posed the question.

1 What -- why would they -- why would we have this language
2 and not require CBRF's to be somehow or another under that
3 same umbrella? I mean --

4 MR. FERGUSON: Because it --

5 THE COURT: Benevolent. Why are they not
6 benevolent. Or why aren't they required to be benevolent,
7 I guess?

8 MR. FERGUSON: Well, the Legislature is presumed to
9 know what they are doing when they draft the statute. And
10 again when they modified it to include all the different
11 type of facilities that are licensed under Chapter 50,
12 again I believe that the intent was that these are all
13 facilities that provide benevolent activities; and
14 therefore, are worthy of the tax exemption.

15 THE COURT: Last thoughts.

16 MS. TRUPKE: Your Honor, just again reiterating
17 exactly what your Honor said. It would be an absurd
18 construction to still hold that nursing homes have to meet
19 the benevolent requirement, but not CBRF's, when CBRFs
20 provide less nursing and medical care and all around care
21 to the elderly.

22 So the word benevolent, it's still in play both for
23 nursing homes and for CBRFs.

24 THE COURT: The Court has had the opportunity to
25 read the statute, both pre-2009 and as it is presently

1 constituted. It creates some -- and I agree with counsel
2 for the city; it does create an interesting set of
3 circumstance. But I don't know where the fight was, but I
4 can -- I kind of know where it lands. Because I'm
5 instructed to just read the statute, and if the meaning is
6 clear on its face to give it that meaning. And I don't
7 see where there is any language that appears to this Court
8 to be -- as I said, it creates some odd circumstance. But
9 it doesn't appear that the Legislature was confused.

10 And I was concerned initially about what -- what
11 protection. And I don't believe that the Legislature goes
12 out and just willy-nilly grants exemptions. I mean that's
13 not -- that doesn't appear to me to be the case. And the
14 Court is -- as I said in my earlier comments, is supposed
15 to jealously guard these exemptions so that -- so as to
16 make sure that everything is in line and the exemption is
17 only given in the manner and to the entity that ultimately
18 the Legislature intended it to be given to.

19 As I said earlier, the difficulty for the Court was
20 just in its own mind sorting out what the difference
21 between all of these different type of entities were. And
22 we get to the point in taking a look at this statute where
23 I think frankly that the hospital's read of the statute as
24 it is presently constituted is a correct read. And that
25 the Court is required to show -- to determine whether the

1 property is owned and exclusively -- and used exclusively.
2 And that it is in fact a CBRF and that there is this ten
3 acre issue. To that end if I -- if those are the things
4 that the statute requires, the protection as I see it is
5 that it is has to be a nonprofit entity.

6 Just providing services to the elderly and housing
7 in this case with some benefits, that as far as I'm
8 concerned, that is not in and of itself a benevolent act.
9 And so the Court doesn't see it that way. But the Court
10 does believe that the case and facts that are presently in
11 place -- I'm going to make some factual findings.

12 And the first factual finding is that Eagle's Wing
13 is a CBRF located in Dodge County, Wisconsin. That
14 Eagle's Wing is owned by Beaver Dam Community Hospital.
15 That Beaver Dam Community Hospital is a nonstock,
16 nonprofit corporation, that Eagle's Wings does provide
17 care for individuals 60 years old or older who cannot live
18 alone, but do not need the level of care that one would
19 receive at a nursing home.

20 The Court does find that Eagle's Wing provides a
21 myriad of services including onsite meals, housekeeping,
22 routine health care monitoring, activities, programs and
23 the like. That's just a short list, but there are a lot
24 of services that are in fact provided by Eagle's Wing to
25 its elderly customers.

1 Eagle's Wing does consist of -- it's a 22 bed
2 facility. It's a Class C CBRF. The basement area of the
3 building that is used to house the Eagle's Wing Nursing
4 Home -- see that -- CBRF facility, the -- there's 100
5 square feet that are apparently used for -- by the
6 hospital for some type of storage.

7 MR. FERGUSON: Computer storage, your Honor.

8 THE COURT: Computer records storage; computerized
9 patient records storage I believe is what I've read.

10 It seems to me -- that's, there is no factual
11 dispute as to that. The question is whether the use by
12 the hospital of some very small portion of this facility
13 somehow or another changes how these facts fall within the
14 Statute 70 and 70.11. The Court doesn't see this storage,
15 relatively small space as having any significant impact on
16 this case.

17 Monthly fee that Eagle's Wing charges for its
18 services, somewhere between 3200 and 3300. It does not
19 appear that a significant amount of the residents -- I'm
20 not sure what -- residents I guess is the proper term.

21 MR. FERGUSON: Yes, your Honor.

22 THE COURT: That there is not a significant amount
23 of the residents who are receiving any kind of public
24 assistance. It does appear that some of the residents
25 have applied for and are receiving Care Wisconsin

1 benefits. I don't know what the -- just a point of
2 curiosity. Do either of you know what -- is that what is
3 commonly referred to as Badger Care, or is that another
4 program?

5 MR. FERGUSON: It's another program that helps
6 people with developmental problems, that it helps them to
7 find and places they can live or people to provide care
8 for them.

9 THE COURT: So some of the residents that do
10 receive the benefit of -- from -- or some benefits from
11 Care Wisconsin. It doesn't appear to me that anyone is
12 provided any free services by Eagle's Wing. It appears
13 that they charge a commercially reasonable rate that they
14 determine based upon a market analysis. And it does
15 appear to the Court that Eagle's Wing does on a yearly
16 basis make a profit.

17 MR. FERGUSON: All of the money, your Honor, is
18 about -- I believe it's 92, 93 percent of it covers the
19 operating cost, and then the remainder goes toward the
20 capitol -- or the maintenance and capitol improvements of
21 Eagle's Wings itself.

22 THE COURT: So eight percent -- so your position
23 is, what? That it -- there is no profit, is as it were?
24 And having profit is not, as you know, the death knell to
25 finding under this statute.

1 MR. FERGUSON: Correct, your Honor. But again it's
2 not like it's making a profit and the money is turned over
3 to Beaver Dam Community Hospital. All of the money that
4 is -- all of the revenues that are generated by Eagle's
5 Wings are used to provide care for the residents there.
6 And then the remaining amount is used for maintenance of
7 the facility and capitol improvements for the facility.

8 THE COURT: So the 75,000 -- and I apologize if I
9 have that number wrong. But there was -- there was some
10 -- there was a \$700,000 number. Was that just the gross
11 receipts?

12 MR. FERGUSON: Yes, your Honor. And it was John
13 Ley's affidavit that I submitted where he's the one that
14 pro -- or testifies to the evidentiary fact that all of
15 the money is used for either the care of the -- what the
16 exact percentages are for the care of the residents, and
17 then the rest of it is used for the maintenance and
18 improvement of the Eagle's Wings itself.

19 MS. TRUPKE: Your Honor, I indicated on Page 4 of
20 my first brief that, yes, during the fiscal year ending
21 June 30, 2008, Eagle's Wing generated --

22 (Court reporter interrupts)

23 MS. TRUPKE: I'm sorry. June 30th, 2008, Eagle's
24 Wings generated \$738,308 in revenue.

25 THE COURT: And Counsel, just so we are clear, you

1 are not -- you don't believe that -- or do you believe
2 that Eagle's Wing does out of that money that they
3 generate for revenue, is there some profit involved there
4 based upon --

5 Go ahead.

6 MS. TRUPKE: Your Honor, we do agree that Beaver
7 Dam Community Hospitals is organized as a nonprofit
8 organization. And we took Mr. Ley's statement for -- as
9 it was about how the money is used. So I don't think we
10 really made that much of an issue.

11 THE COURT: All right. Well, then it does appear
12 that Eagle's Wing takes in in excess of \$700,000, and that
13 that money is used for patient care as well as providing
14 facility maintenance and that there is not a profit as it
15 is commonly thought.

16 The Court does find that Beaver Dam Community
17 Hospital's charity slash community care policy provides
18 for financial assistance to pay Beaver Dam Community
19 Hospital bills; however, it does not provide for financial
20 assistance for the Eagle's Wing bills.

21 Now I had attached -- there was a map.

22 There it is. It's attached to the city of Beaver
23 Dam's motion for summary judgment filed with the Court on
24 February 14th, 2011. That appears to show the metes and
25 bounds of the Eagle's Wing property. And it lists the

1 square footage as 55,937 or 1.28 acres. So the Court does
2 find that to be the acreage of this particular piece of
3 property, which is obviously less than ten acres.

4 All right. Any dispute as to any of the facts that
5 have been found? Appears I've taken those out of --
6 frankly, both of your briefs seem to recite very similar
7 facts. Those appear to be the agreed upon facts.

8 MR. FERGUSON: Yes, your Honor.

9 MS. TRUPKE: Yes, your Honor.

10 THE COURT: Based on those factual findings, the
11 Court does find that, in fact, Eagle's Wing does
12 constitute a property that would be proper for -- to
13 receive the exemption under 70.11, as we have gone
14 through. It does meet -- the Court is using the three
15 elements or three requirements that are set forth and is
16 not finding at this time that it is necessitated that in
17 fact the Eagle's Wing be engaged in some type of
18 benevolent activity.

19 And the Court does find that the statute would
20 indicate that benevolence is not required, assuming that
21 the property is owned and used exclusively by a nonprofit
22 entity that is -- that is operated as a facility that is
23 licensed, certified or registered under Chapter 50. And
24 consequently there doesn't, as I indicated, appear to be
25 any material issue of fact. It is appropriate for summary

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judgment. The Court does grant summary judgment in favor of Beaver Dam Community Hospital.

The Court denies the summary judgment motion as filed by the City of Beaver Dam.

Counsel, you prepare an order?

MR. FERGUSON: Yes, your Honor. Would you like it prepared, your Honor, with the Findings of Fact, Conclusions of Law and the Order?

THE COURT: I would.

MR. FERGUSON: I'll do it.

THE COURT: All right.

MR. FERGUSON: Thank you.

THE COURT: Anything further on this record?

MR. FERGUSON: No, your Honor.

MS. TRUPKE: No, your Honor. Thank you.

THE COURT: We stand adjourned.

(Off the record at 9:06 a.m.)

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STATE OF WISCONSIN)
) SS
DODGE COUNTY)

I, Geralyn E. Schrab, certify that I am the official reporter for Branch I, Dodge County Circuit Court, and that the foregoing is a true and correct transcription of the above named proceedings held on the 8th day of April, 2011.

Dated this 14th day of April, 2011.



Geralyn E. Schrab, RMR

