

COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, SS.

SUPERIOR COURT
CIVIL ACTION NO. 03-278

CATHERINE REYNOLDS, Plaintiff)
)
v.)
)
WILLISTON NORTHAMPTON)
SCHOOL, Defendant)

DEFENDANT’S MEMORANDUM IN SUPPORT
OF MOTION FOR PARTIAL SUMMARY JUDGMENT

UNDISPUTED FACTS

1. Williston Seminary was incorporated in 1841 by the Massachusetts General Court. St. 1841, c. 28. The charitable purpose was “for the intellectual, moral and religious education of youth.” In 1856, legislation was passed permitting the seminary to hold real property “and income from the same shall be applied to the same purposes” specified in the original act. In 1925, the articles were amended to change its name to Williston Academy. In 1970, Williston Academy merged with the Northampton School for Girls, Inc., a Massachusetts charitable corporation organized in 1949, and on July 1, 1971 the defendant’s name was changed to the Williston Northampton School. Affidavit of Chas. McCullagh (Ex. A), ¶ 1.
2. In 1964, Williston built the Lossone Rink. Since then it has been used by the school’s boys and girls ice hockey teams and by the Easthampton community. At the time of the plaintiff’s injury, a parent of a youth participant in the Nonotuck Valley Hockey Association, which occupied the rink pursuant to a “Rink Use Agreement.” Among the terms of use was the NVHA paid Williston \$70 per hour. Id., ¶ 2.
3. Since 1944, Williston has enjoyed tax exempt under §501(c)(3) of the Internal Revenue Code. Id., ¶ 3.
4. The William J. Lossone Rink was built in 1964, and since that time has been used by the Williston boys and girls ice hockey teams and by the Easthampton community. As part of its mission, for many years Williston has permitted a youth hockey group known as Nonotuck Valley Hockey Association to use the rink facility. Revenue from allowing NVHA and other groups to use the facility is about \$151,000 per year. The hourly rate for NVHA to use the rink in 2001 was

\$170 per hour. This is below market-rate for the use of such a facility, and falls well below Williston's for actual costs of building, maintaining and staffing such a facility. This revenue derived from facility rentals campus-wide is well less than 2% of Williston's receipts, as necessary to maintain Williston's tax exempt status.

5. The plaintiff Catherine Reynolds alleges she injured when she fell due to a defective condition at Williston's Lossone Ice Rink. Ms. Reynolds was present at the rink as a spectator; her minor son played in the Nonotuck Valley Hockey Association. See Plaintiff's Complaint, ¶¶ 3-5.

LAW OF THE CASE [Super. Ct. R. 9A(b)(5)]

1. The defendant has the burden of proving charitable immunity status. Barrett v. Brooks Hospital, Inc., 338 Mass. 754 (1959). A charitable corporation's charter is "prima facie evidence of charitable purpose and operation, and unless there is introduced evidence warranting a finding to the contrary, the affirmative defense is established as a matter of law." *Id.*, at 759; Goldberg v. Northeastern University, 60 Mass. App. Ct. 707 (2004) ("When a corporation presents a charter that shows the corporation to be charitable, that charter is prima facie evidence of the corporation's charitable purpose and operation.").
2. In order to have damages against it limited by the charitable cap, the second prong a charity must prove is "that the tort was committed during an activity in direct furtherance of the organization's charitable purposes." Goldberg v. Northeastern University, 60 Mass. App. Ct. 707 (2004).
2. It is a "well established principle . . . that the payment of fixed charges by patrons does not deprive a public trust of its charitable status." Boxer v. Boston Symphony Orchestra, Inc., 342 Mass. 537, 540 (1961). The fact a charitable corporation receives revenue-generating lease payments for allowing others to use its property "do[es] not detract from the charitable purposes of those activities." Conners v. Northeast Hospital Corp., 439 Mass. 469, ___ (2003) (leasing land on which doctors' medical office building sits related to charitable purpose); Proctor v. North Shore Community Arts Foundation, 47 Mass. App. Ct. 372 (1999) (injury on property leased by charitable corporation was subject to cap).
3. The charitable cap applies where damages flow from a tort "committed in the course of any activity carried on to accomplish directly [a defendant's] charitable purposes." G.L. 231, §85K. The cap does not protect a charity from torts flowing from activities "primarily commercial in character." *Id.*
4. A charitable corporation is entitled to the protection of the cap where the tort arises out of activities which were conducted in pursuit of its charitable purposes. "A corporate activity is sufficiently connected to the corporation's charitable purposes unless the reasons for conducting that activity are 'primarily

commercial,' meaning the activity is '*entirely disconnected*' from the charitable purposes of the corporation. Goldberg v. Northeastern University, 60 Mass. App. Ct. 707 (2004) (emphasis added).

5. Under G.L. c. 231, §85K, "'directly' charitable activities are meant to be contrasted with those activities whose thrust is commercial, rather than with all other forms of activities that may in some sense be only indirectly charitable." Mason v. Southern New England Conference Assn. of Seventh-Day Adventists, 696 F.2d 135, 139 (1st Cir. 1982), quoted in Missett v. Cardinal Cushing High School, 43 Mass. App. Ct. 5, 10 (1997).
6. A charitable corporation conducting an all-girls school "for learning," whose student council sponsored a dance for its students and advertised the dance to several nearby all-boys schools, charging \$3 for admission tickets, was entitled to have its liability capped at \$20,000. Missett v. Cardinal Cushing High School, 43 Mass. App. Ct. 5, 10 (1997).
7. In construing the term "directly" as it is used in §85K, the SJC has stated that an activity is "commercial" rather than "charitable" only if its objective is "merely to generate revenue." Harlow v. Chin, 405 Mass. 697, 715 (1989). Cf. Phipps v. Aptucxet Post #5988 VFW Building Assoc., 7 Mass. App. Ct. 928 (1979) (an injury arising from weekly Saturday night dances at a VFW, the revenue from which constituted 85-90% of its income and was used primarily to pay mortgage and overhead expenses on its building, was primarily commercial).
8. In considering if a charitable cap is available to a school, "whether the educational benefits of the [activity] are 'indirect' rather than 'direct' is not determinative; that some educational benefits resulted from [the activity] is enough under §85K to conclude the [activity] accomplished directly the charitable purposes of the school." Missett, supra at 10. For instance, in Mt. Hermon Boys' Sch. v. Gill, 139, 146 (1887), the charitable purpose of "education of boys" included running a farm which generated some revenue.
9. The purpose of the charitable cap is to protect funds and other assets of charitable institutions so they may be devoted to charitable purposes. Ayash v. Dana-Farber Cancer Institute, 443 Mass. 367 (2005), quoting from English v. New England Med. Center, Inc., 405 Mass. 243, 429 (1989), cert. denied, 493 U.S. 1056 (1990). The SJC has enforced the charitable cap as a legislatively mandated limit on the amount of civil damages that can be recovered from a charitable corporation that causes harm by committing a tort in the performance of its charitable purpose, no matter how compelling the circumstances of the injured party. Id., quoting from Keene v. Brigham & Women's Hosp., Inc., 439 Mass. 223, 239 (2003).
10. A motion for partial summary judgment is an appropriate vehicle to determine the applicability of the charitable cap. Proctor, supra. Accord, Derry v. St. Vincent

Hospital, 12 Mass. L. Rptr. 631, 2001 Mass. Super. LEXIS 18 (allowing motion for partial summary judgment limiting hospital's liability to \$20,000 for violation of federal EMTALA statute); Martin v. Kelley, 18 Mass. L. Rptr. 121, 2004 Super. LEXIS 277 (allowing partial summary judgment that diocese is limited to \$20,000 for alleged negligent hiring, supervision and retention of abusive priest).

ARGUMENT

SINCE THE ACTIVITY OUT OF WHICH THE PLAINTIFF'S INJURY AROSE OUT OF AN ACTIVITY THAT WAS NOT ENTIRELY DISCONNECTED FROM WILLISTON'S CHARITABLE PURPOSES AND WAS NOT PRIMARILY COMMERCIAL, THE PLAINTIFF'S RECOVERY, IF ANY, MUST BE LIMITED TO \$20,000.

The plaintiff was present at Williston's ice rink in connection with her young son's skating as a member of the Nonotuck Valley Hockey Association. Permitting youth hockey groups to use its facility is part of Williston's youth education mission, and the rental revenue income derived from that activity is not significant. Revenue from leasing this and other facilities to non-school groups comprises less than 2% of Williston's income. Moreover, the revenue from ice time rental and does not even offset the actual facility costs. Further, the hourly rate at which Williston permits NVHA and other to lease the rink facility is below market-rate.

In determining if the charitable corporation applies, "the relevant inquiry . . . is whether the [activity] is primarily commercial or an activity relates directly to the school's charitable purpose." Here, Samuel Williston's established purpose for the school was "for the intellectual, moral and religious education of youth." As long as some mission-related benefits resulted from the activity, then the activity is considered to accomplish directly its charitable purposes. Missett, supra at 10 (cap is applicable so long as activity is not *entirely disconnected* from charitable purposes). Opening the hockey rink for use by community groups contributes to the education of youth; most people think

that youth sports “build character,” encourage teamwork and prepare youth for challenges they will face later in life. Further, opening the facility serves to bolster community relations and acts as a recruitment tool for the school.

The governing caselaw presents several cases in which schools and other non-profit corporations were sued for defects allegedly causing injury on property leased by them.

In Proctor v. North Shore Community Arts Foundation, 47 Mass. App. Ct. 372, 377 (1999), a Superior Court justice allowed the defendant’s motion for summary judgment on the applicability of the charitable cap. In Proctor, the plaintiff was injured while waiting in a picnic area for a concert to begin. The defendant leased the picnic area to a profit making company which sold food and beverages. The appeals court affirmed, agreeing with the trial court “the maintenance of the picnic area, at no additional cost to patrons, and the sale of refreshments by another entity at the picnic area were incidental to North Shore’s primary activities . . . the picnic area was not formed with the intent to raise revenue for the theater.” *Id.*

More recently, in Conners v. Northeast Hospital Corp., 439 Mass. 469 (2003), the plaintiff was injured when she slipped on an accumulation of ice and snow while walking from a parking lot into the medical office building where she worked. The defendant owned the parking lot and a complex of buildings, but not the medical office building, which it leased. The rent was “modest” and below market-rate. The defendant did not generate any revenue from its snow removal operation, rather it paid \$90,000 per year in snow clearing expenses. “The revenue-generating aspects of the relationship between [the defendant] and the physicians’ practice groups [which leased the medical

office building] do not detract from the charitable purpose of the activities.” Maintaining the entire hospital campus, including snow removal, “accomplished directly” the defendant’s charitable purpose since it facilitated care and treatment of the sick and provided access to patients themselves. *Id.*

Similarly, in Mason v. Southern New England Conference of Seventh-Day Adventists of the Town of South Lancaster, 696 F.2d 135 (1st Cir. 1982), the plaintiff was injured while attending a family reunion and Christmas party at the defendant’s religious school, South Lancaster Academy. The academy made the building available to plaintiff’s family free of charge at the request of a family member who was on its board and whose children attended the school. During the party a motion picture screen fell on the plaintiff and she was injured. The court ruled that the charitable cap applied, and reduced her verdict to \$20,000. Appealing, she argued the activity involved in this case was only indirectly charitable. In a painstaking analysis of the language of §85K and the history of charitable immunity in Massachusetts, the court upheld application of the cap. “It is not critical that the plaintiff was not engaging in a charitable activity on the premises.” *Id.*, at 140. In its charter the academy stated as its purpose to “diffuse moral and religious knowledge by means of . . . training schools.” The court stated that building and maintaining the academy fell within its purpose “and this conclusion is not changed by the [defendant’s] lending the facilities to some of its members. In that respect this case is no different than Enman [v. Boston University, 270 Mass. 299 (1930)] in which maintenance of a dormitory was held charitable even though the university’s goal was to educate rather than house students.” At bottom, the

defendant's activities were not "primarily commercial" so the cap applied. *Id.*, at 140-141.

An older case, Carpenter v. YMCA, 324 Mass. 365 (1949), considered the applicability of the common law charitable immunity where a boy was injured at a playground conducted by a charity whose purpose was "improving the spiritual and mental condition of young men." The court concluded the playground was not operating as a business for profit, "even though such activities incidentally yield revenue." It charged 50¢ per week to boys such as the plaintiff. The running of the playground was part of the YMCA's charitable mission. *Id.*, 367-371.

In a similar vein, in St. Clair v. Boston University, 25 Mass. App. Ct. 662 (1988), the school was immunized for claim for defamation brought by a former security employee on account of a defamatory job reference given by the school's dormitory security manager to a prospective employer. The appeals court noted:

The [job reference] activity in which [the manager] was involved when he engaged in tortious conduct was not commercial in nature, even if some revenue-producing activities may have taken place within the larger division of which [the manager's] department is a part [citation omitted]. [The manager's] response to inquiries about a former security employee was sufficiently related to educational work of the university to make it an "activity carried on to accomplish directly" the university's work, as required by G.L. c. 231, §85K.

Id., at 669.

In this case, there can be no doubt Williston is a charitable corporation and the activity out of which the plaintiff's alleged injury arose was tethered to Williston's charitable purpose of furthering the education of youth, and was not primarily commercial. It cannot be said that Williston's ice rink for youth hockey was *entirely disconnected* to its charitable purpose of the intellectual and moral education of young people. The revenues generated by this rental are insufficient to affect Williston's tax

exempt status and are less than 2% of its budget. The facts of this case fall comfortably within the caselaw for the application of the charitable cap.

CONCLUSION

For all the foregoing reasons, the court should allow the plaintiff's motion for partial summary judgment and order the plaintiff's recovery, if any, is limited to \$20,000.

WILLISTON NORTHAMPTON SCHOOL,
Defendant

By _____
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AFFIDAVIT OF CHARLES McCULLAGH, JR.

Charles McCullagh, Jr., having been duly sworn, deposes and says under oath as follows:

1. I am the Chief Financial Officer of the Williston Northampton School (hereinafter "Williston"). The following is based on my personal knowledge and the business records of Williston.
2. Williston Seminary was incorporated in 1841 by the Massachusetts General Court. St. 1841, c. 28. Its charitable purpose, set forth in the incorporation papers, was "for the intellectual, moral and religious education of youth." In 1856, legislation was passed permitting the seminary to hold real property "and income from the same shall be applied to the same purposes" specified in the original act. In 1925, the articles were amended to change its name to Williston Academy. In 1970, Williston Academy merged with the Northampton School for Girls, Inc., a Massachusetts charitable corporation organized in 1949, and on July 1, 1971 the defendant's name was changed to the Williston Northampton School.
3. Williston is a non-profit entity under §501(c)(3) of the Internal Revenue Code, and has been continuously since 1944.
4. The William J. Lossone Rink was built in 1964, and since that time has been used by the Williston boys and girls ice hockey teams and by the Easthampton community. As part of its mission, for many years Williston has permitted a youth hockey group known as Nonotuck Valley Hockey Association to use the rink facility. Revenue from allowing NVHA and other groups to use the facility is about \$151,000 per year. The hourly rate for NVHA to use the rink in 2001 was \$170 per hour. This is below market-rate for the use of such a facility, and falls well below Williston's for actual costs of building, maintaining and staffing such a facility. This

revenue derived from facility rentals campus-wide is well less than 2% of Williston's receipts, as necessary to maintain Williston's tax exempt status.

SWORN AND SUBSCRIBED UNDER THE PAINS AND PENALTIES OF PERJURY,
THIS ____ DAY OF SEPTEMBER, 2005.

CHARLES McCULLAGH, JR.

NOTARIZATION

COMMONWEALTH OF MASSACHUSETTS
HAMPSHIRE, SS.

On this ____ day of September, 2005, before me, the undersigned notary public, personally appeared Charles McCullagh, Jr., proved to me through satisfactory identification, which was _____, to be the person who signed the preceding document in my presence, and who swore or affirmed to me that the contents of the document were truthful and accurate to the best of his knowledge and belief.

Notary Public
My commission expires:

