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COURT OF APPEALS

STATE OF NEW YORK

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BROOKDALE PHYSICIANS,

Respondent,

-against-

NO. 5

DEPARTMENT OF FINANCE,

Appellant.

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20 Eagle Street  
Albany, New York  
January 9, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUSTICE VALERIE BRATHWAITE NELSON

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Final case on the calendar  
2 is Brookdale Physicians v. Department of Finance. And give  
3 us one minute. And we're very happy to be joined by our  
4 colleague from the Second Department, Justice Valerie  
5 Brathwaite Nelson.

6 MR. DEMBROW: Good evening, Your Honors. Adam  
7 Dembrow on behalf of the respondent appellant, the New York  
8 City Department of Finance. If I may, I'd like to reserve  
9 two minutes for rebuttal?

10 CHIEF JUDGE WILSON: Yes.

11 MR. DEMBROW: Thank you. Your Honors, neither  
12 Section 420-a of the Real Property Tax Law, nor any of this  
13 court's decisions construing that section, permit a for-  
14 profit business enterprise to lease property from a not-  
15 for-profit corporation and maintain a tax exemption on that  
16 property.

17 JUDGE GARCIA: Counsel, when we were here last so  
18 long ago, we talked about your email and the reason given  
19 it's, I think A55, and just to be clear, that is not the  
20 basis you're arguing right now.

21 MR. DEMBROW: That is the basis. That is part of  
22 the basis that we're arguing right now.

23 JUDGE GARCIA: This, it seems to me, was based on  
24 rent calculations and whether or not that exceeded your  
25 costs - - - their costs, right?

1 MR. DEMBROW: Yes, that's correct.

2 JUDGE GARCIA: But that's not what you were just  
3 arguing. Is this accurate or is it not accurate?

4 MR. DEMBROW: So it's - - - let me take a step  
5 back. The - - - in that email, that April 2017 email, the  
6 Department of Finance characterized the trial court's 2014  
7 decision as requiring that Brookdale Dialysis be treated as  
8 a not-for-profit. And the analysis concerning the rents  
9 versus expenses that followed was a result of that  
10 mischaracterization. It's an understandable  
11 mischaracterization - - -

12 JUDGE GARCIA: But it's a mistake.

13 MR. DEMBROW: I'm sorry? Yes. That - - - that  
14 is not what the trial court decision held. Yes, that's  
15 correct.

16 JUDGE GARCIA: All right. So my question is, if  
17 you have a nonprofit that's been operating for 20 years  
18 under this exemption and then the city comes in and says,  
19 you know, you're leasing to a for-profit and that's not  
20 allowed and blah, blah, blah, and you send this notice to  
21 them and they consult with their lawyers and the lawyers  
22 say, no, you're not doing that. You should challenge this.  
23 You should spend the money, you should go to court, you  
24 should take up court resources to challenge this. And then  
25 you get to court and you say, you know, that was a mistake.

1           Actually, your religious purpose isn't really a  
2 religious purpose, and you don't get the - - - why are you  
3 able to do that? What would the policy reason be, the  
4 legal reason we would find that your agency can send a  
5 notice giving one reason and then come into court later  
6 when they make a decision on whether or not to challenge it  
7 and change?

8           MR. DEMBROW: Well, first of all, Your Honor, the  
9 reason we can do that is because Brookdale Dialysis  
10 actually got a much more favorable consideration based on  
11 that mischaracterization than they would have otherwise,  
12 because Brookdale Dialysis is a for-profit business. A  
13 for-profit business can never maintain a - - - can never  
14 operate on a tax exempt property.

15           CHIEF JUDGE WILSON: And so - - -

16           JUDGE GARCIA: But - - - I'm sorry. Go ahead.

17           CHIEF JUDGE WILSON: The Appellate Division says  
18 that it is a for-profit business in this case, in the - - -  
19 in the order under review, right?

20           MR. DEMBROW: That's correct, Your Honor.

21           CHIEF JUDGE WILSON: So what do we do with that,  
22 taking Judge Garcia's concern into account?

23           MR. DEMBROW: Well, first of all, I would - - -

24           CHIEF JUDGE WILSON: Because the Appellate  
25 Division essentially disregarded the - - - I wouldn't say

1           disregarded. The theory they proceeded with is a different  
2           one that doesn't really have to do with the costs, right?

3                   MR. DEMBROW: That's correct. In fact, the  
4           Appellate Division did find that the - - - the rents  
5           exceeded the expenses.

6                   CHIEF JUDGE WILSON: Yeah.

7                   MR. DEMBROW: But the First Department was  
8           correct in that Brooklyn - - - Brookdale Dialysis is a for-  
9           profit enterprise. But the remainder of the First  
10          Department's analysis was incorrect. So what we are - - -  
11          what we're here challenging is - - -

12                   CHIEF JUDGE WILSON: Right. I mean, I guess my  
13          question is, suppose we agreed with you about that, right,  
14          that the remainder of its analysis is incorrect, but that  
15          was not the basis for the administrative decision at all,  
16          not mentioned in the administrative decision.

17                   MR. DEMBROW: It actually was part of the - - -  
18          part of the basis of the administrative decision.

19                   CHIEF JUDGE WILSON: In the earlier  
20          administrative decision, perhaps.

21                   MR. DEMBROW: Well, so the 2017 decision in that  
22          email references the 2014 trial court decision. And when -  
23          - -

24                   CHIEF JUDGE WILSON: And so does that bring up  
25          that previously, I mean, there could have been an appeal of

1           that 2014 decision.

2                   MR. DEMBROW:   There could have been, yes.

3                   CHIEF JUDGE WILSON:   There wasn't.

4                   MR. DEMBROW:   Correct.

5                   CHIEF JUDGE WILSON:   So why is that then, part of  
6           the record in this case?

7                   MR. DEMBROW:   Because when Brookdale Dialysis  
8           brought its second Article 78 petition, the 2017 petition,  
9           it argued that it was qualified under 420-a(1).  And - - -

10                  JUDGE CANNATARO:   But that was the opposition  
11           mounted in response to the statement that the reason for  
12           the revocation of the exemption was that you were operating  
13           at a, you know, in excess of the carrying costs of the  
14           building.  And in the hypothetical that Judge Garcia gave  
15           you, that was a considered decision based on the grounds  
16           that were given.  So why do you now have the benefit of  
17           going back after they've formulated a litigation plan  
18           responsive to the reasons that you gave in that email and  
19           open it up to basically new theories to defend the  
20           decision?

21                  MR. DEMBROW:   Because they're not new theories,  
22           Your Honor.  And when Brookdale Dialysis brought their  
23           Article 78, they - - - they assumed they read that  
24           determination as also including qualification under 420-  
25           a(1).

1 JUDGE CANNATARO: And that was their argument for  
2 why they would still be entitled to an exemption. But when  
3 you say they - - - I forget the phrase you used, they read  
4 it as including that. How do you know that?

5 MR. DEMBROW: Because they argued that in their  
6 petition. In other words, to be clear, it's - - - it's not  
7 the case that the - - - the April 2017 email only - - -  
8 only the sole basis of that decision was the rents versus  
9 expenses which - - - which comes under 420-a(2).

10 JUDGE CANNATARO: Correct.

11 MR. DEMBROW: When they brought their petition,  
12 the petition did not challenge, I mean, it challenged 420-  
13 a(2) but it also challenged 420-a(1) by saying we qualify  
14 under 420-a(1), so you don't even look at - - -

15 CHIEF JUDGE WILSON: The two proceedings were  
16 about different tax years; is that right?

17 MR. DEMBROW: The two proceedings were about  
18 different tax years, but they were before the same trial  
19 judge. And in fact, the trial court said this is basically  
20 the same exact proceeding.

21 CHIEF JUDGE WILSON: It said there was no res  
22 judicata effect.

23 MR. DEMBROW: That's correct.

24 CHIEF JUDGE WILSON: Or something to that effect.

25 MR. DEMBROW: That's correct.

1 CHIEF JUDGE WILSON: Which I assume you agree  
2 with?

3 MR. DEMBROW: We do, yes.

4 CHIEF JUDGE WILSON: Let me ask you this.  
5 Suppose we ruled against you here, could you then challenge  
6 next year's taxes?

7 MR. DEMBROW: I would say yes, because there - -  
8 - there always needs to be compliance with the statute to  
9 get a tax exemption. And our - - - our view is that the  
10 trial court both times, and I do realize there was no  
11 appeal from that first division, the trial court both times  
12 made an error in saying you need to look at the  
13 interrelationship between these companies.

14 CHIEF JUDGE WILSON: If I understood the argument  
15 that I cut you off from making, but I think I cut you off  
16 because I understood it. But I want to get it clearly,  
17 your position is the reason that the issue as to the  
18 entitlement is up before us and that we can reach the  
19 reasoning of the Appellate Division is because that was  
20 necessarily put at issue by the petition itself?

21 MR. DEMBROW: Yes. That's - - - that's correct,  
22 Your Honor.

23 JUDGE GARCIA: So if they hadn't done that, could  
24 - - - could the Appellate Division have done what they did,  
25 or would you be bound by what you told them?



1 MR. DEMBROW: The Appellate Division still could  
2 have done that because as I was - - - as I was just saying,  
3 there always has to be compliance with, I mean, there has  
4 to be compliance - - - for a tax exemption, there has to be  
5 compliance with 420-a. And if there's not compliance with  
6 420-a, then yes, the - - - the Department of Finance can  
7 revoke the exemption. And you know, hopefully, we won't be  
8 constantly stuck in a - - - in a cycle of litigation. But  
9 the fact remains is that the statute has some very clear  
10 requirements which are not met here. And that's why - - -

11 CHIEF JUDGE WILSON: Where does the burden lie?

12 MR. DEMBROW: Here, because the exemption was  
13 revoked, the burden lies with the Department of Finance.  
14 But I would point out that it's a very low burden here  
15 because again on the - - - the - - - the statutory language  
16 does not permit there to be leasing to a for-profit  
17 enterprise. And so the notion that there was some  
18 investigation that the Department of Finance had to do,  
19 that they were supposed to consider this, that, they  
20 considered all they needed to consider, which is that this  
21 property is being leased to a for-profit business, no tax  
22 exemption. And even here - - - even as here, where the  
23 burden is on the Department of Finance, tax exemptions are  
24 still construed very narrowly.

25 JUDGE SINGAS: But doesn't that go against all of

1 our case law, Adult Home, Rehab, AHESI, like that blanket  
2 statement that are we not now to look at exclusive use? Is  
3 that what you're asking the court to do?

4 MR. DEMBROW: No, it is absolutely not contrary  
5 to this court's previous decisions, because all of the  
6 cases that you just mentioned, Adult Home, the situation  
7 there where use was an issue was you have property owned by  
8 a - - - by an exempt company, a not-for-profit, that is  
9 using its own property for some purposes. And the issue  
10 there was, is this purpose a not-for-profit purpose? Is it  
11 a - - - is it an exemptible purpose? So in Adult Home they  
12 said, well, your - - - you have these programs, you're  
13 charging rent for people who are - - - who are being housed  
14 here and getting the benefits of these programs. And the  
15 assessor said, well, if you're making money, that's not a  
16 charitable purpose. And the court said, well, it is  
17 because you have to look at what they're doing to make the  
18 money.

19 But in none of those cases, none of those cases  
20 involved leasing to a for-profit company. The only case  
21 that this court has decided in which there was a not-for-  
22 profit leasing to a for-profit is Krakowski. And in that  
23 case, this court said no, no exemption when a for-profit  
24 business is leasing from a not-for-profit.

25 JUDGE CANNATARO: As a blanket statement, or is

1           there a further requirement that you have to analyze  
2           whether the for-profit's activities are incidental to the  
3           exempt purposes of the leasing nonprofit?

4                   MR. DEMBROW:   As a blanket statement, Your Honor.  
5           The incidental analysis only comes into play when you're  
6           talking about a not-for-profit using its own property.

7                   JUDGE CANNATARO:   Its own property?

8                   MR. DEMBROW:   That's correct.

9                   JUDGE GARCIA:   What if you revoked and told them  
10          you don't qualify under 420-a? That's all you said. And  
11          now they come in and you're like, well, we do this, and we  
12          do that, and we do that. And could you then say, well, you  
13          brought that up, so you have to meet that test because you  
14          brought it up in your petition? Could the agency do that?

15                   MR. DEMBROW:   Yeah, well, the difference I think  
16          - - - I think the agency could do that. But the difference  
17          between the hypothetical that you just suggested and what  
18          happened here is that the Brookdale Dialysis was on notice  
19          of the issues, and they had an opportunity to address them.

20                   JUDGE GARCIA:   Did it?

21                   MR. DEMBROW:   And that was from the old case.  
22          No, in the new case, because they addressed it - - - they -  
23          - - they addressed it in the new case as well.

24                   CHIEF JUDGE WILSON:   Saying at least in part, I  
25          guess, that they addressed it by arguing res judicata,

1 right? So they understood that that was an underlying  
2 issue.

3 MR. DEMBROW: That's - - - that's part of the way  
4 they addressed it. Yes.

5 JUDGE GARCIA: And how else?

6 MR. DEMBROW: I'm sorry?

7 JUDGE GARCIA: How else did they address it?

8 MR. DEMBROW: In in their petition they argued  
9 420-a(1). If you look at the - - -

10 JUDGE GARCIA: Again, that goes to my  
11 hypothetical. If you just say 420-a and they come in and  
12 they say, well, we qualify under this and we - - - because  
13 we don't really know why you revoked, we're throwing things  
14 out because we qualify. Now they've addressed it even  
15 though you just sent them an email saying you don't qualify  
16 anymore.

17 MR. DEMBROW: I would say yes, Your Honor, that  
18 is not ideal. But you have to - - - because here you have  
19 to quali - - - you have to comply with the statute.

20 JUSTICE BRATHWAITE NELSON: But here, you - - -  
21 DO - - - the Department of Finance asserted in the email  
22 that the monies paid by Brookdale exceeded the carrying  
23 cost, and this was the sole basis for the revocation of the  
24 tax exemption. That would seem to be an argument under  
25 420-a(2). I wonder can property which is leased qualify

1 for a tax exemption under subsection 1 or is such property  
2 disqualified from a tax exemption any time it is leased and  
3 subject to the provisions of sub 2?

4 MR. DEMBROW: So under sub 1 there is no - - -  
5 the statutory language does not permit there to be a lease.  
6 There can be a lease under subsection 2, but for - - - to  
7 maintain the tax exemption, it has to be a lease to another  
8 not-for-profit. And that's - - - that's what this court  
9 decided in Sisters of St. Joseph.

10 JUSTICE BRATHWAITE NELSON: So you're arguing  
11 that sub 1 does not exist - - - does not permit a tax  
12 exemption here; is that correct?

13 MR. DEMBROW: That is correct.

14 JUSTICE BRATHWAITE NELSON: So then this court  
15 you - - - I think you're arguing would have to evaluate  
16 this under sub 2?

17 MR. DEMBROW: No, I'm sorry. Under - - - under -  
18 - - it could evaluate it - - - well, it could evaluate it  
19 under sub 1 and say there's no - - - under sub 1, you can't  
20 lease to a for-profit business and maintain your tax  
21 exemption.

22 JUSTICE BRATHWAITE NELSON: So if the tax  
23 exemption does not apply or is not available under sub 1,  
24 under these circumstances, should this court turn to  
25 subsection 2?

1 MR. DEMBROW: It does not have to, but it could  
2 because that was when - - - when the Department of Finance  
3 characterized the 2014 trial court decision as saying  
4 you're meant to be treated as a not - - - not-for-profit.  
5 That was really - - - what they were saying was, all right,  
6 you can lease to a not-for-profit so - - - but there are  
7 still requirements that need to be met to maintain the tax  
8 exemption, so we'll look at those.

9 JUDGE CANNATARO: So counsel in this case, when  
10 Supreme Court said - - - I don't want to paraphrase. "The  
11 primary use - - - the analysis done by DOF was incomplete  
12 inasmuch as the inquiry does not stop at the fact that the  
13 fund receives rent from Brookdale. Rather, the primary use  
14 of the exempt property must be examined". Your argument is  
15 that is a misapprehension of what a(2) permits; is that  
16 right?

17 MR. DEMBROW: That is a misapprehension of what  
18 a(1) and a(2) permit, because a for-profit - - - there is  
19 no scenario where a for-profit business can operate on a -  
20 - - on an exempt property and maintain a tax exemption.  
21 And the - - - so the trial court's holding, both trial  
22 court's holdings - - -

23 JUDGE CANNATARO: And what - - - and what was  
24 there to alert the - - - the petitioner of that fact if the  
25 alleged basis is simply the, you know, the cost versus the

1 profit?

2 MR. DEMBROW: Because that - - - you can't look  
3 at that email in a vacuum. You have to recall that there  
4 was originally a 2013 revocation and that was challenged in  
5 an Article 78. And the trial court ruled in favor of  
6 Brookdale Dialysis there. And then there was a subsequent  
7 - - - actually, there were several - - - there was a  
8 subsequent revocation, which was then itself revoked  
9 following correspondence between the Department of Finance  
10 and counsel for Brookdale Dialysis. And then there was  
11 further back and forth about the - - - the rent versus  
12 expenses. So although there are different tax years  
13 involved - - -

14 JUDGE CANNATARO: And different litigation. Is  
15 there - - - is there any reason, any, I don't know,  
16 strategic or legal reason why the email couldn't have  
17 simply said we're revoking your exemption because you're  
18 leasing to a for-profit entity?

19 MR. DEMBROW: No, they could have said that.  
20 That was - - - that was based on - - - Department of  
21 Finance thought that they could not say that based on the  
22 2014 decision because - - - it's an understandable mistake  
23 because the Department of Finance's understanding of 420-a  
24 is that it cannot be used by a for-profit entity under any  
25 circumstances. And so they had this decision from the



1 trial court, and they interpreted it as saying, all right.  
 2 We're supposed to - - - we're supposed to pretend you're a  
 3 you're a not-for-profit. And that's consistent with a(2) -  
 4 - - a(2) does allow there to be leasing for statutory  
 5 purposes, charitable purposes, hospital purposes, to  
 6 another exempt, not-for-profit entity, but only if the - -  
 7 - the rent does not exceed - - -

8 JUDGE CANNATARO: But that was the emailer's  
 9 mistake. The person who wrote the email, right? There was  
 10 no actual finding holding that in the previous litigation  
 11 that Brookdale Dialysis was a not-for-profit.

12 MR. DEMBROW: That's - - - that's correct.  
 13 That's correct, Your Honor. But it was - - - it was hard  
 14 to understand because the trial courts - - - the trial  
 15 court's holding in 2014 was not consistent with the  
 16 statute. It was not consistent with 420-a. And so Finance  
 17 was in a situation thinking, how do we - - - we have this  
 18 decision. It's asking us to do something that's not  
 19 consistent with the statute. The best way we can  
 20 understand - - - the best way we can reconcile what the - -  
 21 - what the trial court is telling us to do and what, you  
 22 know, and what we understand the statute to mean is to  
 23 proceed this way.

24 JUSTICE BRATHWAITE NELSON: So Counsel, let's  
 25 discuss the case of Pace College v. Boyland, and that case



1 seems to reflect that a for-profit corporation may lease  
2 property in furtherance of the purposes of the owning not-  
3 for-profit and have the exemption fall under subsection 1  
4 of RPAPL 420-a. Is that case distinguishable from this  
5 case?

6 MR. DEMBROW: Absolutely. It is.

7 JUSTICE BRATHWAITE NELSON: How so?

8 MR. DEMBROW: So in Pace College - - -

9 JUSTICE BRATHWAITE NELSON: So that's the case  
10 that involved the cafeteria, correct?

11 MR. DEMBROW: That's correct.

12 JUSTICE BRATHWAITE NELSON: Okay.

13 MR. DEMBROW: And there the cafeteria was - - -  
14 was first of all, it's important to note that the - - - the  
15 property was owned by Pace College. Pace College owned the  
16 property. It didn't - - - it had a - - - the contractor  
17 operating the cafeteria as part of - - - as part of the for  
18 the college mission. And what the court found there is  
19 that given the - - - the fact that the cafeteria equipment  
20 belonged to the college, the fact that the college had a  
21 good deal of oversight and control, that the cafeteria  
22 wasn't really open to the public, it was something meant to  
23 serve members of - - -

24 JUSTICE BRATHWAITE NELSON: The cafeteria served  
25 students, but it was also open to others; is that correct?

1 MR. DEMBROW: I'm not certain. It may have been  
2 open to others, but it was within the college. So it's not  
3 really the same as a - - - you don't necessarily need a  
4 student ID, but it wasn't like advertising to the public to  
5 come in. It was on this floor within the college. And  
6 what the court there found is that really the - - - the  
7 entity using the property really is the college because of  
8 the - - - because of the degree of control, the college  
9 exercises over the - - - the operations, because of the  
10 fact that the equipment belongs to the college. And so  
11 they said the - - - there the profit-making was incidental  
12 to the purpose of the college. That's different from here  
13 where there's a lease to - - - where there's a lease to - -  
14 - from the fund, which is not a hospital, which is a - - -  
15 which is - - -

16 JUSTICE BRATHWAITE NELSON: Which is a not-for-  
17 profit.

18 MR. DEMBROW: It's a not-for-profit.

19 JUSTICE BRATHWAITE NELSON: Such as Pace was a  
20 not-for-profit.

21 MR. DEMBROW: That's correct. But - - -

22 JUSTICE BRATHWAITE NELSON: And in the Pace case,  
23 there was a lease to the contractor dealing with the  
24 cafeteria.

25 MR. DEMBROW: Yes.

1 JUSTICE BRATHWAITE NELSON: That was a for-  
2 profit?

3 MR. DEMBROW: But the difference - - -

4 JUSTICE BRATHWAITE NELSON: Such as Brookdale  
5 Dialysis is a for-profit here.

6 MR. DEMBROW: But the difference is - - - well,  
7 there's two differences. Difference number one is the  
8 cafeteria operator was fulfilling the purpose of the not-  
9 for-profit. That's not the case here. The Schulman Fund  
10 is not a hospital.

11 JUSTICE BRATHWAITE NELSON: So one of the  
12 problems that I see with that argument is that there is no  
13 evaluation in the record for this court to view concerning  
14 the use of the premises of the facility.

15 MR. DEMBROW: Respectfully - - -

16 JUSTICE BRATHWAITE NELSON: And that's what - - -  
17 that's something that the Supreme Court points it out.

18 MR. DEMBROW: Well, the problem is what the  
19 Supreme Court said is that you have to look at how the - -  
20 - the use of the property interacts with Brookdale Hospital  
21 and the Nursing Institute.

22 JUSTICE BRATHWAITE NELSON: And that's what you  
23 seem to be pointing out to the court here. You're making a  
24 use argument, I think. But there was nothing - - - there's  
25 nothing in the record that permits this court to review the

1 use.

2 MR. DEMBROW: Well, the difference is the use is  
3 for-profit. And I know you're saying, well, what about  
4 Pace - - - Pace College v. Boyland. But there, the use  
5 became an issue because it was the - - - it was a small  
6 part of the - - - of the college's operation. That's what  
7 - - - that's what the court found that this is incidental.  
8 Here, the property is 100 percent used for a for-profit  
9 business.

10 JUDGE CANNATARO: I think Justice Brathwaite  
11 Nelson is saying though, is that analysis wasn't done. It  
12 may very well be that it's unlike Pace because there are  
13 certain factual differences, but because those weren't the  
14 stated grounds and because that wasn't the nature of the  
15 investigation conducted by DOF when it decided to revoke,  
16 the reviewing court has no basis to know that.

17 MR. DEMBROW: But well, the reviewing court knows  
18 that it's a for-profit business. I mean, that was never -  
19 - - that was never in doubt. And that was the basis of the  
20 2013 revocation.

21 JUDGE CANNATARO: So was the lessee in Pace.

22 MR. DEMBROW: But the lessee in Pace had a much  
23 more - - - it wasn't - - - it was not operating on a  
24 separate location running a separate business.

25 CHIEF JUDGE WILSON: Let's hear from - - - I'm

1           sorry, let me hear from counsel for Brookdale. You'll have  
2           your rebuttal.

3                       MR. DEMBROW: Thank you.

4                       MR. KASTNER: First of all to follow up, he made  
5           the blanket statement a for-profit cannot lease to a not-  
6           for-profit. You've got Tartikov, Court of Appeals, Pace  
7           University, Court of Appeals, Shrine of Lady of Martyrs,  
8           Court of Appeals. And then you have the Southwinds  
9           Retirement case, which this Second Department - - -

10                      JUDGE RIVERA: What's the - - - what's the  
11           purpose of the lessor?

12                      MR. KASTNER: In our case?

13                      JUDGE RIVERA: Yes.

14                      MR. KASTNER: The purpose of the lessor and - - -  
15           if I may, is to - - - according to the Certificate of  
16           Incorporation, is "To promote, facilitate and enhance the  
17           delivery of quality, efficient, effective and economical  
18           health care and related services to and to improve and  
19           enhance the general health and well-being of the  
20           communities of Brooklyn served by the Brookdale Health  
21           System by benefiting, promoting and furthering the  
22           charitable, scientific and educational purposes of the  
23           constituent entities of the Brookdale Health System that  
24           are exempt from federal taxes including" - - -

25                      JUDGE RIVERA: And how would that be furthered by



1 giving a private company a tax-exempt property to run their  
2 business?

3 MR. KASTNER: Because the - - - they are in  
4 charge of funding the companies and making sure that they  
5 are providing efficient community services out there.  
6 Having a dialysis center, a hospital for Brookdale in an  
7 underserved area serves the very purpose of Schulman.

8 JUDGE RIVERA: What if they had rented - - -  
9 leased it, excuse me, to a supermarket where you had fresh  
10 produce? That benefits the community. People are  
11 healthier.

12 MR. KASTNER: The answer - - -

13 JUDGE RIVERA: Does that - - - does that satisfy?

14 MR. KASTNER: The answer in that situation, I  
15 would say, no. That goes under the Greater Jamaica case,  
16 if you will, where the Greater Jamaica was - - - the  
17 argument was economic development. And this court held  
18 that economic development is - - -

19 JUDGE RIVERA: But I didn't argue - - - I didn't  
20 present the hypothetical on economic development. It's - -  
21 - you were talking about sort of - - - I thought you said  
22 the health, access to services for an underserved  
23 community. Let's take a community. This is well known in  
24 New York City that those kinds of communities don't have  
25 access to fresh produce, healthy food. And so the lessor

1 decides this would be a good thing.

2 MR. KASTNER: I would say that again, it depends  
3 on the facts.

4 JUDGE RIVERA: Yeah.

5 MR. KASTNER: You know, you look at, were the  
6 people from the hospital working there or not? There are a  
7 lot of variations in each case is fact intensive. So I  
8 couldn't answer the question in that situation. It's sort  
9 of like the hypothetical that Judge Wilson gave in the  
10 Bowers Development case that was recently decided, whether  
11 if they decided to put a restaurant to bring people into  
12 the hospital. It depends. Each case depends on the facts.

13 CHIEF JUDGE WILSON: I think I asked you the last  
14 - - - I'm sorry. I think I asked you the last time what if  
15 it had been an auto repair shop and the facts were that 80  
16 percent of the people who used it were the employees and  
17 patrons of the hospital. And I think the answer I got was  
18 that would qualify even if it was a for-profit auto repair  
19 shop.

20 MR. KASTNER: I would vary that one respectfully,  
21 Your Honor.

22 CHIEF JUDGE WILSON: That's why we're here.

23 MR. KASTNER: Okay. I apologize. Sorry, Your  
24 Honor. I would vary in that situation if it's just an auto  
25 repair shop down the block and they had people from the

1 hospital working there. I don't know if that would qualify  
2 because I'm looking at the Salvation Army case v. Town of  
3 Ellicott, where Salvation Army was a charitable proper  
4 entity, and they distinguished that case from the  
5 Stuyvesant Thrift Shop case, it's footnote 6, I think, in  
6 the Town of Ellicott case, which says that because the  
7 people who worked in the thrift shop were the homeless  
8 people who got to work and got some money, that satisfied  
9 the need of the charitable institution.

10 So again, it would depend on - - - I'm not trying  
11 to skirt the issue, Your Honor, but it would depend on the  
12 facts. Just having a repair shop there and the people 80  
13 percent were working, I would say that leans towards a no  
14 in that situation. But you know, this is not that fact.  
15 Here, you have an entity that is in charge in the community  
16 that is underserved, is running a hospital, is running an  
17 institute, has the funds and someone's got the control - -  
18 -

19 JUDGE RIVERA: So then that private company case.

20 MR. KASTNER: And that's the Srogi (ph.) case.

21 JUDGE RIVERA: Yes. So then that private  
22 company, because they happen to rent from that lessor, gets  
23 a tax benefit versus the private company a block away,  
24 who's providing dialysis services, who is not renting from  
25 the not-for-profit. It strikes me that that is not what



1 the legislature intended.

2 MR. KASTNER: Well, the legislature has had a lot  
3 of time to revise because in the last 40 years you've had  
4 many cases. And I think 19 of the cases out of this court  
5 were for the taxpayer. And if that was inequitable, as we  
6 heard the first argument today, the legislature could have  
7 modified that as they did in 1948, 1971, to cover for that  
8 situation. So it's up to the legislature to make the  
9 changes.

10 JUDGE RIVERA: Well, that assumes that the  
11 current statutory framework doesn't cover the situation?

12 MR. KASTNER: I think it does.

13 JUDGE RIVERA: That's my point. I don't - - - I  
14 don't see how the statutory framework permits - - -

15 MR. KASTNER: I think - - -

16 JUDGE RIVERA: - - - this example.

17 MR. KASTNER: I think after this court's  
18 decisions, Southwinds Retirement is a perfect case where  
19 they deal with the Pace University case and that was a hair  
20 salon. And the Second Department explanation for why it  
21 did get the exemption was because it added to the dignity  
22 of the retirees in the house.

23 JUDGE RIVERA: Yet again - - -

24 MR. KASTNER: So each - - -

25 JUDGE RIVERA: That seems to me - - -

1 MR. KASTNER: Sorry.

2 JUDGE RIVERA: - - - that the fact that on a  
3 university campus, you want food easily accessible to  
4 people who are running from class to class and may not have  
5 food easily accessible to them, sort of seems very  
6 integral, makes some sense, and the profit is incidental to  
7 the main mission of - - - of the entity, the lessor. But  
8 in this case, I find it very difficult to see - - -

9 MR. KASTNER: Your Honor, respect - - -

10 JUDGE RIVERA: - - - for-profit dialysis fits - -  
11 - fits the same bill.

12 MR. KASTNER: I'm sorry, Your Honor.  
13 Respectfully, if a cafeteria, Pace University logic - - -

14 JUDGE RIVERA: Yes.

15 MR. KASTNER: - - - was that kids have to eat,  
16 if the Southwinds Retirement logic was the people there  
17 need dignity for getting, you know, fixed up and feel good,  
18 I think clearly a dialysis center in a hospital down the  
19 block is integral to the function of the hospital.

20 JUDGE RIVERA: But it's not the hospital. That's  
21 - - - my problem with your argument there is not that nexus  
22 between the lessor's purpose and why they have a not-for-  
23 profit status and what the for-profit - - - what the for-  
24 profit - - - the services, excuse me, the for-profit is  
25 delivering. I don't disagree with you. Of course the

1 dialysis services are important. That's not my point.

2 MR. KASTNER: I understand, Your Honor. And  
3 that's what the Srogi case came about. Srogi, the owner of  
4 the property was not a hospital. It funded - - - the Srogi  
5 certificate of incorporation is almost similar to the one  
6 that we have here and the court there, this court, found  
7 that they were the, quote, alter ego of the hospital and  
8 therefore they were entitled to exemption.

9 JUDGE RIVERA: But here, aren't they a fundraiser  
10 - - -

11 MR. KASTNER: They raise - - -

12 JUDGE RIVERA: - - - funds as opposed to do work  
13 that's really, truly an alter ego of the hospital that  
14 provides medical services?

15 MR. KASTNER: They did the exact same stuff that  
16 they did in the Srogi. And yet this court found that it  
17 did meet the exemption. And if you look at the language in  
18 Srogi for the certificate, you come out with the same  
19 language. If I can now answer just a couple of the issues  
20 that were raised by my adversary, if I may?

21 JUSTICE BRATHWAITE NELSON: I wanted to ask you  
22 about - - -

23 MR. KASTNER: Sorry.

24 JUSTICE BRATHWAITE NELSON: - - - a point in  
25 your brief. The brief indicates that Brookdale Dialysis

1 has not occupied the premises of Schulman since sometime  
2 around 2019, and that there is now another dialysis entity  
3 that occupies the premises.

4 MR. KASTNER: Thank you.

5 JUSTICE BRATHWAITE NELSON: It would seem that  
6 the issue of how the property is being used by Brookdale  
7 Dialysis and the tax-exempt status of the property may now  
8 be moot. How do you respond?

9 MR. KASTNER: I don't know. I don't represent  
10 whoever is there, but I thank you for bringing up the  
11 issue, because what happened in this case, and this is the  
12 problem here, is we win, we win, we win. We then get a  
13 notice of tax lien from the Department of Finance that  
14 they're going to sell the property, even though - - -  
15 they're going to even though we won, they're going to  
16 foreclose on the lien. And we had to - - -

17 JUSTICE BRATHWAITE NELSON: With respect to my  
18 question.

19 MR. KASTNER: I'm sorry, Your Honor. Apologies.

20 JUSTICE BRATHWAITE NELSON: Brookdale Dialysis  
21 has not, according to the brief, occupied the premises  
22 since 2019. They presently are not on site and they have  
23 not been there since about 2019.

24 MR. KASTNER: Correct.

25 JUSTICE BRATHWAITE NELSON: There may be another



1 facility or another entity occupying the premises. So with  
2 respect to the issue that is before this court concerning  
3 the manner in which Brookdale Dialysis used the property  
4 and the tax-exempt status, is that issue moot?

5 MR. KASTNER: It - - - it is not moot because we  
6 - - - we Brookdale Dialysis went and paid the taxes under  
7 protest. They paid - - - we were under subject to be sold  
8 out. So we went and paid the taxes with a right to go back  
9 to the Department of Finance if and when we win to collect  
10 that money. So the issue is not moot because if the court  
11 were to affirm the Appellate Division, my next move would  
12 be to come to the Department of Finance and say now we are  
13 entitled to get our monies back that we paid. So the issue  
14 per se is not moot. It may not be applicable to whomever  
15 may be there and if they decide to serve them with a  
16 nonexemption revocation, it may not be moot as to them.  
17 But as to my client, the issue is very much alive as to  
18 their rights.

19 CHIEF JUDGE WILSON: And Brookdale, just to  
20 confirm, Brookdale is actually not in the space.

21 MR. KASTNER: Brookdale Dialysis has - - - has  
22 left the place. If I may - - - if I may just touch a  
23 couple of issues that were raised if Your Honor - - - first  
24 of all, we heard and this is an answer to Judge Garcia's  
25 question the last time around, exactly a year ago, the

1 question that somehow the 2013-2014 order is involved and  
2 swallowed into this - - - this decision, page 55. But I'm  
3 reading from the Supreme Court transcript, NYSCEF document  
4 28, page 7.

5 "In other words", and this is DOF, "standing in  
6 the shoes of the owner of the property, the tenant has to  
7 be a not-for-profit and operating for one of the enumerated  
8 purposes as well. That's the prior case. We are not  
9 concerned with that today. And I agree with you that if  
10 the court doesn't want to look at it or review the first  
11 proceeding, I think it's irrelevant to the present  
12 proceedings because we are here today concerned with the  
13 fact, again, not to repeat myself", but he will, "the owner  
14 is making a profit on the lease. It's a second component  
15 to the statute". And they continue on page 10. "Judge,  
16 this should be the end of the analysis as you alluded to  
17 earlier. The 2013 decision shouldn't come into play here.  
18 It shouldn't even be mentioned".

19 JUDGE CANNATARO: So counsel, based on that and  
20 relating to those questions that were being asked of your  
21 adversary, if the court were to disagree with you on the  
22 use question, if we were to hold this as more like Jamaica  
23 Development or Lackawanna or some other case that goes the  
24 other way, would that - - - would this record support a  
25 reversal of the Appellate Division, or is there a deeper,

1           you know, issue regarding the arbitrary and capricious  
2           nature of stating one ground and then litigating a  
3           different ground?

4                       MR. KASTNER: Well, under this court's decisions  
5           in Maderas (ph.) v. Department of Education and Judge  
6           Garcia, Judge Wilson, and Judge Rivera were on that  
7           decision, and the Scherbyn v. BOCES case, this court has  
8           made it clear, we are constrained to the four corners of  
9           the determination and we are powerless. That's the words  
10          of the court in Scherbyn. We are powerless to go outside  
11          of the four corners. So he may raise purpose, use whatever  
12          it may be. This court has enunciated that we don't go past  
13          the four corners. And the determination as has been  
14          pointed out, there's more than one mistake in here. If you  
15          look at the determination, they call it, based on the  
16          foregoing, the exemption application is denied. This  
17          wasn't an application. This was a revocation. And as we  
18          all know, the burden of proof is different. So they seem  
19          to be going on a wrong line right there. So we - - -

20                      CHIEF JUDGE WILSON: So did you - - - would you -  
21                      - -

22                      MR. KASTNER: - - - that income exceeds  
23                      expenses.

24                      CHIEF JUDGE WILSON: So would you - - -

25                      MR. KASTNER: My adversary said 100 percent of



1 the property was used for the for-profit, so that's not  
2 accurate.

3 CHIEF JUDGE WILSON: So would you have us affirm  
4 on a different ground, essentially on the ground that the  
5 administrative record doesn't support the assessment of the  
6 tax?

7 MR. KASTNER: If I had the pleasure of writing  
8 it?

9 CHIEF JUDGE WILSON: Yeah.

10 MR. KASTNER: I would just quote out of Scherbyn  
11 - - - I would write quote out of Scherbyn v. BOCES saying,  
12 "We have said that a reviewing court in dealing with a  
13 determination in which an administrative agency alone is  
14 authorized to make must judge the propriety of such action  
15 solely on the grounds invoked by the agency. If those  
16 grounds are inadequate or improper, the court is powerless  
17 to affirm the administrative agency by substituting what it  
18 considers to be a more adequate or proper basis".

19 CHIEF JUDGE WILSON: And what I'm asking is,  
20 would you - - - would that apply to what the, in your view,  
21 would that apply to what the Appellate Division did here -  
22 - - did here as well? Considering there's a big chunk - -  
23 -

24 MR. KASTNER: Referring to what Judge Garcia said  
25 at the last argument, this court can affirm on other



1 grounds than what the Appellate Division, and I'll take  
2 that.

3 CHIEF JUDGE WILSON: Is that what you're - - -  
4 but it sounds like that's what you want.

5 MR. KASTNER: I'll take that argument. So  
6 clearly here, the determination that it was a quick  
7 determination, it's not even accurate. And we ask that the  
8 court affirm the court below. Thank you.

9 CHIEF JUDGE WILSON: Thank you.

10 MR. DEMBROW: Just a couple of brief points on  
11 rebuttal, Your Honor. Under 420-a, there are two and only  
12 two entities that are of any significance. Property's  
13 owner and the property's user, if it's other than the  
14 owner. All right. Brookdale Hospital and the Nursing  
15 Institute are neither of those entities. They are  
16 statutorily irrelevant. And to the extent that the trial  
17 court and the Appellate Division held differently, that is  
18 a mistake. It's important here because we were discussing  
19 Pace, Your Honor, and my adversary mentioned Tartikov and  
20 Southwinds. I'm glad he did. Tartikov was first of all,  
21 it was a license, not a lease, which - - - which is a  
22 difference.

23 But in Tartikov, what this court held was that  
24 the user of the property is not really the for-profit camp  
25 operator because of the degree of control that the property

1 owner is exercising over this contractor. It's really the  
2 property owner, the exempt entity, that's using the - - -  
3 that's using the property. It was similar in Southwinds  
4 where they said, yes, you have this for-profit business  
5 within the retirement home. But it's really the - - - it's  
6 really a service being provided by the retirement home for  
7 its purposes, just like the camp was operated for the camp  
8 owner's purposes. Just like in Pace College, the cafeteria  
9 was operated for - - - for the college's purposes, not for  
10 its own purposes.

11 Those are all different here where the  
12 relationship between the - - - the owner of the property  
13 and the user of the property is solely that of landlord and  
14 tenant, and that's talking about 420-a. Talking about 420-  
15 a(2) and the notion that you have to look within the four  
16 corners of the determination. First of all, as has been  
17 argued, we think the four corners of the determination do  
18 include a reference to the prior decision. But even if you  
19 look at the determination on its own merits, on its own - -  
20 - on nothing else but the a(2) argument, yes, it's true  
21 that the - - - and if I may just finish? I see my time is  
22 expired. Yes. It's true that the Brookdale Dialysis was  
23 not a not-for-profit, but that being treated as a not-for-  
24 profit gave them more than they were entitled to under the  
25 statutory analysis. So we would ask that the court reverse

1 the First Department here and rule - - -

2 JUDGE RIVERA: And I'm sorry, I'm not quite clear  
3 on this last argument you're making in response to the 420-  
4 a(2) four corners. Could you just explain a little bit  
5 more?

6 MR. DEMBROW: Oh, certainly.

7 JUDGE RIVERA: I'm sorry. It's late. I  
8 understand. But - - -

9 MR. DEMBROW: No, I apologize. Not a problem.  
10 So it was - - - it was not correct to say that the for-  
11 profit entity was to be treated by as a not-for-profit  
12 entity, but that treatment got it into the rent versus  
13 expenses analysis. A for-profit would not have gotten to  
14 that point, would not have had the opportunity to do that  
15 analysis. For-profit is out under - - - under the  
16 statutory language of a(1). It says that property has to  
17 be owned by an exempt corporation.

18 JUDGE RIVERA: Okay. So if I'm understanding  
19 you, if I'm following you, your - - - your argument is that  
20 the only way they can rely on 420-a(2) is if they comply  
21 with a prior, let's call it a condition, precedent,  
22 provision; is that what you're trying to say?

23 MR. DEMBROW: No, I apologize.

24 JUDGE GARCIA: Are you saying that you don't even  
25 get to a(2) if you really see what they are? They got a

1 benefit of getting that analysis when they shouldn't have  
2 even gotten it at all?

3 MR. DEMBROW: Yes.

4 JUDGE GARCIA: But two things with that. One,  
5 the Supreme Court did decide that issue, right? They  
6 looked at the profit issue at Supreme Court and they  
7 rejected it.

8 MR. DEMBROW: Yes.

9 JUDGE GARCIA: But also, doesn't that go to my  
10 earlier point that you tell them that, you tell them you're  
11 a(2) and they say, okay, we're going to win on that, let's  
12 litigate. But now you're saying, no, no, no, you weren't  
13 even entitled to that. Maybe they wouldn't have litigated  
14 if you told them the real reason.

15 MR. DEMBROW: Well, just to be clear that - - -  
16 that wasn't a pretense. That was just a mistake, an  
17 understandable mistake by the Department of Finance. They  
18 weren't trying to mislead them. But - - -

19 JUDGE GARCIA: But it's your mistake, right? So  
20 you tell them that.

21 MR. DEMBROW: Yes.

22 JUDGE GARCIA: And they look at that and they  
23 say, we win on that, and they do win on that in the Supreme  
24 Court. But now you're saying, no, you didn't even get to  
25 that because you got to benefit by that. You get out under

1 the first part.

2 MR. DEMBROW: Two things. Number one, Your  
3 Honor, it's actually not clear that they won on that  
4 because at the Appellate Division, what the Supreme Court  
5 said was, look at this enmeshment between these three  
6 entities, even though two of them are not properly part of  
7 the statutory analysis. And then when the First Department  
8 affirmed, the First Department said, yes, the - - - the - -  
9 - the rent does - - -

10 JUDGE GARCIA: Well, they win in Supreme Court.

11 MR. DEMBROW: I'm sorry?

12 JUDGE GARCIA: They won in Supreme Court, though,  
13 on that. I mean, Supreme Court rejects the argument on the  
14 - - -

15 MR. DEMBROW: I mean, they didn't - - - they  
16 didn't address that really in the Supreme Court, or I'm  
17 sorry, they didn't find that the - - - they didn't find  
18 that the expenses exceeded the rent.

19 JUSTICE BRATHWAITE NELSON: They found that you  
20 had not met your burden.

21 MR. DEMBROW: That's - - - that's right. But  
22 they found that we had not met our burden because we had  
23 not looked at the relationship between Brookdale Hospital  
24 and the Nursing Institute and the fund.

25 JUSTICE BRATHWAITE NELSON: The use? You had not

1           evaluated the use, and the Supreme Court felt that that was  
2           - - - that would have been appropriate and therefore you  
3           had not met your burden.

4                       MR. DEMBROW: Right. But that was an error  
5           because the use was known. It was - - - everybody knew it  
6           was a for-profit dialysis center. There was no question  
7           about the use. So to say that - - - when the Supreme Court  
8           said, well, you have to look at that use and see whether  
9           it's incidental to the hospital does and the nursing  
10          institute does, all wrong. Only entity that matters  
11          besides Brookdale Dialysis is the fund, the property's  
12          owner. And there's no - - - there's no connection between  
13          the fund and Brookdale Dialysis. Whether there's some  
14          connection between the hospital and the nursing institute  
15          and the fund is for purposes of the statutory analysis,  
16          irrelevant. And the Supreme Court erred twice in coming to  
17          that conclusion and so did the First Department. That's -  
18          - - that is one of the reasons we asked for reversal.

19                      CHIEF JUDGE WILSON: Thank you, counsel.

20                      MR. DEMBROW: Thank you.

21                      (Court is adjourned)

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C E R T I F I C A T I O N

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of Department of Finance v. Brookdale Physicians, No. 5 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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