

ARKANSAS COURT OF APPEALSDIVISION IV
No. CV-13-608PROGRESSIVE ELDERCARE
SERVICES–SALINE, INC. d/b/a
HEARTLAND REHABILITATION
AND CARE CENTER
APPELLANT

V.

PATSY KRAUSS
APPELLEE

Opinion Delivered April 30, 2014

APPEAL FROM THE SALINE
COUNTY CIRCUIT COURT
[NO. CV-11-813-3]HONORABLE GRISHAM A.
PHILLIPS, JUDGE

AFFIRMED

PHILLIP T. WHITEAKER, Judge

Progressive Eldercare Services–Saline, Inc. (“Progressive”) appeals from the Saline County Circuit Court’s finding that it was not entitled to the affirmative defense of charitable immunity. Because we find that the circuit court’s decision was not clearly erroneous, we affirm.

Patsy Krauss, a former patient at Progressive, is blind and often attempts to walk without assistance. Consequently, her bed was equipped with an alarm that was to sound when she rose from it. In May 2011, she got out of her bed unassisted, fell, and fractured her hip. The bed alarm malfunctioned and did not sound.

In October 2011, Krauss sued Progressive for negligence, and Progressive answered asserting several defenses, including charitable immunity. Progressive filed a motion for summary judgment on the issue of charitable immunity. The trial court denied the motion

finding that there were genuine issues of material fact. No appeal was taken from this denial.¹ Instead, Progressive filed a motion for evidentiary hearing in which the parties stipulated to the admissibility of all evidence before the trial court. After considering the evidence, the trial court found that Progressive failed to meet its burden of proof and denied its charitable-immunity claim.

Because an evidentiary hearing was held to determine whether Progressive was entitled to charitable immunity, we treat this matter as a bench trial. The circuit court's decision should be reversed only if its findings were clearly erroneous or clearly against the preponderance of the evidence. *DC Xpress, L.L.C. v. Briggs*, 2009 Ark. App. 651, 343 S.W.3d 603.

When determining whether a corporation is entitled to charitable immunity, Arkansas courts consider eight factors:

- (1) whether the organization's charter limits it to charitable or eleemosynary purposes;
- (2) whether the organization's charter contains a "not-for-profit" limitation;
- (3) whether the organization's goal is to break even;
- (4) whether the organization earned a profit;
- (5) whether any profit or surplus must be used for charitable or eleemosynary purposes;
- (6) whether the organization depends on contributions and donations for its existence;
- (7) whether the organization provides its services free of charge to those unable to pay; and
- (8) whether the directors and officers receive compensation.

Masterson v. Stambuck, 321 Ark. 391, 401, 902 S.W.2d 803, 809 (1995). These factors are

¹Generally, a denial of a motion for summary judgment is neither reviewable nor appealable, but this rule does not apply when the refusal to grant a summary judgment motion has the effect of determining that the appellant is not entitled to its defense of immunity from suit, as the right of immunity from suit is effectively lost if a case is permitted to go to trial. *Ark. Elder Outreach of Little Rock, Inc. v. Thompson*, 2012 Ark. App. 681, ___ S.W.3d ___.

“illustrative, not exhaustive, and no one factor is dispositive.” *Id.* at 401, 902 S.W.2d at 810.

Because the charitable-immunity doctrine favors charities and results in a limitation of potentially responsible persons whom an injured party may sue, we give the doctrine a very narrow construction. *Carnell v. Ark. Elder Outreach of Little Rock, Inc.*, 2012 Ark. App. 698, ___ S.W.3d ___. The burden of proving the affirmative defense of charitable immunity is on the party asserting it. *Id.*

The trier of fact alone determines the weight to be given to the evidence. *Gray v. State*, 318 Ark. 601, 888 S.W.2d 302 (1994). The evidence before the circuit court presented several factors for the circuit court to consider in determining whether Progressive is entitled to charitable immunity.

Some factors presented to the court would favor entitlement to charitable immunity. Progressive’s charter limits it to charitable or eleemosynary purposes, the charter contains a “not-for-profit” limitation, and its directors and officers do not receive compensation. While, it is undisputed that Progressive’s administrator and director of nursing are paid for the performance of their jobs, Progressive’s board members, with the exception of the previously mentioned administrator, receive no compensation. Charitable organizations need not “have entirely volunteer staff and management,” particularly when the organization’s size and complexity render “knowledgeable, well-qualified personnel essential.” *George v. Jefferson Hosp. Ass’n*, 337 Ark. 206, 214, 987 S.W.2d 710, 714 (1999). However, the remaining factors require more scrutiny.

Progressive, through its board members, offered evidence that its monetary goal was

to break even. However, the court also heard evidence that Progressive made a profit and used the profit to enhance its operations. It is the role of the trial court to determine the weight of the evidence.

In its first twenty-four months of operation, Progressive had revenue of \$16,722,711 and earned a profit of 4.26%. Progressive takes the position that the existence of a profit is not determinative of charitable status.² It is true that the existence of a profit is not determinative of charitable status, but it is a factor that the court must consider and upon which it might place appropriate weight based upon the evidence of that particular case.

The use of Progressive's profit or surplus is also relevant. There is no evidence that Progressive's profits were distributed to its owners or employees. Instead, it used its profits to make building improvements, to save for operating expenses, and to purchase vehicles, software, and equipment. Progressive's Articles of Incorporation require that any earnings be used to further its charitable purposes. Although the profits were not distributed, the use of profits for building improvements and operating expenses was a factor for the court to weigh and to determine if this use furthered charitable purposes.

Progressive earned a profit and did not rely on or receive any contributions or donations. While reliance on contributions may be less relevant in the context of a modern,

²See *George*, 337 Ark. at 213, 987 S.W.2d at 713–14 (1999). In *George*, the profit margin of a not-for-profit hospital was compared to the profit margin of a for-profit hospital in assessing the charitable-immunity status. Here, the circuit court had no evidence of the profit margin of a for-profit nursing home for comparison purposes.

nonprofit medical provider,³ it is within the circuit court's purview to determine the weight to be given to these factors.

Evidence that Progressive provides services free of charge is lacking. However, a nonprofit medical provider may establish that it provided free care by presenting evidence that it provided unreimbursed health-care services to those unable to pay and to persons covered by governmental programs at below cost. *Jackson*, 375 Ark. at 540, 294 S.W.3d at 5. While forgiving unpaid debts of its residents can establish the component of offering free care, Progressive, by its own figures, provided only \$290,000 in free care out of a revenue of \$16,722,711, which is less than 2%.

Based on these facts, we cannot say that the circuit court's decision was clearly erroneous or against the preponderance of the evidence. Therefore, we affirm its finding that Progressive is not entitled to charitable immunity.

Affirmed.

WYNNE and VAUGHT, JJ., agree.

Kutak Rock LLP, by: *Mark W. Dossett, Jeff Fletcher, and Samantha B. Leflar*, for appellant.

Ellis Law Firm, P.A., by: *George D. Ellis*, for appellee.

³See *Jackson v. Sparks Reg'l Med. Ctr.*, 375 Ark. 533, 541, 294 S.W.3d 1, 5–6 (2009).