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## PRELIMINARY STATEMENT

Plaintiff Danielle Gruskowski is one of many victims of the Spectrum defendants' willful, wanton, grossly negligent and utterly abysmal conduct.<sup>1</sup> Three of these victims are plaintiffs in the instant matters: Diane Gruskowski, Stephen Griscti and Michelle Pfund. They are all residents in Spectrum's Edison, New Jersey condominium group home. All three cases involve common questions of law and fact and arise out of the same series of transactions. They should be consolidated pursuant to R. 4:38-1.

Spectrum's motion for summary judgment is without merit for a number of reasons. First, even though Spectrum has thus far failed and refused to answer any discovery related to the charitable immunity defense, it is clear this defense is inapplicable because only a tiny fraction of Spectrum's funding is derived from private donations. Second, plaintiff Danielle Gruskowski was not a beneficiary of Spectrum at the time they were throwing hot coffee in her face. Third, even charitable immunity were somehow applicable, it would only be relevant to ordinary negligence claims. Charitable immunity would be inapplicable to the claims for willful, wanton, and grossly negligent conduct, the intentional claims, the breach of contract and unjust enrichment claims, the statutory violation claims and the automobile negligence claims. Accordingly, Spectrums' motion for summary judgment should be denied with prejudice.

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<sup>1</sup> Unless otherwise indicated the "Spectrum defendants" collectively refers to Spectrum For Living Group Homes, Inc.; Spectrum For Living Development, Inc.; Spectrum For Living Middlesex, Inc. and; Spectrum for Living, Inc.

## RESPONSE TO MOVANT'S STATEMENT OF MATERIAL FACTS

1. Admitted. However, because defendant has thus far failed to answer any discovery as to the charitable immunity defense, plaintiff is unable to presently confirm in detail the other non-charitable activities plaintiffs believe Spectrum is involved in such as perhaps functioning as an employment agency and sheltered work shop of a component of vocational counseling to determine the employability and potential job performance of residents.

2. Admitted. However, this list is hardly all inclusive of Spectrum's activities. Indeed, their own website shows that in addition to these four centers, Spectrum runs at least 12 additional group homes and condominiums and engages in a plethora of other activities, many of which may or may not qualify as charitable activities. (*Exhibit B*, Spectrum web page entitled "Our Facilities.") Given the fact that no discovery has taken place on the charitable immunity defense, plaintiff is unable to further address these asserted facts.

3. Admitted.

4. Despite the fact that no discovery has taken place on the charitable immunity defense, these facts are denied. First, it is unclear what defendant means by "the facilities total income" and further unclear as to the relevance of same. Spectrum's own website states, "Spectrum's annual budget exceeds \$23,000,000.00 (Twenty-three million dollars)". (*Exhibit A*, Spectrum webpage "Membership 2000"). Indeed, even if the Edison Condominium received about \$150,000.00 in private contributions, a fact which is denied, this is nothing compared to its \$23,000,000.00 annual budget. Furthermore, Joe Griscti, a former Treasurer for Spectrum certifies these facts are untrue. In fact, most of the money Ms. Long characterizes as "private contributions" are in actuality loans.

(*Exhibit J*, Certification of Joe Griscti). Spectrum is nothing more than a conduit for government funding and government programs and the charitable immunity defense does not apply.

5. Denied. First of all, the copy of the Certificate of Incorporation provided to plaintiff's counsel had much of the information cut off. However, even the portions that were legible indicate this statement is incorrect. For example, Article II does not state that the asserted purposes are the "sole" purposes. In fact Article II contains very general language dealing with the services and other activities for which the corporation has been formed. Second, Article III also contains very broad empowerment language for the corporation. Third, it is incorrect to assert that "Spectrum for Living-Middlesex, Inc." is the sole relevant corporation in this case. Indeed, the "Spectrum defendants" are part of a large corporate conglomerate which does far more than the asserted "sole" purpose of the corporation. Indeed, it appears that "Spectrum for Living-Middlesex, Inc.," is just one particular tentacle of a much larger corporate entity which defendants themselves refer to as "Spectrum". Indeed, this corporation has an annual budget of \$23,000,000.00. (*Exhibit A*, Spectrum webpage "Membership 2000") (*Exhibit B*, Spectrum web page entitled "Our Facilities."). Furthermore, the law in New Jersey is clear that neither non-profit status nor the performance of socially useful services, either independently or together, are dispositive of charitable status. Rather, in determining whether or not a corporate entity is entitled to a charitable immunity defense, the Court must employ a traditional analysis which looks beyond the organization's non-profit structure and social service activities. In fact, it is critical to determine the source of funding for the organization. In this case, only a tiny fraction of Spectrum's total annual \$23,000,000.00 budget comes from private funding. Rather, Spectrum appears to be nothing more than a conduit for government programs. (*Exhibit J*,

Certification of Joe Griscti). Therefore, it is not and can not hide behind a charitable immunity defense.

6. See #s5 and 6 above. Furthermore, admitted that that particular language is contained in Article II b of that document.

7. See #s5 and 6 above.

8. See #s5 and 6 above.

9. Admitted. However, Danielle Gruskowski can not be considered a beneficiary of Spectrum at the time of the injury -the only relevant time- because she received no real benefit from having hot coffee thrown in her face.

## STATEMENT OF FACTS

1. Plaintiff Danielle Gruskowski is just one of many disabled residents who have suffered untold abuse, neglect and mistreatment at the hands of Spectrum and their employees. Three of these residents- Danielle Gruskowski, Stephen Griscti and Michelle Pfund- seek redress for these injuries through the instant actions.

2. The Complaint in *Gruskowski v. Spectrum* was filed on July 9, 2001. (*Exhibit C*, Gruskowski Complaint). On Christmas Eve, 2000 defendant Joy Jackson gave plaintiff Diane Gruskowski the Christmas gift of scalding hot tea in her face which resulted in severe burns and facial disfigurement (*Exhibit D*, police report and burn photographs). Diane Gruskowski suffers from severe developmental disabilities which inhibit her ability to speak and otherwise live a normal life. Spectrum's abysmal staff hiring, training and supervision activities are just one aspect of their overall knowing non-compliance with state and federal laws for the protection of these plaintiffs.

3. The Complaint in *Griscti v. Spectrum* was filed on May 2, 2002. (*Exhibit E*, Griscti Complaint). Stephen Griscti's treatment at the hands of Spectrum is truly shocking. It exemplifies Spectrum's overall willful indifference to the health, safety and welfare of its residents. Stephen's story is set forth in detail in his Complaint. Among other injuries at the hands of Spectrum, on May 16, 2000, Stephen suffered a broken femur and other serious injuries because, despite no less than three prior written and numerous other oral pleas from his family, Spectrum deliberately and willfully refused to comply with federal and state law requiring that wheelchair bound vehicle passengers be strapped in. (*Exhibit E*, Griscti Complaint).

4. To characterize Spectrum's conduct as shocking would be a gross understatement; the conduct of Spectrum and/or its employees is criminal. Whether it is throwing coffee in Danielle



Gruskowski's face, or thumbing their nose at the Americans with Disabilities Act and New Jersey State Law governing the safe transportation of wheelchair bound residents, their conduct is not only hurting people, but it has resulted in at least one death. As stated, Stephen Griscti suffered a fractured femur because he was not strapped in his wheelchair while riding in a Spectrum van. Prior to this accident Stephen's family sent Spectrum three written and numerous other oral pleas to comply with this law. Spectrum simply refused.

5. Two years later, after causing Stephen to suffer a fractured femur, Spectrum was still refusing to comply with the law. However, this time the injury to the wheelchair bound passenger was not a broken bone- the injury was death. Indeed, in June 2002, because Spectrum refused to strap Rosario "Sonny" D'Naro into his wheelchair during transport in a Spectrum van he fell out, struck his head and died. 'Arrogance' is insufficient to characterize defendant Richard Bonelli's attitude with respect to this horrific situation. Indeed, all he apparently had to say was "[I don't know] where it's written that you must check a wheelchair when it comes into your vehicle." (*Exhibit F*, news article regarding D'Naro fatality, Bonelli quote).

6. Michele Pfund's Complaint was filed in or about May 23, 2002. This Complaint sets forth in great detail numerous instances of the neglect Michele continues to suffer at the hands of Spectrum. (*Exhibit G*, Pfund Complaint).

7. In the Gruskowski matter Spectrum answered Form C and C2 Interrogatories in or about December 2001. Despite being personally served the Complaint, defendant Joy Jackson has refused to respect the process of the Court or enter any appearance in the case. Same is the subject of a separate motion pending before the Honorable Melvin Gelade, J.S.C. As such, defendant Joy

Jackson has refused to attend a deposition and has answered no paper discovery. (*Exhibit H*, Clark Certification).

8. On or about June 5, 2002, the Spectrum defendants in *Gruskowski* provided a response to plaintiff's initial Notice to Produce. This response was inadequate in a number of respects. Plaintiff has also served a Supplemental Notice to Produce as to the charitable immunity defense. (*Exhibit K*, Supplemental Notice to Produce as to Charitable Immunity Defense). Although the time to answer has not yet expired, defendant has thus far not responded to same. Plaintiff also intends on taking a number of depositions of Spectrum employees and defendants. However, since initial paper discovery is incomplete, those depositions have not yet been noticed (except for that of Joy Jackson which she failed to attend since she is still ignoring the lawsuit). (*Exhibit H*, Clark Certification).

9. Issue was recently joined in the Grisetti matter and discovery is in its infancy stages. Same is similarly true with respect to the Pfund case. (*Exhibit H*, Clark Certification).

10. The current discovery end date in the *Gruskowski* matter is December 15, 2002. The discovery end dates in the Grisetti and Pfund cases are sometime thereafter. (*Exhibit H*, Clark Certification).

11. The corporate defendants in this matter are Spectrum For Living Group Homes, Inc.; Spectrum For Living Development, Inc.; Spectrum For Living Middlesex, Inc. and; Spectrum for Living, Inc. (*Exhibit C*, *Gruskowski* Complaint) (*Exhibit E*, *Grisetti* Complaint) (*Exhibit G*, *Pfund* Complaint). Individual defendants are also named in the various Complaints.

12. Spectrum has interposed virtually the same exact affirmative defenses in all three cases. (*Exhibit H*, Clark Certification).

13. All the Spectrum defendants fall under the same Spectrum corporate umbrella. (*Exhibit A*, Spectrum webpage “Membership 2000”) (*Exhibit B*, Spectrum web page entitled “Our Facilities”) (*Exhibit F*, news article regarding D’Naro fatality) (*Exhibit I*, Spectrum webpage, “About Us”). In addition, there are numerous documents turned over in discovery and investigation, including but not limited to insurance policies, correspondence, reports and the like which demonstrate same. In lieu of inundating the Court with unnecessary paper we will simply represent same to the Court and make the documents are available upon request. (*Exhibit H*, Clark Certification).

14. Spectrum’s annual budget is \$23,000,000 (twenty-three million dollars). (*Exhibit A*, Spectrum webpage “Membership 2000”).

15. The vast majority of Spectrum’s budget income is derived from funding by the government, mostly the state of New Jersey and from contract revenue. (*Exhibit J*, Certification of Joe Griscti).

16. It is expected that if Spectrum would turn over their financial documents, such as for example, previous years tax returns for Spectrum Middlesex (2/29/00 and 2/28/01) the fund-raising amounts reflected as income will not be 17% for 2/29/00 and 14% for 2/28/01. Spectrum Middlesex never had fund-raising amounts close to dollars stated in Ms. Long’s affidavit of 9/9/02. (*Exhibit J*, Certification of Joe Griscti).

17. Approximately 99% of the funding to house and care for Stephen, Danielle and Michelle is obtained from the State of New Jersey. Little if any of the funding comes from private donations. (*Exhibit J*, Certification of Joe Griscti).

## LEGAL DISCUSSION

### POINT I

#### **THE GRUSKOWSKI, GRISCTI AND PFUND CASES SHOULD BE CONSOLIDATED BECAUSE THEY ALL INVOLVE COMMON QUESTIONS OF LAW AND ARISE OUT OF THE SAME SERIES OF TRANSACTIONS**

Rule 4:38-1, “Consolidation” provides:

[W]hen actions involving a common question or fact arising out of the same transactions or series of transactions are pending in the Superior Court, the Court on a parties or its own motion may Order the actions consolidated.

R. 4:38-1(a).

This Rule provides three instances where consolidation is proper: 1) when the cases involve common questions of law; 2) where the cases involve common questions of fact arising out of the same transaction or; 3) where they involve common questions of fact arising out of a series of transactions. If anyone of these factors is met, consolidation is proper. In this case at least two of the three circumstances are met.

Defendant’s motion for summary judgment shows just one of numerous common questions of law in this case. That is, the Spectrum is a defendant in all three cases. It appears their primary defense is charitable immunity.<sup>2</sup> Consolidation is proper because the Court is going to have to pass on this same question in all three cases. Instead of hearing at three separate motions in this regard, judicial economy dictates the motions should be determined together.<sup>3</sup>

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<sup>2</sup>It is worth noting Spectrum has no real substantive defense for their conduct and only desperately hopes to escape liability on a meritless charitable immunity argument.

<sup>3</sup>In all candor however, it should be noted that plaintiffs do not believe it will be difficult for the Court to conclude charitable immunity is inapplicable.

The additional common questions of law are numerous. For example, the Court will have to determine whether or not the defendants overall care for these residents was below applicable standards. The Court will have to determine as to all these cases the extent to which the defendants violated the New Jersey Home and Responsibilities Rights Act. All three plaintiffs are residents of Spectrum and are third party beneficiaries of the same contractual relationship between Spectrum and the State of New Jersey. Common questions of law will have to be determined with respect to defendant's violation of same. The vast majority of Spectrum's \$23,000,000.00 budget comes from State funding. The Court will determine the extent to which defendants have been unjustly enriched by their accepting these funds and mistreating the residents. In fact, Spectrum raises virtually the same exact affirmative defenses in all three cases. (*Exhibit H, Clark Certification*). Accordingly, common questions of law exist in all three cases and they should be consolidated.

These three cases also present numerous common questions of fact which arise out of the same transaction or at least the same series of transactions. As stated, all three plaintiffs are residents of Spectrum's Edison condominiums. They have all been subjected to similar treatment from the same set of Spectrum employees at the Edison condominiums. They have all received substandard care and have all been victimized by defendants' violation of the New Jersey Administrative Code governing standards for the care of the developmentally disabled the New Jersey Nursing Home Rights and Responsibilities Act. In addition, all residents have been placed at the Spectrum Edison Condominiums pursuant to the same contractual relationship with the State of New Jersey. Accordingly, consolidation is proper under R 4:38-1 and plaintiff respectfully requests the Court grant same.

## POINT II

### **NOTWITHSTANDING SPECTRUM HAS THUS FAR FAILED TO PROVIDE ANY CHARITABLE IMMUNITY DISCOVERY, SPECTRUM HAS NOT AND CAN NOT SATISFY ITS BURDEN OF PROVING THE CHARITABLE IMMUNITY ACT APPLIES TO THEM**

Charitable immunity is an affirmative defense, as to which, like all affirmative defenses, defendants bear the burden of persuasion. Abdallah v. Occupational Center of Hudson County, Inc., 351 N.J.Super. 280, 288 (App. Div. 2002) *citing*; Pagano v. United Jersey Bank, 276 N.J.Super. 489, 500 (App. Div.1994), *aff'd*, 143 N.J. 220 (1996); Rendine v. Pantzer, 276 N.J.Super. 398, 435 (App. Div.1994), *aff'd*, 141 N.J. 292 (1995). Spectrum, a \$23,000,000 (twenty-three million dollar) conduit of government social programs, that has at least approximately \$10,000,000 (ten-million dollars) in insurance coverage (*Exhibit H*, Clark Certification), has not and can not satisfy this burden.

***i. Charitable Immunity is Inapplicable to Spectrum Because All But a Tiny Fraction of Its \$23,000,000 Budget is Derived From Private Donations; The Vast Majority Comes From Government Funding and Contract Revenue***

Spectrum seeks to avoid responsibility for its mistreatment of plaintiffs and violation of the law by incorrectly cloaking itself in the veil of charitable immunity. In support thereof, Spectrum basically relies on two self serving documents, a Certificate of Incorporation and By-Laws of one of the companies in the Spectrum umbrella, Spectrum for Living- Middlesex. First, it should be made clear in this case that “Spectrum” is not merely “Spectrum for Living- Middlesex.” Rather, the proper defendants in this case are all the Spectrum corporations- Spectrum for Living Group Homes, Inc.; Spectrum for Living Development, Inc.; Spectrum for Living Middlesex, Inc. and;

Spectrum for Living, Inc. All such defendants have been named or identified as such as having responsibility for the acts and omission which form the basis of the claims in these cases.

Plaintiff strenuously opposes any passing presumption by defendants that these are completely separate and distinct entities. Indeed, despite no discovery in this regard, plaintiff maintains that Spectrum for Living- Middlesex is a wholly owned and wholly controlled shell subsidiary of the larger Spectrum parent. Plaintiffs maintain that the parent corporation so dominates this and the other various subsidiaries such that there is no legitimate distinction between the entities and the subsidiaries serve as the mere instrumentality of the parent. Indeed, Spectrum's own website clearly holds itself out to the world as one entity- "Spectrum." (*Exhibits A, B, H, I*) Until defendant offers evidence beyond any material issue of fact otherwise, they are all defendants in this case. Accordingly, the Certificate of Incorporation and By-Laws of defendant Spectrum for Living- Middlesex are insufficient evidence for the Court to conclude Spectrum was organized exclusively for charitable purposes.

Second, even if "Spectrum for Living- Middlesex" were deemed the sole relevant entity, an untenable argument under these facts, charitable immunity would still be inapplicable because, *inter alia*, private contributions make up a tiny fraction of its overall income. Rather, as with the Spectrum parent, "Spectrum for Living- Middlesex" too is a mere conduit of government social programs and therefore charitable immunity is inapplicable. See, e.g., Parker v. St. Stephen's Urban Dev. Corp., 243 N.J.Super. 317 (App. Div. 1990); Abdallah v. Occupational Ctr. of Hudson Cty., 351 N.J.Super. 280 (App. Div. 2002).

Parker was a fall down case occurring on Steven Manor, a low income housing property in Asbury Park, New Jersey. The name of the property was Stephen Manor. It was owned by

defendant St. Stephen's Urban Development Corp., Inc. ("St. Stephen's"). St. Stephens was purportedly a charitable organization that was organized "to help fill an immediate need for respectable housing" in Asbury Park. The corporation was formed pursuant to the New Jersey Non-Profit Corporation Act and its Certificate of Incorporation included laudable goals such as working for the "health, welfare and morals of the community" and assisting low and moderate income persons to obtain housing. Parker 243 N.J.Super. at 319. The Court also noted that St. Stephens was a non-profit corporation under the Internal Revenue Code and that through its operation of Stephen Manor, it was performing a social service. Id. at 324.

The Law Division found St. Stephens was entitled to charitable immunity from the negligence claims and granted the defendant summary judgment. In reversing this ruling, the Appellate Division found that none of the above factors, "is dispositive of defendant's status for immunity purposes." The Appellate Division, citing to a prior Supreme Court opinion, found that:

[N]on-profit status...cannot be equated with charitableness. Rather, it is but one factor which permits consideration in the determination whether property is being used for charitable purposes.

Id., *citing*, Presbyterian Homes v. Div. of Tax Appeals, 55 N.J. 275 (1970).

The Parker Court further found, "[T]he performance of useful service does not *per se* compel the corollary that a corporation meets the standard for charitable immunity." Id. at 325, *citing*, Jacobs v. North Jersey Blood Center, 172 N.J.Super. 159 (Law Div.1979). The Appellate Division recognized that St. Stephens did not undertake to reach its social service goals of creating low and moderate income housing through its own fund raising efforts. Rather, as does Spectrum in this case, St. Stephens did not qualify for charitable immunity because the vast majority of its funding was provided through government programs. (*Exhibit J*, Certification of Joseph Griscti) (*See also*



Certification of Ann Long). In effect, St. Stephen's was a mere conduit for a federal housing program. This is the case with Spectrum here, St. Stephens was not created to lessen the burden on government but to obtain as much funding from the government as possible and to operate the project with that funding. As such, the Court found "it is no more entitled to charitable immunity than the government itself." Id. at 326.

The Court repeatedly recognized that the whole purpose of the charitable immunity act is to ensure that private charitable contributions are directed toward the beneficiaries of the charity rather than used to pay judgments in lawsuits. Id. at 326-327. Therefore, the Court found that charitable immunity was inapplicable. Id. at 327-28.

Similarly, a cursory review of the Certificate of Incorporation and By-Laws of Spectrum for Living- Middlesex is insufficient evidence to argue Spectrum is entitled to charitable immunity. Indeed, as the Appellate Division recently held:

[W]here a non-profit, non-religious, non-educational organization relies on the immunity based on its asserted charitable status, a traditional analysis as exemplified by *Parker*, which looks beyond the organization's non-profit structure and social service activities, continues to be mandated. And, we are convinced, that traditional analysis must take into account the organization's source of funds as a critical element of charitable status.

Abdallah v. Occupational Ctr. of Hudson Cty., 351 N.J. Super. at 133; See also Bieker v. Community House, 169 N.J. 167, 179-80 (2001) (holding that if the income is dominated by non-charitable funding, immunity shall not apply). In Abdallah, the plaintiff brought a claim against the Occupational Center of Hudson County ("OCHC") for injuries sustained as a result of sexual abuse by another client of OCHC. Plaintiff alleged that OCHC negligently supervised the offending client.

The Law Division concluded that OCHC was entitled to charitable immunity on the negligence claims and granted defendant summary judgment. The Appellate Division reversed.

In reversing the Law Division decision, the Appellate Division focused on the source of funding of OCHC to determine whether or not it was a legitimate charity. The Court found that charitable immunity was inappropriate, among other reasons, because OCHC obtained most of its funding from a combination of government grants from Federal, State, County and Municipal governments and payments obtained in the private market. It further found that the contributions from private donors (the funds intended to be protected by the charitable immunity statute) were too insignificant to deem OCHC as a legitimate, qualifying charity. *Id.* at 136,36.

In the instant matter Spectrum has thus far failed to comply with any discovery related to their charitable immunity defense.<sup>4</sup> Nevertheless, given the limited information we have now, it is clear Spectrum can not qualify as a legitimate charity under the Charitable Immunity Act.<sup>5</sup>

In her Affidavit Ann Long makes reference to “the facility’s total income.” First, the meaning and relevance of this is unclear. Indeed, Spectrum’s own website states, “Spectrum’s annual budget exceeds \$23,000,000.00 [Twenty-three million dollars]”. (*Exhibit A*, Spectrum

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<sup>4</sup>While discovery specifically tailored to the charitable immunity defense was recently served, defendant refused to provide discovery relevant to same in connection with plaintiff’s initial demands, for example, corporate tax returns. (*Exhibit H*, Clark Certification).

<sup>5</sup>It is also firmly established that a party is entitled to conduct full discovery to find support for a claim before a motion for summary judgment will be entertained, especially when critical facts are within the knowledge of other parties to the action. *See James v. Bessemer Processing Co.*, 155 N.J. 279, 311, 714 A.2d 898 (1998); *Velantzas v. Colgate-Palmolive Co.*, 109 N.J. 189, 193, 536 A.2d 237 (1988); *Salomon v. Eli Lilly and Co.*, 98 N.J. 58 (1984); *Bilotti v. Accurate Forming Corp.*, 39 N.J. 184, 193, 188 A.2d 24 (1963); *Standridge v. Al Ramey*, 323 N.J. Super. 538 (App. Div. 1999). However, it is plaintiffs’ position that the Court is in possession of sufficient information now to deny Spectrum’s motion with prejudice.

webpage “Membership 2000”). The fact that the Edison Condos received about \$150,000.00 in private contributions is nothing compared to Spectrum’s \$23,000,000.00 annual budget. Clearly the vast majority of Spectrum’s funding comes from the government and charitable immunity is inapplicable.

The attached certification of Joseph Griscti further demonstrates that Spectrum’s position on charitable immunity is factually unsupported and false. (*Exhibit J*, Certification of Joseph Griscti). Spectrum argues for example that 17% of its income (about \$150,000) comes from “subsidies from Spectrum’s Board as a result of private individual fund-raising donations and activities.” Aside from the fact that \$150,000 is infinitesimal given Spectrum’s total budget of \$23,000,000, this is factually incorrect. These monies can not be classified as income because on all Spectrum Middlesex financial statements monies received from Spectrum for Living Development are classified as loans, not income. (*Exhibit J*, Certification of Joseph Griscti, sub exhibit A-due from [to] SFL Dev. Inc.)

Mr. Griscti further demonstrates in detail the lack of merit of Spectrum’s position with the following chart, referring to sub exhibits B-1 and B-2 of his certification which reflect the following:

Unrestricted Donations	10,000
Dinner Dance Income	80,522
In lieu of dinner dance	8,797
Dinner Dance expenses	<u>(41,697)</u>
<hr/>	
Net donations/fund-raising	57,622
Total Revenue	1,109,748
PERCENTAGE	5.2%
<b>Not the 19% Ann Long indicates!</b>	

(*Exhibit J*, Certification of Joseph Griscti).

Based on his personal knowledge of Spectrum's financial matters, Mr. Griscti further certifies that if they would turn over in discovery their financial documents, such as for example, previous years tax returns for Spectrum Middlesex (2/29/00 and 2/28/01) he expects the fund-raising amounts reflected as income will not be 17% for 2/29/00 and 14% for 2/28/01. Mr. Griscti also certifies that Spectrum Middlesex never had fund-raising amounts close to the dollars stated in Ms. Long's affidavit of 9/9/02. (*Exhibit J*, Certification of Joseph Griscti).

Finally, Mr. Griscti certifies that, based on his personal experience with Spectrum, as well as from their website, that Spectrum for Living Development, Inc. and its related/controlled subsidiaries have annual revenue of \$23,000,000. He estimates that at most only about 3% of this revenue is derived from fund-raising.<sup>6</sup> The remaining 97% comes from State, Federal, County and Municipal grants and contract revenue. (*Exhibit J*, Certification of Joseph Griscti).

Clearly under these circumstances, Spectrum can not be deemed a charity for purposes of the Charitable Immunity Act. Indeed, it is clear the vast majority of Spectrum's income comes from government funding and monies earned as a result of housing residents and their motion for summary judgment should be denied. Parker, 243 N.J.Super. 317; Abdallah, 351 N.J.Super. 280; See also Bieker v. Community House, 169 N.J. 167, 179-80 (2001) (holding that if the income is dominated by non-charitable funding, immunity shall not apply); Pompton Lakes Senior Citizens Housing Corp. v. Borough of Pompton Lakes, 16 N.J. TAX 331 (Tax Court 1997) (denying Charitable status where alleged charity which provided laudable public service where its funding was primarily derived from government funding and rent payments of residents). Furthermore, even if 17% of Spectrum's income was from private contributions, a statement which is clearly not correct,

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<sup>6</sup>We expect the evidence will show even less.

they still should not qualify as a charity because its funding would still be dominated by government funding and contract income. Id.

Interestingly enough, defendant knows the vast majority of its funding comes from the government. Nevertheless, not only have they failed to produce documents to demonstrate the specifics of the government funding, but they fail to even mention same in their moving papers. Instead they make passing reference to Morales v. Martinez, 302 N.J.Super. 50 (App. Div. 1997). However, Morales is not on point.

In Morales the court permitted the application charitable immunity because, unlike Spectrum, although it received government support, the defendant in Morales was, ““essentially supported through charitable contributions.”” Id. at 55, *citing*, Parker, 243 N.J.Super. at 327-28. Indeed, in Morales the defendant derived 40% of its finding from private contributions. Id. at 55. Here Spectrum incorrectly claims about 17% of its funding comes from private contributions. Although incorrect, even if accurate that would still be insufficient for charitable immunity to apply.

In addition, the Court grounded its decision in the fact that, again unlike Spectrum here, in Morales the State did not have not have any arrangement for financial aid, grants or assistance to the defendant nor any commitment to support its general operations. Id. at 52, 55. The instant matter is much different where the vast majority of Spectrum’s \$23,000,000 budget comes from the State of New Jersey pursuant to extensive government funding programs as provided by statute.

Indeed, the threshold issue in any case involving a charitable immunity claim is whether the defendant non-profit corporation, society or association is “organized exclusively for religious, charitable or educational purposes.” In making its case for immunity Spectrum relies on the legislative mandate the Charitable Immunity Act is to be “liberally construed.” However, as the

Supreme Court made clear, the liberal construction referred to in N.J.S.A. 2A:53A-10, “does not come into play until there is a determination that the institution seeking to assert the immunity is one organized for 'religious, charitable [or] educational ... purposes.’” Lawlor v. Cloverleaf Memorial Park, Inc., 56 N.J. 326, 337 (1970). In the instant matter Spectrum has not and can not meet this threshold. New Jersey Courts have held that charitable immunity does not extend to various non-profit entities that perform vital public services. See, e.g., Lawlor, supra (cemetery association); Parker, supra (low income housing complex subsidized with federal funds and operated by church); Jacobs v. North Jersey Blood Ctr., 172 *N.J.Super.* 159 (Law Div.1979) (blood bank). Similarly, Spectrum is not entitled to immunity under the Charitable Immunity Act and its motion for summary judgment should be denied with prejudice.

***ii. Spectrum is Not Entitled to Charitable Immunity Because Danielle Gruskowski was not a Beneficiary, and Spectrum was not Engaged in any Charitable Activity, at the Time it was Throwing Hot Coffee in Her Face***

It is undisputed the Charitable Immunity Act only applies to beneficiaries of the alleged charity with respect to the time of the relevant event. N.J.S.A. 2A:53A-10 Furthermore, whether a plaintiff is a beneficiary of the “works” of a nonprofit, charitable organization for immunity purposes depends upon whether, at the time of the injury, the organization pleading immunity was engaged in the performance of the objectives it was organized to advance. Book v. Aguth Achim Anchai of Freehold, 101 *N.J.Super.* 559 (App. Div.1968). In this case it would be absurd for Spectrum to argue it was rendering a charitable service to Danielle Gruskowski by throwing hot coffee in her face. Even though this action did ultimately benefit Danielle inasmuch as she was

admitted to the hospital and thus granted a brief respite from Spectrum's treatment, it would be against public policy to find same was a legitimate, qualifying benefit to her.

Accordingly, since Spectrum was not engaged in any charitable activity vis a vis Danielle at the time of the injury, charitable immunity is inapplicable. Id.

### POINT III

#### **ASSUMING ARGUENDO THE CHARITABLE IMMUNITY ACT APPLIES TO SPECTRUM, ALL NON-NEGLIGENCE CLAIMS AS WELL AS ALL CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS SURVIVE**

*i. Charitable Immunity Would Not Apply to Claims Arising from Statutory Violations or Breach of Contract*

Spectrum pretends to ignore the fact that this case involves far more than ordinary negligence claims. The treatment plaintiffs have been subjected to at the hands of Spectrum and its employees is shocking. These cases all involve claims of willful, wanton and grossly negligent conduct, as well as claims arising from violations of various statutes and regulations including the Americans with Disabilities Act, the New Jersey Administrative Code for the Safe Transportation of Wheelchair Bound Passengers and the New Jersey Nursing Home Rights and Responsibilities Act. Where charitable immunity is applied, it only serves to dismiss claims for ordinary negligence. Other claims which arise under, or brought pursuant to violations of statutes are not subject to dismissal. See, e.g., Gabin v. Skyline Cabana Club, 54 N.J. 550 (1969) (Charitable Immunity inapplicable where claims based on violation of Child Labor Law statute); Brody v. Overlook Hospital, 121 N.J.Super. 299 (Law Div.1972), *reversed on other grounds* 127 N.J.Super. 331, *affirmed* 66 N.J. 448; see also generally N.J.S.A. 30:13-1, et seq., the New Jersey Nursing Home Responsibilities and Rights Act. This would particularly be the case with respect to the American's With Disabilities Act because it is a federal law which would preempt the state Charitable Immunity Act.

Similarly, the plain language of the Charitable Immunity Act clearly only contemplates dismissal of ordinary *negligence* claims. N.J.S.A. 2A:53A-7 (repeatedly referring to “negligence” as the claim subject to dismissal and providing exceptions in cases of gross negligence against agents



and employees). In this case all plaintiffs are third party beneficiaries of the same contractual relationship between Spectrum and the State of New Jersey. They have all advanced claims for breach of contract and unjust enrichment related to same.

Accordingly, even if the Court were to accord Spectrum charitable immunity under these facts, and plaintiff respectfully argues Spectrum is not so entitled, this would only work to accord immunity for the ordinary negligence claims.<sup>7</sup> The balance of plaintiff's claims including the statutory violations, breach of contract and unjust enrichment would not be subject to dismissal.

***ii. Charitable Immunity is inapplicable to the claims of willful, wanton and grossly negligent conduct of the individual defendants, as well as the auto negligence claims in the Griscti case***

In its brief for summary judgment, Spectrum relies on N.J.S.A. 2A:53A-7, the Charitable Immunity Act. In quoting same, defendant writes, “[the Act]” provides impertinent part that...” Defendant then proceeds to cite the portions of the act which they find favorable to their case. (*Defendant's brief at 7*). They however omit to bring the following to the Court's attention:

c. Nothing in this section shall be deemed to grant immunity to: (1) any trustee, director, officer, employee, agent, servant or volunteer *causing damage by a willful, wanton or grossly negligent act of commission or omission*, including sexual assault and other crimes of a sexual nature; (2) any trustee, director, officer, employee, agent, servant or volunteer *causing damage as the result of the negligent operation of a*

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<sup>7</sup>There has been some controversy as to whether the Charitable Immunity Act applied in cases of gross negligence and the like. See, e.g., Schultz v. Roman Catholic Archdiocese of Newark, 95 N.J. 530 (1984) (recognizing the unsettled question of the statute's application to acts of reckless misconduct); Mahoney v. Carus Chemical Co., Inc., 102 N.J. 564; Siederman v. Amer. Inst. for Mental Studies, 667 F.Supp. 154 (D.N.J. 1987) (holding the Charitable Immunity Act inapplicable in cases of gross negligence). However, the issue has largely become moot since the 1995 amendment of the Act which carves out specific exceptions in cases of gross negligence. N.J.S.A. 2A:53A-7

*motor vehicle*; or (3) an independent contractor of a nonprofit corporation, society or association organized exclusively for religious, charitable, educational or hospital purposes.

N.J.S.A. 2A:53A-7 (emphasis added). As set forth herein, these three cases all involve numerous claims against Spectrum's officers, directors, employees, agents and the like. For example, in the *Gruskowski* matter Spectrum employee Joy Jackson threw hot coffee in Danielle's face. In the *Griscti* case, there are four individual defendants named: Betty Jean; Marie Nolan, Anne Long and Richard Bonelli. As set forth in great detail in the *Griscti* Complaint, including four exhibits annexed thereto, the claims for willful, wanton, and grossly negligent conduct on the part of these individuals are clear. Furthermore, since the *Griscti* matter directly involves damage caused as a result of the negligent operation of the van in which Stephen Griscti suffered his broken femur, charitable immunity is clearly further inapplicable to these defendants.<sup>8</sup> Clearly, none of these claims should be dismissed.

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<sup>8</sup>While the *Pfund* case does not name individual defendants, that cause of action is largely grounded in the New Jersey Nursing Home Responsibilities and Rights Act and is not subject to dismissal. see supra.

**CONCLUSION**

Accordingly, it is respectfully requested the Court grant plaintiffs' cross motion to consolidate and deny Spectrum's motion for summary judgment with prejudice.

LYNCH ♦ MARTIN  
Attorneys for Plaintiffs

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GERALD H. CLARK

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