

NO. 033892

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON

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DYLAN TURNER, RHIANNON TURNER,  
RONAN TURNER, by their Next Friend and  
Parent, DIANE TURNER, individually and on  
her own behalf,

Plaintiffs Below/Appellants

vs.

From the Circuit Court of Berkeley County  
Civil Action No. 06-C-717  
Christopher C. Wilkes

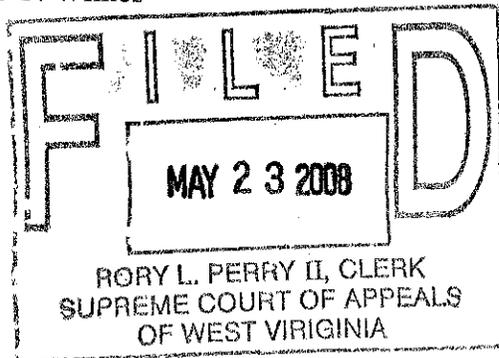
CHARLES TURNER, JR., CHARLES TURNER, SR.  
and LAURIE TURNER,

Defendants Below

and

CITY HOSPITAL, INC.,

Intervenor Below/Appellee



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**APPELLEE'S RESPONSE BRIEF**

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Christine S. Vaglianti (W.Va. State Bar ID No. 4987)  
Associate Litigation Counsel  
WEST VIRGINIA UNIVERSITY HOSPITALS, INC.  
P.O. Box 8128  
Morgantown, West Virginia 26506-8128  
Telephone: 304/598-4199  
Facsimile: 304/598-4292

*and*

Grant P.H. Shuman (W.Va. State Bar ID No. 8856)

SPILMAN, THOMAS & BATTLE, PLLC

P.O. Box 273

Charleston, West Virginia 25321-0273

Telephone: (304) 340-3895

Facsimile: (304) 340-3801

*Counsel for Respondent*

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A. **The Order from which Appellants appeal is not a final order; therefore, this Honorable Court, respectfully, does not have jurisdiction in its appellate capacity over this matter.**

B. **The Circuit Court properly ruled that it has jurisdiction to approve or disapprove the proposed settlements set forth in the three separate Petitions for Approval of Minor’s Settlement submitted on behalf of Dylan Turner, Rhiannon Turner and Ronan Turner.**

C. **The Circuit Court properly ruled that it does not have jurisdiction to limit The Plan’s subrogation rights with respect to the proposed settlements set forth in the three separate Petitions for Approval of Minor’s Settlement submitted on behalf of Dylan Turner, Rhiannon Turner and Ronan Turner as asserted by Appellants.**

D. **The Plan’s subrogation interest is not void as a matter of public policy as to Mrs. Turner’s children.**

E. **The language of The Plan is clear and unambiguous and must be applied as written, notwithstanding Appellant’s attempts to avoid the clear and unambiguous terms of The Plan.**

(1) **Appellants’ State common law claims do not overcome the clear and unambiguous language of The Plan.**

**(2) Appellants' State common law defenses to Appellee's right to subrogation are preempted by ERISA.**

**a. Regardless of whether the made whole rule is preempted by ERISA, the express terms of The Plan render it inapplicable under both West Virginia and federal law.**

**b. The common fund doctrine does not defeat The Plan's right to subrogation.**

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TO THE HONORABLE JUSTICES OF THE  
SUPREME COURT OF APPEALS OF WEST VIRGINIA:

I. **KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER COURT**

On October 4, 2004, Andrea Diane Turner's (Mrs. Turner) three children, Dylan, Rhiannon and Ronan were in a motor vehicle accident. Because Mrs. Turner was an employee of City Hospital, Inc., she and her children were entitled to medical benefits under the City Hospital, Inc. Employee Benefits Plan ("The Plan"). Mrs. Turner made a claim for medical benefits for her children and The Plan paid medical benefits on behalf of the children, subject to its right of subrogation.

On or about October 2, 2006, Mrs. Turner filed suit on behalf of her children, and on her own behalf, against her former husband, Charles Turner, Jr., who is alleged to have been impaired while driving the vehicle in which the Turner children were passengers at the time of the motor vehicle accident on October 4, 2004, and against Charles Turner, Sr. and Laurie Turner, owners of the vehicle being driven by Charles Turner, Jr. (hereinafter "tortfeasors"). In the Complaint, Mrs. Turner alleged that each of the children incurred "divers and sundry expenses in and about (their) medical care and attention." Mrs. Turner also alleged that "she has expended out-of-pocket expenses for the payment of medical bills and specials needs costs for the children...". *See*, Complaint, ¶¶ 27, 30, 34 and 39.

Mrs. Turner and her counsel reached tentative settlements on behalf of the Turner children with the tortfeasors' insurer and with Mrs. Turner's own underinsured motorist insurance carrier. Because Mrs. Turner's children are minors, the proposed settlements

had to be approved by the Circuit Court of Berkeley County, pursuant to West Virginia Code §44-10-14 (2002).

Despite their knowledge of the subrogation provisions of The Plan, and The Plan's assertion of its subrogation rights, Mrs. Turner and her counsel did not inform the Circuit Court of The Plan's assertion of its subrogation rights. Therefore, The Plan intervened in the civil action filed by Mrs. Turner against the tortfeasors for the purpose of protecting its right to subrogation, and to prevent Mrs. Turner from dissipating the settlement funds in derogation of The Plan's rights.

After considering the oral argument and written briefs of the parties, the Circuit Court determined that it had jurisdiction to approve or disapprove the proposed settlements set forth in the three separate Petitions for Approval of Minor's Settlement submitted on behalf of Dylan Turner, Rhiannon Turner and Ronan Turner. The Court determined that it did not have jurisdiction to limit The Plan's subrogation rights with respect to the proposed settlements set forth in the three separate Petitions for Approval of Minor's Settlement submitted on behalf of Dylan Turner, Rhiannon Turner and Ronan Turner as asserted by Appellants. The case was stayed pending further order of the Court, and no final order was ever entered. It is from the Court's order dated September 20, 2007, setting forth these rulings that the Appellants appeal.

## **II. STATEMENT OF FACTS**

On October 4, 2004, the defendant, Charles Turner, Jr., was operating a motor vehicle owned by his father and stepmother, Charles Turner, Sr. and Laurie Turner. Charles Turner, Jr.'s children, Dylan, Rhiannon and Ronan, were passengers in the vehicle. Mr. Turner, while driving under the influence, lost control of the vehicle and ran

into a utility pole. The children sustained injuries. Ronan's injuries were the most serious.

The children's mother, Andrea Diane Turner ("Mrs. Turner"), was an employee of City Hospital, Inc. at the time of the accident involving her children. By virtue of her employment with City Hospital, Mrs. Turner was a participant in the City Hospital Group Benefits Plan and her children were beneficiaries of The Plan. The Plan includes the following, unambiguous language<sup>1</sup> concerning The Plan's subrogation rights:

#### **RIGHT OF REIMBURSEMENT AND SUBROGATION**

To the extent The Plan pays or reimburses any medical or other expense for a Covered Person, it shall have the right to be reimbursed for those expenses from any recovery that any Covered Person may obtain from or against any individual...or any other entity which may be liable for such payment as the result of negligence, contract, or otherwise, including, but not limited to, that Covered Person's own insurance company (for example, that Covered Person's own uninsured or underinsured motorist coverage for automobile insurance medical payments provisions or homeowner's coverage)(hereinafter referred to as "Responsible Party"); this is known as The Plan's right of reimbursement.

...If The Plan Administrator determines, in its sole discretion, that the Covered Person is not adequately protecting The Plan's interests in connection with his or her pursuit of a claim against any Responsible Party, then The Plan Administrator, on behalf of The Plan, shall have the right to intervene in the civil action, lawsuit or claim which the Covered person has filed or made against any Responsible Party to the extent The Plan has paid or reimbursed any medical or other expenses for that Covered Person under The Plan; this is known as The Plan's right of subrogation.

The Plan's right of reimbursement and subrogation are hereinafter referred to as "Right of Subrogation."

The Plan's Right of Subrogation shall constitute an equitable lien against the proceeds (no matter how they are characterized) of any: (1) settlement or compromise between a Covered Person and any Responsible Party; or (2)

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<sup>1</sup> A copy of the Summary Plan Description was submitted to the Circuit Court as Exhibit A to "City Hospital, Inc.'s Objection to Proposed Settlements and Motion for Continuance," filed April 18, 2007. It is important to note that at no time has Mrs. Turner or her counsel asserted that the subrogation language in the Summary Plan Description is ambiguous. There is also no dispute that Dylan, Rhiannon and Ronan Turner are "Covered Persons" under the Plan.

judgment or award obtained by any Covered Person against any Responsible Party. Further, The Plan's Right of Subrogation shall constitute such lien notwithstanding any allocation or apportionment that purports to dispose of portions of the Covered Person's cause of action not subject to The Plan's Right of Subrogation. Any settlement, compromise, judgment or award which excludes or limits or attempts to exclude or limit the cost of medical care or services, or medical products...shall not preclude The Plan from enforcing its Right of Subrogation and/or subrogation lien. *The Plan's Right of Subrogation and/or subrogation lien shall not be eliminated or limited in any way should the settlement, compromise, judgment or award fail to fully compensate or "make-whole" the Covered Person on his or her total claim against any Responsible Party...*(emphasis added).

A Covered Person and/or his or her legal counsel shall promptly pay to The Plan Administrator all amounts recovered as a result of any settlement, compromise, judgment, or award to the extent that any medical or other expenses for that Covered Person have been paid under The Plan...*The Plan has no obligation or duty to pay any legal fees or expenses incurred by such Covered Person in reaching a settlement or compromise or obtaining a judgment or award...*(emphasis added).

Mrs. Turner submitted claims for medical expenses incurred on behalf of her children to InforMed, the third-party administrator of The Plan. In December 2004, InforMed requested additional information from Mrs. Turner in order to evaluate the claims. On December 10, 2004, Mrs. Turner submitted the requested information and agreed "to reimburse The Plan for any benefits paid by or any monies recovered from a third-party as a result of judgment, settlement or otherwise".<sup>2</sup> In her written description of the accident that caused injuries to her children, Mrs. Turner wrote: "...I have obtained a lawyer and understand that when a settlement occurs, InforMed will be reimbursed for payment rendered on the medical bills. At this time, the bills total more than what the insurance coverage allows. However, my lawyer is working diligently to have the total costs taken care of."

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<sup>2</sup> A copy of the information submitted by Mrs. Turner and her signed acknowledgement of the Plan's subrogation rights were submitted to the Circuit Court as Exhibit B to "City Hospital, Inc.'s Objection to Proposed Settlements and Motion for Continuance," filed April 18, 2007.

On April 8, 2005, Mrs. Turner's counsel also acknowledged The Plan's subrogation rights. In correspondence to InforMed, Mrs. Turner's counsel wrote, "...Mrs. Turner is willing to provide for subrogation for any payments made in the event that such recovery is made."<sup>3</sup>

Mrs. Turner's counsel then reached a tentative settlement of the children's claims with the insurer of the vehicle Mr. Turner was driving at the time the children were injured. By correspondence dated November 10, 2006, counsel for City Hospital, Inc. informed Mrs. Turner's counsel that "City Hospital does not waive its subrogation rights with respect to any settlement which may be reached on behalf of" Ronan Turner, Dylan Turner, Rhiannon Turner or Andrea D. Price (formerly Turner).<sup>4</sup>

Because the children are minors, the parties were required to seek the Circuit Court's approval before effectuating the settlement, pursuant to West Virginia Code §44-10-14 (2002). Prior to executing and filing the three separate Petitions for Approval of Minor's Settlement on or about April 9, 2007,<sup>5</sup> Mrs. Turner and her counsel were aware of The Plan's assertion of its subrogation rights and had acknowledged the same, in writing, as set forth above. Despite the clear and unambiguous subrogation language of the Summary Plan Description, and despite Mrs. Turner and her counsel's knowledge of The Plan's assertion of its subrogation rights, the Petitions for Approval of Minor's Settlement submitted on behalf of Dylan Turner, Rhiannon Turner and Ronan Turner by Mrs. Turner and her counsel did not even *mention* The Plan's subrogation claims. With

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<sup>3</sup> See, Exhibit 1 to "Intervenor City Hospital, Inc.'s Group Benefits Plan Brief in Support of Its Claim for Subrogation", filed July 25, 2007.

<sup>4</sup> See, Exhibit C to "City Hospital, Inc.'s Objection to Proposed Settlements and Motion for Continuance".

<sup>5</sup> See Certificate of Service for Notice of Hearing, Order and Petitions filed on or about April 9, 2007.

respect to the Plan's right of subrogation and equitable lien for the same, the Petitions were frankly misleading.

For example, the petition for approval of the settlement on behalf of Ronan Turner includes the statements that "InforMed has also paid medical expenses in the amount of \$106,697.08; however, no Notice of Lien has been received." Not only does the petition fail to mention The Plan's assertion of its right to subrogation, of which Ms. Turner and her counsel were obviously aware, but intentionally misleads the Circuit Court by suggesting that The Plan had not asserted a right to subrogation.<sup>6</sup> The petition submitted for approval of the settlement on behalf of Ronan Turner asked the Court to approve the release of liability attached as Exhibit A to the petition. Said release of liability contains, among other things, the following language: "Westfield Insurance Company will pay the sum of \$105,000.00 in the manner directed by the Circuit Court of Berkeley County, to Andrea D. Turner, individually and as the Mother and Next Friend of Dylan Turner, a minor..." The release further provides that "Nationwide Insurance Company of America will pay the underinsured motorist sum of \$15,000.00 in the manner directed by the Circuit Court of Berkeley County, to Andrea D. Turner, individually and as the Mother and Next Friend of Ronan Turner, a minor..."<sup>7</sup> Further, the release states that:

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<sup>6</sup> The United States District Court for the Southern District of West Virginia considered sanctions against an attorney who deliberately concealed relevant and material information from the court with respect to an employee benefits plan's subrogation rights. See, *Devine v. American Benefit Corp.*, 27 F. Supp. 2d 669, 675 n. 5 (1998). See also, *Provident Life and Acc. Ins. Co. v. Bennett*, 199 W.Va. 236, 240, 483 S.E. 2d 819, 932 (1997) ("If the settlement by the [appellees] and [their insurer] was made with the knowledge, actual or constructive, of [the appellant's] subrogation rights, such settlement and release is a fraud on [the appellant] and will not affect [the appellant's] right to subrogation against [the appellee] or his insurance company.") (citations omitted).

<sup>7</sup> Paragraphs 2 and 3, Exhibit A, attached to the Petition to Approve Minor's Settlement on behalf of Ronan Turner.

Andrea Turner, individually and as the Mother and Next Friend of Dylan Turner, a minor, further warrants and represents that there are no other legal claimants to the proceeds of this settlement other than those set forth in the Petition; that all other expenses not paid from the proceeds of this settlement have been resolved and all rights of subrogation and indemnification against those hereby released have been paid, waived or have otherwise been satisfied. To the extent that any such claims have not been satisfied, the undersigned agrees to save and hold harmless those hereby released and reimburse them for any losses or expenses they may incur in defending any action brought against them by reason of rights acquired by subrogation or otherwise derivative of the incident referenced above.<sup>8</sup>

The Petitions for Approval of Minor's Settlement submitted on behalf of Dylan Turner and Rhiannon Turner, likewise, mentioned medical expenses paid by InforMed on behalf of Dylan and Rhiannon, but did not mention The Plan's assertion of its subrogation rights, of which Mrs. Turner and her counsel were aware. Said petitions also asked the Circuit Court to approve releases containing similar language to that quoted above.

Because the Petitions for Approval of Minor's Settlement did not mention, acknowledge, or protect The Plan's subrogation claims, The Plan filed an Objection to the Proposed Settlements. At a hearing on June 22, 2007, the Circuit Court considered the Objection to the Proposed Settlements as a Motion to Intervene pursuant to Rule 24(a) of the West Virginia Rules of Civil Procedure, and granted The Plan's Motion to Intervene. Thereafter, the Circuit Court directed the parties to submit briefs addressing The Plan's assertion of its subrogation rights in this matter, including but not limited to whether the Circuit Court had jurisdiction to consider the Petitions for Approval of Minors' Settlements in light of ERISA's governance of The Plan.

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<sup>8</sup> *Id.*, Paragraph 7.

By Order entered September 20, 2007, the Circuit Court of Berkeley County ruled that it had jurisdiction to approve or disapprove Dylan, Rhiannon and Ronan Turner's proposed infant settlements as set forth in three separate Petitions for Approval of Minor's Settlement, but it did not have jurisdiction to decide, limit or enforce the Plan's subrogation rights to the Proposed Minor's Settlements submitted on behalf of Dylan, Rhiannon and Ronan Turner. Plaintiffs have taken no other steps before the lower court to advance this settlement, despite the fact that the September 20, 2007 Order clearly contemplates further action. Nevertheless, it is from this Order which Plaintiffs/Appellants appeal. The Intervenor Below/Appellee urges this Honorable Court to affirm the ruling of the Circuit Court of Berkeley County and to remand this matter to the Circuit Court.

### III. TABLE OF POINTS AND AUTHORITIES RELIED UPON

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#### IV. DISCUSSION OF LAW

##### 1. Standard of Review

A circuit court's factual findings are reviewed under a clearly erroneous standard. However, in the case *sub judice*, there is no dispute concerning the circuit court's factual findings. A circuit court's rulings on questions of law are subject to a *de novo* review. Syl. pt. 1, *Pobro, LLC v. LaFollette*, 217 W.Va. 425, 618 S.E. 2d 434 (2005); Syl. pt. 1, *Raleigh General Hospital v. Caudill*, 214 W.Va. 757, 591 S.E. 2d 315 (2003)(citations omitted).

##### 2. Argument

**A. The Order from which Appellants appeal is not a final order; therefore, this Honorable Court, respectfully, does not have jurisdiction in its appellate capacity over this matter.**

The Order from which Appellants appeal is not a "final order." In fact, the Order itself evinces the Circuit Court's intention to retain this matter on its docket and to take additional action. "The objections of the parties are duly noted, and this action is STAYED pending the next order of this Court pertaining to this case." *See*, Order entered September 20, 2007.

Appeals may only be taken from final decisions of a circuit court. "A statutory right to appeal arises in a civil case following the entry of a 'final judgment, decree or order'." *Durm v. Heck's, Inc.*, 184 W.Va. 562, 566 n.3, 401 S.E. 2d 908, 912 n. 3 (1991) (quoting W.Va. Code §58-5-1(a)(1966)). A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined. Syl. pt. 3, *James M.B. v. Carolyn M.*, 193 W.Va. 289, 456 S.E. 2d 16 (1995). There are narrow exceptions to the rule of

finality, including writs of prohibition, certified questions and the “collateral order doctrine,” none of which are applicable to this case

To fall within the collateral order doctrine, an order appealed from must (1) be conclusive; (2) resolve significant issues separate from the merits; and (3) render those significant issues “effectively unreviewable on appeal from final judgment on the underlying action.” *Adkins v. Capehart*, 202 W.Va. 460, 464 n. 15, 504 S.E. 2d 923, 926 n.15 (1998) (quoting *Coleman v. Sopher*, 194 W.Va. 90, 96 n. 7, 459 S.E. 2d 367, 373 n. 7 (1995)) (citing *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867, 114 S. Ct. 1992, 129 L. Ed. 2d 842 (1994)).

The “finality rule” preserves the autonomy of the trial court by minimizing appellate interference and ensuring that the role of the appellate court will be one of review rather than intervention. It furthers efficiency by providing there only will be review where the record is complete and judgment has been pronounced. In the civil context, the rule reduces the ability of litigants to wear down their opponents by repeated, expensive appellate proceedings. *James M.B.*, 193 W.Va. at 292, 456 S.E. 2d at 20.

In this case, the Circuit Court has made no ruling either approving or disapproving the proposed settlements for the three minors. If the Circuit Court is inclined to approve the proposed settlements, it has made no ruling with respect to the distribution of settlement funds. Consequently, the Appellee is not yet in a position to address its subrogation rights in the appropriate federal forum because, to date, there is no consummated settlement from which to seek reimbursement or subrogation. At this point in the litigation between the parties there is only a possibility of settlements being paid by

the defendants to and on behalf of the minors and subsequent action by the Appellee to file an equitable action to protect its subrogation rights.

With this appeal, Appellants have not presented a writ of prohibition or a certified question. The Order from which this appeal is taken is not conclusive, as noted above. The Order does not resolve—or even address—important issues separate from the merits of the dispute between Appellees and Appellant, or between Appellees and Defendants. Finally, the Order makes no ruling that is “effectively unreviewable on appeal from final judgment on the underlying action” as was the case in *Durm*, where the trial court granted summary judgment, with prejudice, to one of the parties, essentially ending the litigation as to that party. Thus, the Order appealed from in this case does not fall within any of the recognized exceptions to the rule of finality.

With rare exceptions, the “finality rule,” requiring orders to be final before appeal, is mandatory and jurisdictional. *James M.B.*, 193 W.Va. at 293, 456 S.E. 2d at 19. Because the Order entered by the Circuit Court of Berkeley County on September 26, 2007 is not a final order, this Honorable Court, respectfully, does not have jurisdiction in its appellate capacity over this matter.

However, if this Honorable Court elects to exercise its appellate jurisdiction over this matter despite the lack of finality of the Circuit Court’s September 20, 2007 Order, it is clear that the Order entered below is correct.

**B. The Circuit Court properly ruled that it has jurisdiction to approve or disapprove the proposed settlements set forth in the three separate Petitions for Approval of Minor’s Settlement submitted on behalf of Dylan Turner, Rhiannon Turner and Ronan Turner.**

West Virginia Code §44-10-14 (2002), the “Minor Settlement Proceedings Reform Act,” gives the Circuit Court of Berkeley County authority to grant or reject the proposed settlements and releases of the children’s claims negotiated by Ms. Turner, as well as the distribution of settlement proceeds.

A federal court considering The Plan’s rights would have no corresponding authority to rule upon the proposed infant settlements. The underlying claims against the tortfeasors, Mr. Turner, Jr., Mr. Turner, Sr. and his wife, Laurie Turner, are not based on ERISA or any other federal question. They are simple negligence claims that are not preempted by The Plan’s assertion of its subrogation rights with respect to the proposed settlements. Therefore, a federal court would have no jurisdiction over the underlying negligence claims and the case is not currently in a posture that would allow The Plan to remove this matter to federal court. *See, Grusznski v. Viking Ins. Co.*, 854 F. Supp. 586 (E.D. Wis. 1994); *Pfefferle v. Solomon*, 718 F. Supp. 1413 (E.D. Wis. 1989)<sup>9</sup>.

In deciding whether to grant the proposed settlements, the Circuit Court must consider The Plan’s subrogation claim. Indeed, the West Virginia Code expressly states that:

If the requested relief is granted, the court shall provide by order that an attorney appearing in the proceeding or other responsible person shall negotiate, satisfy and pay initial expense payments from settlement proceeds, the costs and fees incurred for the settlement and any bond required therefore, *expenses for the treatment of the minor related to the injury at issue*, payments to satisfy any liens on settlement proceeds, if any, and such other directives as the court finds appropriate to complete the settlement and secure the proceeds for the minor.

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<sup>9</sup> Note that these cases involve a unique Wisconsin statute that requires the joinder of all parties having claims based upon subrogation. These cases were also decided before the U.S. Supreme Court’s ruling in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356, 126 S. Ct. 1869, 164 L. Ed. 2d 612 (2006), discussed below.

W. Va. Code §44-10-14(g)(emphasis added). Thus, the Circuit Court must consider The Plan's assertion of its right to subrogation from the settlement proceeds when ruling upon the Petitions for Approval of Minors' Settlements.

**C. The Circuit Court properly ruled that it does not have jurisdiction to limit The Plan's subrogation rights with respect to the proposed settlements set forth in the three separate Petitions for Approval of Minor's Settlement submitted on behalf of Dylan Turner, Rhiannon Turner and Ronan Turner as asserted by Appellants.**

There has been a clear expression of congressional intent that ERISA's civil enforcement scheme be exclusive. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549, 95 L.Ed.2d 39 (1987). ERISA's civil enforcement provision, 29 U.S.C. §1132(3), provides:

Except for actions under subsection (a)(1)(B)<sup>10</sup> of this section, *the district courts of The United States shall have exclusive jurisdiction of civil actions under this sub-chapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this article. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7)<sup>11</sup> of subsection (a) of this section. (emphasis added).*

As previously noted, The Plan seeks equitable relief in the form of reimbursement of medical expenses it paid on behalf The Plan's beneficiaries from the proceeds of the beneficiaries' settlement with the tortfeasors. If it is necessary to file a civil action to

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<sup>10</sup> Subsection (a)(1)(B) provides: "A civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." There is no dispute in this matter that the Turner children were entitled to and received benefits under The Plan. Moreover, there is also little doubt that if Mrs. Turner truly believed that the Plan's subrogation rights were somehow invalid, she could have brought an action under this subsection in order to clarify the terms of the plan as to the instant settlement. Needless to say, she did not do so.

<sup>11</sup> Subsection (a)(7) provides: "A civil action may be brought by a State to enforce compliance with a qualified medical child support order (as defined in section 1169 (a)(2)(A) of this title)." This subsection is not applicable to the case at bar.

obtain said reimbursement, The Plan's action will be governed by 29 U.S.C. §1132(a), §502(a) which provides, in pertinent part, as follows:

A civil action may be brought...  
(3) by a participant, beneficiary, or *fiduciary* (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) *to obtain other appropriate equitable relief* (i) to redress such violations or (ii) *to enforce* any provisions of this subchapter or *the terms of the plan*. (emphasis added).

Respectfully, state courts do not have concurrent jurisdiction of actions brought pursuant to 29 U.S.C. §1132(a), §502(a)(3). Thus, only a federal court may decide The Plan's rights with respect to reimbursement from the proceeds of the beneficiaries' settlements with the tortfeasor.

It is important to note that, to date, The Plan has not filed any kind of action against Mrs. Turner or her children in the Circuit Court of Berkeley County, West Virginia, or in federal court. The Plan only intervened in this matter to make the Circuit Court aware that it intends to assert, under ERISA, its right to reimbursement for the amounts The Plan paid for the beneficiaries' medical expenses from the proceeds of the beneficiaries' settlements with the tortfeasors. The forum in which The Plan will assert its rights will be the United States District Court for the Northern District of West Virginia, if necessary.<sup>12</sup>

Information about The Plan's right to subrogation from the settlement proceeds was omitted from the petitions Appellants and her counsel filed with the Circuit Court. Had The Plan not made the Circuit Court aware of its intention to pursue equitable relief, the Circuit Court might have approved the settlements and directed that the proceeds be

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<sup>12</sup> Moreover, and contrary to Mrs. Turner's assertions, such an action would not require her to litigate anything against members of her family. Instead, such a suit would entail an action between her on behalf of her children and The Plan. In other words, The Plan is not attempting to force Mrs. Turner to file suit against anyone in order for the Plan to assert its rights.

disbursed in a manner that would have impaired The Plan's rights to seek equitable relief as provided for by ERISA, 29 U.S.C. §1132(a), §502(a).

For example, in *Great West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002), a divided Supreme Court of the United States found that a health plan could not impose personal liability on a plan participant and beneficiary for reimbursement of medical expenses the plan had paid where the plan participant and beneficiary settled their claims against a third-party tortfeasor, and the bulk of the settlement funds had been placed in a trust for the beneficiary's medical care. The Court found it significant that the funds to which the plan claimed entitlement were not in the possession of the plan participant and beneficiary, but rather, were in a special needs trust.

After *Knudson* was decided, a unanimous Supreme Court of the United States approved an action where a fiduciary of an ERISA plan sought equitable relief (as opposed to legal relief) from the proceeds of a beneficiary's settlement with a third-party tortfeasor. *See, Sereboff v. Mid-Atlantic Medical Services, Inc.*, 547 U.S. 356, 126 S. Ct. 1869, 164 L. Ed. 2d 612 (2006). In *Sereboff*, the Court found it significant that the ERISA fiduciary sought specifically identifiable funds within the possession and control of the beneficiaries. The ERISA fiduciary was not seeking to impose personal liability upon the beneficiaries for a contractual obligation to pay money. *Sereboff*, 547 U.S. at 356, 126 S. Ct. 1869 at 1874, 164 L.Ed.2d at 363. *See also, Kress v. Food Employers Labor Relations Ass'n.*, 391 F. 3d 563 (4<sup>th</sup> Cir. 2004) (finding that an ERISA plan's subrogation requirements were not unconscionable and the plan language unambiguously required the employee to reimburse the plan first out of any recovery from the third-party

for any accident benefits the plan paid to the employee); *Ralcorp Holdings, Inc., v. Fricke*, 290 F. Supp. 2d 759 (W.D. Ky. 2003) (finding that an administrator of an ERISA health plan was entitled to receive payments from proceeds payable to a plan participant from a structured settlement between the participant and a third-party up to the point of reimbursement for amounts previously paid for health care).

In addition to making the Circuit Court aware of The Plan's intention to seek reimbursement for the amounts it paid for the beneficiaries' medical expenses from the proceeds of the settlements with the tortfeasors, The Plan also asked the Court to preserve the proceeds of the settlements in order to allow The Plan to seek the equitable relief authorized by §502(a)(3) of ERISA. Specifically, The Plan asked that, if the Circuit Court approved the settlements set forth in the petitions, the Court order that the settlement proceeds be maintained in the client trust account of Appellants' counsel or in a separate investment account by Mrs. Turner. A similar procedure was adopted by the Connecticut Superior Court so that the United States District Court could decide a self-funded employee welfare plan's action under ERISA to recover constructive trust or equitable lien funds from medical expenses disbursed to a plan participant following settlement with a third-party tortfeasor. *See, Kassem v. Vanzanten*, 2004 WL 1888850 (Conn. Super. July 22, 2004)<sup>13</sup> and *Scholastic Corp. v. Kassem*, 389 F. Supp. 2d 402 (D. Conn. 2005). *See also, Sereboff*, 547 U.S. at 359, 126 S. Ct. 1874, 164 L. Ed. 2d at 1873 the parties entered into a stipulation that the beneficiaries would preserve the amount of health benefits paid by the plan in an investment account until the district court ruled on the merits of the case and all appeals, if any, were exhausted.

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<sup>13</sup> Copy attached as Exhibit 2 to "Intervenor City Hospital, Inc.'s Group Benefits Plan Brief in Support of Its Claim for Subrogation."

In essence, therefore, The Plan sought to ensure that the settlement funds would not be dissipated before The Plan would have the opportunity to pursue its rights to subrogation pursuant to *Knudson and Sereboff* in the appropriate forum. The West Virginia Code expressly provides that a circuit court may make “such other directives as the court finds appropriate to complete the settlement . . .” W. Va. Code § 44-10-14(g). In this case, the court appropriately declined to allow Mrs. Turner to circumvent The Plan’s rights by concealing the subrogation issue of which she and her counsel were clearly aware and distributing the settlement funds to defeat The Plan’s subrogation rights.

**D. The Plan’s subrogation interest is not void as a matter of public policy as to Mrs. Turner’s children.**

Appellants assert that The Plan’s right to subrogation is not valid because it is contrary to public policy of West Virginia. Appellants also assert that the The Plan’s right to subrogation is invalid because Mrs. Turner had no authority to enter into a contract with The Plan to “assign the children’s rights.”

Contrary to the Appellant’s assertions, this Court has held that:

A provision in an insurance policy providing for the subrogation of the insurer to the rights of the insured to the extent that medical payments are advanced to such insured by the insurer is distinct from an assignment of a tort claim and is not invalid as against public policy of this State.

Syl. pt. 1, *Federal Kemper Ins. Co. v. Arnold*, 183 W.Va. 31, 393 S.E. 2d 669 (1990) (citing *The Travelers Indemnity Co. v. Rader*, 152 W.Va. 699, 166 S.E. 2d 157 (1969)).

This Court has also held that a valid subrogation clause in an automobile insurance contract is enforceable within its terms against any covered person who received benefits

under the policy, even if other than the named insured. *Federal Kemper Ins. Co.*, at Syl. pt. 2. (emphasis added).

This Court has found that “[t]he right to maintain an action to recover pre-majority medical expenses incurred as a result of a minor’s personal injuries belongs to both the minor and the minor’s parents...”. Syl. pt. 5, *SER Packard v. Perry*, 221 W.Va. 526, 655 S.E. 2d 548 (2007). “Application of the common law doctrine of necessities confirms that in West Virginia, a minor may be responsible for his or her own medical expenses.” *Id.*, 221 W. Va. At 526, 655 S.E. 2d at 559. Despite Appellants’ attempt to characterize the payments to be made by the tortfeasors as for something other than hospital and medical expenses,<sup>14</sup> the clear and unambiguous language of The Plan states that:

The Plan’s Right of Subrogation shall constitute an equitable lien against the proceeds (no matter how they are characterized) of any: (1) settlement or compromise between a Covered Person and any Responsible Party; or (2) judgment or award obtained by any Covered Person against any Responsible Party. Further, the Plan’s Right of Subrogation shall constitute such lien notwithstanding any allocation or apportionment that purports to dispose of portions of the Covered Person’s cause of action not subject to the Plan’s Right of Subrogation. *Any settlement, compromise, judgment or award which excludes or limits or attempts to exclude or limit the cost of medical care or services, or medical products...shall not preclude the Plan from enforcing its Right of Subrogation and/or subrogation lien.* (emphasis added).

Moreover, West Virginia Code §44-10-14 (2002), the “Minor Settlement Proceedings Reform Act,” provides, in pertinent part:

If the requested relief is granted, the court shall provide by order that an attorney appearing in the proceeding or other responsible person shall negotiate, satisfy and pay... *expenses for the treatment of the minor related to the injury at issue*, payments to satisfy any liens on settlement proceeds, if any, and such other directives as the court finds appropriate to

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<sup>14</sup> Appellants’ brief, p. 24

complete the settlement and secure the proceeds for the minor.” West Virginia Code §44-10-14(g), emphasis added.

This is a clear expression of public policy that medical expenses advanced on behalf of a minor may be reimbursed from a minor’s recovery from a third-party, regardless of how the settlement proceeds are designated.

Thus, Appellants’ arguments that The Plan’s right of subrogation should be defeated because it against public policy and because the subrogation clause in The Plan is not valid as to the Turner children must also fail.

**E. The language of The Plan is clear and unambiguous and must be applied as written, notwithstanding Appellants’ attempts to avoid the clear and unambiguous terms of The Plan.**

- (1) Appellants’ State common law defenses to Appellee’s right to subrogation are preempted by ERISA.

ERISA preempts “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA, 29 U.S.C. §1144(a). ERISA preempts state regulatory law and common-law rules related to self-funded employee benefit plans. *FMC Corp. v. Holliday*, 498 U.S. 52, 61, 111 S. Ct. 403, 112 L. Ed. 2d 356 (1990). ERISA’s provisions “supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” 29 U.S.C. §1144(a). A state law “relates to an ERISA plan, hence is preempted, if it has a connection with or reference to such a plan.” *Stiltner v. Baretta U.S.A., Corp.*, 74 F.3d 1473, 1480 (4th Cir.1995) (cites and internal quotation marks omitted). ERISA preemption must be “given broad effect because of what the United States Court of Appeals for the Fourth Circuit has characterized as ‘the unparalleled breadth of ERISA’s preemption provision.’” *Tobin v. Ravenswood Aluminum Corp.*, 838 F. Supp. 262, 268 (S.D.W. Va. 1993) (citing *Holland*

*v. Burlington*, 772 F.2d 1140, 1147 (4th Cir. 1985)). In ERISA actions “resort to federal common law generally is inappropriate when its application would...threaten to override the explicit terms of an established ERISA benefit plan.” *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1452 (4<sup>th</sup> Cir. 1992). Indeed, courts have held that ERISA preempts state laws concerning subrogation relating to ERISA plans. For example, the United States Court of Appeals for the Fourth Circuit has ruled against participants or beneficiaries utilizing narrow principles of state anti-subrogation law to deny an ERISA sponsored plan its customary right of reimbursement. *See, e.g., McInnis v. Provident Life & Acc. Ins. Co.*, 21 F.3d 586 (4<sup>th</sup> Cir. 1994); *Hampton Indus., Inc. v. Sparrow*, 981 F.2d 726 (4<sup>th</sup> Cir. 1992); *Provident Life & Acc. Ins. Co. v. Waller*, 906 F.2d 985 (4<sup>th</sup> Cir. 1990).

Importantly, in *Holliday*, the United States Supreme Court held that a Pennsylvania statute that precluded subrogation from a claimant’s tort recovery for benefit payments by a group contract to an employer’s self-funded health care plan was preempted by 29 U.S.C. §1144. *Holliday*, 498 U.S. at 59-65, 111 S. Ct. at 408-411, 112 L.Ed.2d at 54. In this regard, the United States Court of Appeals for the Seventh Circuit has observed that “[a]lthough addressed to a statutory provision, *Holliday*’s holding applies equally to common law subrogation principles as the ‘State Laws’ preempted by ERISA include ‘all laws, decisions, rules, regulations or other State action having the effect of law, of any State.’” *Land v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Health and Welfare Fund*, 25 F.3d 509, 513 n. 6 (7th Cir. 1994). Thus, there is little doubt that West Virginia law concerning subrogation is preempted by ERISA to the extent it relates to an employee benefit plan.

Moreover, this Court has observed that “the identity of the parties is a critical factor when resolving the issue of preemption.” *Martin Oil Co.*, 203 W.Va. 266, 507 S.E. 2d 367 (1997). In a prototypical preemption case, the parties involved will be “employees or former employees, who challenge some aspect of their status as beneficiaries under a plan. Other parties who may be included in a case where preemption is required are the employer, the plan and the plan fiduciaries.” *Martin Oil Co. v. Philadelphia Life Ins. Co.*, 203 W.Va. 266, 270, 507 S.E. 2d 367, 269(1997) (citing *Hollingsworth Paving, Inc. v. Jefferson-Pilot Life Ins. Co.*, 929 F. Supp. 1097, 1100 (W.D. Tenn. 1996)); *Firestone Tire & Rubber Co. v. Neusser*, 810 F. 2d 550, 556 (6<sup>th</sup> Cir. 1987); *General Am. Life Ins. Co. v. Castonguay*, 984 F. 2d 1518, 1521 (9<sup>th</sup> Cir. 1993) (stating that “the key to distinguishing between what ERISA preempts and what it does not...lies in recognizing that the statute [ERISA] comprehensively regulates certain relationships: for instance, the relationship between plan and plan member, between plan and employer, between employer and employee to the extent employee benefit plan is involved and between plan and trustee.”). *See also, Cook Wholesale of Medina, Inc. v. Connecticut General Life Insurance Co.*, 898 F. Supp. 151, 155 (W.D.N.Y. 1995), (“...[b]ecause of ERISA’s explicit language and because state laws regulating these relationships (or the obligations flowing from these relationships) are particularly likely to interfere with ERISA’s scheme, these laws are presumptively preempted.”).<sup>15</sup>

The controversy presented by this appeal involves the relationship between The Plan, its member, Mrs. Turner, and its beneficiaries, the Turner children. The relationships between these parties in this case affect rights and obligations that are

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<sup>15</sup> By contrast, claims against ERISA plans for run-of-the-mill state law claims such as unpaid rent, failure to pay creditors or torts committed by an ERISA plan are not preempted by ERISA. *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 833, 108 S. Ct. 2182, 100 L. Ed. 2d 836 (1988).

regulated by ERISA. Thus, regardless of the fact that the underlying claim is a State tort claim which is not preempted by ERISA, The Plan's right of subrogation and any action to enforce such a right is clearly an issue that is preempted and controlled by ERISA.

(2) Appellants' State common law claims do not overcome the clear and unambiguous language of The Plan.

Appellants seek to convince this Court that State common law should overcome the clear and unambiguous subrogation provisions of The Plan. Similar attempts have been thwarted by courts reviewing ERISA plans' subrogation rights. If this Honorable Court concludes that West Virginia state courts have subject matter jurisdiction over The Plan's right of subrogation<sup>16</sup>, which The Plan does not concede, it is abundantly clear that the plain language of an ERISA plan must be given its intended effect.

As discussed above, there has never been any argument in this case that the language of The Plan documents is in any way ambiguous. Mrs. Turner's argument is not that there is some ambiguity in that plan, but, rather, that she simply does not like what The Plan states. Such an argument is no basis for the avoidance of the plain language of The Plan.

"Broadly speaking, 'ERISA plans are contractual documents, which, while regulated, are governed by established principles of contract and trust law.'" *Blackshear v. Reliance Standard Life Ins. Co.*, 509 F.3d 634, 639 (4th Cir. 2007) (quoting *Haley v. Paul Revere Life Ins. Co.*, 77 F.3d 84, 88 (4th Cir. 1996)). "Accordingly, courts must

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<sup>16</sup> Syl. pt. 3, *SER Orlofske v. City of Wheeling*, 212 W.Va. 538, 575 S.E. 2d 148 (2002) ("West Virginia Courts have subject matter jurisdiction over federal preemption defenses."). However, see 29 U.S.C. §1132(a), Section 502(a) which provides, in pertinent part, as follows: A civil action may be brought... (3) by a participant, beneficiary, or *fiduciary* (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) *to obtain other appropriate equitable relief* (i) to redress such violations or (ii) *to enforce* any provisions of this subchapter or *the terms of the plan*. (emphasis added).

enforce and follow ‘the plan’s plain language in its ordinary sense.’” *Blackshear*, 509 F.3d at 639 (quoting *Bynum v. Cigna Healthcare of North Carolina, Inc.*, 287 F.3d 305, 313 (4th Cir. 2002)). Consequently, where “the plan documents unambiguously address the substantive rights of the parties at issue, the plan language controls.” *Meadows v. Cagle’s, Inc.*, 954 F.2d 686, 691 (11th Cir. 1992). “[T]he terms of an ERISA-regulated employee benefit plan, must be interpreted under principles of federal common law.” *Forcier v. Metropolitan Life Ins. Co.*, 469 F.3d 178, 185 (1<sup>st</sup> Cir. 2006). Importantly, even in state court, federal common law—not state common law—controls the analysis and interpretation of an ERISA plan. *See, e.g., Perry v. Johnson & Wales University*, 749 A.2d 1101 (R.I. 2000) (“[i]n construing the plan, a court does not rely upon state law but instead must apply federal common law.”).

In this case, the foregoing principles make it clear that the terms of the plan, as drafted, control The Plan’s subrogation rights as to Mrs. Turner and her children. Simply put, neither state nor federal common law can vary the express terms of an ERISA plan under any of the theories espoused by Mrs. Turner.

- a. Regardless of whether the made whole rule is preempted by ERISA, the express terms of the plan render it inapplicable under both West Virginia and federal law.

Even if the West Virginia made whole doctrine is not preempted by ERISA—which The Plan does not concede—it is still unenforceable in this action under both federal and state common law. As a general rule, the make-whole doctrine is similar under both federal and state common law. Those federal courts that have adopted the rule in the ERISA context generally state that the rule only applies in those situations where there is no clear contractual provision to the contrary. *See, e.g., Moore v.*

*CapitalCare, Inc.*, 461 F.3d 1, 9 (C.A.D.C. 2006). Indeed, the United States Court of Appeals described the federal make-whole rule as a “rule of federal common law, which requires that an insured be made whole before an insurer can enforce its right to subrogation under ERISA, unless there is a clear contractual provision to the contrary.” *Copeland Oaks v. Haupt*, 209 F.3d 811, 813 (6th Cir. 2000). Likewise, this Court has also recognized that parties may contract out of the made-whole rule, as have a majority of courts that have considered the issue. *Kanawha Valley Radiologist, Inc. v. One Valley Bank, N.A.*, 210 W.Va. 223, 227, 557 S.E. 2d 277, 281 (2001) (citations omitted). The language of the ERISA plan in this case leaves no doubt that the parties unequivocally opted out of the made whole rule under either state or federal law.

The Plan clearly states: “*The Plan’s Right of Subrogation and/or subrogation lien shall not be eliminated or limited in any way should the settlement, compromise, judgment or award fail to fully compensate or make-whole the Covered Person on his or her total claim against any Responsible Party...*” (emphasis added). It is difficult to conceive of a more clear and unequivocal waiver of the made-whole rule. In such a situation, there is no question that the made whole doctrine is inapplicable in this case.

In interpreting a much less explicit provision dealing with the same issue, the United States District Court for the Northern District of West Virginia has ruled that the clear terms of an ERISA plan’s subrogation and reimbursement provisions are controlling and not subject to the federal “made-whole” doctrine. *Great West Life & Annuity Ins. Co. v. Barnhart*, 19 F. Supp. 2d 584 (1998). Similarly, the Fourth Circuit has also condemned a district court’s use of simple equity to permit a participant to offset her reimbursement to the plan by the costs of obtaining the third-party recovery where the

language of the plan did not qualify the right to reimbursement by reference to the costs associated with recovery. The Court found that it was “bound to enforce the contractual provisions as drafted.” *United McGill Corp. v. Stinnett*, 154 F. 3d 168, 173 (4<sup>th</sup> Cir. 1998).

Based on the foregoing legal authority, Appellants’ claim that they should not be bound by The Plan’s right of subrogation because they have not been “made whole” must fail based upon express contractual language. Put simply, the plain language of The Plan expressly states that the make-whole doctrine shall not limit the plan’s recovery. Even if the make-whole doctrine applies in this case, both federal law and West Virginia law allow parties to contract around the rule. There could be no more explicit instance of such a contractual waiver of the make-whole rule in this case. Federal and West Virginia authority make it abundantly clear, therefore, that the make-whole doctrine cannot avail Mrs. Turner’s position in this case.

- b. The common fund doctrine does not defeat The Plan’s right to subrogation.

Appellants’ alternative claim that The Plan’s equitable lien for subrogation should be reduced to reflect the attorneys’ fees and expenses associated with obtaining recovery from the tortfeasors must also fail. In support of this claim, Appellants rely on the “common fund doctrine” and an Illinois Supreme Court decision, *Scholtens v. Schneider*, 173 Ill. 2d 375, 671 N.E. 2d 657 (1996). In the *Scholtens* case, the language of the employee benefits plan did not expressly address the effect of the common fund doctrine on the plan’s right of subrogation. The Illinois Supreme Court concluded that the common fund doctrine is outside the scope of ERISA’s preemption provision, 29 U.S.C.

§1144(a) (1982), and the trustees of the plan were obligated to pay the reasonable value of the legal services rendered in protecting their subrogation lien.

Following the *Scholtens* case the United States Court of Appeals for the Seventh Circuit had occasion to consider the Illinois common fund doctrine in the context of ERISA. See, *Administrative Committee of the Wal-Mart Stores, Inc. Associates Health and Welfare Plan v. Varco*, 338 F.3d 680 (7th Cir. 2003). Unlike *Scholtens*, the ERISA plan in *Varco* expressly stated that the plan “does not pay for nor is responsible for the participant’s attorney’s fees. Attorney’s fees are to be paid solely by the participant.” *Varco*, 338 F.3d at 683. Like Mrs. Turner, the beneficiary in *Varco* attempted to argue that the Illinois version of the common fund doctrine applied in determining her recovery. As an initial matter, the Seventh Circuit concluded that “the Illinois common fund doctrine conflicts with, and therefore is preempted by, the terms of the Plan . . .” *Varco*, 338 F.3d at 691. The court further addressed the notion of a federal common fund doctrine, and concluded that “the Plan in this case controls the relationship between Varco and the Committee, and because it does not authorize the payment of attorney’s fees, we do not possess the authority to rewrite the Plan in her benefit.” *Id.*, at 692.

The same analysis in *Varco* applies here. The West Virginia version of the common fund doctrine would impose a requirement for The Plan to share in Mrs. Turner’s attorneys’ fees. Under the reasoning of *Varco*, such a requirement is preempted by ERISA in the first instance. Moreover, even if a federal common fund doctrine applied, it would be defeated by the plain terms of The Plan. The Plan clearly states that the Plan is not responsible for sharing in the cost of obtaining recovery against a third-party: “*The Plan has no obligation or duty to pay any legal fees or expenses incurred by*

*such Covered Person in reaching a settlement or compromise or obtaining a judgment or award....”* (emphasis added).

Even if West Virginia law applied, the result would be no different. It is well-settled law in West Virginia that “[w]here provisions in an insurance policy are plain and unambiguous and where such provisions are not contrary to a statute, regulation, or public policy, the provisions will be applied and not construed.” Syl. pt 2, *Shamblin v. Nationwide Mut. Ins. Co.*, 175 W.Va. 337, 332 S.E.2d 639 (1985). Accord Syl., *Keffer v. Prudential Ins. Co. of America*, 153 W.Va. 813, 172 S.E.2d 714 (1970) (“Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.”). Similarly, “[t]he right of subrogation can either be modified or extinguished through express contractual language, or by an action of the surety which is inconsistent with the right of subrogation[.]” *Provident Life and Acc. Ins. Co. v. Bennett*, 199 W.Va. 236, 240, 483 S.E.2d 819, 822 (1997) (quoting Syl. pt. 9, *Ray v. Donahew*, 177 W.Va. 441, 352 S.E. 2d 729 (1986)). It is true that in *Federal Kemper*, this Court found that when an automobile insurer is reimbursed under a subrogation clause in an insurance contract, the reimbursement should be reduced by the insurer’s *pro rata* share of the cost to the covered person of obtaining recovery against the third-party. *Federal Kemper Ins. Co.*, at Syl. pt. 3. However, the subrogation language in the insurance contract at issue in *Federal Kemper* was silent as to the insurer’s obligation to share in the cost of obtaining recovery against the third-party. In this case, The Plan is not silent. It expressly states that The Plan has no obligation to reimburse Mrs. Turner for the fees and costs she incurred, and, as such, the plain, unambiguous language of The Plan should control.

V. **RELIEF PRAYED FOR**

As fiduciary of the employee-funded ERISA benefit plan in question, Appellee has a duty to The Plan's participants to adhere to the terms set forth in the summary plan description and to ensure The Plan's financial viability. The Plan approaches Mrs. Turner's circumstances no differently than it has approached other situations involving covered persons who have been injured by third parties and have needed medical care as a result of such injury. The Plan has paid medical benefits on behalf of the covered persons, and the covered persons have reimbursed The Plan from settlements or judgments received from third parties and their insurers, in compliance with the terms of The Plan and The Plan's right to subrogation. The Plan's right to subrogation does not benefit the Appellee, who has no right to the funds deposited in The Plan, but benefits The Plan participants who have paid into The Plan and who may need medical benefits in the future.

Mrs. Turner and her counsel portray the Appellee as requesting relief to which it is not entitled. Nothing could be further from the truth. The Plan is not a tortfeasor in this matter. The Plan played no part in causing injuries to the Turner children. Likewise, The Plan did not create or contribute to the situation in which the Turner children's potential damages exceed the insurance coverage available from the tortfeasors and Mrs. Turner's own underinsured liability carrier. At a time when the Turner children needed medical care, The Plan provide medical benefits for that care. In turn, Mrs. Turner did not have to pay for her children's medical care out-of-pocket.<sup>17</sup> The Plan did so without any

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<sup>17</sup> Had it not been for The Plan's payment of Ronan's medical bills in the amount of approximately \$106,000, Mrs. Turner's liability for Ronan's medical care at the out-of-state hospital would have been in excess of \$300,000. *See*, Correspondence to Circuit Court of Berkeley County in support of City Hospital Inc.'s opposition to three separate Petitions for Approval of Settlements, filed April 19, 2007.

assurance of reimbursement of the benefits it paid on the children's behalf. However, The Plan clearly stated its right to subrogation from any funds that Mrs. Turner and her children receive from third parties. Mrs. Turner and her counsel acknowledged the same without reservation.

The terms of The Plan are clear and unambiguous. Whether federal or state common law is applied to the questions presented in this appeal, and whether the common law is applied by a state court or a federal court, the terms of The Plan must be applied as written. Consequently, the Appellee respectfully requests that this Honorable Court remand this matter to the Circuit Court of Berkeley County, West Virginia in order that the Circuit Court may approve or disapprove the three separate proposed infant settlements and preserve the proceeds of those settlements until the Appellee can file a claim for equitable relief in the United States District Court for the Northern District of West Virginia. In the alternative, Appellee requests that this Honorable Court find that the terms of The Plan are clear and unambiguous and must be applied as written, without resort to state or federal common law.

**CITY HOSPITAL, INC.**

By Counsel

*Christine S. Vaglianti / by gphs*

Christine S. Vaglianti (W.Va. Bar ID 4987)

Associate Litigation Counsel

WEST VIRGINIA UNIVERSITY

HOSPITALS, INC.

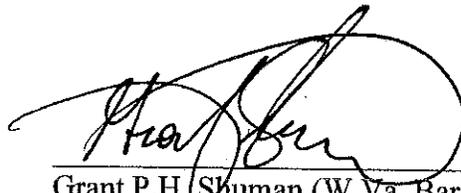
P.O. Box 8128

Morgantown, West Virginia 26506-8128

Telephone: 304/598-4199

Facsimile: 304/598-4292

*and*



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Grant P.H. Shuman (W. Va. Bar ID 8856)  
SPILMAN, THOMAS & BATTLE, PLLC  
P.O. Box 273  
Charleston, West Virginia 25321-0273  
Telephone: (304) 340-3895  
Facsimile: (304) 340-3801  
*Counsel for Respondent*

NO. 033892

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON

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DYLAN TURNER, RHIANNON TURNER,  
RONAN TURNER, by their Next Friend and  
Parent, DIANE TURNER, individually and on  
her own behalf,

Plaintiffs Below/Appellants

vs.

From the Circuit Court of Berkeley County  
Civil Action No. 06-C-717  
Christopher C. Wilkes

CHARLES TURNER, JR., CHARLES TURNER, SR.  
and LAURIE TURNER,

Defendants Below

and

CITY HOSPITAL, INC.,

Intervenor Below/Appellee

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**CERTIFICATE OF SERVICE**

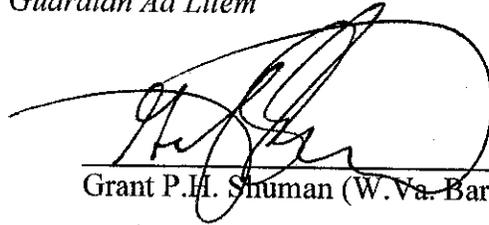
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I, Grant P.H. Shuman, do hereby certify that I have served the foregoing  
“APPELLEE’S RESPONSE BRIEF” upon counsel of record by depositing true and  
accurate copies thereof in the U. S. Mail, postage paid, this 23<sup>rd</sup> day of May, 2008,  
addressed as follows:

Brenda Waugh, Esq.  
P.O. Box 1820  
Inwood, WV 25428  
*Counsel for Plaintiffs*

Michael D. Lorensen, Esq.  
101 South Queen Street  
P.O. Drawer 1419  
Martinsburg, WV 25402-1419  
*Counsel for Defendants*

Timothy Helman, Esq.  
222 West Johns  
Martinsburg, WV 25401  
*Guardian Ad Litem*



Grant P.H. Shuman (W.Va. Bar ID 8856)