

**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS  
No. 33892**

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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:**

**Case No. 06C-717 below  
Circuit Court of Berkeley County**

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

**Defendants Below**

**and**

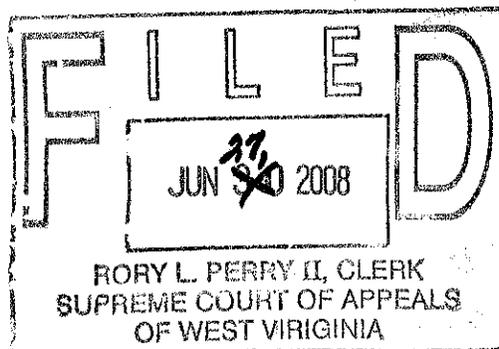
**CITY HOSPITAL INC.,**

**Intervenor Below/Appellee**

**REPLY BRIEF OF RONAN, DYLAN, RHIANNON AND DIANE TURNER**

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**TABLE OF CONTENTS: APPELLANTS REPLY BRIEF**

I. INTRODUCTION..... 6

II. REPLY TO RECITATION OF FACTS. .... 6

III. ARGUMENT AND AUTHORITIES. .... 7

    A. The appeal is proper since the Order of September 20, 2007 is a final order and adjudicates all issues between the Turner children and City Hospital, Inc. . . . . . 8

    B. City Hospital, Inc. has recognized the jurisdiction of this court over the lien inasmuch as they have sought relief before the Circuit Court and further recognized that without such relief the funds may never be available to City Hospital, Inc... . . . . . 12

    C. City Hospital, Inc. has failed to address the savings clause within ERISA, 29 U.S.C. 1144 (b), which precludes pre-emption unless City Hospital, Inc. demonstrates that their fund is entirely self funded and not part of any program of reinsurance or other insurance program.. . . . . 14

    D. City Hospital, Inc. has failed to meet their burden to demonstrate that relevant state laws which are of general applicability are preempted by ERISA, 29 U.S.C. 1144 (1982) .. . . . . 17

    E. City Hospital, Inc. as the drafter of the plan, has failed to demonstrate the presence of a valid, clear and unambiguous subrogation clause. City Hospital, Inc. has further failed to demonstrate why the clause does not violate public policy. .... 20

    F. City Hospital, Inc. has failed to demonstrate why the Turner children should not be “made whole” in accord with the West Virginia “made whole doctrine” . . . . . 22

    G. City Hospital, Inc. has failed to demonstrate why they should not bear their share of attorney fees and costs and why the plan participant, Mrs. Turner should bear those expenses solely out of her own private funds.... . . . . . 27

    H. City Hospital will be unjustly enriched if they are permitted to take from the children’s recovery, including their future medical expenses without bearing a share of attorney costs and fees in procuring this settlement. . . . . 29

    I. The Administrator of the Plan for City Hospital, Inc. has acted with a conflict of interest in administering the plan and seeking to recover the full funds from these children when their Plan may benefit from that action.. . . . . 30

III. CONCLUSION. .... 31

**TABLE OF AUTHORITIES**

29 U.S.C. §1144(a) (1982). .... 17,18

29 U.S.C. §1144(b) (1982) ..... 15, 16, 17, 20

W.Va. R. Civ. P., Rule 54(b). .... 10

W.Va. Code §44-10-1 *et seq.* . .... 11

W.Va. Code §58-5-1 ..... 10

Adkins v. Capehart, 202 W.Va. 240, 504 S.E.2d 923 (1988) ..... 10,11

Administrative Committee of the Wal-Mart Stores, Inc. Associates Health and Welfare Plan v. Varco, 338 F.3d 680 (7th Cir. 2003) *cert den.* 542 U.S. 945, 1245 S.Ct. 2904 (2004) ..... 13,14, 27

Associated Wrecking and Salvage Co. v. Wiekhorst Bros. Excavating & Equip. Co., 228 Neb. 764, 424 N.W.2d 343, 348 (1988) ..... 30

Anderson v. Wood, 204 W.Va. 558, 514 S.E.2d 408 (1999) ..... 23

Bishop v. Burgard, 198 Ill. 2d 495, 507, 764 N.E.2d 24, 33 (2002) ..... 27,28

Buskirk v. State-Planters' Bank & Trust Co., 113 W.Va. 764, 169 S.E. 738 (1933) ..... 24

Bynum v. Cigna Healthcare of North Carolina, Inc., 287 F.2d 305 (4<sup>th</sup> Cir. 2002) . .... 31

Coleman v. Sopher, 194 W.Va. 90, 459 S.E.2d 367 (1995) ..... 11

Copeland Oaks v. Haupt, 209 F.3d 811 (6<sup>th</sup> Cir. 2000) ..... 25

Copley v. Mingo County Board of Education, 195 W. Va. 480, 466 S.E.2d 139 (1995) ..... 29

Donaldson Mine Company v. Human Rights Commission, 187 W.Va. 631, 420 S.E.2d 902 (1992) ..... 28

Durm v. Heck's, Inc., 184 W.Va. 562, 566 n.2, 401 S.E.2d 908, 912 n.2 (1991) ..... 9,10

Estate of Marjorie I. Verba by Sally Jo Nolan, Executrix v. David A. Ghaphery, M.D., 210 W.Va. 30, 32, 552 S.E. 2d 406 (2001) (dissent) . .... 28

Federal Kemper Insurance Co. v. Arnold, 183 W.Va. 31, 393 S.E.2d 669 (1990) . . . . 21, 23, 28

Firestone Tire & Rubber Co. v. Neusser, 810 F.2d 550 (6<sup>th</sup> Cir. 1987) . . . . . 18,19

FMC Corp. v. Holliday, 498 U.S 52, 111 S.Ct. 403 (1990) . . . . . 16

Great West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 122 S.Ct. 708 (2002) . . . . . 14

Guido v. Guido, 202 W.Va. 198, 202, 503 S.E.2d 511, 515 (1998). . . . . 9

Hampton Indus., Inc. v. Sparrow, 981 F.2d 726 (4<sup>th</sup> Cir.1992) . . . . . 17

Humphreys Railways v. F/V Nils S, 603 F. Supp. 95, 98 (E.D.Va. 1984). . . . . 29

Hoffman v. Reinke Mfg. Co., 227 Neb. 66, 416 N.W.2d 216, 219 (1987)).. . . . 30

Huggins v. Fitzpatrick, 102 W.Va. 224, 228, 135 S.E. 19, 20 (1926). . . . . 14

James M.B. v. Carolyn M., 193 W.Va. 289, 456 S.E.2d 16 (1995) . . . . . 9

Kanawha Valley Radiologists, Inc. v. One Valley Bank N.A., 210 W.Va. 223, 238, 557 S.E.2d  
277 (2001). . . . . 23

Kern v. Freed Co., 224 Va. 678, 680, 299 S.E.2d 363, 365 (1983). . . . . 29

Kittle v. Icard, 185 W.Va. 126, 405 S.E.2d 456 (1991) . . . . . 25

Martin Oil Co. v. Philadelphia Life Insurance Co., . . . . . 17, 18, 19, 28

Mekertichian v. Mercedes-Benz U.S.A., L.L.C., Ill.App.3d 828, 807 N.E.2d 1165, 283 Ill.Dec.  
324 (Ill.App. Dist.1 03/31/2004); *upheld* 347 Ill.App.3d 828, 807 N.E.2d 1165, 283  
Ill.Dec. 324, 2004 , . . . . 28

Metropolitan Life Insurance Co. et al. v. Glenn, 2008 WL 2444796 (2008) . . . . . 30

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 732, 105 S.Ct. 2385 (1985) . . . . . 16

Orlofske v. The City of Wheeling, 212 W.Va. 538, 575 S.E.2d 148 (2002) . . . . . 28

Provident Life and Accident Ins. Co. v. Bennett, 199 W.Va. 236, 483 S.E.2d 819 (1997) 22, 23, 24

Provident Life & Acc. Ins.Co. v. Waller, 906 F.2d 985 (4<sup>th</sup> Cir. 1990)*cert den.* 498 U.S. 982, 111  
S.Ct. 12 (1990) . . . . . 19, 29

Ray v. Donohew, 177 W.Va. 441, 352 S.E.2d 729 (1986) .....	24
Sereboff v. Mid-Atlantic Medical Services, Inc., 547 U.S. 356, 126 S.Ct. 1869, 164 L.Ed. 2d 612 (2006) .....	13, 23
Scholastic Corp. v. Kassem, 389 F. Supp. 2d 402 (D. Conn. 2005) .....	13
Scholtens v. Schenider, 173 Ill. 2d 375, 671 NE.2d 657 (1996) .....	27
Travelers Indemnity Co. v, Rader, 152 W.Va. 699, 166 S.E.2d 157 (1969) .....	21
United McGill Corp. v. Stinnett, 154 F.3d 168, 173 (4 <sup>th</sup> Cir. 1998) .....	26

## **I. INTRODUCTION**

Our opposing party, City Hospital, Inc. does not disagree that Dylan, Rhiannon and Ronan Turner were all injured when their father, under the influence, wrecked the car. City Hospital, Inc. also does not disagree that the children and their mother have thus far been tossed through five separate court proceedings as a result of their father's recklessness. But City Hospital, Inc. does disagree that these three children should have their future medical bills and pain and suffering compensated through the only insurance proceeds available to them. Rather, City Hospital Inc. contends that they deserve to take as much as 97% of the monies available to compensate Ronan for his pain and suffering and his future medical bills. City Hospital, Inc. contends that neither public policy nor the established laws of the State of West Virginia should require that they bear any portion of the costs that the children and their mother have incurred to retain an attorney in order to secure a recovery from the automobile insurance companies in this matter. City Hospital, Inc. contends that ERISA (Employee Retirement Income Security, 29 U.S.C. §1132, et seq.), a federal law which was enacted to protect employee benefits, preempts all of West Virginia laws designed to protect injured children. City Hospital, Inc. has refused to negotiate, participate in mediation, or entertain any compromise whatsoever.

## **II. REPLY TO CITY HOSPITAL, INC.'S STATEMENT OF FACTS**

As both City Hospital, Inc. and the Turner family have described, there are few disputed facts regarding the underlying matter. Charles Turner, Jr. wrecked a car while driving the Turner children and was eventually convicted in State v. Turner, Berkeley County Case, 05 F 376, on October 1, 2007 of two counts of neglect by a parent causing serious bodily injury. The children

sustained injuries, with the youngest, Ronan, sustaining life threatening injuries from which he eventually recovered, but will most likely need future medical treatment. All of the children have suffered physical and emotional injuries. Along with their mother, they have been involved in five separate court proceedings resulting from their father's callous acts.

The Appellee, City Hospital, Inc., in their characterization of the facts have attempted to portray the infant settlement proceeding in this matter as a clandestine attempt of the children and their mother to trick the Circuit Court into reducing the lien asserted by City Hospital, Inc. They further characterize Mrs. Turner's actions in seeking payment for her children's pending medical bills as a waiver of all of their rights under state and federal laws. However, the findings of the court and the records of this proceeding do not support these characterizations.

Both parties have offered exhibits and proffers, including a great deal of correspondence which preceded the filing of the PETITION in this matter. In that correspondence, Mrs. Turner and her counsel requested updated amounts of asserted liens and attempted to negotiate reduction of the liens in conformity with West Virginia laws. Mrs. Turner and her counsel, however, never agreed to bear City Hospital Inc.'s share of litigation costs and expenses. Neither did Mrs. Turner or her counsel ever agree or endorse a contract where Mrs. Turner expressly conveyed Ronan's right to seek a recovery for his pain and suffering or future medical costs to City Hospital. [Plaintiff's Exhibits][City Hospital's Exhibits]

Both the intervenor, City Hospital, Inc. and their "third party administrator" Infor-Med were formally requested to participate in the mediation between Mrs. Turner, the children, and Mr. Turner's insurance company, Westfield, but refused. [Plaintiff's Exhibit #3] Both the intervenor, City Hospital, Inc. and their third party administrator, Infor-Med were served with the

initial petition in this matter which expressly informed the court that Infor-Med had paid the children's medical bills, along with the notice of hearing scheduling the initial hearing. [Petition/Certificate of Service] City Hospital, Inc. was present by representatives and their counsel, at the initial hearing on this petition. [Order June 22, 2007] At this hearing, City Hospital, Inc. moved to intervene in the proceeding and said motion was not opposed by Mrs. Turner and her children, or by the defendants. At this hearing City Hospital, Inc. fully participated in the proceeding and a briefing schedule was established wherein City Hospital, Inc. was provided every opportunity to participate fully in the proceeding. [Order June 22, 2007] Mrs. Turner has attempted, at every juncture in this matter, to be candid with the court and to seek a mutually acceptable resolution with City Hospital, Inc.

The only remaining factual disputes involve the failure of City Hospital, Inc. to voluntarily provide all plan documents and policies. A full disclosure will permit the analysis of the plan in light of the ERISA Savings Clause, 29.U.S.C. 1144 (b), a full review of the supporting documentation and policies describing the ambiguous provisions which have been provided, as well as a review of the conflict of interest exhibited by the administrator in administering this plan to the detriment of the employee and the children, and to the benefit of the plan.

### **III. ARGUMENT**

A. The appeal is proper since the Order of September 20, 2007 is a final order and adjudicates all issues between the Turner children and City Hospital, Inc.

This Court has held that "... (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). Interlocutory orders are not appealable inasmuch as they do not terminate a claim or the litigation between the parties. "To be appealable, therefore, an order either must be a final order or an interlocutory order approximating a final order in its nature and effect." Guido v. Guido, 202 W.Va. 198, 202, 503 S.E.2d 511, 515 (1998).

The order issued by the Circuit Court in this case, is not final as against the defendants, Mr. Charles Turner, Jr., Mr. Charles Turner, Sr., and Laurie Turner. However, it is final as to the infant settlement petition and the circuit court's refusal to exercise jurisdiction to adjudicate the critical issues pertaining to the intervenor, City Hospital, Inc. in said proceeding. The order of the circuit court absolutely forecloses the infant plaintiff, Ronan, from being able to recover any amounts of the first \$106, 697.08 awarded to him, through settlement or jury verdict, and practically forecloses him from any recovery beyond the remaining \$8302.92 inasmuch as no other insurance policies are available to satisfy any judgment. The Circuit Court has conclusively determined that it will not exercise jurisdiction to apply the laws of the State of West Virginia to this infant's recovery and inasmuch as that ruling has been made, such ruling stands as a final adjudication as between the two parties: Diane, Ronan, Dylan and Rhiannon Turner and City Hospital, Inc.

Additionally, even if that provision were not construed to be a final order, the order issued by the lower court is also subject to appellate review under the exception to the rule in a case cited by City Hospital Inc., Durm v. Heck's, Inc., 184 W.Va. 562, 401 S.E.2d 908 (1991). This case provides that: "An interlocutory order would be subject to appeal under this doctrine if it (1) conclusively determines the disputed controversy, (2) resolves an important issue

completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment."

Durm v. Heck's Inc., *supra*, 566 (fn.2).

In that Durm v. Heck's, Inc., this Court held that even though some issues may remain regarding negligence, when the order adjudicated all issues as to one party, it is a final order in its "nature and effect." Durm v. Heck's Inc., *id.*, 184 W.Va. 566. In addressing the demands of justice, this Court held:

...[T]o deny an immediate appeal from the disposition of an identifiable and separable portion of a ... [civil] action might result in an injustice." Wright & Miller, *supra*, at 20. In the interest of avoiding such potential injustice and in the interest of judicial economy, where an order granting summary judgment to a party completely disposes of any issues of liability as to that party, the absence of language prescribed by Rule 54(b) of the West Virginia Rules of Civil Procedure indicating "no just reason for delay" exists and "directi[ng] ... entry of judgment" will not render the order interlocutory and bar appeal provided that this Court can determine from the order that the trial court's ruling approximates a final order in its nature and effect. W.Va.R.Civ.P. 54(b). Since no further issue remained to be resolved regarding Foodland's liability, the circuit court's order must be viewed as a final order subject to appeal. See W.Va.Code § 58-5-1(a) Durm v. Hecks, Inc., *id.*, 184. W.Va. 566-567.

Similarly, the authorities cited by City Hospital, Inc. in support of their position that this order is not a final order are misplaced. One such case, Adkins v. Capehart, 202 W.Va. 240, 504 S.E.2d 923 (1988) is unlike the case at bar, since it involved litigation which was ongoing as to those parties. In that case, this Court recognized the ongoing nature of the conflict between those parties and addressed it in a per curium opinion, stating "... (T)he circuit court's order clearly contemplates additional review, if only in the nature of monitoring the progress of proposed methodology changes, and further provides for continuing jurisdiction over the matter for "any purpose related to the issues involved, including requests for modification or dismissal." Adkins

v. Capehart, *id.*, fn 16. Another case cited by City Hospital, Inc., Coleman v. Sopher, 194 W.Va. 90, 459 S.E.2d 367 (1995) involved litigation wherein one party had requested a new trial and in that case this Court held that, "... (W)hen a party agrees to or requests a new trial, rather than resist both the new trial and the remittitur, ... [d]enial of appellate review is justified on the ground that the party has 'elected' to accept" the new trial "and should be bound, as if it entered a settlement agreement." Coleman v. Sopher, *id.*, 194 W.Va. 95.

In this matter, the order issued by the Circuit Court, in denying jurisdiction over the entire matter pertaining to City Hospital Inc., clearly determines that the circuit court will not reduce the liens in accordance with W.Va. Code §44-10-14 (g). The only issue that remains in this case to consummate the infant settlement, is the reduction of this lien. This order also resolves an important issue completely separate from the merits of the action. Finally, the order is otherwise unreviewable since if the matter is to proceed to trial and a final judgment rendered, the judgment will be for the amount determined by the jury and City Hospital, Inc. will assert their lien to immediately attach the judgment that the jury awards to Mrs. Turner and the children. The final judgment order in the underlying civil case will not address this issue since the circuit court has already determined it has no jurisdiction.

Therefore, without review of this order at this stage in the proceeding, the matter will proceed through litigation and a judgment. Mrs. Turner has made it clear to the court and to the parties that, for the sake of family harmony and the relationship between the children and their paternal grandparents, she does not wish to engage in litigation against her former in-laws. City Hospital, Inc. has informally indicated that it intends to prosecute this matter against the grandparents, if Mrs. Turner moves to dismiss the complaint and the infant settlement petitions.

If City Hospital, Inc. successfully pulls Mrs. Turner through litigation, she will be unable to recover for her son Ronan, since City Hospital, Inc. has refused to permit any reduction in their lien, leaving only \$8302.92 in insurance proceeds available to satisfy a Judgment. Charles Turner, Jr., is now incarcerated. Mrs. Turner is aware, from the divorce proceedings, that he has no assets and is judgment proof. Even if the children were to prevail in the litigation against their grandfather, the owner of the vehicle, Mrs. Turner does not wish to attach the personal assets of the children's grandparents to satisfy Ronan's judgment.

City Hospital, Inc. claims that the order of September 20, 2007 is not a final order and asserts in support that "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." Mrs. Turner and the children would like to know what steps City Hospital, Inc. would have them take. Proceed through expensive litigation, pitting the children against their incarcerated father and grief stricken grandparents in order to, at the end of the litigation, hand over all proceeds to City Hospital, Inc. when City Hospital, Inc. will not even agree to reimburse Mrs. Turner for litigation expenses, including costs incurred for copies of medical records they have provided to her? This final order adjudicates the only issue which precludes conclusion of this case. The only issues which need to be adjudicated to finalize this settlement is whether or not Ronan, Rhiannon and Dylan should receive the compensation for their pain and suffering and future medical expenses and whether or not City Hospital, Inc. should be required to bear their share of litigation costs and expenses.

B. City Hospital, Inc. has recognized the jurisdiction of this court over the lien inasmuch as they have sought relief before the Circuit Court and further recognized that without such relief the funds may never be available to City Hospital, Inc.

In the most recent Supreme Court case involving federal adjudication of a subrogation lien in an ERISA plan, Sereboff v. Mid-Atlantic Medical Services, Inc., 547 U.S. 356, 362-363 126 S.Ct. 1869, 164 L.Ed. 2d 612 (2006), the court held that as an equitable remedy, subrogation is only available when identified funds are available to the plan participant. Obviously in this matter, there are no such funds at present. Even if the settlement as presented in the PETITION were approved, no such funds, under the terms of the structured settlement will even be available until the children attain the age of majority and no funds would ever be available to Diane Turner, the plan participant. Recognizing this infirmity, City Hospital, Inc. has accepted the state court jurisdiction over the proceeds and requested, in effect, that the state court issue an injunction requiring that the funds be set up in an account pursuant to City Hospital, Inc.'s specifications in order to permit them to have access to the funds.

City Hospital, Inc., absent action by the Circuit Court, could be precluded from subrogation if the funds are not deposited into a specifically identifiable fund which is within the control or possession of Mrs. Turner or the children. In citing a pre-Sereboff, Connecticut District Court opinion, Scholastic Corp. v. Kassem, 389 F. Supp. 2d 402 (D. Conn. 2005), City Hospital, Inc. recognizes this requirement.

In another case holding relied on by City Hospital, Inc. regarding the federal common funds doctrine, the federal court in Illinois based its holding, in a large part, on the fact that the funds were identifiable and in the possession of the plan participant. Administrative Committee of the Wal-Mart Stores, Inc. Associates Health and Welfare Plan v. Varco, 338 F.3d 680, (7<sup>th</sup> Cir. 2003), cert den. 542 U.S. 945, 124 S.ct. 2904 (2006). In Varco, the attorney fees had been paid

and that the remaining proceeds were in the possession of the adult injured party. The total settlement was \$100,000.00 and the lien asserted was only \$18,865.72. In addressing the reimbursement of the lien, the Court recognized that "... (A) ll of the disputed funds remain in Varco's sole possession in a reserve account in her name. The Committee in this case is therefore seeking to assert its rights under the Plan, through an equitable action, to monies held in their entirety by Varco" Administrative Committee of the Wal-Mart Stores, Inc. Associates Health and Welfare Plan v. Varco, id, 691.

It is not surprising that City Hospital, Inc. therefore acquiesced to the jurisdiction of the State Court in this proceeding when they asked that the Circuit Court ignore the tentative agreement between Mrs. Turner and her father-in-law, which was found to be in the best interest of the children, and place the funds in a structured settlement. City Hospital, Inc. advocated that the court would issue an order contrary to the best interest of the children and the agreement between the Turners and place the settlement proceeds in an account which would provide them with access under the principles of equity. Since the funds are not currently in the possession of either Mrs. Turner or the children and since the funds will never be in the possession of Mrs. Turner and will not be in the possession of the children until they reach the age of majority, it is arguable that City Hospital, Inc. may even assert a lien. Further, having recognized the Circuit Court's jurisdiction in seeking relief as to the proceeds, City Hospital, Inc. can not now claim that the Circuit Court is lacking subject matter jurisdiction.

C. City Hospital, Inc. has failed to address the savings clause within ERISA, 29 U.S.C. 1144 (b), which precludes pre-emption unless City Hospital, Inc. demonstrates that their fund is entirely self funded and not part of any program of reinsurance or other insurance program

City Hospital, Inc. has failed entirely to address the "savings clause" contained within the preemption clause of ERISA, which returns to the State the power to enforce state laws that regulate insurance and such clause prevents these state laws from preemption by ERISA. 29 U.S.C. §1144 (b).<sup>1</sup> Additionally, if certain plans fall under the provisions of the "deemer

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<sup>1</sup>29 U.S.C. §1144 (b) provides, in part:

Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), ***nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.*** (Emphasis added.)

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies...

(6)(A) Notwithstanding any other provision of this section -

(I) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides -

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance,

clause” and those plans may not be subject to a State’s specific insurance laws if preempted by ERISA. However, the only plans which are included in the “deemer” clause, which may avoid a state’s regulation, are self-funded that do not utilize any commercial insurance in any fashion. 29 U.S.C. §1144 (b) (2). Plans that purchase insurance, so called ‘insured plans’ are directly affected by state laws that regulate the insurance industry. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 732, 105 S.Ct. 2385 (1985).

The effects of the “savings” and “deemer” of the ERISA preemption clause were detailed in FMC Corp. v. Holliday, 498 U.S. 52, 111 S.Ct. 403 (1990). The Supreme Court held, “... (E)mployee benefit plans that are insured are subject to indirect state regulation. An insurance company that insures a plan remains an insurer for purposes of state laws, ‘purporting to regulate insurance’ after application of the deemer clause (of ERISA).” *Id.* at 409. The insurance company is therefore not relieved from state insurance regulation. The ERISA plan is consequently bound by state insurance regulations insofar as they apply to City Hospital, Inc.’s insurer.

The involvement of a regulated insurer under the ERISA deemer clause may be identified as a “reinsurer,” an “excess insurer,” a “stop gap insurer,” or an “umbrella insurer.” Those regulated insurers may not escape the regulation by the state’s insurance laws through an assertion of preemption by ERISA. *Id.*

While City Hospital, Inc. has not provided the documents necessary to determine whether or not the plan that they have adopted is subject to the savings clause, they have cited authority in \_\_\_\_\_ issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

support of their positions which provide this analysis, citing Hampton Indus., Inc. v. Sparrow, 981 F.2d 726 (4<sup>th</sup> Cir.1992). In this case, while the Fourth Circuit indeed held that a broad North Carolina statute which specifically addressed subrogation was preempted, that court also held that the inquiry only begins by examining the subrogation clause and the state law. The inquiry must extend to an examination of the nature of the plan and whether or not it is truly self-insured. When a plan cannot demonstrate that it is *entirely self-funded*, the savings clause prevents preemption of state. The court stated: "Although we conclude that ERISA's preemption provision operates in this case, we must still decide whether section 44-50 falls within the scope of the saving clause in 29 U.S.C. § 1144(b)(2)(A). The saving clause provides that the states continue to have the power to regulate insurance, subject to 29 U.S.C. § 1144(b)(2)(B)." Hampton Indus., Inc. v. Sparrow, *supra*, 729. The Hampton Industries court had been provided with and fully reviewed the plan and was able to then evaluate the District Court's finding that the Plan was self-funded with stop-loss elements. Hampton Indus., Inc. v. Sparrow, *id.* In the case at bar, no such documentation has been provided. Therefore even if the court were to find that ERISA preempts the state laws of general application, the matter should be remanded to Circuit Court for discovery on the issue of the nature of the plan to determine the application of the Savings Clause.

D. City Hospital, Inc. has failed to meet their burden to demonstrate that relevant state laws which are of general applicability are preempted by ERISA, 29 U.S.C. 1144 (1982)

Martin Oil Co. v. Philadelphia Life Insurance Co., 203 W.Va. 266, 507 S.E.2d 367 (1997) establishes that the burden is on City Hospital, Inc. to demonstrate that all of West Virginia laws implicated in this matter which are of general applicability, including those

pertaining to contracts to the detriment of infants, the made-whole doctrine and the common fund doctrine, are pre-empted by ERISA, 29 U.S.C. §1144(a) (1982). City Hospital, Inc. has failed to do so.

A party seeking preemption under the jurisdictional provision of the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a) (1994), must first overcome the starting presumption that Congress does not intend to supplant state law. State law actions that are clearly subject to preemption include those where West Virginia law attempts to affect the manner in which pension benefits are calculated under federal law, where the pension plan's existence is a critical element of the state law cause of action, or one in which the West Virginia statute expressly refers to ERISA or ERISA plans. Those state law actions that incidentally involve or refer to ERISA plans, but do not present the risk of conflicting or inconsistent state law concerning pension plan regulation are not preempted under federal law.

Martin Oil, id, 203 W.Va. 267

City Hospital, Inc. has not demonstrated in any way that the West Virginia laws pertaining to the made whole rule, the ability of parent's to assign the rights of the children's recoveries, or the common fund doctrine affects the manner in which pension benefits are calculated. City Hospital, Inc. has failed to show how the plan existence is a critical element of these state law. City Hospital, Inc. has not cited a single provision of the West Virginia which refers to the ERISA statute. Martin Oil Co. v. Philadelphia Life Insurance Co., id. In support of their claim City Hospital, Inc. relies primarily on non-binding federal court opinions, such as Firestone Tire & Rubber Co. v. Neusser, 810 F.2d 550 (6<sup>th</sup> Cir. 1987). However, in that case, the Sixth Circuit held that the statute at issue in that matter was not preempted by ERISA, 29 U.S.C. §1144(a). That court expressly held that no single factor is dispositive and that ERISA does not preempt state or local laws when the law is a neutral provision of general application which applies to employees without regard to their status as ERISA participants. Firestone Tire &

Rubber Co. v. Neusser, *supra*, 555. Similarly, the case at bar involves provisions which are of general application and apply equally to all citizens and children of this state, regardless of whether or not their parent is employed by a corporation, such as City Hospital, Inc.

City Hospital, Inc. also cites the Fourth Circuit decision in Provident Life & Acc. Ins.Co. v. Waller, 906 F.2d 985 (4<sup>th</sup> Cir. 1990) *cert den.* 498 U.S. 982, 111 S.Ct. 12 (1990) in support of their position that the Fourth Circuit has ruled against participants or beneficiaries utilizing narrow principles of state-antisubrogation law to deny an ERISA plan its customary right of reimbursement. The state laws at issue in this matter bear no resemblance to the antisubrogation law at issue in the Virginia case. Additionally, that opinion specifically did not address preemption. The Fourth Circuit specifically stated, in footnote 7, "A question does exist, however, as to whether ERISA preempts the Virginia anti-subrogation provision, Va.Code Ann. § 38.2-3405 (Michie 1986 Repl.)... (W)e are saved from weighing in on the issue because we conclude that no subrogation situation is presented here...(T)he Virginia anti-subrogation provision is inapplicable, and so we do not reach the preemption issue." Provident Life & Acc. Ins.Co. v. Waller, *supra*, 990. It should be noted, however, that in this case, the Fourth Circuit, adopted a federal common law unjust enrichment doctrine which, in fact, could also serve to require that City Hospital Inc., bear their share of attorney fees and expenses Provident Life & Acc. Ins.Co. v. Waller, *id.*

Martin Oil Co. v. Philadelphia Life Insurance Co., *supra*, places a very heavy burden on a party who desires that federal laws supplant the laws that the legislature of West Virginia have passed for the protection of the citizens of the State of West Virginia. In citing cases which bear little resemblance to the facts presented in this and which were announced in remote jurisdictions

in opinions which often contain only dicta about preemption, City Hospital Inc. has failed to meet that burden. This Court should find that West Virginia laws of general application including the laws to protect infants, the made whole rule and requirement that City Hospital, Inc. bear their share of litigation expenses are not pre-empted by 29 U.S.C. §1144(a), *supra*.

E. City Hospital, Inc. as the drafter of the plan, has failed to demonstrate the presence of a valid, clear and unambiguous subrogation clause. City Hospital, Inc. has further failed to demonstrate why the clause does not violate public policy

The mere fact that this dispute is before this Court stands as evidence that the language is not clear. The language, given the lack of definition and the express intention to override equity and state law is ambiguous and should be construed in favor of the children. The language does not cite any specific provisions nor include detailed language that informs the parties that they are giving up firmly established principles of equity and rights under both state and federal law, through the terms of the contract. The language does not include provisions to provide a parent with a right to compromise an infant settlement, by assigning a future benefit, without the approval of a court. The language fails to state that children who are injured will be unable to receive compensation for future medical costs or their pain, suffering and permanent disabilities if the contract is endorsed. Even the plain language of the contract, by incorporating complicated and undefined legal terms is ambiguous. As such, the contract being inconsistent with not only the established laws of West Virginia but many basic principles of equity is unenforceable. Further, considering the potential for conflict of interest, the terms much be construed against the drafter of the plan.

Even if it were found to be clear or unambiguous, if construed as suggested by City Hospital, Inc. it violates public policy and is therefore an unenforceable subrogation clause. City

Hospital, Inc. cites an excerpt from Federal Kemper Insurance Co. v. Arnold, 183 W.Va. 31, 393 S.E.2d 669 (1990) in support of their position the subrogation clause does not violate public policy even though this clause has the effect of an assignment of an infant's tort claim. City Hospital Inc. further claims that their clause does not violate public policy even though it leaves Ronan without any proceeds for future medical treatment. This lack of funding for future treatment may render him dependent upon the state's welfare system for critical, accident-related medical care in the future. City Hospital, Inc. misinterprets this Court's holding of Federal Kemper Insurance Co. v. Arnold. The syllabus points provide the holding of this Court in evaluating the implications of a subrogation clause.

1. "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 the public policy of this State." Syllabus Point, The Travelers Indemnity Co. v. Rader, 152 W.Va. 699, 166 S.E.2d 157 (1969).

2. A valid subrogation clause in an automobile insurance contract is enforceable within its terms against any covered person who receives benefits under the policy, even if other than the named insured.

3. When an automobile insurer is reimbursed, under a subrogation clause in the insurance contract, for benefits paid to a covered person that such person has then successfully recovered from a third party, the reimbursement should be reduced by the insurer's pro rata share of the cost to the covered person of obtaining the recovery against the third party.

Federal Kemper Insurance Co. v. Arnold, *id.*, 183 W.Va. 32.

In Federal Kemper, a personal injury action was settled for \$215,000. One-third of the recovery, or \$71,667, went to the parties' lawyer, leaving a net recovery of \$144,333. The asserted lien was \$5,000. In upholding that reimbursement of the \$5,000.00 of medical payments rendered, less attorney fees, the court held that to allow otherwise would permit the plaintiff in a double recovery. Federal Kemper Insurance Co. v. Arnold, *id.* In that case, unlike the case at bar,

the injured party retained funds to pay attorneys fees and for their pain and suffering. Under such situation, it is not difficult to understand why that clause did not violate public policy.

In another case cited by City Hospital, Inc., Provident Life and Accident Ins. Co. v. Bennett, 199 W.Va. 236, 483 S.E.2d 819 (1997), this Court upheld the enforcement of a subrogation clause within the parameters of the made whole doctrine in a case involving the payment of health insurance for children. This Court discussed public policy in that decision.

The circuit court's finding that the Kittle made whole doctrine is inapplicable because Mr. Bennett settled with State Farm for less than the policy limits is clearly wrong. First, the made whole doctrine embodies a policy deemed socially desirable in this State, in so far as it fosters the adequate indemnification of innocent automobile victims. Second, if we approved of the yard stick used by the circuit court to remove application of the made whole doctrine, recovery of less than policy limits, this Court would be sanctioning a test that undermines the policy justification for the doctrine. This we cannot allow. Therefore, we hold that when applying the made whole doctrine it is incumbent on the circuit court to consider: 1) the ability of parties to prove liability; 2) the comparative fault of all parties involved in the accident; 3) the complexity of the legal and medical issues; 4) future medical expenses; 5) nature of injuries; and 6) the assets or lack of assets available above and beyond the insurance policy.

Provident Life and Accident Ins. Co. v. Bennett, id., 199 W.Va. 242.

Therefore, in accord with precedent cited by City Hospital Inc, public policy demands that this clause be fully evaluated and that in order to be consistent with public policy that it be construed to permit the children to be made whole and for City Hospital, Inc., to bear their share of attorney fees and litigation costs.

F. City Hospital, Inc. has failed to demonstrate why the Turner children should not be "made whole" in accord with the West Virginia "made whole doctrine"

There is no dispute that City Hospital, Inc. has sought to enforce subrogation and that subrogation is a remedy found in equity. Sereboff, supra. City Hospital, Inc. has

properly relied upon this Court's holding in Kanawha Valley Radiologists wherein the court held that the insurance clause, like that at bar, did not include language that mandated an override of all equitable principles. Although in *dicta*, this Court suggested that certain insurance policies could, override principles of equity, that issue was not adjudicated by this Court. Kanawha Valley Radiologists, Inc. v. One Valley Bank N.A., 210 W.Va. 223, 238, 557 S.E.2d 277 (2001). Even City Hospital, Inc. has asked the Circuit Court to invoke principles of equity to order the proceeds held in trust until the final adjudication of the lien. Obviously, City Hospital, Inc. understand that principles of equity apply to this matter within all relief requested by all parties pertaining to the adjudication of the subrogation interest before the Circuit Court.

City Hospital, Inc. has relied upon language contained in their policy which they claim clearly and expressly precludes them from bearing their share of attorney fees and costs in any litigation when a party seeks compensation for their own pain and suffering and future medical bills. This Court has upheld subrogation clauses only when they are construed to require that the insurance company bear its share of the costs and fees. Federal Kemper, supra. See also Anderson v. Wood, 204 W.Va. 558, 514 S.E.2d 408 (1999) (Requiring, based on principles of equity and Federal Kemper, that DHHR be required to bear a pro rata share of fees and costs when asserting subrogation.)

Two cases involving injured children and subrogation clauses have been interpreted by this court as requiring an examination in the facts of the case before upholding or otherwise adjudicating a subrogation clause. This Court held in Provident Life and Accident Ins. Co. v. Bennett:

The issue presented in *Kittle* was whether the appellant, West Virginia Department of Human Services, was entitled to be fully reimbursed for the medical expenses it paid on behalf of the appellees from the amount the appellees eventually received as a settlement from the legally liable party. We pointed out in syllabus point 1 of *Kittle* that "[t]he right of subrogation depends upon the facts and circumstances of each particular case." Huggins v. Fitzpatrick, 102 W.Va. 224, 228, 135 S.E. 19, 20 (1926).<sup>1</sup> Syllabus point 3, *Ray v. Donohew*, 177 W.Va. 441, 352 S.E.2d 729 (1986).<sup>2</sup> We also quoted with approval the ruling by the Wisconsin Supreme Court in Rimes v. State Farm Mut. Ins. Co., 106 Wis.2d 263, 316 N.W.2d 348, 353 (1982), wherein it was said that "[o]ne who claims subrogation rights, whether under the aegis of either legal or conventional subrogation, is barred from any recovery unless the insured is made whole."<sup>3</sup> *Kittle*, 185 W.Va. at 129, 405 S.E.2d at 459.

Provident Life and Accident Ins. Co. v. Bennett, *supra*, 199 W.Va 240:

It is not surprising that City Hospital, Inc. has reached in the deep barrel of judicial history and located a case entirely unrelated to the injuries sustained by the Turner children and the efforts of City Hospital, Inc. to preclude their recovery for their injuries to support their position that the children need not be made whole in this settlement. City Hospital, Inc. cites Ray v. Donahew, 177 W.Va. 441, 352 S.E.2d 729 (1986) in support of their position. That matter involved two adults in a property dispute regarding a promissory note. However, in that case, this Court specifically recognizes that subrogation must be enforced within the principles of equity. At Syllabus Point 8, this Court held: "Subrogation, being a creation of equity, will not be allowed except where the subrogee has a clear case of right and no injustice will be done to another." (Citing Syl., Buskirk v. State-Planters' Bank & Trust Co., 113 W.Va. 764, 169 S.E. 738 (1933). Ray v. Donahew, 177 W.Va. 441, 352 S.E.2d 729 (1986))

Oddly, City Hospital Inc. is relying on federal cases in applying the "made whole rule." This reliance is wrongly placed. First, the West Virginia made whole rule is not

preempted by federal law. If it were, this court would not even have jurisdiction and couldn't apply the federal law, or the state law. Therefore, the Court should follow precedent and the interpretation of the "made-whole rule" as articulated by cases on point by this Court, such as Kittle v. Icard, 185 W.Va. 126, 405 S.E.2d 456 (1991).

Despite the fact that this Court should apply precedent from case on point in the adjudication of this matter, City Hospital, Inc. has cited a number of federal court cases. City Hospital, Inc. claims that the made whole doctrines adopted by the federal courts is similar to the doctrine adopted by West Virginia. Although the cases cited are not on point and are of limited precedential value, some of the cases cited by City Hospital, Inc. may include a few important considerations beyond the dicta. For example, in Copeland Oaks v. Haupt, 209 F.3d 811 (6<sup>th</sup> Cir. 2000), the Sixth Circuit held that the Plan in that case was not entitled to any of the \$100,000 in proceeds that the injured person was awarded for personal injuries which were placed in a settlement trust. That Court held that the plan may be able to claim subrogation of the \$5000.00 awarded in that case for medical payments, subject to the made-whole rule. In rejecting the Plan's narrow reading of their contract, the court stated: "As noted by the Eleventh Circuit, were we to accept Copeland Oaks' position, "the [Plan] could avoid a default rule of insurance law applicable in the ERISA context merely by giving itself discretion to interpret the plan. We do not believe that ERISA gives the Fund that kind of authority, which is denied to insurance companies not governed by ERISA." Cagle, 112 F.3d at 1522. Copeland Oaks v. Haupt, *supra*, 813.

Another case cited by City Hospital, Inc. regarding the federal made whole doctrine is United McGill Corp. v. Stinnett, 154 F.3d 168, 173 (4<sup>th</sup> Cir. 1998). This case also addresses the federal made whole doctrine and is not on point. In United McGill Corp. the Fourth Circuit specifically held that they were not addressing a case such as that at bar:

We leave for another day how to treat situations where the beneficiaries' recovery from the third party after deducting attorney's fees is actually less than the plan's reimbursement claim, thus ostensibly requiring the beneficiary to pay out of her own pocket to meet the plan's claim. See Bollman, 112 F.3d at 117 (refusing to address this hypothetical scenario because the third party settlement in that case fully financed both the attorney's fees and the plan's claim). We do note that future disputes over such an anomalous result can easily be avoided by more careful drafting of subrogation and reimbursement provisions. See Health Cost Controls, 139 F.3d at 1071 (indicating that plan specified that "in no event will the amount of reimbursement . . . exceed . . . [t]he amount actually recovered from that part of judgment or settlement in excess of the amount necessary to fully reimburse the Employee. . . for out-of-pocket expenses incurred, including attorney fees"); Ryan, 78 F.3d at 125 (reciting that subrogation provision provided that "if the payment you receive from the third party, less your attorneys' fees and other legal expenses, is not enough to reimburse benefit payments at 100%, you must reimburse the plan 100% of what is left after paying your attorneys' fees and other legal expenses").

United McGill Corp. v. Stinnett, *supra*, 171.

While this case did not address West Virginia common funds doctrine, the Fourth Circuit nonetheless clarified that had the case been such as that at bar, where City Hospital, Inc. is demanding payment on young Ronan's claim and refusing to bear any attorney fees or costs, which will result in Mrs. Turner being personally and legally liable for all attorney fees and costs, the result would have been different.

City Hospital, Inc. provides scant authority as to why these opinions which have no precedential value and are not on point should sway this court rather than the opinions that this court has expressly articulated regarding facts that are not unlike those at bar. This Court should

continue in the line of precedent begun with Kittle v. Icard, *supra*, and require that these injured children be made whole.

G. City Hospital, Inc. has failed to demonstrate why they should not bear their share of attorney fees and costs and why the plan participant, Mrs. Turner should bear those expenses solely out of her own private funds

Just as City Hospital, Inc. has confused the analysis between the federal and state made whole rules, they have also confused the analysis between the state and federal common fund doctrines.

Both state and federal common fund doctrines have developed independently in state and federal courts. Preemption litigation and the development of the common fund doctrine in the state of Illinois has developed independently and uniquely in the state and federal courts. Two separate rules have emerged. In state court, the state common fund doctrine applies when an ERISA plan attempts to enforce the provisions of a subrogation clause. The state court analysis is set forth in Scholtens v. Schenider, 173 Ill. 2d 375, 671 NE.2d 657 (1996) and specifically holds that the state law as developed in the state's common fund doctrine is not pre-empted. The analysis was affirmed in Bishop v. Burgard, 198 Ill. 2d 495, 507, 764 N.E.2d 24, 33 (2002).

City Hospital, Inc. has cited a subsequent Seventh Circuit opinion in Administrative Committee of the Wal-Mart Stores, Inc. Associates Health and Welfare Plan v. Varco, 338 F.3d 680 (7<sup>th</sup> Cir. 2003) wherein the federal court doctrine is described. However, this opinion did not overrule Scholtens. The Illinois Supreme Court continues to recognize the state law regarding the common funds doctrine. In a case involving a separate issue where both federal and state doctrine is inconsistent, the Illinois Supreme Court stressed their obligation to adhere not to the federal law, but to the state law, citing Bishop.

Accordingly, federal circuit court decisions are considered persuasive, but not binding on us or our supreme court in the absence of a decision by the United States Supreme Court as recognized in *Sprietsman*. See *Bishop v. Burgard*, 198 Ill. 2d 495, 507, 764 N.E.2d 24, 33 (2002) (where the United States Supreme Court has not ruled on a question, federal circuit courts of appeals exercise no appellate jurisdiction over the Illinois Supreme Court). As we have previously noted, the United States Supreme Court has not issued any opinions concerning state privity requirements under Magnuson-Moss. Accordingly, while the Illinois Supreme Court may opt to give weight to the decisions of lower federal courts interpreting a federal statute, it is under no compulsion to do so. See *Griffin v. Bruner*, 341 Ill. App. 3d 321, 324, 793 N.E.2d 974, 976 (2003) (while decisions of lower federal courts interpreting a federal statute are not controlling on an Illinois court, the Illinois court may opt to give weight to the federal court opinions). \*fn2

[30] We, however, are bound by the decisions of the Illinois Supreme Court. *People v. Spahr*, 56 Ill. App. 3d 434, 438, 371 N.E.2d 1261, 1264 (1978) ("Illinois supreme court decisions are binding on all Illinois courts, but decisions of Federal courts other than United States Supreme Court decisions concerning questions of Federal statutory and constitutional law are not binding on Illinois courts"). After our supreme court has declared the law with respect to an issue, this court must follow that law, as only the supreme court has authority to overrule or modify its own decisions. *Illinois Labor Relations Board v. Chicago Transit Authority*, 341 Ill. App. 3d 751, 758, 793 N.E.2d 730, 735 (2003). As an inferior court of review, our serving as a reviewing court on our supreme court's interpretation of federal law would inject chaos into the judicial process. As a result, whether there is going to be any change or modification of the precedent set by *Rothe* and *Szajna* should first be determined by our supreme court and not by us.

*Mekertichian v. Mercedes-Benz U.S.A., L.L.C.*, Ill.App.3d 828, 807 N.E.2d 1165, 283 Ill.Dec. 324 (Ill.App. Dist.1 03/31/2004); *upheld* 347 Ill.App.3d 828, 807 N.E.2d 1165, 283 Ill.Dec. 324, 2004.

Similarly, any action by this Court should adhere to the requirements of the West Virginia law regarding preemption as set forth in *Orlofske v. The City of Wheeling*, 212 W.Va. 538, 575 S.E.2d 148 (2002), *Donaldson Mine Company v. Human Rights Commission*, 187 W.Va. 631, 420 S.E.2d 902 (1992), and *Martin Oil v. Philadelphia Life Insurance Company*, *supra*, 203 W.Va. 266, as well as the West Virginia common funds doctrine as adopted in subrogation clauses and described *Federal Kemper v. Arnold*, *supra*, and by Justice Davis in her dissent in

The Estate of Marjorie I. Verba by Sally Jo Nolan, Executrix v. David A. Ghaphery, M.D., 210 W.Va. 30, 32, 552 S.E. 2d 406 (2001) (*dissent*) (fn. 12). The federal authority cited by City Hospital Inc., has no precedential value and should not persuade this court to abandon its own precedent.

H. City Hospital will be unjustly enriched if they are permitted to take from the children's recovery, including their future medical expenses without bearing a share of attorney costs and fees in procuring this settlement

City Hospital, Inc., has cited the Fourth Circuit's opinion in Provident Life & Acc. Ins. Co. v. Waller, 906 F. 2d 985 (4<sup>th</sup> Cir. 1990) in support of their position that ERISA, 29 U.S.C. §1144(a), *supra*, preempts the entire body of law in West Virginia created for the protection of the assets of injured children. While this case did not address the preemption issue (*supra* p. 19), it did adopt a federal common law "unjust enrichment" doctrine. In Provident, an injured adult had received payments from an ERISA plan for medical bills. When the recovery from the third party included those payments and also included additional funds in excess of those payments, the Fourth Circuit concluded "... (T)hat fashioning a federal common law rule of unjust enrichment is appropriate in the circumstances of this case." The court cited Virginia law which "... (W)ill imply a promise to pay for goods received, Kern v. Feed Co., 224 Va. 678, 680, 299 S.E.2d 363, 365 (1983), and several cases recognize the related theory of quantum meruit, which holds that when one party performs services at the request of the other party to a contract, "the law creates an obligation, which is an implied-at-law contract, to pay a reasonable compensation. . . ." Humphreys Railways v. F/V Nils S, 603 F. Supp. 95, 98 (E.D.Va. 1984). Provident Life & Acc. Ins. Co. v. Waller, *supra*, 993..

West Virginia also recognizes that a party should not benefit from unjust enrichment. In Copley v. Mingo County Board of Education, 195 W. Va. 480, 466 S.E.2d 139 (1995) the court described the West Virginia doctrine when this Court cited two cases from Nebraska describing the doctrine:

The principle underlying quantum meruit recovery "is a contract implied in law, based on the equitable doctrine that one will not be allowed to profit or enrich oneself unjustly at the expense of another." Associated Wrecking and Salvage Co. v. Wiekhorst Bros. Excavating & Equip. Co., 228 Neb. 764, 424 N.W.2d 343, 348 (1988). "If benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefore, the law requires the party receiving and retaining the benefits to pay their reasonable value." Id. (quoting Hoffman v. Reinke Mfg. Co., 227 Neb. 66, 416 N.W.2d 216, 219 (1987)).

Copley v. Mingo County Board of Education, *supra*, 486.

In the event that this court may decline to address the issue of preemption, the court should issue an order preventing City Hospital, Inc. from enjoying unjust enrichment by failing to bear their share of the attorney fees and costs, by shifting the entire burden to these children.

I. The Administrator of the Plan for City Hospital, Inc. has acted with a conflict of interest in administering the plan and seeking to recover the full funds from these children when their Plan may benefit from that action.

City Hospital, Inc. has never supplied sufficient fund documents for the court to determine whether or not their plan has been established in such a manner as to involve a regulated insurer such as a "reinsurer," an "excess insurer," a "stop gap insurer," or an "umbrella insurer." Further, in the documents that they have elected to provide they have never provided documents to the court nor to the parties to define the procedures employed in evaluating and paying claims, as well as evaluating and collecting subrogation claims sufficient to determine whether or not a conflict of interest is presented such as outlined in the June 19, 2008 United

States Supreme Court decision, Metropolitan Life Insurance Co. et al. v. Glenn, 2008 WL 2444796 (June 19, 2008). In the case at bar, the plan administrator is making decisions which affect the children of the employee not for the benefit of the children, not for the benefit of the employee, but for the sole benefit of City Hospital, Inc. City Hospital, Inc. should not be able to control the recovery of these children until all documents regarding their plan are made available to the court for the evaluation in light of not only the savings clause and deemer clauses, but also this potential serious conflict of interest. Historical documentation pertaining to the instances when City Hospital, Inc. has sought subrogation and engaged in litigation to obtain subrogation payments as well as policies and procedures for the evaluation of all claims should be provided.

City Hospital, Inc. has relied upon an opinion issued by the Fourth Circuit in their opinion which also found that the plan administrator acted within a conflict of interest when that administrator denied an employee's request for a surgical procedure for an employee's child. In that case, the Fourth Circuit interpreted the language of the contract contrary to the interpretation by the administrator of the plan due to the standard mandated by the conflict of interest. Bynum v. Cigna Healthcare of North Carolina, Inc., 287 F.2d 305 (4<sup>th</sup> Cir. 2002) Similarly, in this matter, this Court should interpret the language of the plan consistent with not only established doctrines. This Court should also interpret the provisions with great scrutiny to prevent the conflict of interest presented by the administrator's interpretation of the clause.

## **CONCLUSION**

Ronan, Rhiannon, and Dylan Turner are three innocent children. They have suffered immensely by the horrific acts of their father which caused at least one of them to suffer serious physical injuries and all of them to suffer emotional injuries. Along with their mother, they have

been involved in five separate court proceedings resulting from their father's callous acts. In an effort to protect these children, maintain stable family relationships, and provide for their future education and medical needs, their mother negotiated a settlement with their paternal grandfather's insurance company.

An unrelated third party, her employer, now seeks to force her into litigation against her family members and place her in a position where her children's only source of payment for their future medical bills will be a judgment that they would have to enforce against their grandfather. Her employer seeks to use a law which was enacted to protect her employment benefits from being mishandled, to cause her to enter into yet another series of hearings and further litigation by insisting that they are entitled to a 100% recovery for every dime paid under her health insurance policy. They are so unwilling to compromise that they have refused to participate in mediation or bear any of the litigation costs or expenses.

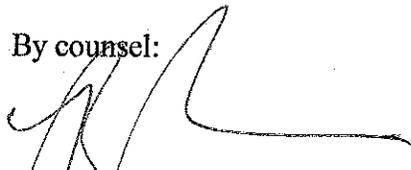
Fortunately, the laws of the State of West Virginia were designed to protect children such as Ronan, Rhiannon and Dylan from the type of action that City Hospital, Inc. is seeking this court to sanction. The action sought by City Hospital, Inc. to deprive these children of their settlement is not authorized by state nor federal law.

The circuit court refused to accept jurisdiction which effectively dismissed the infant settlement, which was contingent upon an equitable reduction of liens. The circuit court erred in ruling that it had no jurisdiction over adjudication of the infant settlements, insofar as they address the enforcement or limits of liens or subrogation interests. The circuit court erred when it found that the State laws of West Virginia are preempted by the ERISA and then failed to reduce any subrogation lien asserted by City Hospital, Inc. in accord with established doctrines.

For these reasons, the decision of the circuit court should be set aside and this matter should be remanded with instructions for the circuit court to hold a hearing regarding the infant settlement petition and properly exercise jurisdiction to reduce the liens in conformity with the laws of the State of West Virginia. In the alternative, this matter should be remanded for further factual development with regard to the plan adopted by City Hospital, Inc. such that the circuit court may make findings of fact as to the applicability of the "savings" clause for a proper adjudication of the issues of preemptions under the provisions of that clause, conflict of interest, and interpretation of the ambiguous provisions relied upon by City Hospital, Inc..

**RONAN TURNER, et al.,**

By counsel:



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**NO 080367**  
**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS,**  
**CHARLESTON, WEST VIRGINIA**

**DYLAN TURNER, RHIANNON TURNER, RONAN TURNER, by their next friend and parent, DIANE TURNER, individually and on her own behalf,**  
**Appellant/Plaintiffs Below**

**vs:**

**Case No. 080367 (on appeal)**  
**(Berkeley Co.06C-717)**

**CHARLES TURNER, JR., CHARLES TURNER, SR., and LAURIE TURNER,**  
**Defendants Below**  
**and**

**CITY HOSPITAL INC.,**  
**Appellee/Intervenor Below**

**CERTIFICATE OF SERVICE**

Service of the foregoing APPELLANT'S REPLY BRIEF were had upon the following by placement of the same in the regular course of the U.S. Mail, with proper postage affixed, this the 27st day of June, 2008 addressed as follows:

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