

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COPY

**MORGAN COUNTY WAR MEMORIAL
HOSPITAL, BY AND THROUGH MORGAN
COUNTY WAR MEMORIAL HOSPITAL
BOARD OF DIRECTORS,
JOHN BORG, and
VALLEY HEALTH SYSTEM, INC.,**

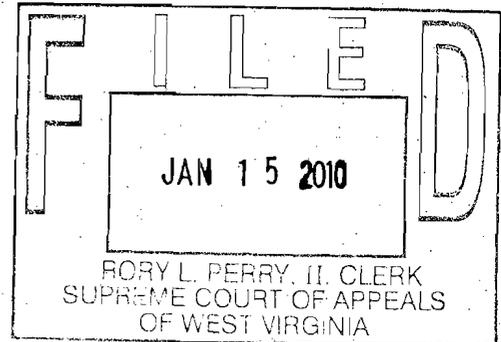
Appellants/Defendants Below,

v.

DOCKET NO. 35298

**JENNIFER BAKER, JANET HORNER,
SHARON HENDERSHOT, BARBARA JOHNSON,
TANYA MANLEY, HELEN MILLER,
CHRISTINE MULLEN, RUTH SMITH,
BERNICE STOTLER, DEE ANN STOTLER,
LINDA STOTLER, BARBARA YOST,
CAROL LAYTON, NANCY WAUGH,
and TERRY KESECKER,**

Appellees/ Plaintiffs Below.



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I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Morgan County War Memorial Hospital is a small county owned hospital in Berkeley Springs, West Virginia. It has 41 beds and approximately 180 full time and part time employees. In 1972, War Memorial Hospital (herein “War¹” or “the Hospital”) adopted a “defined benefit” pension plan for the benefit of its eligible employees (herein called the “Plan”).² A defined benefit plan provides a pension calculated under a formula set forth in the plan, using factors such as compensation and years of service. No employee has an individual account in the Plan, which is funded by the employer, based upon annual calculations made by the Plan’s actuary.

In this case, the employees did not contribute any amount whatsoever to the Plan. The entire expense and the entire economic risk of providing the formula pension benefit have been borne exclusively by the Hospital. As of January 1, 2010, the Plan has accumulated a surplus of about \$650,000.00. The disposition of the surplus is one of the primary issues in the case below.³

The issues in this appeal arise from the fact that the Circuit Court has granted summary judgment in favor of the Plaintiff employees, declared the Plan was terminated, and awarded the Plan surplus to the Plaintiffs below. In so doing, the Circuit Court disregarded the Plan language and the legal effect of the Plan, and disregarded undisputed evidence that the Plan was not terminated.

¹ For purposes of this brief, the term “War” also includes John Borg and Valley Health System, Inc.

² The Plan is attached as Exhibit A to the Complaint.

³ The surplus assets would be calculated after the 15 plaintiffs (and the sole non-plaintiff participant) have been paid their accrued (earned under the formula) benefits, as calculated by the Plan actuary pursuant to this defined benefit plan (to which the Plaintiffs have never contributed, and in which the Plaintiffs do not have individual accounts).

A. Summary of Legal Issues

Most important to an understanding of this case, the Hospital intended from the outset that the Plan would be a “qualified” plan under Section 401(a) of the Internal Revenue Code. The Plan states at Section 1.1 that “the Plan is intended to meet the provisions of Section 401(a) of the Internal Revenue Code of 1986, as amended (the ‘Code’) which are applicable to a governmental plan as defined in Code Section 414(d).”⁴

It is only because the Plan is “qualified” under federal tax law that (1) participants are not taxed on their benefits until such amounts are distributed to them; and (2) the Plan’s income and gains on its assets are tax exempt while such amounts remain in the Plan. The Plan’s qualified status is based upon its continued compliance, both in form and in operation, primarily with Sections 401 through 415 of the Code, and voluminous Treasury Regulations issued thereunder, in addition to other guidance (*e.g.* Revenue Rulings) issued regularly by the Internal Revenue Service.

As a Plan sponsored and administered by Morgan County War Memorial Hospital, a governmental entity, the Plan is not subject to the jurisdictional requirements of ERISA, which explains why this litigation is in the West Virginia court system, and not in the federal court system. However, the inapplicability of ERISA should not be confused with the fact that the Plan is a creature of federal tax law in all material respects.⁵ Its qualified status under federal tax law has been protected and preserved at various times in its history by War’s applications for and

⁴ See Section 1.1 of the Plan.

⁵ For example, the Plan was amended on November 14, 2003, to comply with minimum distribution rules under Code section 401(a)(9); the Plan was amended in 2006 to comply with requirements under Code section 401(a)(25) regarding actuarial equivalence; and the Plan was amended in 2009 to comply with limitations on benefits under Code section 415, all as required to maintain the Plan’s qualified status under federal tax law.

receipt of favorable determination letters from the Internal Revenue Service,⁶ confirming the Plan's qualified status.⁷

The foregoing summary is essential to a correct understanding of the primary issue before this Court: the question of whether Judge John C. Yoder correctly decided as a matter of law that the Hospital did terminate the Plan effective as of December 31, 2003. If the Plan was terminated, then (and only then) the Court would need to address the issue of the Plan's surplus assets which arise from War's contributions to the pension trust, and the investment performance of the assets held within that pension trust.

As explained below, Defendants' position is that the Plan is not terminated, but remains "frozen,"⁸ and that the Plan continues for its original purpose of paying retirement benefits to plan participants, 15 of whom are the Plaintiffs in this case. At the same time, because there is a surplus in the pension trust, the Hospital wishes to transfer those surplus assets into its other qualified plan, which is a defined contribution plan, thereby adding to the individual accounts of the approximately 100 Hospital employees who participate in that plan, some of whom are Plaintiffs in this case.⁹

⁶ IRS has issued ruling letters on the qualified status of the Plan at various times in its history, including letters issued in 1988 and in 2003. Another such ruling letter will be requested by War in 2010, thereby protecting the tax advantages of the Plan for participants and beneficiaries.

⁷ If the Plan ever lost its qualified status, all benefits would be taxable to participants, even before receipt; the pension trust would be taxed on its income back to the date of plan disqualification; and any participant who received a lump sum distribution would not be permitted to make a tax-free rollover into an IRA.

⁸ When a plan is frozen, it simply means that no additional employees may participate in the plan, and existing participants do not accrue additional benefits. As in this case, a plan will usually be frozen because the employer has adopted another plan for the benefit of its eligible employees.

⁹ It has never been a secret, but has been openly and forthrightly communicated, that War previously sought the return of the surplus assets for the sole purpose of acquiring land on which to construct a new hospital, for the benefit of all citizens of Morgan County. However, a great majority of the Plaintiffs refused to sign the 2005 proposed consent and release documents which will be discussed below, and the Hospital therefore decided, in its capacity as settlor, that in the alternative, the best use of the surplus would be to apply it for the benefit of all 100 or so employees who participate in its defined contribution

Plaintiffs, on the other hand, simply want the surplus for themselves. However, their attempt to make a barely colorable claim for the surplus as a windfall is possible only if the Plan is terminated under the law. Because the Plan is not terminated, the Plan's provisions at Section 9.3 for possible asset distribution following termination never become operable, and Plaintiffs lack standing to assert any claim for the surplus. Nevertheless, all Plaintiffs still have their accrued benefits under the defined benefit pension plan, and many of them also have their accrued benefits under War's defined contribution plan. If Plaintiffs were to receive the Plan's surplus, it would be in the nature of a complete windfall, resulting in an additional payment equal to more than 3 times the amount needed to pay the actual accrued benefits earned by Plaintiffs under the Plan. The law generally disfavors a windfall.¹⁰

B. Summary of the Events that Led to this Appeal

War exercised its discretion as settlor, and froze the pension plan in 1987 (meaning that no additional participants could join the Plan and that no additional benefits accrued to the participants under the Plan). At the same time the Plan was frozen, all employees were placed into a new plan.¹¹ In 2004, the War Board of Directors voted to begin the process of terminating the defined benefit Plan, with the clear intent of using the surplus for building a new hospital.

Plan termination is, by law, a process in which several steps must be taken before it is complete. In this case, the first step in the process was a vote by the Board of Directors to terminate the Plan, which occurred on February 24, 2004. The Board's premise for its 2004

retirement plan. The Plan document permits a transfer of the surplus at Section 10.2.

¹⁰ *Washington-Baltimore Newspaper Guild v. Washington Star*, 555 F.Supp. 257, 260 (D.C.D.C. 1983); *In Re C.D. Moyer Pension Trust*, 441 F.Supp. 1128, 1133 (E.D.Pa. 1977).

¹¹ The new Plan that was started in 1987 is a defined contribution plan, and is the plan into which War now desires to transfer the surplus funds from the Defined Benefit Plan. A transfer is permitted at

resolution was that War's President, John Borg, would meet with the employees, obtain the employees' consent to return the surplus to War,¹² enabling the employees to receive their accrued benefits earlier than normal, provided that each of the employees would sign consent and release forms.

Upon meeting with Mr. Borg, the employees refused to consent and most refused to sign releases accepting their defined benefit and returning the surplus to War. As a direct result of the employees' refusal to consent and their refusal to sign releases accepting their defined benefit, War's Board voted on January 6, 2006 to rescind the prior vote to terminate the Plan and stop the termination process, because the Board's conditions of termination had not been met.¹³

Under threat of litigation from Plaintiffs, War filed a Declaratory Judgment action in the United States District Court for the Northern District of West Virginia, seeking judicial determination of the rights and responsibilities of the parties, and a determination as to the disposition of the surplus funds in the Plan. That case was dismissed by the federal court based on lack of jurisdiction under ERISA.¹⁴ The Plaintiffs immediately filed the instant Complaint claiming that they were entitled to the entire surplus in the Plan.

Ultimately, War filed a Motion for Partial Summary Judgment, requesting that the Court rule that the Plan had not been terminated, because the conditions for termination had not been met, the Plaintiffs had not agreed to sign the release and accept their benefits, and as a result had not met the conditions of the Board in beginning the termination process. The Plaintiffs below

Section 10.2 of the Plan document.

¹² See C. William Locke, Chairman of the War Board of Directors, Depo. 102:5-12, and 107:10-14 (March 25, 2009) referring to the Board Resolution and the Consent of the Release Form.

¹³ See War Board Resolution dated January 6, 2006, attached as Exhibit 3 to Defendants' Motion for Partial Summary Judgment.

¹⁴ Claims for benefits under government plans and church plans are subject to the jurisdiction of state courts, where state courts often apply ERISA principles by analogy.

filed a Cross Motion for Summary Judgment, asking the Court to rule that the Plan had been terminated because of one of the 2004 Resolutions, and ignoring all other evidence to the contrary. The termination issue is critical to this case because if the Plan is not terminated, then Plaintiffs have no basis to make a claim for surplus funds under Plan Section 9.3.

On April 8, 2009, the Court held a hearing and ruled that the Plan had been terminated. Before ruling from the bench, Judge John C. Yoder stated on the record that, "I'm not going to sit here and tell you that I'm anything more than 51% confident of the decision I'm making."¹⁵ In so ruling, the Court ignored the fact that Helen Miller, a key Plaintiff (as the War H.R. Director) and someone who worked with the Plan on a regular basis, had testified repeatedly in her deposition that the Plan had not been terminated, which is a very damaging admission by Plaintiffs. The Court also ignored the fact that Shawn Bogenrief, an experienced consultant and director of the firm that advised War for many years regarding the pension plan, also testified that the Plan had not been terminated.

To make matters worse, when the Circuit Court issued its Order on May 4, 2009, holding that the Plan had been terminated, the Circuit Court went beyond the scope of the argument and the summary judgment motion and its own ruling in the April 8, 2009 hearing, and ruled that the surplus funds belong to the Plaintiffs, which was not the issue in the Summary Judgment Motion and went far beyond the relief that had been requested. In so doing, the Court ignored numerous principles of law, including the principle that the surplus does not belong to the employees because the employer bore the risk of financial solvency of the Plan. The Court's *sua sponte* ruling deprived War of any opportunity to argue the above legal principles, and deprived War of

¹⁵ See Exhibit B (Hrg. Tr., pages 2-4) to Defendants' Objections to Plaintiffs' Proposed Order.

the opportunity to argue regarding the meaning of the Plan language at Section 9.3, which is permissive and discretionary in nature, subject to the discretion of the Hospital as settlor.

In short, not only did the Court make an incorrect ruling regarding Plan termination, but its ruling went beyond the relief requested in the Summary Judgment Motions and awarded the surplus to the Plaintiff employees, without allowing War the opportunity to make arguments regarding disposition of the surplus and generally ignoring the Plan language and principles of pension plan interpretation.

As a result, the Circuit Court has completely disposed of the Plaintiffs' claim that they are entitled to the Plan surplus, and, recognizing this fact, the Circuit Court made a specific finding in its May 4, 2009 Order that there was no reason for delay of the appeal to this Court. It is from this May 4, 2009 ruling that Defendants filed their petition for appeal pursuant to W.Va. R.Civ.P. 54(b).

Defendants request that this Court reverse the rulings of the Circuit Court, rule that the Plan was not terminated, reverse the ruling of the Circuit Court with respect to the award of surplus assets to the Plaintiffs, and award summary judgment to the Defendants that the Plan was not terminated.

II. STATEMENT OF FACTS

1. War is a government owned hospital. War was created by an act of the West Virginia Legislature, (known as Senate Bill No. 222 passed in the 1947 session), and pursuant to certain provisions and stipulations contained in a Resolution and Order of the County Commission, (then County Court), of Morgan County, West Virginia, dated the 4th day of February, 1947, and has been owned and operated under the direction of the Morgan County Commission continuously since 1947.

2. War is operated under the direction of a Board of Directors, appointed by the Morgan County Commission, and currently managed under a contract with Valley Health System.

3. On July 1, 1972, War's Board of Directors adopted the Pension Plan, as a qualified plan, for the purpose of providing retirement benefits to the Hospital's employees.

4. As amended, the stated purpose of the Plan is set forth as follows:

Section 1.1. Purpose.

The Morgan County War Memorial Hospital Employees' Pension Plan (the "Plan") is maintained by Morgan County War Memorial Hospital (the "Employer") to provide its eligible employees with retirement benefits. The Plan is intended to meet the provisions of Section 401(a) of the Internal Revenue Code of 1986, as amended (the "Code") which are applicable to a governmental Plan as defined in Code Section 414(d).

5. War made all contributions to the Plan and bore all costs to maintain and manage the Plan assets. The Hospital bore all risk of funding sufficiency and the investment experience of Plan assets. Employees made no contributions to the Plan and bore no funding risk. Their accrued benefits are guaranteed.

6. The Plan has been amended and restated several times, including the following:

- a. The original Employees' Pension Plan Agreement was written in July 1972 and dated October 30, 1972.
- b. The Plan was amended and restated July 1, 1980, signed January 20, 1981. Plan amendment number 2 was signed October 16, 1985 effective June 30, 1985.
- c. The Employees' Pension Plan Agreement was amended and restated effective on July 1, 1985, and signed January 14, 1987.
- d. By action of the Board of Directors, the Defined Benefit Plan was "frozen" as of July 1, 1987.

- e. The current Plan document, dated July 1, 2001, as amended and restated. (See Exhibit A attached to the Complaint), has been further amended as recently as June 30, 2009.¹⁶

7. In every instance, the Plan was written or rewritten to comply with the requirements of the Internal Revenue Code and Treasury Regulations. At various times, the Hospital applied for and received favorable determination letters from IRS confirming the qualified status of the Plan, and the intent of the Hospital to administer the Plan in accordance with federal tax law and IRS rulings.¹⁷

8. Benefits under the Plan were frozen and no other participants have been admitted to participate in the Plan since July 1, 1987.

9. As of March 31, 2009, the Plan assets equaled \$721,169.47 and its obligations to participants equaled \$156,747.00, leaving a surplus of \$564,422.27. That surplus is more than three times the amount needed to pay the actual accrued benefits earned by remaining participants under the Plan.

10. War intended to terminate the Plan and distribute accrued benefits to participants, following conclusion of the termination process.

11. After accrued benefits were paid, War intended to use the residual surplus assets to begin funding the construction of a new hospital building in Morgan County and so informed the Plaintiffs, provided that the Plan was properly terminated under the applicable law.

12. To accomplish its goal to fund the new hospital building, War prepared Plan amendments in June, 2002 which were submitted in mid-2004 to IRS for a determination letter requesting IRS approval of the termination of the Defined Benefit Plan and distribution of assets,

¹⁶ Various Plan amendments adopted after the alleged termination date of December 31, 2003, are included as part of War's motion to supplement the record on appeal.

¹⁷ IRS issued such letters in 1988 and in 2003, and they are part of War's motion to supplement the record

which included early distribution of the vested benefits to each participant and payment of the residual assets to War.

13. The accrued benefits for all participants had fully vested by the Plan amendment which was effective June 30, 2002.

14. On February 24, 2004 the War Board of Directors agreed to multiple Written Consent Resolutions intending to result eventually in the subsequent termination of the Plan. The Resolutions stated that the Board desired to terminate the Plan effective December 31, 2003, and the Board authorized and directed the following actions on behalf of War:

- a. To make application to the Internal Revenue Service for a determination upon termination of the Plan to the effect that the Plan is qualified under Code Section 401(a);
- b. To make any changes to the Plan required by the Internal Revenue Service as a condition of the issuance of a favorable determination letter or to authorize such actions as may be required to cause the Plan to be qualified under the Code;
- c. To make [early] distributions under the terms and conditions of the Plan as soon as administratively feasible once the Plan has received a favorable letter from the Internal Revenue Service; and
- d. To return to the employer all monies remaining after the satisfaction of all obligations to Plan participants.

15. On June 1, 2004, IRS application forms and Plan documents were filed with IRS seeking IRS confirmation of the Plan's qualified status upon the future termination of the Plan, and in an effort to comply with one of the multiple consent resolutions adopted in 2004.

16. On June 1, 2004, John Borg, Hospital Administrator,¹⁸ held a meeting with the active employees to provide information about the termination process of the Defined Benefit

in this case. IRS is expected to issue an updated determination letter in 2010.

¹⁸ Plaintiffs have alleged that John Borg (personally) was also the Plan Administrator, which is plainly untrue, as the Plan names War as Plan Administrator at Section 1.3, and any actions taken by John Borg

Plan.

17. On October 6, 2005 the IRS issued its conditional letter, confirming that if the Plan's accrued benefit obligations to all Plan participants were satisfied, the Plan surplus assets could be returned to War without being adversely affected. The IRS stated that War should adopt proposed amendments submitted to IRS on June 8, 2005, and should either purchase guaranteed annuity contracts, or make cash distributions as soon as administratively possible, to complete the termination process.¹⁹ For reasons set forth in the next three paragraphs, War never adopted the proposed amendments and the IRS letter became null and void.

18. On December 5, 2005, War made a written proposal to the remaining Plan participants, for the termination of the Plan titled "Consent to Amendment and Release". The proposal states at pages 2 and 3 that the participants will receive the benefits promised under the Plan and that the Hospital will use the assets it receives from the Plan to purchase land for the future expansion of the Hospital. The Hospital also proposed that participants could choose one of three options, namely:

- a. A lump sum distribution (subject to income tax liability and withholdings),
- b. An annuity (a joint annuity for married participants), or
- c. A tax-free rollover of the lump sum payment to an IRA.

19. The Plan participants, most of whom are Plaintiffs herein, rejected the Hospital's proposal for termination of the Plan, including current distribution of their accrued benefits, and claimed an ownership interest in all Plan assets, including the residual assets. Plaintiffs had every right to reject the Hospital's proposal, and as settlor, the Hospital's Board then had every

were in his capacity as Hospital Administrator.

¹⁹ See IRS letter addressed to War, dated October 6, 2005, at page 2.

right either to continue with the termination process, or, to rescind the 2004 resolutions.

20. As a direct result of the Plaintiffs' refusal to consent to termination, on January 6, 2006, War's Board of Directors, by unanimous written consent, before Plan termination was accomplished, rescinded the proposed termination of the Plan by adopting the following resolutions which rescinded the 2004 resolutions which had approved a future Plan termination:

WHEREAS, the Board previously adopted resolutions to terminate the Plan effective as of December 31, 2003, contingent upon obtaining a release from each participant which would allow the Plan to be amended to provide for the return to the Employer of all assets of the Plan remaining after satisfaction of all liabilities to Plan participants; and

WHEREAS, the Board has determined, in its best business judgment, due to its inability to obtain the releases from all participants, to postpone the Plan termination and to rescind its prior resolutions which terminated the Plan;

NOW, THEREFORE, BE IT RESOLVED, that the consent resolutions executed by the Board of Directors on February 24, 2004 approving the termination of the plan effective as of December 31, 2003 are hereby rescinded; and ...

(See 2006 Board Resolution attached as Exhibit 3 to Defendants' Reply to Plaintiff's Response to Defendants' Motion for Partial Summary Judgment and Response to Plaintiffs' Cross Motion for Summary Judgment).

21. On May 10, 2006, eight Plan Participants (Barbara Yost, Christine Mullen, DeeAnn Stotler, Bernice Stotler, L. Darlene Stotler, Tanya Jo Manley, Nancy Waugh and Jennifer Baker) made a demand for immediate payment to them of the Plan's surplus funds through their legal counsel.

22. Faced with the prospect of litigation threatened by Plaintiffs, War then filed a Declaratory Judgment²⁰ action in the United States District Court for the Northern District of

²⁰ In seeking the declaratory judgment, War affirmatively stated that it has never abandoned Plan participants and would guarantee that all participants receive their accrued benefits as provided by the Defined Benefit Plan's accrued benefit calculations as noted above.

West Virginia on July 6, 2006 seeking direction from the District Court regarding the employees' pension rights and the proposed termination of the Plan, including the issue of who would receive the residual assets if the Plan was terminated. That case was dismissed by the federal district court on June 25, 2007 for lack of subject matter jurisdiction.²¹

23. Upon the dismissal of the federal declaratory judgment action, 15 of the remaining 16 Plan participants filed a lawsuit on June 26, 2007 against War, John Borg, the Hospital Administrator, and Valley Health System (which operates the hospital through an Affiliation Agreement), styled *Baker, et al. v. Morgan County War Memorial Hospital, et al.* The Plaintiffs raised a new cause of action, alleging that War had breached a fiduciary duty toward them by proposing to obtain the Plan surplus, and by seeking direction from the federal court. Because War filed a declaratory judgment action, Plaintiffs now seek punitive damages of One Million Dollars (\$1,000,000.00), although that demand is not before this Court.

24. War filed a Motion for Partial Summary Judgment before the Morgan County Circuit Court on December 10, 2008. War alleged a very narrow issue - that the Plan was not terminated, because the Board's multiple resolutions to begin the Plan termination process were conditional, and those conditions were never met. The Plaintiffs filed a cross Motion for summary Judgment, alleging conversely that the Plan was terminated as of December 31, 2003.

25. On April 8, 2009, the Circuit Court of Morgan County, West Virginia, ruled that the Plan was terminated effective as of December 31, 2003. The Circuit Court's Order dated May 4, 2009, is styled as an Order Granting Plaintiffs' Motion for Partial Summary Judgment; however, the practical effect of the Order is to award final judgment regarding the surplus funds

²¹ War subsequently appealed this decision to the United States Court of Appeals for the Fourth Circuit. The United States Court of Appeals for the Fourth Circuit upheld the District Court's dismissal for lack of jurisdiction on November 19, 2008.

to the 15 Plaintiffs, implicitly excluding the Plan participant who received her accrued benefit in 2005, the Plan participant who can receive her accrued pension upon request, (neither of whom are Plaintiffs herein), and any other participants who have received benefits since December 31, 2003.

26. The Court's ruling was based solely upon one consent resolution of the Board of Directors of the Hospital dated February 24, 2004, although that corporate document in fact contained five interrelated resolutions in the nature of conditions relating to the issue of Plan termination – conditions that were never met. The Court ignored the subsequent January, 2006 resolutions rescinding the 2004 decision to initiate termination.

27. After the Summary Judgment motions were filed, but before the Court ruled on the motions, depositions of key witnesses in this case were taken. The depositions revealed the following facts that were presented to the Circuit Court prior to its ruling on the summary judgment motions. The relevant testimony is as follows:

28. Plaintiff Helen Miller, (who performed most or all of the day-to-day functions at the Hospital regarding the Plan at issue in this case), testified in her deposition that the necessary steps to be taken in the termination of the Plan had not been taken. The relevant testimony²² is as follows:

- a. Helen Miller testified that she interacted with members of Gardner & White, (the pension consulting firm which provided information and record keeping to Ms. Miller on behalf of War Memorial Hospital regarding the Plan). Ms. Miller testified that Mr. Buchanan of Gardner & White informed her that closing and terminating a defined benefit plan was a process that contained several steps which needed to be completed

²² The Court should note that, due to the time frames of the depositions in the case below, and due to the fact that the cross motions for summary judgment were under consideration by the Circuit Court, and the Court had scheduled argument, Defendants filed transcript excerpts in a motion even though the transcripts in question were not yet signed. The transcript of deponent Shawn Bogenrief was only received on April 7, 2009, the day before the final hearing regarding the summary judgment motion.

to terminate the Plan. These steps, as noted in her own handwriting, included:

- i. Process will take 18 months (approx.);
- ii. File with IRS to amendment to terminate the plan and distribute all benefits;
- iii. When employees are notified depends on applicable laws and their requirements;
- iv. Purchase annuities, lump sum distribution;
- v. Distribute excess assets.

b. Ms. Miller testified that these steps were not concluded.²³ Miller stated with regard to her deposition Exhibit 13, which were Ms. Miller's handwritten notes reflecting the above 5 steps:

A. Yeah, it's my handwriting.

Q. Okay. And what would that – what is this document, ma'am? Could you tell us?

A. This was information that I obtained from Greg Buchanan indicating steps to terminate the plan.

Q. Okay. And Greg Buchanan is the actuary?

A. Yes.

...

Q. Okay. Would they have been your notes then?

A. Yeah, they were some notes that I probably made.

Q. Very well. So, ma'am, these steps listed on page one there, steps one, two, three, four and five, as far as you know that would have been what Greg Buchanan told you that needed to be done?

A. Well, this was what he had told me at the beginning before we started purchasing or making the amendments to the plan for the purchase of those under five thousand. That's when this was obtained because it was January of 2002.

Q. Okay. So this would have been the process that he outlined to you...

A. Sure.

Q. ...for the less than five thousand...

A. Well, this was a process that he indicated needed to be taken to terminate the plan. I mean, some of the things that needed to be done with that.

Miller Depo., (March 9, 2009) 43:1-7, 19-22, 44:1-15

²³ See Exhibit 13 from deposition transcript of Helen Miller attached as Exhibit A to Defendants' Supplement to Defendants' Motion for Partial Summary Judgment and Miller transcript pages 43, 44, 63, 64, 109, 110, 137 and 138 attached as Exhibit B to Defendants' Supplement to Defendants' Motion for Partial Summary Judgment.

- Q. In the second line under Mr. Buchanan's name it says, "Steps to terminate the plan," and you have five numbered paragraphs thereunder. And what did this mean to you when Mr. Buchanan said it to you?
- A. This would have been what he was referring to as a way that the plan could be reduced down for assets to be distributed.
- Q. Did you understand him to mean that all these things had to be done to terminate the plan?
- A. Well, I don't think this was all that needed to be done. This was just the beginning of...
- Q. So then is it fair to say that these are maybe the first five things that have to be done to terminate the plan or at least these are among the things that have to be done to terminate the plan?
- A. These were things they recommended to be completed if the plan was to be terminated.

Miller Depo., (March 9, 2009) 109:11 – 110:5

- c. Ms Miller further testified that the 2004 resolution by the Board terminating the Plan was conditioned on the employees signing the releases.
- Q. Do you recall what Mr. Borg said?
- A. Not specifically, no. I mean, it was just a general summary of what was taking place and why the release needed to be signed and where the money was going to be used for the purchase of the land for the hospital.
- Q. Why did he say that the release needed to be signed?
- A. Well, I know that that's one of the requirements of the termination of the plan. I don't recall what he specifically indicated.
- Q. Okay. You just don't recall what he said?
- A. No.

Miller Depo., (March 9, 2009) 63:15 – 64:5

- d. Ms. Miller further stated:
- Q. This morning – in your testimony this morning you were testifying with respect to the release documents in responses to questions from Mr. Cochran. And I believe you testified this morning that it was a requirement for plan termination that the releases be signed. Do you recall that?
- A. Yes, I do recall that.

- Q. Considering the fact that the releases have not been signed, then in your view does that mean a requirement for termination wasn't met?
- A. Well, the employees that were not asking for the plan to be terminated. They're not saying that one way or the other.
- Q. Are you familiar with the resolution that was passed by the board of War Memorial Hospital in February of 2004 regarding a plan termination?
- A. Yes.
- Q. Were you familiar with it at the time or have you only learned about it since then?
- A. No, I remember Mr. Borg indicating that he needed to get board approval or a resolution completed for that.
- Q. Did you understand that resolution in 2004 to be conditional on certain other events taking place?
- A. Yes.
- Q. And can you tell us – I mean, I assume from your earlier testimony that signing the releases would have been one of those conditions? Is that a fair characterization?
- A. Right.

Miller Depo. (March 9, 2009) 137:6 – 138:13

29. Ms. Miller's testimony was, in essence, an admission that the termination of a plan is a process, and an admission that the process had not been completed, and that the Board's 2004 Resolution terminating the Plan was conditional on the releases being signed by the employees.

30. Shawn Bogenrief also testified. Bogenrief is a manager and very experienced consultant at the Gardner & White firm who advised War regarding certain aspects of the Defined Benefit Plan. He is a successor advisor to Mr. Buchanan, with whom Ms. Miller spoke regarding Plan termination. Consistent with the testimony of Ms. Miller, Bogenrief testified that the Plan closing was a process²⁴ that had not been completed and as a result, the Plan was not terminated.

Q. Sure. You said the termination was a process.

²⁴ See also Bogenrief deposition transcript pages 19 – 21 attached as Exhibit C to Defendants' Supplement to Defendants' Motion for Partial Summary Judgment.

- A. Correct.
- Q. The end of the process was, as – as I recall your description, that there – there’s a distribution of the benefits to the employees or participants, correct?
- A. Correct.
- Q. To your knowledge, did that occur in this plan?
- A. It did not.
- Q. So based on that, did the hospital complete the termination of the plan?
- A. They did not.
- Q. Do you know why that was?
- A. It was explained to me by the administration of the hospital that the – 100 percent of the employees did not sign the release form.

See Bogenrief Depo, 49:6–24 (March 31, 2009) attached as Exhibit D to Defendants’ Supplement to Defendants’ Motion for Partial Summary Judgment.

31. Bogenrief testified that the “final stage” of termination is processing the election forms. “And as the last dollar leaves the plan, the plan is terminated.” *Bogenrief Depo*. 19:21-24 (March 31, 2009).

32. Bogenrief also stated that the termination was rescinded by the 2006 Board resolution based on the fact that the employees did not sign the release form. After being shown the 2006 Board Resolution, Bogenrief testified:

- Q. Very well. Sir, this is a resolution of the War Memorial Hospital that rescinds that termination process. Have you seen this document before?
- A. No.
- Q. Okay. Does that comport with your understanding of what occurred?
- A. That—that being?
- Q. That being that the termination process was stopped or rescinded because of – of what you previously testified.
- A. It is my understanding.

See Shawn Bogenrief Depo., 53:14-54:1 (March 31, 2009) attached as Exhibit E to Defendants’ Supplement to Defendants’ Motion for Partial Summary Judgment.

33. C. William Locke, Chairman of the Board at War, testified²⁵ in his deposition that the Plan was never terminated. Locke testified that the February 2004 Board Resolution beginning the Plan termination process was conditional, and the Plan was never terminated.

Locke testified:

- A. As far as I know, it has never been terminated.
- Q. Even though that document in front of you, Locke No. 4, says the plan is hereby terminated.
- A. The plan cannot be terminated until the participants had agreed to the termination. The amendment – the resolution was written in anticipation that there was a possibility that the participants would agree, and if they had, then this resolution would have been carried forth, and the plan would have been terminated on the date that it is so stated.
- Q. So it's your testimony that on the day you entered into this, this was all contingent, is that it?
- A. That was out understanding.

See Locke Depo, 95:9–96:6 (March 25, 2009).

34. See also the deposition testimony of David Applewood, Former CFO of War, who also testified that the Plan was never terminated. Applewood testified:

- A. First of all, there are two Board Resolutions. The first Board Resolution was to basically go ahead and open the plan up so that we could move to the process to close that plan. The plan has never been terminated mainly because proof of that is that on an annual basis, an actuary would always come in, do a calculation on the plan and see what benefits were owed to the participants. So the plan was never terminated.

See Applewood Depo, 21:7-17 (March 20, 2009).

35. The facts that have developed in this case clearly show that the termination was

²⁵ The deposition transcripts of Locke and former CFO David Applewood were received on April 13, 2009, too late to include in the argument before the Circuit Court on April 8, 2009, when the Circuit Court granted Summary Judgment to the Plaintiffs/Appellees. The transcripts were ultimately filed by the Plaintiffs into the record on August 5, 2009. Appellants have included relevant portions of the transcripts in their Motion to Supplement the Record filed with this Court (even though the transcripts are technically already in the record) for the Court's convenience.

conditioned on the agreement of the participants, the participants did not agree and consequently the releases were not signed by most participant employees. The Board therefore rescinded its conditional termination resolutions, the Hospital did not comply with the directions given by IRS in the October 6, 2005 letter that outlined steps to complete the termination process, the assets were not distributed, and the Plan was not terminated.

36. Because the Plan was not terminated, Plaintiffs lack the ability even to assert a claim for the surplus under Plan Section 9.3.

37. The Plan termination process was never completed; the Plan continues in operation, and indeed was amended as recently as June 30, 2009 at Section 4.10 to comply with §415 of the Internal Revenue Code. Pursuant to the Internal Revenue Code, it will be amended further to comply with changes in the tax law applicable to qualified plans (including frozen plans).

38. The Plan never paid benefits to anyone pursuant to the "Termination Procedures" of Section 9.3, which states in part that "benefits of affected Participants ... will be distributed ... as soon as practicable to each such Participant ... " following Plan termination.

39. The Plan has continued to pay normal benefits pursuant to the ongoing provisions of Articles III, IV and V. For example, participant Mitchell received her accrued benefit in the fourth quarter of 2005. The Plan may shortly pay accrued benefits to Participant Diana Ward, who is also not a party in this case.

40. Some Plaintiffs have retired, and although eligible to elect to receive their normal retirement benefits, have elected not to do so, as of December 31, 2009.

41. *Revenue Ruling 89-87*, 1989-2 C.B. 81, (attached as Exhibit 5 to Defendants' Motion for Partial Summary Judgment) provides that in order to terminate a qualified plan, the

date of termination must be established, the benefits of Plan participants and other liabilities under the Plan must be determined with respect to the date of Plan termination, and all Plan assets must be distributed to satisfy those liabilities in accordance with the terms of the Plan as soon as administratively feasible after the date of termination. *Revenue Ruling 89-87* holds that a pension plan, under which benefit accruals have ceased, is not terminated if, after an amendment is adopted to terminate the Plan, the Plan assets are not distributed as soon as administratively feasible but are held in the trust which remains in existence in order to make distributions when employees become entitled to receive payments as provided under the terms of the Plan as they exist when the amendment is adopted.

42. *Revenue Ruling 69-157*, 1969-1 C.B. 115, provides that a trust that is part of a qualified plan will not retain its qualified status after the plan has been terminated. *Revenue Ruling 69-157* also provides that a plan is not considered terminated in fact where the plan continues in effect until all assets have been distributed in accordance with the terms of the plan.

43. Disregarding these facts, the Court ruled that the Plan was terminated as of December 31, 2003. However, in the May 4, 2009 Order, the Court went far beyond its ruling in the hearing and awarded the surplus to the Participants, save granting War the opportunity to file this appeal and staying the case below to allow the filing of the Petition for Appeal.

44. It is from that May 4, 2009 Order that this Appeal arises.

III. ASSIGNMENTS OF ERROR

A. The Court Wrongly Held that the Plan was Terminated as a Matter of Law.

45. In the process of analyzing the issue of plan termination, the Court ignored or failed to understand the intent of the Hospital, as settlor, in adopting and maintaining a qualified

defined benefit plan,²⁶ is governed by the Internal Revenue Code. War's intention that the Plan be subject to the federal tax law requirements for qualified plans is set forth clearly at Section 1.1 of the plan document.

46. The Court erred in failing to recognize that Plan termination is a process rather than a single isolated event, and that such a process has been recognized repeatedly by the courts and by a federal agency (the Internal Revenue Service) whose positions and views are entitled to great deference, according to the United States Supreme Court, as discussed below.

47. The Court erred in deciding that the Plan was terminated based upon a single, isolated board resolution, rather than analyzing the multiple, interrelated board resolutions adopted by War's Board in February, 2004.

48. The Court erred in not recognizing that the 2004 resolutions were contingent upon the plaintiffs signing the proposed consent and release documents.

49. The Court erred in failing to recognize the important admission by plaintiff, Miller (the H.R. Director) that plan termination is a process, and the process was never completed in this case.

50. The Court erred in not recognizing that War, as settlor, had the legal authority to change course, consistent with the contingent nature of the 2004 resolutions, and decide not to go forward with the process of plan termination. In addition, the Court erred in not recognizing that it is of no consequence that the plan document does not specifically provide for rescinding the termination decision; as explained below, the law gives the Board the power to rescind.

51. The Court erred in concluding that a board resolution alone (even if it were not contingent) is sufficient to terminate a plan as a matter of law.

²⁶ See Order, Findings of Fact, at ¶ 1. Further, all parties agree the Plan is a "defined benefit" plan. See

52. The Court erred in not understanding that ongoing Plan amendments are consistent with the existence of an ongoing pension plan, and not a terminated pension plan.

B. Assuming That the Plan Was Terminated as a Matter of Law, the Court Erred in Ordering the Distribution of Surplus/Residual Assets to the Plaintiffs.

53. The Motion and Cross Motion for Summary Judgment requested a ruling on the issue of Plan termination. An Order with respect to the distribution of surplus assets is beyond the scope of those motions.

54. The Court erred in ordering the distribution of assets to plaintiffs without the defendants having been heard on this separate issue. The Defendants have therefore been deprived of due process of law on this issue.

55. The Court ignored the discretionary, permissive nature of the Plan language at Section 9.3 which states that if the Plan is terminated, then “any residual assets may be distributed to the participants . . .” The above permissive, discretionary decision is to be made by War as settlor.

56. The Court also ignored the law and Plan provisions at Sections 7.2 and 7.3 which give War, as Plan Administrator, the right to construe and interpret the terms of its own plan document.

57. The Court erred in attempting to direct the residual assets to the Plaintiffs, thereby extinguishing War’s ability under Plan Section 10.2 to transfer surplus assets to its other qualified retirement plan for the benefit of its 100 or so participating employees. Plaintiffs cannot accurately claim to be the only legitimate recipients of the Plan’s surplus; the Pension Plan at Section 10.2 specifically allows War as settlor to transfer surplus assets to its other qualified plan, and Plaintiffs have no say in that decision.

IV. POINTS AND AUTHORITIES RELIED ON

A. Standard of Review

The appropriate standard of review has been described by this Court as follows:

In Syllabus Point 1 of *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994), this Court stated that “[a] circuit court’s entry of summary judgment is reviewed *de novo*.” Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is required when the record shows that there is “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” In Syllabus Point 3 of *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963), this Court held: “A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.”

Moreover, “[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syllabus Point 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). In addition, “[i]f the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.” Syllabus Point 3, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

Jochum v. Waste Management of West Virginia, Inc., _____ W.Va. _____, _____ S.E.2d. _____ 2009 WL 1543884 (W.Va.)

B. The Circuit Court Erred in Ruling that the Plan Was Terminated.

The Circuit Court erred in its Order in at least the following ways:

1. **The Court Ignored the Intent of the Settlor, as Shown in the Plan Itself, Which Requires the Application of Federal Tax Law to Properly Resolve This Issue.**

The general rule in West Virginia is that in giving effect to a trust “the intent of the settlor prevails, unless it is contrary to some positive rule of law or principle of public policy.” *Hemphill*

v. *Aukamp*, 164 W.Va. 368, 264 S.E. 2d 163 (1980). Also, it should be noted that “in ascertaining the intent of the settlor, the entire trust document should be considered.” *Proudfoot v. Proudfoot*, 214 W.Va. 841, 846, 591 S.E. 2d 767 (2003). One need go no further than the opening page of the Plan at Section 1.1 to see the intent of the drafters plainly stated: “The Plan is intended to meet the provisions of Section 401(a) of the Internal Revenue Code of 1986, as amended” (emphasis added)

Clearly, the settlor’s intent, as stated in the Plan itself, requires the application of federal tax law, which controls the administration and termination of qualified plans.²⁷ The Plan is subject to the Internal Revenue Code, and, various Revenue Rulings are directly applicable to this Plan and the issue of whether it is terminated. However, the Court disregarded the principles of federal tax law in making its ruling.

Plaintiffs have argued strenuously that federal tax law has no place in the resolution of the issues now before this Court. At page 6 of their Respondents’ Response to Petition for Appeal, they quote the 2008 opinion of the United States Court of Appeals for the Fourth Circuit in the jurisdiction case, where that court noted that a breach of fiduciary duty claim “does not necessarily depend upon resolution of substantial questions of federal tax law.”²⁸ While that may be true in any given case, the point to bear in mind in the instant appeal is that the statement by the Fourth Circuit has no relevance at all to this appeal for a very simple reason.

This appeal has nothing to do with fiduciary duty. Plan termination is a settlor function,

²⁷ Although a related Declaratory Judgment case filed in federal district court for the Northern District of West Virginia was dismissed for lack of federal jurisdiction under ERISA, this cannot mean that there is no application of federal tax law to a qualified plan. Further, the federal decision, the federal court had no jurisdiction to opine on the merits of the case since it determined it had no jurisdiction.

²⁸ *Morgan County War Memorial Hospital v. Baker, et al*, 314 Fed. Appx. 529, 534 (4th Cir. 2008).

not involving any possible breach of fiduciary responsibility,²⁹ which Plaintiffs have plainly and openly acknowledged in their response to Defendants Petition for Appeal at page 27. Therefore, a statement by the federal court that a claim for breach of fiduciary duty does not necessarily involve federal tax law cannot have any relevance to the issue of whether the Board, as settlor, terminated this Plan as a matter of law.

Because the Plan is a “government plan” under the law, it is not subject to federal jurisdiction under ERISA, and therefore the state court in West Virginia has subject matter jurisdiction with respect to claims asserted by the Plaintiffs. However, consistent with the clear intent of the Hospital as settlor, the Plan is not free from requirements of federal tax law.³⁰ The fact that the Plan is “qualified” means that it must meet certain Internal Revenue Code requirements. Because it “qualifies” under federal tax law, Plan participants receive certain tax benefits with respect to benefits accrued and contributions made to the Plan.³¹

According to decisions of this Court and the United States Supreme Court, the courts should give deference and weight to the legal positions taken by government agencies (such as the Internal Revenue Service) which have specialized experience in a particular field requiring sophisticated expertise (e.g., the termination of a qualified pension plan). “[G]ood judicial administration ... require[s] that the standards of public enforcement and those for determining

²⁹ See discussion at pages 32- 33 below.

³⁰ There is no West Virginia statute that governs War's Pension Plan. By comparison, if this Plan covered members of a paid police or fire department, it would likely be subject to W.Va. Code § 8-22-25, as explained in *Brown v. City of Fairmont*, 221 W.Va. 541 (2007), wherein this Court directed the circuit court to follow the terms of a pre-existing divorce order which applied W.Va. Code §8-22-25 in dividing an individual pensioners retirement benefit between the pensioner and his former spouse. Because no pre-existing Court order or State statute governs War's Plan, the *Brown* analysis is not relevant to this case; War believes that the issue of whether a qualified plan is terminated is one of first impression in the courts of this State.

³¹ The Plan itself brings the federal law and rules into play in its interpretation : “The Plan is intended to meet the provisions of Section 401(a) of the Internal Revenue Code of 1986, as amended (the “Code”)

private rights shall be at variance only where justified by very good reasons." *Skidmore v. Swift*, 323 U.S. 134, 140 (1944); *United States v. Mead*, 533 U.S. 218, 235 (2001) (*Skidmore* deference is especially appropriate "where the regulatory scheme is highly detailed."); *DiFelice v. U.S. Airways*, 397 F. Supp. 2d 735, 751-752 (E.D. Va. 2005). See also, *Security Nat'l Bank v. First W.Va. Bancorp*, 166 W.Va. 775, 779 (1981), cited with approval in *Corliss v. Jefferson County Bd. Of Zoning Appeals*, 214 W.Va. 535 (2003).

Also, where there is no state common law directly on point, plan sponsors and fiduciaries, as well as courts are permitted to obtain guidance from decisions under ERISA, even though portions of ERISA does not apply to a "government plan." *Mackenzie v. Regional Principals Association*, 377 N.J. Super. 252, 265; 872 A.2d 150, 158 (N.J. Super. 2004). Even the Plaintiffs have acknowledged that ERISA "may provide helpful guidance ..."³²

The federal Internal Revenue Code and IRS regulations are the foundation of a qualified defined benefit plan. Even if the federal tax code and IRS rules were not controlling, (which they are) courts give deference and weight to legal positions taken by government agencies which have specialized experience in a field requiring sophisticated expertise. See, *Security Nat'l Bank v. First W.Va. Banco*, 166 W.Va. 775 (1981) (interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous). The Circuit Court failed to apply the legal requirements for a qualified plan termination, as set forth in IRS rulings.

2. The Court Ignored IRS Rulings that Hold a Qualified Plan is not Terminated Until Plan Assets are Distributed.

which are applicable to a governmental Plan as defined in Code Section 414(d)." *Section 1.1, Morgan County War Memorial Hospital Employees' Pension Plan*, July 1, 2001.

³² See Respondents' Response to Petition for Appeal, page 16, citing and quoting ERISA with approval.

The Plan is qualified for favorable tax treatment under the Internal Revenue Code, and as a qualified plan must follow termination procedures established by the IRS and as set forth by IRS.

According to IRS,³³ in order to terminate a qualified plan, three events must occur:

1. the date of termination must be established,
2. the benefits of plan participants and other liabilities under the plan must be determined with respect to the date of plan termination, and
3. all plan assets must be distributed to satisfy those liabilities in accordance with the terms of the plan as soon as administratively feasible after the date of termination.

Unless all three events occur, as a matter of law, a qualified plan is not terminated. The Hospital did not complete all the steps necessary to terminate the Plan. Specifically, it is undisputed that Plan assets have not been distributed. Typically, the employer satisfies this obligation to distribute Plan assets to Plan participants by purchasing annuities. Such annuities pay the participants the benefits owed to them when an event (retirement, death, termination of employment) occurs that qualifies them for payment of benefits under Article IV of the Plan document. In this case, the Plan never purchased annuities or took any action to satisfy this third requirement for Plan termination, and therefore the Plan is not terminated.

The Internal Revenue Service has made it clear that a plan that is amended to terminate and to cease benefit accruals has not, in fact, been terminated if the assets are not distributed as soon as administratively feasible after the stated date of plan termination. *Ruling 89-87*. If the plan assets have not been distributed within one year, the plan will be presumed to be on-going. *Revenue Ruling 89-87*. (A pension plan, under which benefit accruals have ceased, is not

³³ *Revenue Ruling 89-87, 1989-2 CB 81. (See Exhibit 5 to Defendants' Motion for Partial Summary Judgment).*

terminated if, after an amendment is adopted to terminate the plan, the plan assets are not distributed as soon as administratively feasible, but are held in the trust which remains in existence in order to make distributions when employees become entitled to receive payments as provided under the terms of the plan as they exist when the amendment is adopted.) *Revenue Ruling 89-87*, 1989-2 CB 81.

In this case, the Plan continues to operate, although entry of additional employee participants to the Plan is precluded because the Plan is frozen. For example, the Plan continues to be amended to conform to federal law. Also, people continue to retire and accept their accrued benefits under the Plan. As an example, participant Carol Mitchell signed benefit claim forms on October 27, 2005, to begin receiving benefits on December 1, 2005, almost two years after the purported Plan termination date of December 31, 2003, as determined by the Circuit Court. (See Affidavit of Neil McLaughlin attached as Exhibit 1 to Defendants' Motion for Partial Summary Judgment)

3. The Circuit Court's Order Ignores the Fact that the 2004 Decision to Begin the Plan Termination Process Was Conditioned upon Various Subsequent Events that did not Occur.

The Court ignored the fact that the Board's 2004 Plan termination resolutions were conditioned upon the employees accepting their defined benefits and agreeing that the Plan was terminated. Because most employees did not sign the proposed consent and release documents, and did not accept their accrued benefits (thereby not meeting the Board's termination conditions), the Board passed the resolutions in January, 2006 rescinding the conditional 2004 termination resolutions and stopping the termination process. Plaintiffs seek to pick and choose that portion of the 2004 resolutions that best suits their argument, while ignoring the remainder of the 2004 resolution and also ignoring the 2006 Board resolutions that rescinded the

termination process.

The Court ignored important facts in the case to reach its erroneous conclusion. Plaintiff Helen Miller, who, as Hospital H.R. Director, worked with the Plan on a regular basis, and is certainly the most knowledgeable plaintiff regarding the operation of the Plan, testified that the plan termination was conditioned on the releases being signed:

- Q. Did you understand that resolution in 2004 to be conditional on certain other events taking place?
- A. Yes.
- Q. And can you tell us – I mean, I assume from your earlier testimony that signing the releases would have been one of those conditions? Is that a fair characterization?
- A. Right.

Miller Depo. (March 9, 2009) 138:13

Shawn Bogenrief, a senior consultant at the Gardner & White consulting firm who advised War over several years regarding certain aspects of the defined benefit plan, also testified that the Plan was not terminated because 1) the assets were not distributed as required by IRS rules to complete the termination of a plan, and, 2) the employees never signed the releases. When asked about the releases, Bogenrief testified:

- Q. So based on that, did the hospital complete the termination of the plan?
- A. They did not.
- Q. Do you know why that was?
- A. It was explained to me by the administration of the hospital that the – 100 percent of the employees did not sign the release form.

See Bogenrief Depo., (March 31, 2009) 48:21-24 attached as Exhibit D to Defendants' Supplement to Defendants' Motion for Partial Summary Judgment.

Bogenrief also testified:

- Q. Sure. You said the termination was a process.
- A. Correct.

- Q. The end of the process was, as – as I recall your description, that there – there’s a distribution of the benefits to the employees or participants, correct?
- A. Correct.
- Q. To your knowledge, did that occur in this plan?
- A. It did not.
- Q. So based on that, did the hospital complete the termination of the plan?
- A. They did not.

See Bogenrief Depo, (March 31, 2009) 48:6-19 attached as Exhibit D to Defendants’ Supplement to Defendants’ Motion for Partial Summary Judgment.

Testimony from other witnesses support Miller and Bogenrief’s statements, for example, William Locke, Chairman of War’s Board, explicitly testified that:

- A. As far as I know, it has never been terminated
- Q. Even though that document in front of you, Locke No. 4, says the plan is hereby terminated.
- A. The plan cannot be terminated until the participants had agreed to the termination. The amendment – the resolution was written in anticipation that there was a possibility that the participants would agree, and if they had, then this resolution would have been carried forth, and the plan would have been terminated on the date that it is so stated.
- Q. So it’s your testimony that on the day you entered into this, this was all contingent, is that it?
- A. That was our understanding.

See Locke Depo, (March 25, 2009) 95:9–96:6.

If this Court were to analyze the facts based on a contract theory, there would have been a failure of a condition precedent (i.e., the Plaintiffs failed to sign the release) which led to the termination resolutions being rescinded. The Restatement (First) of Contracts §250 (1932) states in relevant part:

§ 250. Definition of “Condition Precedent” And “Condition Subsequent”

In the Restatement of this Subject a “condition” is according as the context indicates, either a fact (other than mere lapse of time) which, unless excused as stated in §§ 294-307

(a) must exist or occur before a duty of immediate performance of a promise arises, in which case the condition is a "condition precedent," . . .

Restatement (First) Of Contracts § 250 (1932) (portions omitted).

The Restatement (Second) of Contracts outlines the effect of a failure to satisfy the conditions:

§ 225. Effects of the Non-Occurrence of a Condition

(1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.

(2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.

. . .

Restatement (Second) Of Contracts § 225 (2009) (portions omitted).

Therefore, even if this Court were to analyze the issue based on a contract theory, there was a failure of a condition precedent (the Plaintiffs' lack of agreement and signature on the releases) that precluded the Plan from being terminated.³⁴

However, there is more than a contractual analysis that supports the Board's rescission of the termination process. As Plaintiffs acknowledged at page 27 of their response to Defendants' Petition for Appeal, the matter of "if and when" a plan will ever be terminated is a "settlor function." A settlor function is an action or decision made by the sponsoring employer, rather

³⁴ This Court has held that:

The following is stated in 17 Am.Jur.2d, Contracts, Section 24: 'In negotiating a contract the parties may impose any condition precedent, the performance of which is essential before they become bound by the agreement; in other words, there may be a condition precedent to the existence of a contract. * * * It has been held that parties to a written contract may agree that the contract is not to be operative until the happening of an oral condition, and consequently that it may be shown that the contract did not become operative because the parol condition was not fulfilled. A promise, or the making of a promise, may be conditioned on the act or will of a third person.' In the latter case the Court said that a contract is not made so long as in the contemplation of both parties something remains to be done to establish a contract relation. 'A contract may be signed on condition that it shall not take effect until others have signed it.' A condition precedent is not a question of phrase or form but of the intention of the parties

than by a fiduciary exercising discretion. The courts and the government have consistently recognized a distinction between settlor (grantor) functions, which are not subject to a fiduciary duty, and fiduciary activities which must conform to trust law. For example, in Advisory Opinion 2001-01A, the U. S. Department of Labor stated that it "has long taken the position that there is a class of discretionary activities which relate to the formation, rather than the management of plans, ... these so-called settlor functions include decisions relating to the establishment, design and termination of plans and ... generally are not fiduciary activities" (See Exhibit 7 attached to Defendants' Motion for Summary Judgment).

The above distinction is based upon the common law of trusts. Just as a settlor/grantor of a trust is not performing a fiduciary role in deciding to create the trust, the sponsoring employer of a pension plan is not performing a fiduciary role in adopting, designing, freezing, or terminating a plan and the related trust by which it is funded. The substantial freedom granted to employers in the design of pension plans applies equally to the amendment or termination of such plans. When an employer adopts, amends, or terminates a pension plan, its actions are analogous to those of a settlor of a trust, rather than the actions of a trustee or fiduciary. Plan sponsors are generally free at any time for any reason to adopt, modify or terminate a plan. See *Hughes Aircraft v. Jacobson*, 525 US 432, 443-44 (1999). See also *Beck v. Pace International Union*, 551 U.S. 96 (2007) (decision to terminate plan or to merge plan is a plan sponsor decision).

The most common settlor functions are "design" decisions concerning establishment of the plan, benefits to be provided, and the amendment and termination of the plan. When employers undertake those actions, they do not act as fiduciaries but as settlors. *Lockeed Corp. v.*

Miners' and Merchants' Bank v. Gidley, 150 W.Va. 229, 235, 144 S.E.2d 711, 715 (W.Va. 1965)

Spink, 517 U.S. 882, 890 (1996). See also, *Tatum v. R.J.Reynolds*, 392 F.3d 636, 640 (4th Cir. 2004)(plan sponsor amending plan acts as settlor, not fiduciary); *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1465 (4th Cir. 1996) (plan sponsor does not become fiduciary by performing settlor functions); *Johnson v. Georgia Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994) (employer was under no fiduciary duty with respect to plan design decision).

As the Plan document provides at Section 9.2, the Hospital has "sole discretion" to terminate the Plan. As long as the Plaintiffs receive their accrued benefits (which has never been an issue), the Hospital can amend, merge, or terminate the plan in any manner which complies with those provisions in the Internal Revenue Code which are applicable to qualified government plans. Such decisions are business decisions, just as the initial adoption of the Plan, the decision to freeze the Plan, and all Plan amendments have been business decisions, and are settlor decisions. Likewise, the Hospital can transfer surplus assets to its other qualified plan, based on Section 10.2 of the Plan document.

The Court erred by ignoring Plaintiff Miller's own testimony that the Plan was not terminated and the similar testimony of the Plan consultant and thereby erred in its decision that the Plan was terminated, because the conditions of Plan termination were never met and the assets were never distributed. As a result, the Court erred in its decision that the Plan was terminated, and also erred in its apparent decision that the initial steps in the termination process could not be rescinded, as discussed hereinbelow.

4. **The Court ignored facts that should have resulted in granting of summary judgment to War, or in the alternative, precluded summary judgment entirely.**

(citations omitted).

It is undisputed that the Plan assets have not been distributed, consequently, as a matter of law, based on IRS *Revenue Ruling 89-87*, which is applicable to all qualified plans. The Plan was not terminated because a required step of the termination process was never completed. This should have led the Circuit Court to grant summary judgment to War that the Plan was not terminated.

The Court erred in not taking into account the undisputed facts that the Hospital has amended the pension plan document more than once, subsequent to the alleged termination date of December 31, 2003. Likewise, the Court erred in not taking into account the fact that the Plan has distributed retirement benefits in the ordinary course of plan administration, well after the alleged termination date of December 31, 2003. The Court erred in not understanding that these facts are consistent with the existence of an ongoing pension plan, and not a terminated pension plan.

The Plaintiffs certainly acknowledge in their Complaint that the Plan has not been terminated. In fact, at paragraph 28d of the Complaint, Plaintiffs assert that the Defendants breached their fiduciary duty to Plaintiffs³⁵ by "refusing to terminate the Plan..." As explained above, Plaintiff Miller, who was the War employee that managed the Plan paperwork and is the only Plaintiff intimately knowledgeable about the day to day Plan operations, openly and candidly admits that the Plan was not terminated, which was in accord with the testimony of Shaun Bogenrief and William Locke. Consequently, the facts show that the Plan was not terminated, which should have led to the Court granting summary judgment as to that issue in War's favor.

³⁵ As noted and supported herein, the decision to terminate the Plan is a "settlor" decision and not a fiduciary decision.

In the alternative, even if the Court were to find that this issue is disputed (with which War would not agree), then the testimony of Miller, Bogenrief, Locke and Applewood, at a minimum create material disputed facts that should have precluded summary judgment being entered in favor of the Plaintiffs/Appellees below.

5. The Court ignored the fact that the 2004 termination resolutions were rescinded.

The Court ignored the fact that although the Hospital's Board adopted conditional resolutions in 2004 which authorized proceeding to a termination, the resolutions were formally rescinded in January, 2006, and there was no distribution of all Plan assets, as required for a termination by both the Internal Revenue Service and the courts. As a result, the Plan is not terminated as a matter of law and the Court erred in holding otherwise.

As various courts have held, it is an elementary principle of corporate law that "if the board has the power to adopt resolutions (or policies), then the power to rescind resolutions (policies) must reside with the board as well; board resolutions are typically revocable by the board at will. *Unisuper LTD. v. News Corp.*, 2005 Del. Ch. LEXIS 205, appeal denied 906 A.2d 138 (Del. 2006); *In re General Motors Shareholder Litigation*, 2005 Del. Ch. LEXIS 65 (2005), affirmed 2006 Del. 138 (2006). See also *Weisler v. Metal Polishers Union*, 533 F.Supp. 209 (S.D.N.Y. 1982) (fact that trustees previously authorized payout does not mean that subsequent trustees cannot rescind earlier decision).

Plaintiffs argued below that one of the interrelated 2004 resolutions should be viewed in isolation, and by itself was legally sufficient to terminate the Plan irrevocably, but cited no legal authority in support of that position. Plaintiffs argue that once the 2004 resolutions were passed, the Board lost all ability to exercise settlor functions. Such a limitation is not set forth in the Plan or in the law, and is simply wishful thinking by Plaintiffs.

Contrary to the Plaintiffs' argument, the Hospital's resolutions of January, 2006 rescinded the 2004 resolutions, as permitted by law. The 2006 Board Resolutions (*see* Exhibit 3 to Defendants' Reply to Plaintiffs' Response to Defendants' Motion for Partial Summary Judgment and Response to Plaintiffs' Cross Motion for Summary Judgment) confirm the fact that the 2004 resolutions were "contingent upon obtaining a release from each participant" as to the distribution of Plan assets. *Id.* Flowing from this release contingency was the concept that the employees would be paid their accrued benefits, and then the surplus returned to War for the new hospital. Because the employees refused both the release and the proposed annuity, the Board then rescinded the 2004 termination resolutions. Only a small number of the Plaintiffs executed the release documents, the contingency was not satisfied, and the 2004 resolutions were rescinded.

Plaintiffs argued below that the 2006 resolutions could not be valid because the Plan does not by its terms empower the Hospital to rescind the earlier resolutions. Plaintiffs' argument completely misses the point that the Hospital's Board has the legal authority of a settlor³⁶ to take steps on behalf of the Hospital regarding the Plan, regardless of whether it is set forth specifically in the Plan document. For example, the Hospital froze the Plan in 1987, and had the clear legal authority to do so as settlor and Plan sponsor, regardless of the fact that freezing the Plan is not addressed in the Plan document and was not subject to consent by the Plaintiffs.

³⁶ The matter of "if and when" a plan will ever be terminated is a "settlor function." A settlor function is an action or decision made by the sponsoring employer, rather than by a fiduciary exercising discretion. The courts and the government have consistently recognized a distinction between settlor (grantor) functions, which are not subject to a fiduciary duty, and fiduciary activities which must conform to trust law. For example, in Advisory Opinion 2001-01A, the U. S. Department of Labor stated that it "has long taken the position that there is a class of discretionary activities which relate to the formation, rather than the management of plans, ... these so-called settlor functions include decisions relating to the establishment, design and termination of plans and ... generally are not fiduciary activities" (*See* Exhibit 7 to Defendants' Motion for Partial Summary Judgment.)

Plaintiffs relied heavily below on the proposed consent and release documents circulated to them in December, 2005 as a basis for claiming that the Plan had been terminated, because one of the paragraphs in the release documents referred to the Plan as having been terminated. In December, 2005, however, the Board had not yet halted the termination process. The 2004 resolutions were rescinded in early January, 2006. Also, the proposed release documents³⁷ were never executed by most of the Plaintiffs, and, as the Circuit Court noted at the oral argument on March 4, 2009, were merely in the nature of settlement offers made in the hope of avoiding possible litigation and, as such, contained standard release language. The law is clear that a proposal document which merely contains a conditional offer of settlement cannot be binding until accepted by both parties, and only then does the proposal document become a binding agreement. *Goldman v. Commissioner*, 39 F.3d 402, 406 (2d Cir. 1994). A conditional offer of settlement is not proof of anything, let alone plan termination.

Plaintiffs' reliance on the language in the releases is doubly misplaced because most Plaintiffs did not sign the releases and the language, as the Circuit Court stated on March 4, 2009, was in the nature of a standard release form. When most Plaintiffs declined to sign the release documents in late 2005, and declined the annuities, the 2004 Board resolutions were promptly rescinded, as the Hospital's Board had every right to do.

Even beyond the fact that the Board had the legal authority to rescind the proposed termination, the proposed release documents have no legal effect because they were never executed by most of the Plaintiffs. Because the release documents were not executed by all Plaintiffs, the Plaintiffs cannot rely on those documents now as a basis for their claim that the

³⁷ The release documents contain a termination date of December 31, 2003, based upon the date contained in the Board resolutions of February 24, 2004.

Plan was or should have been terminated.³⁸ Based upon the longstanding IRS position (set forth in Revenue Rulings herein) and upon the court decisions, such as *Jensen v. Moore-Wallace North America*, No. 06-4388(6th Cir. 2007) (published at 41 EBC 2406) (discussed herein), there was no Plan termination.

6. A Board Resolution, Without More, Does Not Terminate a Plan.

Plaintiffs' argument for an immediate windfall payout of the entire surplus, and the Court's acceptance of that argument, appears to rest entirely on one of the multiple Board Resolutions of February, 2004, which began the process of terminating the Plan.

However, the law is clear that a Board's resolution is merely one step in the total process, and is not sufficient in and of itself to terminate the Plan. *Shatto v. Evans Products*, 728 F.2d 1224, 1226 (9th Cir. 1984) (adoption of board resolutions constitutes "mere formalities," and such resolutions do not by themselves result in the termination of a pension plan.). Just as the courts have held that more than a resolution is necessary to terminate a trust, the courts have also held that more than a resolution is needed to create a trust. See *Catawba Industrial Rubber Co. v. IRS*, 64 T.C. 1011 (1975) (a mere resolution by the board is not sufficient to establish a trust).

Resolutions should be read in light of the surrounding circumstances, the situation of the parties, and their conduct. *Chesapeake & Ohio Ry. v. Deepwater Ry.*, 57 W.Va. 641, 672, 50 S.E. 890, 903 (1905). To terminate the Plan, the Board was required to take additional steps and

³⁸ Subsequent to the original 2004 resolutions and before their rescission in early 2006, if there had been any statement regarding a Plan termination date, it would have "no legal significance". See *Matter of Trusts Created By Ferguson*, 929 P.2d 33, 36 (Colo. Ct. App. 1996). See also, *Jensen v. Moore-Wallace North America*, No. 06-4388 (6th Cir. 2007) (published at 41 EBC 2406) (in 2001, employer gave notice of termination, but retracted notice in 2004).

actually distribute the assets and satisfy the liabilities of the Plan.³⁹

In a matter somewhat similar to the instant action, the Sixth Circuit determined in 2007 that there can be no plan termination where plan assets are not distributed. *Jensen v. Moore-Wallace North America*, No. 06-4388 (6th Cir. 2007) (published at 41 EBC 2406) (See Exhibit 6 to Defendants' Motion for Partial Summary Judgment).⁴⁰ The *Jensen* case was decided under ERISA, but as Plaintiffs have acknowledged, ERISA can be a source of helpful guidance to this Court in the resolution of this appeal.⁴¹

In *Jensen*, the pension plan's current and former participants claimed \$200 million of surplus Plan assets. After freezing the Plan in December, 2000, the employer had informed plan participants in January, 2001, that it would terminate the pension plan by March 31, 2001. In addition to notifying the plan participants, the employer sought a favorable determination letter from the Internal Revenue Service (just as War did in the instant case), and it also filed a termination notice with the Pension Benefit Guaranty Corporation. Although the Court's opinion is silent with respect to the employer's adoption of a termination resolution, it strains credibility to believe that a substantial public company would have taken all of these important,

³⁹ See also, *Revenue Ruling*, 89-87, cited above, on the requirements for terminating a "qualified plan."

⁴⁰ The *Jensen* case involved the proposed termination of a pension plan subject to ERISA and the Internal Revenue Code, while the Plan in the instant case is subject to West Virginia trust law and the Internal Revenue Code. However, a fiduciary's duties under ERISA "draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment." *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996). According to the United States Court of Appeals for the Fourth Circuit, "to the extent that a state court wishes to look to ERISA for determining how to define a fiduciary's duty in the context of employee benefit plans, it is free to do so" *Morgan County War Memorial Hospital v. Baker*, 314 Fed. Appx. 529, 537(4th Cir. 2008). Likewise, a state court is free to look (and should look) to federal law in determining that a governmental pension Plan is not terminated as a matter of law, especially where, as here, there is no state law on the issue. See *MacKenzie*, 377 N.J. Super. at 265, 872 A.2d at 158.

⁴¹ See Respondents' Response to Petition for Appeal at page 16 (quoting and citing ERISA with approval).

steps toward termination without the passage of a termination resolution.⁴² In any event, all of these actions combined did not terminate the plan, but merely served to express the employer's intent to move toward termination in the future.

In May, 2004, the employer notified participants that it would not terminate the pension plan. As in the instant case, the plan document required that the plan be terminated before surplus assets could ever be distributed. Because the plan was not terminated, such fact "eliminates as a matter of law any possible claim plaintiffs might have stemming from a termination." 41 EBC at 2410. In concluding that the plan was not terminated, the court noted the fact that Plan assets had never been distributed, which is consistent with the requirement of *Revenue Ruling 89-87* noted above.

The *Jensen* court, relying on basic principles of contract interpretation, recognized that the employer had not terminated the Plan under any conventional meaning of the word "terminate" because Plan participants still received ongoing benefits under the Plan. Similarly, the Plan in the instant case continues to pay benefits to qualified participants who elect to receive benefits upon a distribution event, such as retirement, death, or other termination of employment. For example, in the fourth quarter of 2005, participant Mitchell received her annuity.⁴³ Participant Ward, who is also not a party to this case, is eligible to receive her annuity upon her written request.

7. The Plan Administrator has Discretion in Interpreting the Plan, and the Court Failed to defer to the Administrator's Discretion.

War is the Plan Administrator of this Plan according to Section 1.3 of the Plan document.

⁴² The IRS operations manual, at the section which addresses termination of a qualified plan, requires examination of the document "(e.g., Board of Director's resolution)" reflecting proposed termination.

⁴³ See Affidavit of Neil McLaughlin as Exhibit 1 to Defendants' Motion for Partial Summary Judgment.

The War Board has discretion, pursuant to the Plan document, to interpret the Plan and make decisions consistent with the Board's obligations under the Plan:

"The Administrator may adopt such rules and procedures as it deems necessary or desirable to provide for the proper administration of the Plan." ...
"Consequently, benefits under this Plan will be paid only if the Administrator decides in its discretion that the applicant is entitled to them."

Section 7.3, Morgan County War Memorial Hospital Employees' Pension Plan, effective as of July 1, 2001.

"The Administrator has the duties and powers necessary to discharge its obligations under the Plan and Trust, including, but not limited to, the following:

(a) To construe and interpret the Plan and decide all questions arising in the administration, interpretation and application of the Plan;"

Section 7.2, Morgan County War Memorial Hospital Employees' Pension Plan, effective as of July 1, 2001.

Courts have consistently held that the Plan Administrator's authority should not be disturbed, absent an abuse of discretion:

"Where 'the benefit Plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the Plan,' courts must respect that authority and overturn only those decisions which result from an abuse of discretion."

Sargent v. Holland, 114 F.3d 33, 35 (4th Cir. 1997), citing *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 956 (1989). See also, *Restatement Trusts, Second*, Section 187; and *Restatement Trusts, Third*, Section 50 (exercise of discretion is not subject to control by court, except for abuse of discretion).

The Circuit Court erred in overruling the Board's discretionary decision.

C. Whether or Not the Plan is Terminated, the Circuit Court Erred in Awarding the Surplus to Plaintiffs.

1. The Court ignored the fact that the Plan language is discretionary

The Plan document provides at Sections 9.2 and 9.3 that *if* the Employer terminates the Plan, then residual assets "*may*" be distributed to Participants ... (emphasis added).

"Any residual assets **may** be distributed to the Participants if all liabilities of the Plan to Participants and their Beneficiaries have been satisfied and the distribution does not contravene any provision of law."⁴⁴

In finding as a matter of law that "the Plan assets shall be completely distributed," the Court ignored the significant obstacle within the plain language of Section 9.3, which is the simple word "may." According to Section 9.3, if there is a termination, "any residual assets *may* be distributed to the Participants" after all liabilities to participants have been satisfied, and provided the distribution is not otherwise illegal. (Emphasis added). Section 9.3 does not say that any residual assets "shall" be distributed to participants. The Employer is clearly within its rights to exercise its discretion to distribute no portion of the surplus to the participants, but rather, to transfer the entire surplus to the War Memorial Hospital Employees' Money Purchase Plan for the benefit of all participants in that Plan (presumably including Plaintiffs). Section 10.2 of the Plan document provides for the transfer of Plan assets to another plan. That is a settlor function which the Employer has discretionary authority to undertake if, as, and when it may choose to do so. As explained below, plaintiffs have no legal right to surplus assets not required to pay accrued benefits.

Under West Virginia case law, the Plaintiffs have no contract rights to the plan surplus. The plaintiff / employees have no inherent or vested right to the surplus funds, and can have no legal objection to amendments to the Plan, so long as they receive their accrued benefit after it becomes payable. This Court has held that:

⁴⁴ See Section 9.3 of the Plan attached as Exhibit A to the Complaint.

“The general rule, supported by the clear weight of authority, is that a pension granted by a public authority is not a contractual obligation but is a gratuitous allowance, in the continuance of which the pensioner has no vested right, and accordingly, the pension is terminable or alterable at the will of the grantor.”

Taylor v. Board of Education of Cabell County, 152 W.Va. 761, 767, 166 S.E.2d 150, 153-54 (1969) (citations omitted).

The law in West Virginia has also recognized the ability of the settlor/sponsor of a pension plan to modify a plan as to non-vested assets:

“... as long as the plan continues in effect, a retired pensioner under a noncontributory plan has a vested right to a payment that has accrued and become due and payable and such vested right to such accrued payment can not be reduced, disturbed or impaired by any subsequent legislation; but such vested right does not attach to future payments that have not accrued and the character and the amount of such unaccrued future payment may be modified, changed, increased or reduced at any time by action of the pension authority which creates the pension or retirement plan or system in changing or modifying it to accomplish any such result.”

Taylor v. Board of Education of Cabell County, 152 W.Va. 761, 772, 166 S.E.2d 150, 156 (1969).

Plaintiffs have no vested rights in the Plan surplus. They have a vested right to their accrued benefits under the Plan document at Section 4.5. The Hospital is entitled to transfer any surplus funds to its other qualified plan because of the financial risk it incurred in the operation of the Plan, because the Hospital would have been required to make up any shortfall in funding this Plan. Finally, the Plan can be modified at the will of the Hospital – so long as the participants receive their defined benefits.

This Court has held that:

“The word ‘may’ generally signifies permission and connotes discretion. See, e.g., *Powers v. Union Drilling*, 194 W.Va. 782, 786, 461 S.E.2d 844, 848 (1995) (commenting that ‘[t]he legislator’s **choice of the term ‘may’ leaves no doubt that availment’ of particular identified procedures delineated in statute being addressed by court ‘was intended to operate in discretionary, rather than an obligatory, manner’**); *Weimer-Godwin v. Board of Educ. of Upshur County*, 179 W.Va. 423, 427, 369 S.E.2d 726, 730 (1998) (interpreting

statutes using word 'may' and determining that they grant discretion because '[t]he word 'may' generally should be read as conferring both permission and power'); *Hodge v. Ginsberg*, 172 W.Va. 17, 22, 303 S.E.2d 245, 250 (1983) ('We agree with the respondent that the use of the word 'may' in a statute often indicates discretion.')

State v. Hedrick, 204 W.Va. 547, 552, 514 S.E.2d 397, 402 (1999).

Black's Law Dictionary defines "may" as: "Word 'may' usually is employed to imply permissive, optional or discretionary, and not mandatory action or conduct."⁴⁵ In *Butcher v. Miller*, 212 W.Va. 13, 569 S.E.2d 89 (2002), this Court held that the word "may" connotes discretionary action, while "will" implies mandatory action.⁴⁶ Black's Law Dictionary defines "will" as: "An auxiliary verb commonly having the mandatory sense of 'shall' or 'must.' It is a word of certainty, while the word 'may' is one of speculation and uncertainty."⁴⁷

If it was the intention of the settlor of the Plan to mandate that the residual assets be distributed to the Plaintiffs, then the settlor would have undoubtedly used the word "shall," "must," or "will," rather than "may." By using the word "may," the settlor retained the power to transfer the surplus to its other Plan, for the benefit of all eligible employees, and not just the

⁴⁵ Black's Law Dictionary, Sixth Edition, 1991, Page 676.

⁴⁶ See also *CTA Inc. v. U.S.*, 44 Fed. Cl. 684, 692-93 (1999) ("Repeated use of the word 'may' rather than 'shall' or 'will' denotes discretion. See *Peoria Tribe of Indians of Oklahoma v. United States*, 177 Ct. Cl. 762, 369 F.2d 1001, 1005 (1966) ("use of word 'may' denotes discretion to pursue alternative courses of action"); *Gleghorn v. City of Wichita Falls*, 545 S.W.2d 446, 447 (TEX 1976) (" 'Will' denotes certainty while 'can' denotes permissiveness or 'the right to.'"); *RVP Development Corp. v. Furness Golf Const. Inc.*, WL 1737589 (Mich. App. 2004) ("The word 'will' is defined as '[a]n auxiliary verb commonly having the mandatory sense of 'shall' or 'must.' Black's Law Dictionary, 6 ed."); *Regional Transp. Dist. v. Outdoor Systems, Inc.*, 34 P.3d 408, 420 (Colo. 2001) ("Plainly, the meaning of 'will' is mandatory rather than hortatory. See *Burnell v. Smith*, 122 Misc.2d 342, 471 N.Y.S.2d 493, 496 (N.Y. Sup. Ct. 1984) ('[T]he word 'will' is defined as '[a]n auxiliary verb commonly having the mandatory sense of 'shall' or 'must' It is a word of certainty, while the word 'may' is one of speculation and uncertainty'.') (quoting Black's Law Dictionary 1771 (4th ed. 1951)); see also *Milner v. Dudley*, 77 Nev. 256, 362 P.2d 439, 443 (1961); *McElroy v. Luster*, 254 S.W.2d 893, 896 (Tex. Civ. App. 1953); *In re Kids Creek Partners, L.P.*, 220 B.R. 963, 973 Bkrcty, (N.D. Ill., 1998) ("It is true that 'will' is defined as having the mandatory sense of 'shall' or 'must.' Black's Law Dictionary, p. 1598 (6th ed. 1990)).")

⁴⁷ Black's Law Dictionary, Sixth Edition, 1991, Page 1102.

Plaintiffs.

2. **The Circuit Court's decision on the ultimate issue in the case was entirely premature and ignored fundamental principles of the pension plan.**

The Circuit Court erred by far exceeding the scope of the summary judgment motions because, after finding the Plan was terminated (which was within the scope of the relief the cross summary judgment motions requested) the Court *sua sponte* proceeded to decide who should receive the surplus – thereby bypassing the Defendants' ability to make appropriate arguments regarding ultimate disposition of the surplus funds, which War would transfer to its other Plan if permitted by the Court.

The oral argument regarding the motions did not encompass the ultimate issues as to who should receive the surplus, but, when the written Order was issued, the Court decided that issue *sua sponte* ignoring the fact that the issue in contention in the briefs and arguments was whether the Plan was terminated-not the distribution of the assets or the ultimate disposition of the case.

Because of the Court's error, Defendants were not given an opportunity to argue that, under the Supreme Court's *Beck* decision, the employees are not entitled to the surplus assets because of the financial risk that War bore in managing the Plan, given that War would have been liable to make up any deficit if there had not been enough funds to pay the defined benefits when due.⁴⁸ Defendants were not given an opportunity to argue the correct interpretation of the Plan and the Hospital's right to transfer the surplus to its other qualified plan.

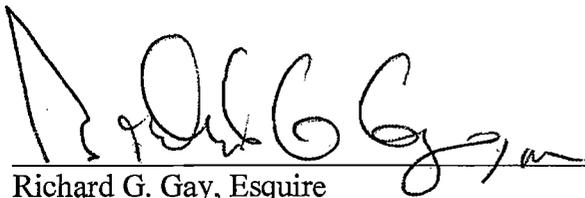
⁴⁸ The importance of the Plan's nature as a defined benefit plan, and the ramifications and effect of the definition of a defined benefit plan, cannot be overstated, because:

“A defined-benefit plan, ‘as its name implies, is one where the employee, upon retirement, is entitled to a fixed periodic payment.’ *Commissioner v. Keystone Consol. Industries, Inc.*,

V. RELIEF PRAYED FOR

The Appellants, War Memorial Hospital, John Borg, and Valley Health System, respectfully request that this Court reverse the decision of the Circuit Court below, grant summary judgment to the Defendants, and rule that the Plan was not terminated, and Plaintiffs therefore have no ability to assert a claim to the surplus. In the alternative, if the Court rules the Plan was terminated, this Court should reverse the award of the surplus to Plaintiffs and rule that War has the discretionary right to transfer the surplus to its other qualified plan.

Respectfully submitted,
War Memorial Hospital,
Valley Health System, and
John Borg,
Appellants, by counsel,

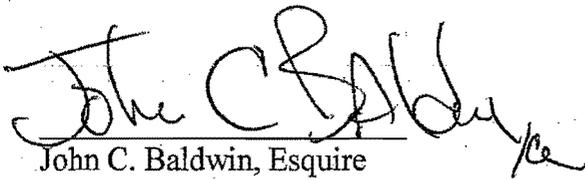


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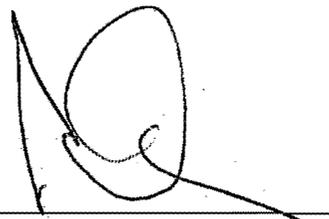
508 U.S. 152, 154, 113 S. Ct. 2006, 125 L.Ed.2d 71 (1993). In such a plan, the employer generally shoulders the investment risk. It is the employer who must make up for any deficits, but also the employer who enjoys the fruits (whether in the form of lower plan contributions or sometimes a reversion of assets) if plan investments perform beyond expectations. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-440; 119 S. Ct. 755, 142 L.Ed.2d 881 (1999).

Beck v. Pace International Union, 551 U.S. 96, 127 S. Ct. 2310, 2314, 168 L.Ed.2d 1 (2007).

Under the United States Supreme Court's definition in *Hughes Aircraft* and in *Beck*, the employees in a defined benefit plan are entitled to "a fixed periodic payment" upon retirement – and the Employer, War, is entitled to transfer surplus assets to its other qualified retirement plan, based on the investment risk that War took in managing the Plan and effectively guaranteeing payment of accrued benefits. This concept was wholly ignored by the Circuit Court and was error in the Circuit Court's analysis.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MORGAN COUNTY WAR MEMORIAL
HOSPITAL, BY AND THROUGH MORGAN
COUNTY WAR MEMORIAL HOSPITAL
BOARD OF DIRECTORS,
JOHN BORG, and
VALLEY HEALTH SYSTEM, Inc.

Appellants,

DOCKET NO. 35298
CIVIL ACTION NO. 07-C-78

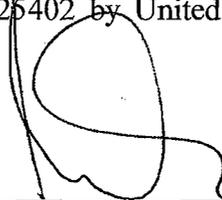
v.

JENNIFER BAKER, JANET HORNER,
SHARON HENDERSHOT, BARBARA JOHNSON,
TANYA MANLEY, HELEN MILLER,
CHRISTINE MULLEN, RUTH SMITH,
BERNICE STOTLER, DEE ANN STOTLER,
LINDA STOTLER, BARBARA YOST,
CAROL LAYTON, NANCY WAUGH,
and TERRY KESECKER,

Appellees.

CERTIFICATE OF SERVICE

I, Richard G. Gay, Esquire and/or Nathan P. Cochran, Esquire, the undersigned, do hereby certify that a true and accurate copy of the **BRIEF ON APPEAL, MOTION TO SUPPLEMENT RECORD** and **CERTIFICATE OF SERVICE** has been served upon Mark Jenkinson, Esquire, and/or Lawrence Schultz, Esquire, at Burke, Schultz, Harmon & Jenkinson, P.O. Box 1938, Martinsburg, West Virginia 25402 by United States first-class mail, postage prepaid, on this 14th day of January, 2010.


Richard G. Gay, Esquire
Nathan P. Cochran, Esquire