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.,

Petitioners/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,

Respondents/Plaintiffs Below.

RESPONSE BRIEF OF APPELLEES

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KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

Morgan County Hospital (MCH) began a Defined Benefit pension program ("the Plan") in 1972. In 1987, MCH "froze" the Plan. The time employees had put in up to that point was recorded and credited. No new employees entered the Defined Benefit Plan, and everyone was switched to a separate Defined Contribution Plan. All new employees were only covered by the Defined Contribution Plan.

Over the years, the majority of employees in the frozen Defined Benefit Plan either quit, retired with a fixed benefit, or died before receiving any benefits. The number of remaining active employees covered by the frozen Plan dwindled to less than 20 by 2003. MCH was the employees' fiduciary under the Plan.

Periodically, an actuary was hired to calculate the present value of each employee's vested, fixed benefit. In 2005 the total cost of annuities to provide benefits to all of the employees was $142,911.00. The total funds available to pay these benefits was $817,262.00, meaning once the cost of paying for all the employees' retirement benefits was paid, a surplus or "residual asset" of $674,351.00 would be left over. The Plan clearly says MCH may not obtain the residual assets, and that MCH may not amend the Plan to obtain the residual assets. The Plan clearly says the employees "may" be paid the residual assets upon termination once all the obligations and liabilities of the Plan are met.

This case is about how MCH, and its management company, Valley Health Systems ("Valley"), and Valley employee John Borg ("Borg") schemed to unlawfully seize the residual assets from the employees, and how, thus far, the Appellee 15 employees (Plaintiffs below) have stopped them.

The Board of Directors of MCH terminated the Plan by its express terms effective December 31, 2003. This triggered a set of duties called "termination procedures" set forth in § 9.3 of the Plan. Even though MCH is the fiduciary of the Plan, it did not perform those duties. Instead it spent two years applying to the IRS for permission to take the residual assets for itself in violation of the clear language of the Plan.

MCH, Valley, and Borg finally determined that the only way MCH could take the assets would be if the employees consented. The employees understandably refused. In 2006, MCH sued the employees in the U.S. District Court for the Northern District (Martinsburg) for a declaration that MCH owned the funds. That suit was dismissed by the District Court for lack of subject matter jurisdiction, since ERISA does not apply to this governmental Plan. That dismissal was upheld on appeal, because "the federal courts have routinely found that they lack subject matter jurisdiction over actions by ERISA benefit Plan Participants against governmental plans…" Morgan County War Memorial Hospital, v Jennifer Baker, et.al., 314 Fed.Appx. 529, 2008 WL 4949141 (C.A.4 (W.Va.)), 45 Employee Benefits Cas. 1843. The Fourth Circuit Court of Appeals also held, "A breach of fiduciary duty claim against War Memorial involves interpreting a trust document, the Plan, that is a creature of state law, and Appellees can prove a breach of fiduciary duty claim without resolution of any issues of federal tax law.". *Id.* at 14.

The employees immediately sued in Morgan County Circuit Court seeking the residual assets, and damages for breach of fiduciary duty.

In December 2008, Appellants moved for Summary Judgment and Appellees filed a cross-motion. Appellants' Motion, if granted, would have disposed of the entire case by permitting MCH to rescind the termination, returning to the *status quo ante* and dismissing the breach of fiduciary duty claims. (Had the Circuit Court done this, or should this Court allow it, MCH will simply hold the funds in trust until the last of these women is dead. Then there will be no one left to complain about their self-dealing.)

Appellees sought for the Court to rule that MCH be bound by the Plan it wrote. The court held that MCH terminated the Plan in 2003, and that under the clear terms of the Plan the only party entitled to the residual assets were the employees.

Appellants call this a case of first impression in West Virginia. Would that it were so. The law of self-dealing fiduciaries is well-settled.

STATEMENT OF FACTS

1. MCH is a county-owned hospital and its pension plan is thus not bound by ERISA. Valley Health Systems[1] ("Valley") operates the hospital pursuant to an operating agreement between Valley and MCH.
2. During most of the events which gave rise to this lawsuit, the Hospital Administrator at MCH was John Borg. Mr. Borg is an employee of Valley who was tasked with operating MCH. Mr. Borg was the Plan Administrator for the pension plan.
3. The pension plan ("Plan") was written by MCH. MCH is the fiduciary for the employees.
4. The employees were not permitted or required to make any cash contributions to the Plan. Instead, they contributed their loyalty and their service. The Plan is a benefit of employment and a form of deferred compensation.

[1] Valley Health System is a regional health care system headquartered in Winchester, Virginia. It owns or operates five hospitals including two in West Virginia. Its assets exceed a half billion dollars. In early 2009, Valley signed a contract to purchase MCH from the Morgan County Commission.

5. The employees are not employed by Morgan County government. The hospital is a separate entity. No surpluses are ever transferred from MCH to the County, and no taxpayer funds support MCH or this pension plan.
6. The Defined Benefit Plan was written in 1972, and "frozen" in 1987. Since 1987, all new employees have been covered under a separate, Defined Contribution plan. No new Participants have been added to the Defined Benefit Plan since 1987.
7. In the intervening 22 years, all but 16 of the Participants who were covered by the Plan have retired and received their benefits, or resigned or died without receiving benefits. Until recently, all of the 15 Appellees were full time employees of MCH. They are all women, and longtime Hospital employees.
8. For a variety of reasons, the long dormancy of the Plan produced a sizable surplus in the fund set aside to pay benefits.
9. The present value of the Plan's obligations to the 16 participants, as of March 31, 2009, was \$156,747.00. On that date, the fund contained \$721,169.47, leaving a surplus of \$564,422.27. The total fund was much larger before the bear market of 2008-2009, exceeding \$900,000.00 at one point.
10. In 2002, Borg and MCH decided the hospital would attempt to seize the residual assets.
11. Effective December 31, 2003, the Board of MCH terminated the Plan pursuant to § 9.2.
12. Section 9.2 says:

> While the Employer expects and intends to continue the Plan, the Employer reserves the right to terminate the Plan at any time in its sole discretion. The Plan will terminate (a) *by resolution of the Employer's Board of Directors*, (b) upon the dissolution, merger, consolidation or reorganization of the Employer or (c) upon the sale by the Employer of all or substantially all of its assets unless a successor is substituted for the Employer under Section 10.1. A partial termination of the Plan may occur with respect to a group of

> Participants on any date specified by the Employer or required by law. [Emphasis added.]

13. Appellants failed to quote § 9.2 in full or attach it as an exhibit.

14. Borg and MCH decided to seize the residual assets despite language in the Plan which clearly prohibits the Employer, MCH, from obtaining the assets.

15. Section 10.3 of the Plan says:

> The Employer will have no right, title, or interest in any portion of the Plan assets, nor may any portion of the Plan assets be returned to the Employer, directly or indirectly, unless a contribution was made by a mistake of fact, provided that the contribution is returned to the Employer within one year of the original contribution date.

16. Appellants failed to quote § 10.3 anywhere in the Brief, or attach it as an exhibit.

17. Moreover, even though the Plan gives MCH broad powers of amendment, certain types of amendments are expressly prohibited:

> *The Employer reserves the right to amend the Plan from time to time, provided that the amendment*:
> (a) Except as provided in Section 10.3, does not deprive any active, retired or terminated Participant or any beneficiary of the benefits provided by previous contributions to the Plan to which he is entitled;
> (b) Does not eliminate or reduce a Participant's Normal Benefit under the Plan; and
> (c) *Does not provide for a reversion of Plan assets to the Employer on Plan termination or otherwise.* [Emphasis added.]

Section 9.1.

18. Appellants failed to quote § 9.1 anywhere in the Brief, or attach it as an Exhibit.

19. The Plan MCH wrote says it cannot have the residual assets, and the MCH cannot amend the Plan so as to permit it to have the residual assets. This is called "anti-reversion" language. Appellants never mention these provisions which will always thwart MCH's desire to seize the assets for itself.

20. MCH concedes at paragraph 12 of its Statement of Facts that in June 2002, it prepared an amendment to the Plan permitting MCH to seize the residual assets. This scheme was in direct violation of the Plan document's clear anti-reversion language, and the prohibition on such amendments outlined above.

21. Eighteen months later, effective December 31, 2003, MCH terminated the Plan by written consent resolution of its Board. See Petition Response Exhibit 1.

22. Appellants call this termination "conditional," but it is not conditional. The Plan is terminated clearly, and without qualification, effective December 31, 2003. See Consent Resolution, Petition Response Exhibit 1.

23. Appellants have failed to quote the unconditional language of the Consent Resolution anywhere in their Brief, or attach it as an exhibit.

24. At footnote 5 on page 9, Appellants say MCH received a "favorable determination" letter from the IRS on October 6, 2005. All the IRS required was the adoption of an amendment permitting reversion of the residual assets to MCH. What MCH apparently failed to tell the IRS is the same fact Appellants left out here: such an amendment is *prohibited* by § 9.1(c) of the Plan MCH wrote!

25. Also in the fall of 2005, MCH called in the employees, on work time, and presented them with the release document reproduced at Petition Response Exhibit 2.

26. Appellants have failed to quote the release in their Brief or attach it as an exhibit.

27. This remarkable document sought to have the employees waive the anti-reversion language in the Plan to let MCH seize the residual assets and release any and all claims against MCH for such torts as breach of fiduciary duty. In the release document, MCH

conceded that it could not amend the Plan without the consent of the employees. The Release also concedes, "the Plan was terminated December 31, 2003."

28. MCH proposed, in exchange for this massive disavowal by the employees of their rights, to give them nothing more than the retirement benefits it already owed them under the Plan.

29. The employees refused to consent. MCH later offered a small sum to each employee to sign the release; still the vast majority refused.

30. At this point in the late fall/winter of 2005-2006 MCH attempted to "rescind" the earlier, unconditional termination, falsely calling it "contingent" for the first time nearly two years after it was written. *Petition*, pg. 8, ¶ 20.

31. Counsel contacted MCH on behalf of the employees in January 2006.

32. In May of 2006, undersigned counsel wrote to MCH demanding the surplus be paid to the Employees.

33. Having failed in repeated attempts to seize the surplus, MCH sued for a declaration in U.S. District Court for the Northern District of West Virginia. In a several count complaint, MCH sought, among other things, to have the Court award it the residual assets.

34. On the day the employees were sued by their Employer and fiduciary, they were all women in their 40s, 50s, and 60s. Few had much education beyond high school, and most were non-professional staff.

35. The present value of their pensions under the Plan averaged less than $10,000.00 per woman. Projected monthly benefits range from about $50 to $250 per month.

36. When they were sued by their Employer and fiduciary, these women faced having their small pensions eaten up by legal fees in a drawn out legal battle. They persisted nevertheless.

37. The District Court dismissed MCH's claims, citing lack of federal subject matter jurisdiction. This dismissal was upheld by the U.S. Fourth Circuit Court of Appeals in a 27-page unpublished opinion dated November 19, 2008. Morgan County War Memorial Hospital, v Jennifer Baker, et.al., 314 Fed.Appx. 529, 2008 WL 4949141 (C.A.4 (W.Va.)), 45 Employee Benefits Cas. 1843.

38. The Employees filed this suit in state court.

39. While the Fourth Circuit appeal was pending, Appellants sought a stay of discovery. This was refused by the Circuit Court, but Appellants did not set any depositions of the employees until after they filed their Motion for Summary Judgment in December, 2008. In their motion, Appellants claimed there was no dispute as to any material fact.

40. Now, after the Motion for Summary Judgment has gone against them, Appellants have lately filed, and used throughout their Brief, depositions taken after they claimed there was no genuine issue of material fact.

41. The employees cross-filed for Summary Judgment on the issues raised by Appellants.

42. After a full briefing schedule and oral argument, the Circuit Court issued its Order May 4, 2009, some five months after the motion was initially made by Appellants. The Court, with some amendments, endorsed the Order provided by Appellees' counsel.

43. The Circuit Court's Order is Petition Response Exhibit 3.

STANDARD OF REVIEW

Appellants have identified the proper Standard of Review in this case.

DISCUSSION OF APPELLANTS' CLAIMED ERRORS OF LAW

Appellants have listed a number of errors they claim the Circuit Court committed. These arguments fulfill the promise of Appellants' Statement of Facts and Procedural History – they are factually incomplete. Indeed, Appellants' failure to show this Court the consent resolution language *or* the Plan's definition of termination *or* the Plan language which prohibits the seizure of the residual assets *or* the Release Document is reflected in every case they cite. Their legal authority is self-distinguishing, given its foundation in false impressions created by withheld documents and facts. As a result, what would typically be a response to a particular argument in a particular context is universal: the reader of the Appellants' Brief must always ask herself, "Is the case they are citing one in which there was truly a conditional or contingent resolution of the Board, or one where there is no contingency in the language at all?"

"Is the Plan in this cited case a Plan where the Employer has unlimited authority to amend, or one where, as here, the Employer's power to amend is limited by the Plan's clear language?"

In every argument made by Appellant, either the consent resolution, the termination language of § 9.2, or the anti-reversionary language of § 9.1 and § 10.3 is mischaracterized or ignored in its entirety. These are the *central* documents in the case. The result is a Brief on Appeal about some other case, not the one Judge Yoder decided.

Appellees will note these mischaracterizations and remind the reader of § 9.1, § 9.2, and § 10.3 as necessary in the response to the individual arguments.

The Plan was terminated in accord with its express terms on February 24, 2004, effective December 31, 2003. The Circuit Court, which examined and remarked upon all of the undisputed material facts, including those ignored by Appellants here, agreed with Plaintiffs below, who argued the employees were the only proper recipients of the funds. Circuit Court Order, Petition Response Exhibit 3.

Appellants say the Court decided the "gravamen of the entire case," when it ruled the Employees were entitled to the surplus, but that is not so. The gravamen of the case is, "What damages should the Employer pay for the breach of fiduciary duty inherent in spending more than two years trying to seize the residual for itself when it should have been distributing assets?" That question will be answered by a jury back in Morgan County, and is not presented here.

I THE COURT APPLIED THE PLAIN LANGUAGE OF THE PLAN TO THE UNDISPUTED FACTS.

Appellants begin their argument with the claim that, under a "defined benefit" Plan, the employer is entitled to a reversion of the residual assets because it shouldered the investment risk. For this proposition they cite Hughes Aircraft v. Jacobson, 525 US 432, 443-44 (1999) and Beck v. Pace International Union, 127 S.Ct. 2310, 2314, 168 L.Ed.2d 1 (2007), both of which are governed by ERISA, while this plan is not. How do Hughes and Beck deal with anti-reversionary language such as § 9.1 and § 10.3 in the instant case? So far as Appellees can tell, neither of the plans in Hughes and Beck contain anti-reversionary language. The rights of the parties to the residual assets are *directly addressed* by the Plan MCH wrote here. One need not refer to either ERISA or the federal courts in the face of the clear language of the Plan. Whether one views this as a contract or a trust makes no difference in its construction under West Virginia law. The primary rule is to read and apply the plain language of the document.

Wheeling Dollar Savings and Trust Co. v. Hanes, 160 W.Va. 711, 237 S.E.2d 499 (1977) (When construing a trust, you determine the intent of the donor from the language he used, and if the meaning of the language is plain, the rule must be given effect accordingly.); McKeny Construction Co. v. Town of Rowlesburg, 187 W.Va. 521, 420 S.E.2d 281 (1992) (Where parties lawfully enter into a contract and their contract is free from ambiguity or doubt, the contract provides the law which governs their relationship.)

MCH and Valley set forth three general propositions in numbered paragraphs, citing Hughes and Beck. All may be generally true, but none apply here.

The first is that surplus assets "typically" belong to the Employer. Not so with this Plan. On its face it says,

> The Employer will have no right, title, or interest in any portion of the Plan assets, nor may any portion of the Plan assets be returned to the Employer, directly or indirectly, unless a contribution was made by a mistake of fact, provided that the contribution is returned to the Employer within one year of the original contribution date.

The Plan, §10.3.

This clear language directly contradicts the "typical" treatment claimed above. The "directly or indirectly" language seems to suggest that using the surplus to reduce Employer contributions might be prohibited. We need not reach that issue just yet. Suffice to say that where an inapplicable[2] doctrine of federal law conflicts with the clear language of a contract, the plan language controls. It bears repeating that this easy issue of well-settled law was not even addressed in the Petition or Brief by Appellants. It was not error for the Circuit Court to apply the plain language of the contract to the undisputed facts.

Second, Appellants say what MCH did was make decisions involving "moving assets" and that these are "settlor functions," not fiduciary functions. This argument is not supported by the cases.

ERISA does not define settlor functions but does define fiduciary functions. "...[C]ase law has created the doctrine that settlor functions include those acts by plan sponsors that are not covered by ERISA fiduciary provisions." In re AB&C Group, Inc., No. 8-bk-482, 207 WL 1939077 (U.S. Bankruptcy Court, N.D. West Virginia, 2009), citing Hughes and Beck, *supra*. (ERISA does not bind this Court in this case, and where general ERISA doctrine conflicts with the plain language of the Plan, the Plan will control. ERISA may, however, provide helpful guidance on questions like the difference between settlor and fiduciary obligations.)

Fiduciaries are bound by the prudent man standard of care pursuant to 29 U.S.C. § 1104(a):

> (1) ...a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like

[2] The Fourth Circuit said in its opinion that, this case "simply cannot depend upon the resolution of any issues involving ERISA because ERISA does not even apply to governmental plans." Morgan County War Memorial Hospital, v Jennifer Baker, et.al., 314 Fed.Appx. 529, 2008 WL 4949141 (C.A.4 (W.Va.)), 45 Employee Benefits Cas. 1843.

> capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
> (D) *in accordance with the documents and instruments governing the plan* insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter. [Emphasis added.]

Section 7.8 of the Plan defines fiduciary duties as follows:

> Section 7.8 Fiduciary Responsibilities. A Fiduciary with respect to the Plan will discharge his fiduciary duties solely in the interest of Plan Participants and their beneficiaries with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims. It is intended under the Plan that a fiduciary will be responsible only for the proper exercise of its own fiduciary duties and obligations to the extent not properly allocated or delegated to other persons.

As this Response has shown, terminating the Plan then spending more than two years attempting to seize the residual assets in violation of the clear Plan language is not solely in the interest of the beneficiaries. Indeed, it is not in their interest at all. It was solely in the interest of MCH, Borg, and Valley. A fiduciary who tries to help himself to a portion of the corpus of a trust is breaching a *fiduciary* duty, especially where the assets he seeks to seize for his own use are specifically forbidden to him by the Plan he wrote. Appellants' scheme called for "moving assets" into MCH's accounts.

Third, Appellants say that filing a declaratory judgment action to "determine a settlor's rights..." is not a breach of fiduciary duty.

When the employees refused to consent to an unlawful amendment to the Plan, their fiduciary sued them. These are non-union working people, most at low wages. The present value of the vested retirement benefits average $10,000.00 per woman, at most a benefit of a few hundred dollars per month at retirement.

From which funding source were these women expected to fight their fiduciary in this lawsuit? MCH knew when it filed suit that by taking the untenable position that it was entitled to the residual assets, it was requiring them to essentially bet their vested benefits on the outcome.

This was not an inquiry required to resolve an ambiguity in the Plan nor to allocate assets fairly *among* beneficiaries. It was an economic power play in the form of a lawsuit filed in a court which lacked jurisdiction. None of this was in the interest of anyone but MCH and Valley. It was an old-fashioned shakedown.

Appellants have not cited any case in which a fiduciary attempted to seize Plan assets to which it had no claim, and could never have a claim, then sued the beneficiaries when they said, "No." If this self-dealing course of conduct is not a breach of the fiduciary's duty, then the term has no meaning.

The Plan, in § 9 and § 10, divides the whole human race into three groups:

1) Those who have no right to the residual assets, directly or indirectly, and may not amend the Plan to give themselves such a right (MCH – See § 10.3 and § 9.1);
2) Those to whom "any residual assets may be distributed" after the satisfaction of all liabilities of the Plan. (The Employees – See § 9.3); and
3) Everyone else.

Even Group Three above – "Everyone else" – has a superior claim to MCH. At least Group Three above is not flatly prohibited from receiving the funds. It is not much of a claim, but it is better than MCH's claim. Imagine if some stranger to the contract sued these employees. In the absence of any Plan language creating a colorable right, we would say such a suit was frivolous.

This Court has said:

The fiduciary duty is "[a] duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law[.]" Black's Law Dictionary 625 (6th ed.1990). No one has captured the essence of the fiduciary obligation more eloquently than Justice Cardozo when he wrote:

> Many forms of conduct permissible in a workday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions.... Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd[.]

Elmore v. State Farm Mut. Auto. Ins. Co., 202 W.Va. 430 (1998).

In Elmore, the Court declined to find a fiduciary duty on the part of an auto insurer to a third-party claimant. The Court went on to say that it has never even recognized that the "relationship between an insurer *and its insured* is in the nature of a fiduciary relationship," 202 W.Va., at 437. [Emphasis added.]

Thus, even the familiar duty of an insurer to its insured, set forth in Shamblin v. Nationwide Mut. Ins. Co., 183 W.Va. 585, 396 S.E.2d 766 (1990), is not as thorough and demanding as a fiduciary duty. The duty to a first-party insured requires only that the insurer weigh the insured's interest equally with its own interest. A fiduciary must always elevate the beneficiary's interest *above* its own interest. MCH has blatantly breached this duty for years.

Appellants cite Taylor v. Cabell County, 152 W.Va. 761, 767, 166 S.E.2d 150, 153-54 (1969) for the idea that if "legislation" impairs the employees' rights, they may not claim harm against the government. This citation ignores several distinctions between Taylor and the instant case.

First, the employees in Taylor are government employees – the plan sponsor is the government itself. Here, the sponsor is *not* the government, and the sponsor can never pass legislation to impair anyone's rights.

The issues raised in underfunded municipal retirement systems – such as the inability of government to meet its obligations without raising taxes to ruinous levels – may someday be considered by this Court, and Taylor will have its place in that discussion. Here the funds are in place, the mechanism for distributing them to the employees is set forth and unchanging. It need only be followed.

Most importantly, *this pension is not funded with tax monies*. The employees are not Morgan County government employees. The pension plan is a government plan but not a publicly funded plan. It is over funded, not underfunded. The funds come from revenues earned by the hospital. The plan is frozen, so payments in excess of the amount set aside are impossible, anyway. Taylor would be inapposite even if it held that the fiduciary could sue the beneficiaries to get access to a surplus in the face of contrary language in the Plan.

There is no error here.

II THE TERMINATION WAS UNCONDITIONAL AND IN ACCORD WITH THE EXPRESS TERMS OF THE PLAN.

Summary of Argument

In their response to the Petition for Appeal, Appellees repeatedly noted the absence from the Petition of the documents and contractual language upon which the Circuit Court made its ruling. These are:

- The Consent Resolution ("The Plan is terminated...[.]")
- § 9.2 of the Plan ("The Plan will terminate by resolution of the Board of Directors.")
- § 9.1 of the Plan (Employer may amend the Plan, but no reversion to Employer permitted.)
- § 10.3 of the Plan (Employer has no "right, title or interest in Plan assets; "Plan assets may not be" returned directly or indirectly to the Employer.")
- The Consent to Amendment and Release document presented to Appellees ("The Plan is terminated...[.]")

These documents are still absent from Appellants' filings before this Court. One cannot show the Circuit Court's Order contains prejudicial, reversible error without a thorough discussion of the meaning of each document and Plan provision used by the lower Court to reach its decision. These are not the texts Appellees say are important; they are the texts the Circuit Court said were important, in the order from which this appeal was taken.

In ninety pages of Petition and Brief by Appellants, they have never once presented the language of the Consent Resolution which they claim makes it contingent or conditional in any fashion. The Circuit Court did not find it to be conditional or contingent, if found the resolution to be simple and unambiguous.

If Appellants are to be awarded the relief they seek, they must *show* this Court, not merely say, that the consent resolution is contingent or conditional. If we begin and end this Response Brief with one criticism of Appellants' argument it is this: the argument assumes what it must prove. They have said it is conditional many times, but never shown it to be so. In order to avoid the mandatory termination procedures of § 9.3, MCH must show it never terminated the Plan. Once the Plan was unconditionally terminated, there is nothing to do but:

> <u>Section 9.3</u>. <u>Termination Procedures</u>. The benefits of affected Participants and beneficiaries, to the extent then funded, *will* be fully vested and nonforfeitable as of the Plan termination date or partial termination date and *will* be distributed in a method described in Article V as soon as practicable to each such Participant or beneficiary. Assets of the Plan *will* be applied to provide these benefits in the following priority:
>
> (a) First, benefits to Participants who began receiving benefits at least three years before the Plan termination (including those benefits which would have been received for at least three years if the Participant had then retired);
>
> (b) Next, all other nonforfeitable benefits; and
>
> (c) Next, all other benefits.
>
> If assets are insufficient to cover all benefits in any class above, they may be allocated pro-rata within that class.
> *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.* All provisions of the Plan which are not inconsistent with this Article IX will continue in effect, including all the powers and duties of the Administrator, the Employer, and the Insurer, until a complete distribution of the Plan assets has been made. [Emphasis added.]

The Plan, § 9.3.

In the Petition and Brief, Appellants have said at least 20 times that the consent resolution was contingent, or conditional. Appellants have never explained what words of condition *make* the consent resolution contingent. Where is the "if...then" language that any drafter knows is the *sine qua non* of contingency?

Appellees have searched this Brief (like we searched the Petition and the briefs before the Circuit Court), and found nothing even suggesting the existence of such a condition. Turning to the Plan documents and the consent resolution itself, nothing points to any contingency.[3]

However, when we search the 2005 Consent to Amendment and Release document, we do find at Paragraph C, a statement by the Appellants to their employees which uses the past tense: "The Plan was terminated effective as of December 31, 2003," – an unconditional termination. This was a communication from MCH directly to the Plan participants – indeed, the employees testified that Mr. Gay addressed them face to face. Clearly, the document was written by a lawyer. The document described the Plan as terminated.

This is no trivial matter. The *essential* fiduciary duty is to tell beneficiaries the truth. Where the Consent to Amendment and Release says, "The Plan was terminated" it meant there was no condition. If there was a condition, MCH failed to be truthful with the employees about the Plan when it sought to have them waive their rights.

Finally along these lines, every one of these documents – the Plan, the Consent Resolution, and the Release document – was written by MCH. The Consent Resolution and the

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[3] WHEREAS, the Board of Directors of the Employer now desires to terminate the said Plan effective December 31, 2003;
NOW, THEREFORE, BE IT RESOLVED, that *the Plan is terminated effective as of the date noted above*; and
BE IT FURTHER RESOLVED, that the appropriate officers of the Employer be, and hereby are, authorized and directed to take the following actions on behalf of the Employer:

1. 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); and
2. 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 action as may be required to cause the Plan to be qualified under the Code; and
3. To make 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
4. To return to the Employer all monies remaining after the satisfaction of all liabilities to Plan Participants.

[Emphasis added.]

Release were likely written or approved by Mr. Gay or someone in his office. Certainly Mr. Gay represented MCH at the time the Release was written. Had that Release informed the Appellees that the termination would only take effect if they signed the document, it would have comported with what Appellants now say about termination. It did not comport with what they now say is the truth. The story has changed to fit their defense to this lawsuit.

Having failed to put a condition or contingency in the Consent Resolution, and apparently aware the claimed contingency did not exist, MCH in 2006 drafted a belt-and-suspenders document that simultaneously declared the earlier termination contingent, *and*, for good measure, rescinded it. Naturally, were it ever truly contingent, the failure of the contingency would have collapsed the termination by operation of law, making rescission unnecessary.

Having failed to show a contingency, MCH argues in the alternative that termination never occurred because it could, at any time it wished, rescind the unconditional termination. MCH unconditionally terminated the Plan in 2003. Under the Plan it was required to distribute the assets "*as soon as practicable*" [Emphasis added] § 9.3.

Sections 9.2 and 9.3 say the Plan will terminate by resolution and the benefits will be distributed as soon as practicable. What MCH did instead of distributing the assets was seek the permission of the IRS (for two years!) to seize the residual for itself. When that failed, it attempted to rescind the termination.

Section 9.2 lists the mandatory duties of MCH after termination. Rescinding the termination is not listed, nor is "spending two years in a fruitless attempt to convince the IRS to permit you to seize assets you own Plan says you can never have," and then "rescinding the termination when you fail."

The Circuit Court construed the plain language of the Plan – what was required and what was permitted. It rightly rejected the logic presented by Appellants here. Belt-and-suspenders language can be a useful tool for dealing with unknown future events, but it should never be used to hide an attempted theft of the other fellow's pants.

How, in all honesty, can one fail to quote the *actual language which both sides agree was pivotal*? The answer is that in all honesty, you must quote the pivotal language, especially when that language is opposed to the way you have characterized it to the Court.

A. <u>"TERMINATION"</u>

The Circuit Court of Morgan County used the word "termination" as it is used in the Plan MCH wrote. Appellants have tried, and are still trying, to confuse the term by reference to IRS regulations, ERISA, and other extraneous sources.

The Plan is a contract written by MCH. That contract must be construed under West Virginia law. The first rule is to examine the plain meaning of the text.

From the Plan, § 9.2:

> <u>Section 9.2</u>. <u>Termination</u>. While the Employer expects and intends to continue the Plan, the Employer reserves the right to terminate the Plan at any time in its sole discretion. The Plan will terminate *(a) by resolution of the Employer's Board of Directors*, (b) upon the dissolution, merger, consolidation or reorganization of the Employer or (c) upon the sale by the Employer of all or substantially all of its assets unless a successor is substituted for the Employer under Section 10.1. A partial termination of the Plan may occur with respect to a group of Participants on any date specified by the Employer or required by law. [Emphasis added.]

It is inescapable that the Board terminated the Plan February 24, 2004, effective December 31, 2003. There was a resolution of the Board terminating the Plan. *See*, footnote 3, *supra*.

There follow in § 9.3 a set of duties and directives the Employer must follow once it terminates the Plan:

> Section 9.3. Termination Procedures. The benefits of affected Participants and beneficiaries, to the extent then funded, *will* be fully vested and nonforfeitable as of the Plan termination date or partial termination date and *will* be distributed in a method described in Article V as soon as practicable to each such Participant or beneficiary. Assets of the Plan *will* be applied to provide these benefits in the following priority:
>
> (d) First, benefits to Participants who began receiving benefits at least three years before the Plan termination (including those benefits which would have been received for at least three years if the Participant had then retired);
>
> (e) Next, all other nonforfeitable benefits; and
>
> (f) Next, all other benefits.
>
> If assets are insufficient to cover all benefits in any class above, they may be allocated pro-rata within that class.
>
> *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.* All provisions of the Plan which are not inconsistent with this Article IX will continue in effect, including all the powers and duties of the Administrator, the Employer, and the Insurer, until a complete distribution of the Plan assets has been made. [Emphasis added.]

Note the mandatory nature of the directives in the first part. Note also the language permitting distribution to the employees ("Participants") after the liabilities are all paid. Instead of following these simple and straightforward directives, MCH followed a two year course of conduct designed to seize the residual assets for itself, including, but not limited to, 1) seeking approval from the IRS to take the assets; and 2) approaching these loyal employees with the

Release shown at Petition Response Exhibit 2. When the employees refused, their fiduciary sued them.

Where in § 9.3 is the Employer directed to try to seize the assets for itself, or induce the loyal employees to abandon their rights? Where does § 9.3 direct MCH to *file a lawsuit* against the employees in a court without jurisdiction? To appeal to the Fourth Circuit?

All the things MCH did are *not* in § 9.3; everything § 9.3 requires, MCH failed or refused to do. Now MCH cites its own failure to take *any* of the mandatory actions set forth in § 9.3 as proof the Plan was never terminated at all. This is sophistry. This is especially breathtaking when one sees that the reason MCH did none of the things required in § 9.3 is *because it was asking the IRS for permission to seize the residual assets.*

Put another way, Appellants wish this Court to conflate the definition of termination in § 9.2 with the termination procedures it refused to carry out in § 9.3. The Circuit Court instead applied the plain language of the contract. There is no error in having done so.

MCH is 5 ½ years late in fulfilling its duties under § 9.3. It is high time MCH got started. Affirming the Circuit Court would serve that goal.

Appellants rely in great degree upon the testimony of Helen Miller and Shawn Bogenrief regarding the definition of "termination." It may be interesting to know what they thought, but just as in the case of the ERISA precedent in Hughes and Beck, *supra*, it is not in any way binding on this Court. As shown *supra*, the Plan written by MCH defines termination simply and plainly – the Plan is terminated by Board Resolution. While a court will resort to circumstances to construe a contract, it will not resort to verbal declarations of the parties either before, at the time of, or after the execution of the contract to aid in construing the language. Skraggs v. Hill, 37 W.Va. 706, 17 S.E. 185 (1893); Shewsbury v. Tuffts, 41 W.Va. 212, 23 S.E.

692 (1895). If a trust is declared in writing, courts never permit parol proof of a trust to contradict an intention expressed upon the face of the instrument, for that would be to allow parol evidence to vary, contradict, or annul a written instrument. See Atkinson v. College, 54 W.Va. 32, 46 S.E. 253 (1903). The legal rules which govern this case have been in place for over one hundred years.

The Plan is unambiguous. Termination occurs as set forth in § 9.2, then § 9.3 orders the benefits be distributed "as soon as practicable." This mandatory fiduciary duty, written into the Plan by MCH itself, has been ignored for more than five years. The Plan controls the relationship of these parties, and MCH is bound by the duties it set for itself. The Circuit Court said as much.

Helen Miller is described as the "*de facto* Plan Administrator," in the Petition. This is a canard. Helen Miller is the Human Resources Manager at the hospital, but also a Plaintiff herein! If she is the Plan Administrator, why has MCH refused her demand to pay the residual assets to the employees?

In a more serious vein, consider the position in which Helen Miller finds herself. She is a small part of a management team which has been executing a strategy designed to relieve her of property which should belong to her. She is, in a word, in a terrible position. She was in that position the day John Borg hatched this scheme and she has been there every day since. Moreover, the tasks she performed were largely clerical. She never decided anything about the design of the Plan or where or how to invest the money. In Appellants' terms, what she did were not even "settlor" functions.

To call Helen Miller the Plan Administrator is an attempt by John Borg to hide from the scheme he planned and executed here. Borg decided on amendments to propose to the Board.

Borg presented the Consent Resolution to the Board. Borg oversaw the drafting and presentation of the "Release" document. Mr. Borg will never be able to hide behind Helen Miller at the trial of this matter. He should not be permitted to hide in this Court, either.

The Release document presented to the employees in late 2005 is attached as Exhibit 2 to the Response to Petition. The reader is urged to study this document closely. It is very revealing about MCH's view of its own conduct here. The document, titled "Consent to Amendment and Release," was prepared by attorneys who apparently understood at some level that in order to get a sustainable consent and waiver of these women's rights, MCH would have to tell them the whole truth.

In Paragraph C of the Recitals, MCH said, "*The Plan was terminated effective as of December 31, 2003.*" Note the lack of any language of condition or contingency. This was almost two years after the Consent Resolution which MCH now claims was contingent.

Paragraphs D and E summarize the effect of § 10.3 and § 9.1 of the Plan. Paragraph H of the Recitals sets forth that the employees will receive their regular retirement under the Plan, "but will not receive and will be waiving additional benefits that could otherwise be paid..." to the employees if the Plan were not amended. This Paragraph acknowledges the effect of § 9.3 of the Plan.

Interestingly, four of the five documents obscured by the Petition and Brief on Appeal are dealt with one way or another in Petition Response Exhibit 2. The fifth *is* Exhibit 2.

The three separate Plan provisions which were not included in the Petition or Brief are summarized in Paragraphs D, E, and H. The unconditional Consent Resolution is also flatly unconditional in Paragraph C. The fifth fugitive document is, of course, the Release Document itself, and given how it reveals the others, there was never apparently any hope it would be included by these Appellants.

These fugitive documents set forth the meaning of the Plan, not the testimony of Helen Miller and Shawn Bogenrief. The Circuit Court considered all of this information, including the depositions of these fact witnesses taken after Appellants claimed there were no genuine issues or material fact here.

Appellants cite the definition of a condition precedent from the Restatement (First) of Contracts. There is no language in the Consent Resolution which conditions the termination of the Plan on any fact which "must exist or occur before a duty of...performance...arises." While the Restatement correctly states the law, there is no condition precedent in the resolution. Had there been any such language constituting a condition precedent, surely Appellants would have pointed it out by now.

Finally Appellants say that the "if and when" of termination is a settlor function, not a fiduciary duty. For that matter, the Plan itself says at § 9.2:

> [T]he Employer reserves the right to terminate the Plan at any time in its sole discretion.

So it may be a settlor function, and MCH gets to decide "if and when." MCH decided "if." They terminated it. They chose "when:" December 31, 2003. Respondents have never argued that MCH did not have the right to say if and when, nor that the termination was a breach of fiduciary duty. The Circuit Court never ruled that the termination was a breach of fiduciary duty.

There is no error in finding the Plan was terminated.

B. <u>RESCISSION</u>

In January 2006, MCH's Board attempted to rescind the termination of December 31, 2003. As stated above, had the termination been truly conditional, no rescission would have been necessary.

Moreover, § 9.3 of the Plan, titled "Termination Procedures," sets forth the duties which devolved upon MCH once it terminated the Plan. None of those duties include rescinding the termination. Nor is it listed as an option. The central duty is to distribute the vested benefits as soon as practicable. Examination of the language of § 9.3 also reveals that the benefits will be "fully vested and non-forfeitable as of the Plan termination date."

Rescinding the termination violates the duty to distribute the benefits "as soon as practicable." Given the wide swings in the value of the Trust due to the volatility of the financial markets, this is no small matter. Moreover, it is hard to imagine a fiduciary's duties are not implicated in the "as soon as practicable" language. The central purpose of the Plan is to furnish money to the employees. Does rescinding the termination also make the benefits non-vested and fully forfeitable? Appellants do not say. It is unreasonable to say the benefits are fully vested and non-forfeitable one day, and not the next.

The United States Code describes a fiduciary as discharging his duties "(A) for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan…" 29 U.S.C. § 1104(a).

MCH has never provided the benefits to the employees in the 5 ½ years since the Plan was terminated. MCH says the IRS must approve the termination. Had MCH not tried to seize the assets that approval would have been received years ago. This is no quibbling technical issue – the entire financial system teetered on the bank of collapse in the fall of 2008. No American –

least all of these women – can afford to be sanguine about what may come next. To have your vested retirement assets hang in the balance while your fiduciary dithers and schemes to seize the surplus is intolerable.

In the end, the Circuit Court took the judicially conservative, common-sense approach: it read the clear language in the Plan MCH wrote, and applied it to the undisputed facts.

> This Plan was terminated in accord with its requirements December 31, 2003. Moreover, examination of the Plan document reveals no basis for a later rescission of the termination. MCH's duties once it terminated the Plan were clear and obvious from the face of the Plan. Rescission of the termination was not among those duties; nor was it an option. Plaintiffs' Motion is GRANTED. The Plan was terminated effective December 31, 2003.

Order Granting Partial Summary Judgment to Plaintiffs, ¶ 11.

It is not error for the court to apply the unambiguous language of the Plan to the undisputed facts.

III FEDERAL TAX LAW DOES NOT COMPEL A DIFFERENT RESULT HERE

Appellants still claim that federal tax law controls the meaning of the word "termination" as it is used in the Plan.

As an initial matter, the United States Court of Appeals for the Fourth Circuit has disposed of this issue completely. "A breach of fiduciary duty claim against War Memorial involves interpreting a trust document, the Plan, that is a creature of state law, and Appellees can prove a breach of fiduciary duty claim without resolution of any issues of federal tax law." Morgan County War Memorial Hospital, v Jennifer Baker, et.al., 314 Fed.Appx. 529, 2008 WL 4949141 (C.A.4 (W.Va.)), 45 Employee Benefits Cas. 1843, pg. 14. While an unpublished opinion is not binding precedent, this one provides the law of *this* case.

More importantly, MCH now wishes to control the trust for the indefinite future until, frankly, all of these women are dead. Whose interests are served by returning to the *status quo* and permitting the assets to sit in a trust account until the last of the employees can no longer complain? Certainly not the employees' interest. Of course, the employees' interest is the central purpose of the Plan and serving those interests is the paramount duty of a fiduciary.

Notice the not-so-subtle shift in Appellants' position here. In 2002-2003, they terminated the Plan and applied to the IRS for a determination that MCH could seize the residual assets. When the IRS stopped them, they sought consent from the employees, in 2005, and the employees said "No." Then they sued in federal court for a declaration that MCH was entitled to the residual assets. The federal court dismissed their claims.

About the time the Fourth Circuit rejected their appeal, Appellants apparently divined that § 9.1 and § 10.3 were never going to permit them to seize the residual assets. Now their position is that termination never occurred and they can simply wait until the last of these women have retired and/or died and seize the surplus anyway, and no one will be there to complain. It will take longer, but the result will be the same. The Circuit Court of Morgan County disrupted the scheme. This Court is being asked to let it continue in its new and more deliberate form. Appellees urge this Court to affirm the ruling of the Circuit Court.

Appellants furnish another version of the same argument they have made repeatedly with no success – that a Board resolution may not terminate a pension plan.

In this iteration, Appellants cite Jensen v. Moore-Wallace North America, No. 06-4388 (6th Cir. 2007), a case distinguished by the Circuit Court in its order below. First, as the Circuit Court noted, it is an unpublished opinion. It is not binding precedent in the Fourth Circuit, nor in this Court.

Even if it were binding, Jensen is utterly different. The Employer is Jensen never passed a termination resolution. It said it planned to terminate in the future, but never did so. MCH said "the Plan is terminated..." (Petition Response Exhibit 1); and "the Plan was terminated..." (Petition Response Exhibit 2).

Again, the reason the benefits were not distributed in this case was not the result of an unavoidable delay – it was because MCH was scheming to seize the residual assets! MCH used two years during which it should have been distributing assets and wrapping up this Plan on a scheme to take money from the trust to which it had no entitlement. The bad faith of MCH cannot be permitted to serve its arguments here.

IV THE AWARD OF THE RESIDUAL ASSETS TO APPELLEES IS THE ONLY OPTION

Having shown that Appellants unconditionally terminated the Plan effective December 31, 2003, and that the mandatory "Termination Duties," set forth in § 9.3, do not include rescission, the remaining issue before this Court is how to deal with the residual assets.

Appellants claim the Court acted beyond its mandate in ordering that, since termination had occurred and could not be effectively rescinded, the Appellants carry out the termination procedures and deliver the residual assets to Appellees. According to Appellants, the Circuit Court "far exceed[ed] the scope of the summary judgment motions." This claim, as an initial matter, is dubious at best.

In their initial "Motion for Summary Judgment and Incorporated Memorandum of Law" before the Trial Court, Appellants sought, in part, "an Order granting Summary Judgment in favor of Defendants as follows:

> 1. The Plan is not terminated, and therefore, the Plaintiffs have no basis in law for claiming a distribution of "residual" Plan assets;..."

See, "Motion for Summary Judgment and Incorporated Memorandum of Law."

This request for relief would appear to place ownership of the residual assets directly at the center of the motion Appellants filed below. Appellees filed a cross motion for summary judgment. Appellants repeated the request for relief in their reply.

The Circuit Court was asked to find that Appellants terminated the Plan. It did so, and because the issue was before it, the Court ordered MCH to carry out the termination procedures and then award the residual to Appellees. What the Court did was perhaps unforeseen by Appellants but well within the scope of the relief they requested.

But let us suppose, for the sake of argument, that the Court made a ruling beyond the scope of the motion and cross motion, that its award of the residual assets was indeed beyond the scope of the motion, as Appellant claims.

Courts are empowered to rule, *sua sponte*, on issues which are a part of the case before them. The standard of review on summary judgment is *de novo*. This Court has held that, in certain circumstances, a Circuit Court may grant a summary judgment even in the absence of a written motion by one of the parties. In Syllabus Point 4, Southern Erectors, Inc. v Olga Coal Co., 159 W.Va. 385, 223 S.E.2d 46 (1976), this Court said:

> Where a court acts with great caution, assuring itself that the parties to be bound by the judgment have had an opportunity to develop all of the probative facts which relate to their respective claims, the court may grant summary judgment under Rule 56, *sua sponte*.

Southern Erectors was a case in which one party filed a Rule 56 motion, and the trial court granted a summary judgment to the party opposing the motion, *even though no cross motion was filed.*

Here, of course, cross motions were filed and both sides extensively briefed the matter. The one alternative which MCH has developed, merger, is purely a legal issue.

What are the factual or legal obstacles to a summary judgment on the disposition of these assets?

Appellants, in some ninety pages of Petition and Brief on Appeal, have identified no genuine issues of material fact which preclude summary judgment on disposition of the residual assets. Instead, Appellants' entire argument is a legal one – whether there is anything else MCH might lawfully do with the money. In Meadows v. Walmart, 207 W.Va. 203, 530 S.E.2d 676 (1999), this Court found that the Circuit Court of Jefferson County acted properly when it found an issue was purely a legal one and granted summary judgment *sua sponte*, citing Southern Erectors with approval.

In the absence of a genuine issue of material fact, summary judgment was proper. What Appellees wish to avoid is a return to Circuit Court where we will *immediately* file a motion for summary judgment on this issue. This will involve a briefing schedule of at least a month or two, another decision by the Circuit Court, and another appeal to this Court on a purely legal issue that ought to be decided now. In the absence of a factual dispute, this Court can resolve the issue right here and now by affirming the Circuit Court.

Appellants say that regardless of whether the Plan is terminated, it was error to find the residual assets should go to the Appellees. Appellants say that MCH should be permitted to merge this Plan with the Defined Contribution Plan it uses for over 100 employees, in lieu of

MCH's required contributions. The first problem with this attempt to escape liability has its roots in the history of this case.

When MCH sued the Plan Participants in federal court three and a half years ago, no mention was made of any merger with the Defined Contribution Plan. Instead, MCH sought a ruling from the federal court that *it* was entitled to the proceeds, despite the language in the Plan which says Employer can never have any part of the assets, and can never amend to be permitted any part of the assets.

Why, given MCH's history, should this Court or the Appellees trust that MCH will do anything except try to take this money for its own use?

Appellees caught MCH, elbow-deep in the cookie jar, trying to take the cookies for itself. MCH asked a federal court and a state court to let them have the cookies; both said no. Now they want this Court and Appellees to believe it was their intent to share the cookies with the whole neighborhood all along. Appellees have no reason to believe this, and this Court should not believe it, either.[4]

We are left with a purely legal issue. MCH cannot have the residual assets. Nor can MCH use the assets to offset its required contributions to the Defined Contribution Plan. Such an act would run afoul of § 10.3, which says no portion of the Plan assets may be "returned to the Employer, directly or indirectly..."

To permit MCH to use the residual assets to pay its required plan contributions under the newer Defined Contribution Plan would free up an equivalent amount for use by MCH in

[4] There is no longer any mention in Appellants' court filings that MCH is entitled to the residual assets; one benefit of the principled stand taken by these fifteen women is MCH has abandoned all efforts to have the courts award it the money its own Plan says it cannot have. Of course, MCH would like this Court to simply allow it to return to the status quo and wait until there is no one left to claim the surplus – a slower version of the original scheme.

whatever way it chooses. This would be in no way different from using the funds to build a new hospital.

MCH says it should be permitted to merge the two plans, pursuant to Plan § 10.2. This was the situation in Beck v. Pace International Union, 551 U.S. 96, 127 S.Ct. 2310 (2007). In Beck a pension fiduciary sought to terminate its plan by purchasing annuities (as Appellees seek in the instant case). The union for the employees argued that the pension fiduciary should instead have merged the Plan with a multi-employer plan run by the union. Had the Employer terminated the Plan by purchasing annuities, it would have been able to help itself to the residual asset of $5 million. ERISA permits this sort of outcome, if the plan documents allow it. (Here, of course, we have specific, unambiguous anti-reversion language in the Plan.)

The United States Supreme Court held that merger is an *alternative* to Plan termination, not a *method* of Plan termination.

The distinction is dispositive in a case, like this one, where termination has already occurred. Once termination has been ordered by the Board, the Plan sets forth the duties, among them to distribute the assets to the Plan participants "as soon as practicable."

Merger or transfer of assets is not an option. "We hold that merger is not a permissible method of terminating a single-employer defined-benefit pension plan." 551 U.S. 96, at 111. Justice Scalice delivered the opinion of a unanimous court.

.Finally, MCH has provided this court with no case where any court has ignored the plain language of a pension plan as to reversion, or merger. This Response has revealed the Plan language, ignored by Appellants, which bars MCH from obtaining the assets. It is inescapable – MCH can never lawfully own the residual assets.

Faced with this impenetrable barrier, MCH has apparently elected two alternative strategies: first, to wait until all the employees have died, then take the assets anyway, or second, merge the Plan with the Defined Contribution Plan in order to reduce MCH's contribution to that Plan.

The first strategy above is unavailing as a matter of law. The Plan is very clear, and as this has been dealt with *supra*, it will not be repeated here. Suffice to say that what is a dishonest, impermissible act during the employees' lifetimes will not be cured of the defect by reason of their deaths.

The second strategy is the last refuge of MCH. It is centered on § 10.2 of the Plan, which says:

> The Plan will not, in whole or in part, be merged or consolidated with or have its assets or liabilities transferred to any other Plan, unless each Participant of this Plan would be entitled to receive a benefit immediately after the merger, consolidation, or transfer (if the Plan terminated on that date) equal to or greater than the benefit he would have been entitled to immediately before the merger, consolidation, or transfer (if the Plan terminated on that date.)

The Plan, § 10.2.

There are two problems with this approach. First it would run afoul of the language of § 10.3, which prohibits MCH from receiving the assets "directly or indirectly." Under the Defined Contribution Plan, MCH must contribute a set amount (the "Defined Contribution") to each employee's retirement account each year. MCH would now like to use this surplus to make those contributions, thus conserving its own funds for other uses. This is precisely the sort of finagling prohibited by the use of "indirectly" in §10.3.

The second, and dispositive, problem with merging the Plans is, it is simply too late. Merger of the Plan is an *alternative* to termination which must be selected before termination.

In Beck v. Pace International Union, 551 U.S.96, 127 S.Ct. 2310, 168L.Ed.2d (2007), (a case cited by Appellants for another purpose), Justice Scalia wrote for the Court that merger of one plan with another is an *alternative* to termination, not a method of termination. In Beck, a union had argued that the residual assets should not be returned to the employer upon termination, but instead merged with a multi-employer plan so the employees would get some benefit. Unlike in the instant case, reversion was permitted under the Beck plan.

The Supreme Court held that the proposed merger was not a proper method of termination, and that once termination took place, merger was no longer an option. This holding depended in part upon the Pension Benefit Guarantee Corporation's (PBGC's) interpretation of the applicable law.

Thus, if MCH wished to merge this Plan with the Defined Contribution Plan the time to have attempted this was *before* the termination of December 31, 2003. By now it should be obvious why MCH did not pursue this course earlier: it wanted the assets for itself!

It is too late for MCH to merge this Plan with another. To seize the residual, "directly or indirectly," is impermissible under the Plan it wrote. The only persons with any claim to the residual assets are the Appellees, who "may" receive the residual assets after all Plan liabilities are paid.

CONCLUSION

The Plan was terminated effective December 31, 2003, and the only option permissible for the residual assets is that they go to the Appellees.

The Circuit Court carefully considered the law and applied it to the undisputed facts. Summary Judgment was proper. There is no error here.

RELIEF PRAYED FOR

Appellees urge the Court to affirm the ruling of the Circuit Court.

Respectfully submitted,

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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.,

Petitioners/Defendants Below,

v. **Docket No. 35298**

JENNIFER BAKER, et.al.,

Respondents/Plaintiffs Below.

CERTIFICATE OF SERVICE

I, Mark Jenkinson, counsel for Plaintiffs, hereby certify that I have served a true copy of the foregoing *Response Brief of Appellees* upon the following counsel by hand delivery and/or placing the same in the United States Mail, first class, postage prepaid, this 29th day of January 2010.

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