

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.,**

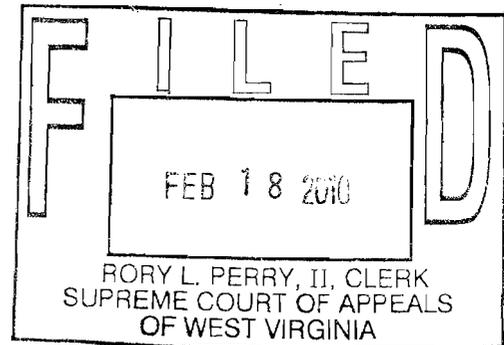
Appellants/Defendants Below,

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, BABARA
YOST, CAROL LAYTON, NANCY WAUGH,
and TERRY KESECKER,**

Appellees/Plaintiffs Below.



REPLY BRIEF OF DEFENDANTS/APPELLANTS

Richard G. Gay, Esquire
WV Bar ID No. 1358
Nathan P. Cochran, Esquire
WV Bar ID No. 6142
Law Office of Richard G. Gay
31 Congress Street
Berkeley Springs, WV 25411
(304) 258-1966

John C. Baldwin, Esquire
Baldwin Law Group, LLP
600 Washington Avenue
Suite 302
Towson, MD 21204
(410) 828-5510

Counsel for Appellants

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I. APPELLANTS/DEFENDANTS' JOINT REPLY BRIEF ON APPEAL

A. Defendants' Reply to Plaintiffs' Characterizations Of Proceedings and Ruling in the Lower Court

According to Plaintiffs, this case is about how the Defendants, in bad faith, plotted and conspired to steal pension assets from fifteen (15) women who are current or former employees of War Memorial Hospital ("War" or the "Hospital"), and participants in the Hospital's Pension Plan.¹ In making these grim allegations, Plaintiffs consistently overlook the fact that the Defined Benefit Plan in this case is just that – it defines benefits. There has never been any question that the Plaintiffs will receive their benefits as defined in the Plan – said another way, the Hospital will fulfill its promise to the Plaintiffs, so that the Plan pays them every penny they have earned under the terms of the Plan.

Consequently, the Hospital will fulfill its fiduciary duties to these current and former employees – the duty to deliver to them all benefits which they have earned under the terms of the Plan. That is the primary duty owed by the Plan administrator, and that is the duty the Hospital will fulfill.²

But the Plaintiffs want more than was promised to them under the Plan benefit formula. The central goal of the Plaintiffs is to enlarge the fiduciary duty to include some imagined duty to distribute the surplus to them and only to them. As the courts have held, however, the law does not create an exclusive duty to maximize pecuniary benefits. The Plan Administrator is

¹ Plaintiffs apparently believe that gender should be a most significant factor in the resolution of this appeal, considering the fact that they refer to themselves by their gender at least eleven times throughout their Brief. Defendants believe that gender should not be an issue in any way.

² It is a fact that Defendants at one time did openly, honestly and candidly, seek the surplus assets for the sole purpose of constructing a new hospital to benefit all the citizens of Morgan County. It is also a fact that Defendants now seek to be able to transfer the surplus assets to the Hospital's defined contribution pension plan for the benefit of all 100+ employees who participate in the Plan.

under no obligation to use the Plan's total assets to the participants' optimum benefit, as appellate courts held in the *Collins* case and in the *Foltz* case discussed below.

Plaintiffs seek not only the accrued benefits which they have earned under the terms of the Plan benefit formula (which accrued benefits have never been in dispute), but they also seek a wholly unearned and undeserved windfall, over and above their accrued benefits in both the frozen Defined Benefit Plan and the ongoing Defined Contribution Plan. Simply put, the law disfavors a windfall.³

Rather than agree to Plaintiffs' demands and allow Plaintiffs to enrich themselves unjustly, Defendants have properly raised defenses to Plaintiffs' claims, and have previously attempted a declaratory judgment action so there would be no doubt that the Hospital was doing the right thing. In response, Plaintiffs uniformly and steadfastly assert that every step taken by Defendants is an alleged breach of fiduciary duty and certainly taken in bad faith.

But that unfounded allegation is not the issue in this appeal. The primary issue in this appeal is whether or not the Defined Benefit Plan was terminated. At most, this appeal involves only two issues:

1. Was the Plan terminated as a matter of applicable law?
2. Whether or not the Plan was terminated under the law, did the lower court err in awarding the surplus to Plaintiffs?

Plaintiffs seek mightily to make this appeal about fiduciary duty in their quest to portray Defendants as "villains" and their desire for punitive damages. However, the legal issues of whether the Plan was terminated and whether the Plaintiffs should have been awarded the surplus do not involve fiduciary duty, particularly considering the fact that plan termination is a

³ *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), aff'd 582 F.2d 1273 (3d Cir.1978).

“settlor function,” and Plaintiffs have conceded that point. Plaintiffs’ recurring arguments on fiduciary duty are irrelevant to this appeal.

This Court can now find that the Plan was not terminated for any or all of the following reasons:

1. The 2004 Board resolutions were conditional, and the conditions were never satisfied; or

2. While Plaintiffs choose to focus exclusively on one of the 2004 resolutions because it fits their argument, in fact there were multiple interrelated resolutions which must be read at a whole, and when taken as a whole, it is obvious that the resolutions do nothing more than initiate the process of Plan termination; or

3. The 2004 resolutions were rescinded entirely by the 2006 resolutions, as the Board had every legal right to do; or

4. The Plan was not terminated in the manner required by applicable federal tax law for a qualified plan, and the qualified plan rules on plan termination are entitled to “*Skidmore* deference”⁴ according to the United States Supreme Court, as well as various decisions of this Court; or

5. Any of the other reasons advanced by Defendants in their Brief.

If this Court finds that the Plan was not terminated, then the case is essentially concluded because the Plaintiffs can have no standing even to request the surplus if the Plan is not

⁴ See Revenue Ruling 89-87, 1989-2 C.B. 81, especially in light of *Skidmore v. Swift*, 323 U.S. 134, 140 (1944); *United States v. Meade*, 533 U.S. 218, 235 (2001) (*Skidmore* deference is especially appropriate where the regulatory scheme is highly detailed). See also, *Security National Bank v. First West Virginia Bancorp.*, 166 W. Va. 775, 779; 277 S.E.2d 613 (1981).

terminated.⁵ The Plan would need to be terminated, and all accrued benefit obligations would need to be met. *See e.g. Shatto v. Evans Products*, 728 F.2d 1224, 1227 (9th Cir. 1984).

B. Defendants' Reply to Plaintiffs' Statement of Facts

1. At paragraph 2 of their Statement of Facts ("Statement"), Plaintiffs allege that Defendant John Borg was the Plan Administrator of the Pension Plan. However, the Plan document provides at Section 1.3 that the Hospital is the Plan Administrator. Any steps taken by John Borg in regard to the Plan were taken in his capacity as President of the Hospital, and not as an individual. While he was previously the "Hospital Administrator," John Borg was never the Plan Administrator, and should never have been named as a defendant in this meritless case. In his deposition taken in 2007, he denied being the Plan Administrator.

2. At paragraph 4 of their Statement, Plaintiffs state that they contributed their service. Defendants wish to note that the Hospital paid the Plaintiffs' salaries, made all of the contributions to the Defined Benefit Plan, and provided various other conditions of employment. However, at no time was it ever determined by anyone that Plaintiffs' employment would be a basis for them to acquire or earn any right to surplus pension assets.

3. At paragraph 7 of their Statement, Plaintiffs state that "until recently, all of the 15 Appellees were full time employees of MCH." That statement is wrong. For example, Plaintiff Waugh's employment ended in 1982. Plaintiff Kesecker's employment ended in 1993. Obviously, those individuals have not contributed "their loyalty and their service" to the Hospital for many years, but nevertheless demand their share of the claimed windfall.

⁵ *See* Appellants' discussion of the *Jensen* case at pp. 40 and 41 of Appellants' Brief. In *Jensen*, the Plan's current and former participants claimed \$200 million of surplus plan assets. The Court held that, despite various steps toward termination, the employer had not terminated the plan under any conventional meaning of the word "terminate." Because the plan was not terminated, such fact "eliminates as a matter of law any possible claim plaintiffs might have stemming from a termination." *See* Appellants' Brief at p. 41.

4. At paragraph 11 of their Statement, Plaintiffs claim that the Hospital's Board terminated the Plan. That claim is a legal conclusion, not a statement of fact. Plaintiffs seek to confuse facts with legal conclusions throughout their Response Brief. In 2004, the Hospital Board adopted several interrelated resolutions, but it merely began the termination process as a matter of law, and Plan termination is the central issue before this Court at this time.

5. At paragraph 19 of their Statement, Plaintiffs again accuse the Hospital of trying to seize the surplus assets for itself. At footnote 4 on page 37 of their Response Brief, however, Plaintiffs state that the Hospital "has abandoned all efforts" to have the courts award it the surplus. Apparently, Plaintiffs cannot make up their mind on that point. To be clear, Defendants simply wish to see the surplus assets transferred to the Hospital's other qualified plan for the benefit of current and future Hospital employees who participate in that Plan. The surplus assets may yet be used to provide retirement benefits to a large group of employees, rather than providing a windfall to 15 people, some of whom have not worked for the Hospital in many years.

6. At paragraph 20 of their Statement, Plaintiffs refer to the proposed Plan amendment which was approved by IRS, but was never adopted by the Hospital, given the fact that the Hospital board stopped the process of Plan termination. Under that amendment, as approved by the IRS, the termination process would have continued, and Plaintiffs would have received the early distribution of their accrued benefits as part of the ultimate termination. Because the termination process was halted, however, Plaintiffs did not receive their accrued benefits, which can now be paid only upon reaching early retirement, normal retirement, or other separation from service.⁶

⁶ In the absence of Plan termination, the Plan provides at Article IV for the distribution of benefits only upon normal retirement, early retirement, disability retirement, or other separation from service. The

7. At paragraph 21 of their Statement, Plaintiffs again state the erroneous legal conclusion that the Plan terminated as of December 31, 2003. The Board's 2004 resolutions were contingent on various events, not the least of which was the requirement that all Plaintiffs sign the consent and release documents. The testimony of William Locke, Chairman of the Board, is uncontested on that point,⁷ and in fact is supported by the testimony of Plaintiff Helen Miller.⁸

8. At paragraph 23 of their Statement, Plaintiffs again make a legal argument. Plaintiffs refer the Court to only one resolution, while ignoring the remaining four resolutions, and also ignoring the undisputed testimony of Board Chairman Locke.

9. At paragraph 27 of their Statement, Plaintiffs reference the proposed Consent to Amendment and Release, and argue that the Hospital made various concessions by that proposed document. The proposed Release contains signature lines at page 6 for the Plan participant, for the Hospital, and for the participant's spouse. While one or two Plaintiffs signed that document, the Hospital never executed any such document, and it never moved past the "proposal/offer" stage. The proposal was an attempt to avoid litigation, and was broadly worded, as is normally the case with any such release. The Circuit Court recognized that the document was in the nature of a release during oral argument below. An unsigned proposed document is not a concession of any kind.

10. At paragraph 30 of their Statement, Plaintiffs state that the Hospital "attempted" to rescind the 2004 resolutions. The 2006 resolutions speak for themselves, and there was no factual or legal impediment to such rescission.

normal form of benefit for a married participant is a joint and survivor annuity. The normal form of benefit for a single participant is a single life annuity.

⁷ See the deposition testimony of William Locke, Chairman of the Board, at p. 19 of Appellants' Brief.

⁸ See the testimony of Plaintiff Helen Miller at pp. 15 through 17 of Appellants' Brief.

11. At paragraph 35 of their Statement, Plaintiffs reference the relatively modest accrued benefits payable to Plaintiffs from the frozen Plan. Given the fact that Plan benefits were frozen in 1987, and the Plan was replaced by the Defined Contribution Plan, it is only natural that benefits under the Defined Benefit Plan would be relatively modest. Plaintiffs conveniently fail to mention that most of the Plaintiffs also have benefits which have been accruing since 1987 under the ongoing Defined Contribution Plan. The larger point is that the amount of accrued benefits under the Defined Benefit Plan is completely irrelevant to the issue of whether Plaintiffs should receive the surplus assets as a windfall.

12. At paragraph 38 of their Statement, Plaintiffs state that “the Employees filed this suit in state court” after excoriating Defendants for previously filing the declaratory judgment suit. The fact is that when Plaintiffs’ counsel made demand for the surplus in 2006 (*see* paragraph 32 of Plaintiffs’ Statement of Facts), the Plaintiffs at that time made their demand under threat of litigation. The Defendants simply filed their declaratory judgment action before the Plaintiffs could file their suit seeking their windfall.

13. At paragraph 42 of their Statement, Plaintiffs note that the Circuit Court, on May 4, 2009, signed the Order written by Plaintiffs’ counsel. Plaintiffs fail to mention that at the status conference on April 8, 2009, the Circuit Court noted that the matter is “not clear cut.” The Court stated: “I’m not going to sit here and tell you that I’m anything more than 51% confident of the decision I’m making.”⁹

⁹ *See* statements by the Honorable John C. Yoder, as set forth at p. 6 of Appellants’ Brief, and as found at Exhibit B of Defendants’ Objections to Plaintiffs’ Proposed Order.

C. Defendants' Reply to Appellees' Discussion Regarding Errors of Law

In their Discussion of Appellants' Claimed Errors of Law, Plaintiffs accuse Defendants of mischaracterizing and ignoring the "central documents" in the case. However, it is the Plaintiffs who have mischaracterized and/or ignored documents in this case:

1. Plaintiffs refer to the 2004 "consent resolution," consistently ignoring the fact that there were a total of five interrelated resolutions enacted by the Hospital Board on February 24, 2004. Plaintiffs focus on only one resolution, while ignoring the last four and treating them as meaningless. As this Court has ruled, specific words or clauses of a document are not to be treated as meaningless or discarded if any reasonable meaning can be given to them, consistent with the whole document. *Moore v. Johnson Service Co.*, 158 W.Va. 808; 219 S.E.2d 315 (1975);

2. Plaintiffs consistently ignore the three resolutions adopted by the Hospital Board on January 6, 2006, expressly rescinding the 2004 resolutions. By rescinding the 2004 resolutions, the Board halted the termination process, and released the Hospital's officers from its previous directions to seek the agreement of the Plaintiffs to the use of surplus assets for the construction of a new hospital;

3. Plaintiffs consistently refer to the proposed consent and release document as though it had actually been executed and adopted by the parties, and therefore had some legal significance. As an unexecuted draft document, it means nothing whatsoever; it is absurd to suggest that a party is bound by a statement in an unexecuted proposed document. If parties were bound by unexecuted documents, there would be no point in signing them at all;

4. Most of all, Plaintiffs continue to refer to Sections 9.1, 9.2 and 10.3 of the Plan document in isolation, while refusing to consider the Plan document in its entirety. In particular,

Plaintiffs have steadfastly ignored Section 1.1 of the Plan document, where the Hospital expressed its clear intent that the Plan would comply with Section 401(a) of the Internal Revenue Code of 1986 as amended. Consequently, based on the clear Plan language at Section 1.1, all aspects of this Plan, including its alleged termination, must be analyzed against the requirements of applicable federal tax law; and

5. Likewise, while Section 10.3 states that Plan assets will not be returned to the employer, the immediately preceding Section 10.2 states that Plan assets may be transferred to another qualified plan. The intent is that a transfer under Section 10.2 could not violate Section 10.3. The Plan document must be read as a whole, and in a manner so that all sections are consistent with each other. *Moore v. Johnson Service Co., supra.*

Therefore, it is the Plaintiffs who seek to mischaracterize and ignore important documents in this case. At the end of that discussion, Plaintiffs revert back to the (irrelevant) topic of an alleged breach of fiduciary duty, which they desperately hope will get them to a jury and punitive damages.

D. Defendants' Reply to Plaintiffs' Discussion of the Plain Language of the Plan and the Undisputed Facts

At pages 14-20 of their Response Brief, Plaintiffs first argue that Defendants wrongfully seek a reversion of the residual assets in the Plan. Plaintiffs appear to be confused, considering the fact that Defendants do not seek a reversion of residual assets, but rather, seek to transfer the residual assets to the Hospital's other qualified plan to provide greater retirement benefits to all participants in that plan (some of whom are actually Plaintiffs herein).

Plaintiffs' argument again transitions into an analysis of fiduciary duty, even quoting with approval from ERISA at page 16. Plaintiffs appear further confused on the applicability of ERISA to this case. At page 14, they state that "one need not refer to either ERISA or the federal

courts ...” At page 16, however, they state that ERISA may “provide helpful guidance ...” and proceed to quote ERISA with approval.

As previously stated, the Defendants’ primary duty under the Plan is to provide the defined benefits to the current and former employees as they become eligible to receive those benefits. There has never been any question that the Hospital will provide those benefits, and consequently, no breach of fiduciary duty.¹⁰

Plaintiffs’ arguments on fiduciary duty and alleged breach of duty have no place in this appeal because they have no relevance to the issue of whether the Plan was terminated. Plaintiffs’ entire discourse on a fiduciary attempting to steal plan assets has no bearing upon the question of whether plan termination is a multi-step process (as Defendants contend) or consists of a single isolated resolution, ignoring all other factors (as Plaintiffs contend).

Nevertheless, at page 18, Plaintiffs make their “whole human race” argument, dividing the world into three groups. Of course, they omit from their list the Hospital employees who participate in the Hospital’s other qualified plan, into which the Defendants desire to transfer the surplus assets, as permitted by the Plan document at Section 10.2.

¹⁰ 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.*, 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.

E. Defendants' Reply to Plaintiffs' Argument That Termination Was Unconditional

Beginning at page 21 of their Response Brief, Plaintiffs argue that Defendants have failed to show that the 2004 Board resolution was contingent or conditional in any fashion. While Defendants believe that they will never satisfy Plaintiffs on that point, Defendants now note the following for the Court. The 2004 Board resolutions are actually five in number, and the Board intended that all of the conditions set forth therein be satisfied before the Plan would be terminated:

1. Hospital officers were directed to apply to I.R.S. for a favorable determination letter, confirming that the Plan was still qualified under the Internal Revenue Code. The Hospital applied for such a letter on June 1, 2004, and IRS issued a conditional letter on October 6, 2005;

2. Hospital officers were directed to adopt any amendment required by IRS as a condition of issuing a favorable determination letter. The Hospital declined to adopt such proposed amendments, and the favorable determination condition was not satisfied, meaning that the IRS determination was rendered null and void.¹¹ The fact that the resolutions anticipated further amendments to the Plan is itself a strong indication that the Plan was not terminated; a terminated plan cannot be amended. *See Shatto v. Evans Products*, 728 F.2d 1224, 1226 (9th Cir. 1984);

3. Hospital officers were directed to make distributions after the Plan had received a valid IRS favorable determination letter. That step was not taken;

¹¹ See Appellants' Motion to Supplement Record at ¶ 3, and letter to I.R.S. dated February 8, 2006, confirming decision by Hospital to rescind all steps taken toward termination of the Plan.

4. Hospital officers were also directed to return surplus assets to the Hospital, after satisfaction of accrued benefit liabilities to Plan participants. The Hospital agreed in correspondence with the IRS that the surplus assets could be returned to the Hospital upon written consent of all Plan participants and their spouses. When written consent was not received from Plan participants, the surplus was not returned to the Hospital. As Chairman Locke testified, any Plan termination was always contingent upon consent by participants to the reversion of surplus assets.¹² That condition was absolutely not met.

By late December 2005, it was known that Plan participants would not sign the consent and release documents, so the Board adopted resolutions on January 6, 2006, rescinding the 2004 resolutions, and formally directing Hospital officers to halt the termination process. There can be no question that the Board had the legal authority to rescind the 2004 resolutions. As a matter of law, Board resolutions are typically revocable by the Board at will.¹³ Defendants have cited various cases and authorities at page 36 of their Brief in support of that proposition. On the other hand, Plaintiffs have cited no legal authority whatsoever to suggest that the Board did not have authority to rescind the 2004 resolutions. The Defendants' authorities are undisputed.

The fact that the draft consent and release document was written to state that "[T]he Plan was terminated ..." means absolutely nothing because:

1. It was a proposed document drafted to avoid litigation (which the Circuit Court recognized as being akin to a broad liability release in the hearing below), and never executed by the parties;
2. It was drafted before Plaintiffs had refused to agree that the surplus be returned to build a new hospital; and

¹² See Locke testimony cited above.

¹³ See cases cited at Appellants' Brief, p. 36.

3. It was drafted before the Board rescinded the 2004 resolutions, as it had every right to do.

F. Defendants' Reply to Plaintiffs' Analysis of "Termination."

Beginning at page 25 of their Response Brief, Plaintiffs argue that the word "termination" must be defined without reference to the Internal Revenue Code, which Plaintiffs label as an "extraneous source." That argument completely ignores Section 1.1 of the Plan document, and the Hospital's clear intent that Section 401(a) of the Internal Revenue Code would govern the terms and operation of this Plan. The Hospital's intent that the Plan be governed by the Internal Revenue Code is further confirmed by the Hospital's request for and receipt of favorable determination letters from the IRS in 1988, 2003, and in 2005.¹⁴

In addition, the Plan document at Section 8.4 states that West Virginia law will apply to this Plan only "to the extent not superseded by the laws of the United States." In the matter of Plan qualification under Section 401(a), as intended by the Hospital, the laws of the United States supersede all other laws. Plan termination is an issue of qualification, as evidenced by the Hospital's application for a favorable determination letter in June, 2004, and the IRS issuance of such letter, with conditions, in October, 2006. In another case where the plan document expressly referred to Code Section 401 and regulations thereunder, the Court held that because the plan incorporated the Code and the regulations, it was necessary to comply with the Code and regulations in the event the plan was ever terminated. *Shatto v. Evans Products*, 728 F.2d 1224, 1227 (9th Cir. 1984). For Plaintiffs to contend that federal tax law is "extraneous" to this issue ignores the foundational legal source of the entire Plan document, because the entire

¹⁴ See Appellants' Motion to Supplement Record at ¶ 5, and attached copies of favorable determination letters issued by I.R.S. over several years.

document was drafted and amended repeatedly to conform to federal tax law, and repeatedly evaluated by IRS for document compliance with federal tax law.

As stated in Defendants' Brief at page 28, the Internal Revenue Service has very specific requirements which must be met before a qualified plan is considered to be terminated,¹⁵ and those requirements were not met in this case.

The Plan was not terminated for any or all of the following reasons:

1. The 2004 resolutions were contingent, and the contingencies were not met; or
2. The 2004 resolutions were rescinded by the Board in January 2006; or
3. The qualified plan requirements for a Plan termination (under Revenue Ruling 89-87) were not met; or
4. Any of the other reasons set forth in Defendants' Brief (*e.g.*, a resolution by itself is a mere corporate formality and accomplishes nothing).

In addition, (as conceded by Plaintiffs) plan termination is a settlor function, and not a fiduciary function.. The question of whether or not the Hospital terminated the Plan does not involve fiduciary duties. Plaintiffs' Response Brief even cites a case which confirms the point. *See In re A B & C Group*, 411 B.R. 284, 294 (U.S. Bankr. Ct., N.D. W.Va 2009) (when employers undertake plan termination, they do not act as fiduciaries but as settlors). Consequently, a fiduciary duty issue does not arise in the context of this appeal.

G. Defendants' Reply to Plaintiffs' Analysis of "Rescission"

As stated above, the Hospital Board had the absolute legal authority in 2006 to rescind the 2004 resolutions, which had merely initiated the termination process. Defendants have cited

¹⁵ See Revenue Ruling 89-87, and related decision by United States Supreme Court in *Skidmore v. Swift*, as discussed at fn. 3 above.

recent case law in support of that point at page 36 of their Brief.¹⁶ In response, Plaintiffs have cited no legal authority whatsoever.

Most revealing is the statement by Plaintiffs at page 31 of their Brief where they state: “[T]he central purpose of the Plan is to furnish money to the employees.” In fact, however, the central purpose of the Plan is to provide accrued (earned) benefits to eligible participants upon their retirement. It has never been the “central purpose” of any defined benefit plan to provide a windfall to a small group of employees and former employees. The Hospital, as Plan Administrator, is under no obligation to use the Plan’s total assets to the participants’ optimum benefit. The law does not create an exclusive duty to maximize pecuniary benefits. *Collins v. Pension & Insurance Comm.*, 144 F.3d 1279, 1282 (9th Cir. 1998); *Foltz v. U.S. News*, 865 F.2d 364, 373 (D.C. Cir. 1989). See also, *Hughes Aircraft v. Jacobson*, 525 U.S. 432, 440 (1999) (because decline in value of defined benefit plan’s assets does not alter accrued benefits, participants have no entitlement to share in plan surplus).

Once again, Plaintiffs cite ERISA (the U.S. Code) with approval at page 31, while at the same time attempting to use ERISA elsewhere in their Response Brief to discredit cases which are contrary to their arguments. Plaintiffs also argue that their vested retirement assets were hanging “in the balance” based upon turbulent financial markets. That statement is absolutely untrue because of the fact that Plaintiffs’ accrued benefits in the Defined Benefit Plan are guaranteed by the Hospital as Plan Sponsor. The Plaintiffs have never borne any financial risk whatsoever in connection with the future receipt of their accrued benefits upon their retirement.

¹⁶ Board resolutions are typically revocable by a Board at will. See cases cited at p. 37 of Appellants’ Brief.

H. Defendants' Reply to Plaintiffs' Argument that Federal Tax Law does not Compel a Different Result.

Plaintiffs continue to claim that notwithstanding the fact that the Plan has always been a qualified plan under the Internal Revenue Code, and notwithstanding the fact that the Hospital's intent is clearly stated at Section 1.1 ("the Plan is intended to meet the provisions of Section 401(a) of the Internal Revenue Code ..."), somehow (Plaintiffs believe) federal tax law should have nothing to do with the issue of plan termination. The Hospital's statement of intent at Section 1.1 is plain and unambiguous. Consistent with a case cited in Plaintiffs' Response Brief, there are no circumstances which would justify a deviation from the unambiguous language of Section 1.1 that the Internal Revenue Code governs this Plan. *McKeny Construction Co. v. Town of Rowlesburg*, 187 W. Va. 521, 525; 420 S.E.2d 281, 285 (1992).

The requirements of the Internal Revenue Code, as set forth in Revenue Ruling 89-87, have everything to do with the termination of a qualified plan such as this one. As discussed at page 28 of Appellants/Defendants' Brief, there are three specific events which must occur before a qualified plan is terminated. In this case, those requirements were simply not met. State and federal courts have historically given deference ("*Skidmore* deference") and great weight to legal positions taken by government agencies such as IRS which have specialized experience in a particular field. Appellants have cited numerous cases from this Court and the United States Supreme Court which support adopting the position of IRS on the termination issue. *See also, Texaco v. United States*, 528 F.3d 703, 711 (9th Cir. 2008) (IRS Revenue Rulings are entitled to at least "*Skidmore* deference").

Plaintiffs argue that the United States Court of Appeals for the Fourth Circuit completely disposed of this issue in their favor. It did not. The Fourth Circuit stated only that a breach of fiduciary duty claim can be resolved without resolution of issues of federal tax law. Because

plan termination is a settlor function and not a fiduciary function, the Fourth Circuit statement is not applicable to this appeal. There are so many cases holding that plan termination is a settlor function and not a fiduciary function that the citations for those cases could go on for pages. Defendants will merely refer the Court to pages 33 and 34 of their Brief, and the cases which are cited therein. The Fourth Circuit never said that federal tax law is irrelevant in the issue of terminating a pension plan qualified under the Internal Revenue Code, particularly where the settlor clearly expressed its intention at Section 1.1 that the Plan would comply with the Code.

Further, as this Court well knows, any judicial decision made without jurisdiction is void. The Fourth Circuit had jurisdiction only to determine that it had no jurisdiction – any other pronouncement by that Court regarding the substance of this case has no weight because that Court lacked jurisdiction.

At pages 33 and 34 of their Response Brief, Plaintiffs once again claim that the Hospital still seeks to seize the residual assets, this time after “these women” have retired and/or died, when “no one will be there to complain.” Of course, Plaintiffs accuse Defendants of complete bad faith throughout all of these events.

In response, Defendants will state again that they only wish to see all of the surplus assets transferred to the Hospital’s Defined Contribution Plan, and commit to increasing benefits under the Defined Contribution Plan, in order to allocate the money more quickly to employee accounts. Plaintiffs’ bald, unsupported assertions of bad faith are preposterous.

I. Defendants’ Reply to Plaintiffs’ Argument that an Award of all Assets to Appellees is the Only Option

Defendants agree that if the Plan were ever to be terminated under the law, then the award of residual assets to all participants (not just Plaintiffs) would be an option under the terms of the Plan. However, it is merely an option, and by no means the only option.

At page 26 of their Response Brief, Plaintiffs quote Section 9.3 of the Plan document, which sets forth certain procedures which are part of the termination process. At the outset, Section 9.3 states that accrued benefits which have been earned by participants “will” be distributed in a method described in Article V. Further down, however, Section 9.3 also states that any residual assets “may” be distributed to participants under certain circumstances. The use of the word “may” is obviously permissive and clearly implies that residual assets “may not” be distributed to participants. If the Hospital had intended that residual assets must be distributed to participants, then the terms of Section 9.3 presumably would have stated that residual assets “will” be distributed to participants. Defendants note that at least one appellate court has specifically held that the word “may”, as used in a pension plan, is “permissive, not mandatory.” *Collins v. Pension & Insurance Comm.*, 144 F.3d 1279, 1282 (9th Cir. 1998).

However, Section 9.3 says “may” and not “will” in relation to any residual assets. If the Plan was terminated, then there is a discretionary decision to be made with regard to disposition of surplus assets. That decision should only be made by the Hospital as Plan Sponsor and Plan Administrator. The Hospital Board has every right under the Plan document to decide that surplus assets should be transferred to the other qualified plan sponsored by the Hospital, in order to increase benefits of Hospital employees who participate in that plan. It was error for the lower court to award the surplus to Plaintiffs because (a) the Plan is not terminated, and therefore Section 9.3 is not applicable; and (b) the Hospital Board has discretion to deal with the surplus under Section 10.2 of the document (which would apply whether or not the Plan is terminated), and that right was denied by the decision of the Circuit Court.

The ability to transfer assets under Section 10.2 derives from the language of Section 414(l) of the Internal Revenue Code (which Plaintiffs maintain at page 25 is “extraneous”). The

language of Plan Section 10.2 generally tracks the language of Code Section 414(l), which is titled "Merger and Consolidation of Plans or Transfers of Plan Assets." The Treasury Regulations under Code 414(l) separately define various terms. The term "merger or consolidation" is defined as combining two or more plans into a single plan. However, a "transfer of assets" is separately defined as a diminution of assets in one plan and the acquisition of those assets by another plan.¹⁷

Subsequent to filing their motion, Defendants have consistently spoken of their goal of transferring the surplus assets to the Defined Contribution Plan under Section 10.2 of the Defined Benefit Plan. A transfer of surplus assets to a Defined Contribution Plan was approved by IRS in Revenue Ruling 2003-85, 2003-32 I.R.B. 291. Defendants have never once stated a goal or desire to merge the Defined Benefit Plan into the Defined Contribution Plan. Therefore, Plaintiffs' entire argument against a Plan merger (at pages 36-40 of their Brief) is off the mark factually and entirely irrelevant.

As settlor, the Hospital does have the lawful right to freeze or terminate its Defined Contribution Plan, on a basis that would end any further obligation to fund that plan. Likewise, the Hospital has the right to amend the Plan prospectively to increase or decrease annual contributions. For the record, Defendants now warrant and affirm to this Court that if the Circuit Court ruling is reversed, and this Court affirms the discretionary right of the Hospital Board to transfer the surplus to its Defined Contribution Plan, then such surplus shall be allocated at the earliest date allowed by law among the accounts of eligible employees who participate in that plan as of the date or dates required by law and by the terms of the plan.

Defendants note Plaintiffs' argument at page 37 that this Court should not trust Defendants to "do anything except try to take this money for its own use." Defendants have

¹⁷ See Treasury Regulation § 1.414(l)-1(b).

already warranted to this Court that the surplus would be used solely to increase benefits of Hospital employees who participate in the Defined Contribution Plan. Defendants believe that no further comment is needed in response to Plaintiffs' charge that Defendants are untrustworthy.

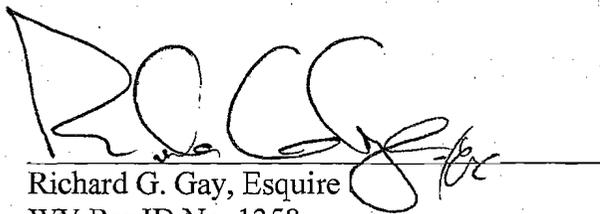
II. CONCLUSION

The Circuit Court erred in finding that the Defined Benefit Plan was terminated as a matter of law. Whether or not the Plan was terminated, the Court erred in awarding the surplus to Plaintiffs.

III. RELIEF PRAYED FOR

Appellants urge the Court to reverse the rulings of the Circuit Court in full, to rule that the Plan was not terminated, and to dismiss the case in its entirety.

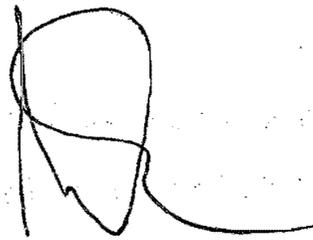
Respectfully submitted,
War Memorial Hospital,
Valley Health System, and
John Borg,
Appellants, by counsel,



Richard G. Gay, Esquire
WV Bar ID No. 1358
Law Office of Richard G. Gay, L.C.
31 Congress Street
Berkeley Springs, WV 25411
(304) 258-1966



John C. Baldwin, Esquire
Baldwin Law Group, LLP
600 Washington Avenue
Suite 302
Towson, MD 21204
(410) 828-5510



Nathan P. Cochran, Esquire
WV Bar ID No. 6142
Law Office of Richard G. Gay, L.C.
31 Congress Street
Berkeley Springs, WV 25411
(304) 258-1966

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

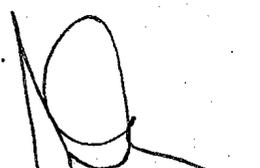
v.

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 **REPLY BRIEF OF APPELLANTS/DEFENDANTS** 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 15 day of February, 2010.


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