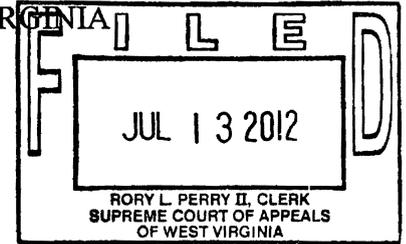


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



The City of Fairmont and
Fairmont City Council, Defendants Below,
Petitioners.

vs.)

Appeal No. 12-0205
(From the Circuit Court of Marion County,
West Virginia, Civil Action No. 11-P-13)

Fairmont General Hospital, Inc., Plaintiff Below,
Respondent

REPLY BRIEF OF PETITIONERS, DEFENDANTS BELOW

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Cases

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Charter Provisions

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Section 2.04 of the Fairmont City Charter1

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Now come the City of Fairmont and Fairmont City Council and reply to Fairmont General Hospital Inc.'s Brief as follows:

BY NAMING FAIRMONT CITY COUNCIL AS A DEFENDANT TO THE DECLARATORY JUDGMENT PROCEEDING BELOW, FAIRMONT GENERAL HOSPITAL, INC., MADE ALL NINE INDIVIDUAL COUNCIL MEMBERS PARTY DEFENDANTS AND SAID COUNCIL MEMBERS AND THE CITY OF FAIRMONT AS A MUNICIPAL CORPORATION HAD STANDING TO SEEK THE DECLARATIONS FROM THE CIRCUIT COURT SET FORTH IN THE AMENDED COUNTERCLAIM.

Fairmont General Hospital, Inc., does not, in its brief, address the questions raised on appeal with respect to the merits. Instead, the great majority of Fairmont General Hospital, Inc.'s brief is dedicated to its position that the members of Fairmont City Council and the City of Fairmont did not have standing to bring forth the counts of the amended counterclaim because Fairmont General Hospital's Inc.'s original complaint did not name the individual council members but identified them collectively under the auspices of "Fairmont City Council". In advancing this position, Fairmont General Hospital, Inc., sites no dispositive statute, charter provision or other authority in support of its position. In fact, in advancing its position, Fairmont General Hospital, Inc., ignores the applicable statutory provisions and well settled principles of West Virginia law.

The City of Fairmont is a municipal corporation existing pursuant to the provisions of West Virginia Code §8-1-1. In particular, the City of Fairmont is municipal corporation that has adopted the Plan IV - Manager Plan form of government described in West Virginia Code §8-3-2 *Plan IV*. The Code provides that under this plan: (1) [t]here shall be a council of not less than five nor more than eleven members [and] (3) [t]he council shall be the governing body.

The definition of governing body can be found in West Virginia Code §8-1-2(1) and shall mean ". . . the mayor and council together. The definition of councilmen is found in West

Virginia Code §8-1-1(2) and shall mean “. . . the members of the governing body by whatever name such members are called.

The above terms and definitions are consistent with the provisions of the Charter of the City of Fairmont. Article II Section 2.01 of the said Charter provides that the council shall be comprised of nine council members and Section 2.04 provides that “all powers of the City shall be vested in the council.”

West Virginia Code §8-12-1(3) provides that all municipalities shall have the plenary power and authority to institute, maintain and defend any civil action or other proceeding in any court. Accordingly it is the council and its members who have the power to institute, maintain and defend any civil action or other proceeding in any court.

There is nothing in any of the controlling statutes or the Charter of the City of Fairmont that supports Fairmont General Hospital Inc.’s position that the council of the City of Fairmont is a legal entity separate and distinct from its members. In fact, there is authority to the contrary. It has been held that the council of a city is not a legal entity but is merely a body composed of a mayor and councilmen with certain corporate powers. *Gates v. Council of the City of Huntington*, 93 F. Supp. 757, (USDC. S.D. W.Va. 1950). Although *Gates* holds that a council has no capacity to sue or be sued, Fairmont General Hospital, Inc., having named the Fairmont City Council as defendants to this proceeding cannot be heard to complain that the council members are not parties to the proceeding and do not have the right to maintain the claims set forth in the amended counterclaim. See *Chesapeake & Ohio System Federation v Hash*, 170 W.Va. 294, 294 S.E. 2d 96 (1982).

It is clear that Fairmont General Hospital, Inc., intended for the lower court’s ruling to apply to the individual council members of the Fairmont City Council, particular Councilmember

Deborah Siefrit and Councilmember Ron Straight. The argument of Fairmont General Hospital, Inc., to the contrary that the individual council members, including Councilmember Deborah Siefrit and Councilmember Ron Straight, were not parties to the proceeding under the auspices of defendant, "Fairmont City Council" is most disingenuous. A review of the prayer of the original declaratory judgment complaint reveals that Fairmont General Hospital, Inc., sought an injunction enjoining the defendants from "sending individuals to FGH's Board of Directors meeting on February 28, 2011. The individuals referenced were unquestionably Councilmember Deborah Siefrit and Councilmember Ron Straight, who had been duly appointed to the Fairmont Hospital Board, FGH's legitimate governing board, on January 25, 2011.

Moreover, the disposition of the issue here is governed by the statute under which the suit was brought, the Uniform Declaratory Judgments Act, West Virginia Code §55-13-1 et seq. The Act provides that any person interested under a . . . written contract or other writings construing a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. Section 13 of the Act defines the word "person" to mean "any person, partnership, joint stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever.

The language of this declaratory judgment statute clearly authorizes the types of claims set forth in the amended counterclaim by municipal corporations. Since all powers of the City of Fairmont, a municipal corporation, are vested in the council, the council acting through its members, had standing to seek the declaration set forth in the amended counterclaim. It is of no consequences that the members of said council did not have a personal interest in the subject

matter of the counterclaim. *West Virginia Utility Contractors Association v. Laidley Field, Etc.* 164 W.Va. 127, 260 S.E. 2d 847 (1979).

Lastly, Fairmont General Hospital, Inc., in arguing that because the individual council members were not specifically joined as party defendants, they, cannot maintain the amended counterclaim under the collective status as defendant Fairmont City Council, ignores the holding of this Court in *Chesapeake & Ohio System Federation v Hash*, 170 W.Va. 294, 294 S.E. 2d 96 (1982). Fairmont General Hospital's Inc's argument is in substance the same argument that this Court rejected in *Hash, Id.*

CONCLUSION & PRAYER FOR RELIEF

Given all of the above, and given all matters set forth in petitioners' Brief, it is clear that the Circuit Court of Marion County erred in granting Fairmont General Hospital, Inc.'s (FGH) motion for summary judgment and in failing to grant the City of Fairmont and Fairmont City Council's motion for summary judgment, insofar as the undisputed facts reveal that the City of Fairmont was entitled to judgment as a matter of law.

Wherefore, the City of Fairmont and Fairmont City Council pray that that this Court reverse the Order of the Circuit Court of Marion County, West Virginia entered January 13, 2012, and remand the matter to said Circuit Court for the entry or an order granting the City of Fairmont and Fairmont City Council's motion for summary judgment and for an order:

1. Declaring that the corporate bylaws of FGH purportedly as amended on August 23, 2010, inconsistent with the terms and conditions of FGH's valid and lawful Articles of Incorporation as stated September 19, 1985, contrary to and in violation of the laws of the State of West Virginia, spurious, and of no force and effect to the extent that: A) said amended bylaws purport to provide FGH's board of directors with the authority to appoint it's own members; B)

said amended bylaws no longer require members of the board to be bona fide residents of Marion County; and C) said amended bylaws are otherwise inconsistent with said Articles of Incorporation;

2. Declaring all appointments made by FGH's board of directors to its self-appointed new board of directors on November 22, 2010, January 24, 2011, and February 28, 2011, unlawful, invalid and of no force and effect;

3. Directing and requiring FGH to recognize and seat all duly made appointments to the Fairmont Hospital Board made by the Fairmont City Council pursuant to the aforementioned Articles of Incorporation as stated September 19, 1985, and all such appointments which shall thereafter made pursuant to Articles; and

4. Declaring the Amended and Restated Articles of Incorporation purportedly adopted on August 22, 2011 and re-adopted on October 24, 2011, claimed ratified effective to August 23, 2010, null and void and of no force or effect.

Respectfully submitted this the 12th day of July, 2012.

THE CITY OF FAIRMONT, and
FAIRMONT CITY COUNCIL,
Defendants below, Petitioners by Counsel

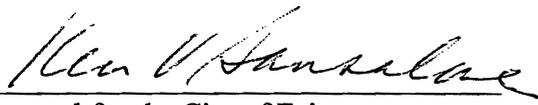


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CERTIFICATE OF SERVICE

I, Kevin V. Sansalone, Counsel for the City of Fairmont and Fairmont City Council, do hereby certify that on the 12th day of July, 2012, I served a true and accurate copy of the foregoing “Reply Brief of Petitioners, Defendants Below” upon the following by such service as indicated:

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