

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA  
BUSINESS COURT DIVISION

2023 FEB 20 PM 3:33

CHARLESTON AREA MEDICAL CENTER, INC.,

CATHY S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

PLAINTIFF,

v.

CIVIL ACTION NO. 22-C-359

Presiding: Judge Nines

Resolution: Judge Akers

WEST VIRGINIA UNITED HEALTH SYSTEM,  
INC., d/b/a WEST VIRGINIA UNIVERSITY  
HEALTH SYSTEM, and WVU HEALTH SYSTEM;  
THOMAS HEALTH SYSTEM, INC., d/b/a  
THOMAS HEALTH; HERBERT J. THOMAS  
MEMORIAL HOSPITAL ASSOCIATION, d/b/a  
THOMAS MEMORIAL HOSPITAL;  
CHARLESTON HOSPITAL, INC., d/b/a SAINT  
FRANCIS HOSPITAL; THS PHYSICIAN  
PARTNERS, INC.; PULMONARY ASSOCIATES  
OF CHARLESTON PLLC, d/b/a CRITICAL  
CARE, PLLC; TRAKE, LLC; PHILLIP COX, D.O.,  
an individual; KEVIN EGGLESTON, M.D., an  
individual; ROBBY KEITH, M.D., an individual;  
JAMES D. PERRY, III, D.O., an individual;  
TAMEJIRO "TOM" TAKUBO, D.O., an individual;  
RYAN WADDELL, D.O., an individual; and W.  
ALEX WADE, M.D., an individual,

DEFENDANTS.

**ORDER DENYING CAMC'S MOTION TO CONSOLIDATE**

This matter comes before the Court on Charleston Area Medical Center, Inc. ("CAMC")'s Motion to Consolidate filed, November 22, 2022. Opposition to consolidation was filed November 22, 2022, jointly by Defendants, West Virginia United Health System, Inc., d/b/a West Virginia University Health System and WVU Health System (hereinafter "WVU Health"), Thomas Health System, Inc. d/b/a Thomas Health ("Thomas Health"); Herbert J. Thomas Memorial Hospital Association d/b/a Thomas Memorial Hospital ("Thomas Memorial"); Charleston Hospital, Inc. d/b/a Saint Francis Hospital ("St. Francis"); THS Physician Partners, Inc. ("THSPP") (THSPP,

**SCANNED**

together with Thomas Health, Thomas Memorial and St. Francis, collectively referred to by the Plaintiff as “the Thomas Parties”), and a separate opposition brief was filed the same day by Defendants, Pulmonary Associates of Charleston PLLC d/b/a Critical Care, PLLC (“PAC”); Trake, LLC (“Trake”); Phillip Cox, D.O., Kevin Eggleston, M.D., Robby Keith, M.D., James D. Perry, III, D.O., Tamejiro “Tom” Takubo, D.O., Ryan Waddell, D.O., and W. Alex Wade, M.D. (the individuals collectively, “the PAC Physicians”). CAMC filed a Reply Brief on January 6, 2023.

The Plaintiff and Defendants have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

This Court, upon consideration of all submissions of the parties, as well as the applicable rules and law, DENIES the Motion to Consolidate on both procedural and substantive grounds.

1. The above-captioned civil action, Kanawha County Civil Action No. 22-C-359, (sometimes referred to herein as “the Business Court Case”) was referred to the Business Court Division (BCD) by the Chief Justice of the West Virginia Supreme Court of Appeals, upon request of the parties, and pursuant to W.Va.T.C.R. 29.01 et seq. The undersigned was assigned Presiding Judge to this matter by Order entered September 7, 2022, and an initial case management conference/scheduling conference was held December 16, 2022.

2. The parties to the instant civil action are: CAMC; West Virginia United Health System d/b/a West Virginia University Health System and WVU Health System (“WVUHS”); Thomas Health System, Inc. d/b/a Thomas Health (“Thomas Health”); Herbert J. Thomas Memorial Hospital Association d/b/a Thomas Memorial Hospital (“Thomas Memorial”); Charleston Hospital, Inc. d/b/a Saint Francis Hospital (“St. Francis”); THS Physician Partners, Inc. (“THSPP”) (THSPP, together with Thomas Health, Thomas Memorial and St. Francis, collectively



referred to by the Plaintiff as “the Thomas Parties”); Pulmonary Associates of Charleston PLLC d/b/a Critical Care, PLLC (“PAC”); Trake, LLC (“Trake”); and individual members of PAC and Trake, Phillip Cox, D.O., Kevin Eggleston, M.D., Robby Keith, M.D., James D. Perry, III, D.O., Tamejiro “Tom” Takubo, D.O., Ryan Waddell, D.O., and W. Alex Wade, M.D. (collectively, “the PAC Physicians”).

3. The claims in Civil Action No. 22-C-359 arise out of a failed merger between CAMC and PAC.

4. The matter CAMC seeks to consolidate, Civil Action No. 22-C-937, also is pending in the Circuit Court of Kanawha County, before Judge Jennifer Bailey. No motion to refer that matter to the BCD under W.Va.T.C.R. 29.01 et seq. has been filed, and the matter has not otherwise been referred to the BCD by the Chief Justice.

5. The parties to Civil Action No. 22-C-937 are: Pulmonary Associates of Charleston PLLC d/b/a Critical Care, PLLC (“PAC”); Phillip Cox, D.O.; Kevin Eggleston, M.D.; Robby Keith, M.D.; James D. Perry, III, D.O.; Tamejiro “Tom” Takubo, D.O.; Ryan Waddell, D.O.; W. Alex Wade, M.D., and CAMC.

6. Civil Action No. 22-C-937 (or the “ICU/Patient Safety Case”) involves a dispute under the ICU Agreement between CAMC and PAC. It includes claims for Breach of Contract – Interference with Physician-Patient Relationship (Count I); Breach of Contract – Failure to Adjust Fair Market Value Payments (Count II); Violation of the Patient Safety Act (See, W.Va. Code §16-39-1 et seq.) (Count III); and Tortious Interference with Physician-Patient Relationship (Count IV).

7. CAMC advised this Court at the December 16, 2022 Scheduling/Case Management Conference that Judge Bailey heard three days of evidence in Civil Action No. 22-C-937 and issued a preliminary injunction in that matter.

8. WVU Health and the Thomas Parties are NOT parties to the ICU/Patient Safety Case, and they oppose consolidation as procedurally and substantively improper. WVU Health and the Thomas Parties advise that they were not involved in the injunction hearings.

9. On January 10, 2023, this Court received notice that: a) Judge Bailey entered an Order, December 9, 2022, sealing the entire record in the ICU/Patient Safety Case; b) Judge Bailey entered a 24-page Order following the three days of evidentiary hearings; and c) CAMC filed a Notice of Appeal with the Supreme Court of Appeals of West Virginia, on January 6, 2023. The Court received copies of the two orders and the Notice of Appeal, but copies were not provided to WVU Health and the Thomas Parties.

10. CAMC asserts that West Virginia Rule of Civil Procedure 42(a) and W. Va. T.C.R. 29 give this Court authority to consolidate the ICU/Patient Safety Case with the Business Court Case, even though it has not been referred to the BCD by the Chief Justice.

11. CAMC has presented no case or decision authorizing a matter filed in Circuit Court to bypass the W. Va. T.C.R. 29 requirement of a referral from the Chief Justice of the West Virginia Supreme Court of Appeals to send a case to the Business Court Division, and the procedural issue presently before this Court appears to be a matter of first impression.

12. In the absence of decisional authority authorizing a matter filed in Circuit Court to bypass the W. Va. T.C.R. 29 requirement of a referral from the Chief Justice of the West Virginia Supreme Court of Appeals, this Court is reluctant to bypass the usual path and manner in which cases are referred to the Business Court Division. On procedural grounds alone, CAMC's request can be denied.

13. In addition, PAC, WVU Health and the Thomas Parties oppose consolidation and assert that the ICU/Patient Safety Case is unrelated to WVU Health or the Thomas Parties, and



based on the allegations in the complaint, there is not a single fact or issue of law in the ICU/Patient Safety Case that is common to the Business Court Case.

14. CAMC's request to consolidate the two actions under West Virginia Rule of Civil Procedure 42(a) provides insufficient analysis of the requirements under Rule 42, or applicable case law. Rule 42 permits consolidation "[w]hen actions involving a common question of law or fact are pending before the court." W.Va. R. Civ. P. 42(a). While both actions are pending in the Circuit Court of Kanawha County, the Court considers that WVU Health and the Thomas Parties not involved in the allegations set forth in the Second Action (Patient Safety Act issues or the PAC-CAMC ICU Agreement). In addition, the separate actions also lack a common question of law or fact.

15. Further, even if there were common questions of law or fact, the Supreme Court of Appeals of West Virginia has instructed trial courts to consider the following factors when exercising discretion in deciding consolidation: (1) whether risks of prejudice and possible confusion outweigh considerations of judicial dispatch and economy; (2) what burden on parties, witnesses, and available judicial resources would be imposed by multiple lawsuits; (3) the length of time required to conclude multiple lawsuits as compared to the time required to conclude a single lawsuit; and (4) the relative expense to all concerned of the single-trial and multiple-trial alternatives. Syl. Pt. 2, *State ex rel. Appalachian Power Co. v. Ranson*, 190 W. Va. 429, 430, 438 S.E.2d 609, 610 (1993). The Court will consider the *Ranson* factors below.

16. Risk of Prejudice and Confusion / Absence of Judicial Dispatch and Economy. The allegations about CAMC's Patient Safety Act issues and Interference with Physician-Patient relationships do not involve WVU Health or the Thomas Parties. Having to sort through CAMC's alleged violation of the Patient Safety Act and interference with physician-patient relationship would lead to prejudice and confusion, far outweighing any illusory assertion of judicial dispatch

and economy. In any event, WVU Health and the Thomas Parties should not have to expend resources on CAMC patient safety issues that do not concern them - evidence and testimony of those issues, which involve CAMC patients, is for CAMC and the PAC physicians to address. The same is true of the ICU Agreement. WVU Health and the Thomas Parties are not involved and should not have to foot the bill for litigation regarding the separate dispute about the PAC-CAMC ICU Agreement. Adding those unrelated issues to this case will only add unnecessary cost and delay the Business Court Case.

17. Consolidation Adds Burdens to the Parties. Consolidation risks increasing the burdens to WVU Health and the Thomas Parties. The Second Action will have separate and additional motion practice, briefing, discovery, and depositions of witnesses, which are entirely unrelated to the First Action. Moreover, the Circuit Court of Kanawha County can easily streamline resolution of the Patient Safety Act issues, Interference with Physician-Patient relationships claims and ICU Agreement issues without unnecessarily burdening unrelated entities here.

18. The Length of Time to Conclude Separate Lawsuits. The current judicial assignments are more likely to lessen the length of time required to conclude the two separate actions as compared to the time required to conclude a single lawsuit. The Court notes there exists a pending dispositive motion in the instant civil action currently. Because the two civil actions contain separate questions of law and fact, the Court finds the most efficient way of resolving them (in the least amount of time) would be if they were not consolidated.

19. Unnecessary Expense to All Concerned. As stated, Civil Action No. 22-C-937 involves ICU/Patient Safety Case claims (Violation of Patient Safety Act, Interference with Physician-Patient Relationship and ICU Agreement). It would be unnecessarily expensive and wasteful to WVU Health and the Thomas Parties to have to prepare, staff and attend a trial




regarding claims that do not involve common issues of law or fact, and which are not alleged to relate to conduct WVU Health and the Thomas Parties. There is no efficiency of trial through consolidation.

20. CAMC has not convinced this Court that, in the exercise of the Court's discretion, the "Ranson" factors are satisfied. For these reasons, the Court is of the opinion to, and does hereby, DENY CAMC's Motion.

### CONCLUSION

It is hereby ADJUDGED and ORDERED that Plaintiff's Motion to Consolidate filed November 22, 2022 is hereby DENIED. The Court notes the objections and exceptions of the parties to any adverse ruling herein. The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

ENTER: February 28, 2023

  
JUDGE SHAWN D. NINES  
JUDGE OF THE WEST VIRGINIA  
BUSINESS COURT DIVISION

date 2/28/23  
Certified copies sent to:  
— counsel of record R. Miller  
— parties T. Hurley  
— other A. Cooke  
(please indicate)  
By CSG  
— certified/1st class mail  
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