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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0600

STATE OF WEST VIRGINIA, ex rel. GRANT COUNTY COMMISSION, Petitioner,

v.

HONORABLE LYNN NELSON, Judge of the Circuit Court of Grant County,
KIMBERLY LINVILLE, ROBERT W. "BOB" MILVET, THE BOARD OF TRUSTEES
OF GRANT MEMORIAL HOSPITAL TRUST FOUNDATION, INCORPORATED
(otherwise known as GRANT MEMORIAL HOSPITAL), Respondents.

**VERIFIED PETITION FOR WRIT OF PROHIBITION AND
APPEAL PURSUANT TO COLLATERAL ORDER DOCTRINE**

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I. QUESTIONS PRESENTED

This is a verified petition for a writ of prohibition and a combined appeal pursuant to the collateral order doctrine by the Grant County Commission from an Order entered by the Circuit Court of Grant County on July 29, 2020 denying Grant County Commission's Motion to Dismiss the Plaintiff's Complaint. The Circuit Court's ruling presents the following questions:

Writ of Prohibition:

1. Whether the Circuit Court exceeded its legitimate powers and erred as a matter of law in denying the Grant County Commission's Motion to Dismiss Plaintiff Kimberly Linville's Complaint by failing to find that the Grant County Commission was not the "employer" of Linville under the Human Rights Act, W.Va. Code § 5-11-9, or the Whistle-blower Law, W.Va. Code § 6C-1-2(c), or a "health care entity" under the Patient Safety Act, W.Va. Code § 16-39-4?

Appeal Pursuant to Collateral Order Doctrine:

2. Whether the Circuit Court erred as a matter of law in denying the Grant County Commission's Motion to Dismiss the Plaintiff Kimberly Linville's Complaint by failing to find that the Grant County Commission is immune pursuant to the Governmental Tort Claims and Insurance Reform Act, W.Va. Code § 29-12A-4, for the claims of intentional acts including discrimination, retaliation and wrongful termination of Linville by the CEO of Grant Memorial Hospital, Robert Milvet, and/or the Board of Trustees of Grant Memorial Hospital?

The Petitioner also seeks a rule to show cause pursuant to Rule 16(j) of the West Virginia Rules of Appellate Procedure and a stay of the Circuit Court civil action pending consideration of this Petition.

II. STATEMENT OF THE CASE

This action arises from the termination of Kimberly Linville's employment as Chief Nursing Officer at Grant Memorial Hospital by the hospital's CEO, Robert W. "Bob" Milvet. Linville filed her Complaint on April 27, 2020 naming three Defendants: Mr. Milvet, the CEO of Grant Memorial Hospital; the Board of Trustees of Grant Memorial Hospital Trust Foundation, Incorporated; and the Grant County Commission. (App. 5-14)

Linville as the Chief Nursing Officer at Grant Memorial Hospital reported to Milvet. (¶ 6 of Complaint, App. 6) Linville alleges numerous acts of Milvet's created a hostile work environment and alleges Milvet engaged in inappropriate conduct outside of the hospital. (¶¶ 8-11 of Complaint, App. 6-7) Linville contends that Milvet engaged in an improper relationship with a nurse manager and that this relationship was having an adverse effect on employees of the hospital, as well as patient safety. (¶ 12 of Complaint, App. 8)

Linville alleges that she complained to Milvet and to the CFO of the hospital about "how finances were being handled at Grant Memorial after cash flow issues caused bills not to be paid and a vender to hold up delivery of needed medical supplies." (¶ 15 of Complaint, App. 8) Linville informed Milvet that she would make a recommendation to terminate the nurse manager. (Complaint ¶ 14, App. 8) Linville also claims she expressed concerns about Milvet's alleged treatment of other employees and was critical of his actions outside of the workplace. (Complaint ¶ 16, App. 9) Linville contends Milvet terminated her in retaliation for her complaints.

Linville's Complaint contains four counts. The first count is a "Whistle-blower," discrimination and/or retaliation claim brought pursuant to W.Va. Code § 6C-1-3. Linville contends that the Defendants Grant Memorial Hospital and the Grant County Commission, constitute her "employers" pursuant to W.Va. Code § 6C-1-2(c) and that she is an "employee" under § 6C-1-2(b). (Complaint ¶¶ 18, 19, App. 9-10) Linville contends that Milvet's action in "failing to properly manage finances, including unpaid bills and the failure to allow Linville to address the employee scheduling issues caused by the nurse manager resulting in unnecessary wages being paid out, amounted to 'waste' under § 6C-1-2(f)." (¶ 20 of Complaint, App. 10) Linville also asserts that Milvet's action in firing her was discriminatory and/or in retaliation for her complaints of waste. (¶ 21 of Complaint, App. 10) The sole claim in count one against the

Grant County Commission in conclusory fashion alleges “[t]he Board and the Commission are liable for their own discriminatory and/or retaliatory actions¹ and are vicariously liable for the actions of their employee and agent Milvet.” (¶ 22 of Complaint, App. 10)

The second count is a claim brought pursuant to the Patient Safety Act, W.Va. Code § 16-39-1, *et seq.* Linville contends that Grant Memorial Hospital is a “health care entity” and that she was a “health care worker” as both terms are defined under the Act. (¶¶ 25 and 26 of Complaint, App. 11) Linville alleges she made good faith reports of actions by the nurse manager that created waste and endangered patient’s safety. (¶ 26 of Complaint, App. 11) Linville also asserts the administration’s failure to pay bills held up delivery of needed medical supplies, which endangered patient safety. (¶ 28 of Complaint, App. 11). She further alleges that Milvet’s action in firing her from employment was in retaliation for her complaints of waste and wrongdoing. (¶ 29 of Complaint, App. 11) There is no allegation that the Grant County Commission is a “health care entity.” Again, the sole allegation against the Grant County Commission in count two alleges “[t]he Board and the Commission are liable for their own discriminatory and/or retaliatory actions and are vicariously liable for the actions of their employee and agent Milvet.” (Complaint ¶ 30, App. 11)

The third count alleges a violation of the West Virginia Human Rights Act, W.Va. Code § 5-11-1, *et seq.* Linville asserts that all the Defendants are persons under W.Va. Code § 5-11-3(a) and “employers” under W.Va. Code § 5-11-3(d). (Complaint ¶ 33, App. 12) Linville claims her firing was motivated in whole or in part by her complaints of discriminatory actions and a sexually hostile work environment at Grant Memorial Hospital. (¶ 34 of Complaint, App. 12) Linville again

¹ The Complaint does not set forth any specific discriminatory or retaliatory actions by the Grant County Commission in any of the counts.

asserts “[t]he Board and the Commission are liable for their own retaliatory actions and are vicariously liable for the actions of their employee and agent Milvet.” (§ 35 of Complaint, App. 12)

The fourth count is an intentional infliction of emotional distress count and is based upon the alleged conduct of the hospital CEO set forth in Counts 1, 2 and 3.

On May 18, 2020, the Grant County Commission filed a Combined Motion to Dismiss and Memorandum in Support of its Motion to Dismiss arguing that the Grant County Commission is immune from Kimberly Linville’s intentional tort claims pursuant to the Governmental Tort Claims and Insurance Reform Act, W.Va. Code § 29-12A-4(b)(1). (App. 15-26) Additionally, the Grant County Commission asserted it cannot be liable to Linville under the Whistle-blower or Human Rights Act as it was not the “employer” of Linville. The Grant County Commission also sought dismissal of the Patient Safety Act count on the basis it is not a “health care entity” under the Act.

The Grant County Commission brought its Motion to Dismiss on for hearing before the Honorable Judge Lynn Nelson on July 9, 2020. The Plaintiff, Kimberly Linville, did not file a memorandum in opposition to the Motion to Dismiss or any other response to the Motion. Upon considering the arguments of counsel, the Circuit Court denied Grant County Commission’s Motion to Dismiss by Order dated July 29, 2020. (App. 1-4) The trial court granted a stay in this case for 30 days to allow the Grant County Commission to pursue this appeal.

III. SUMMARY OF ARGUMENT

The Circuit Court of Grant County exceeded its legitimate powers and erred as a matter of law by issuing an order denying the Grant County Commission’s Motion to Dismiss. The Grant County Commission was not the employer of the Plaintiff, Linville. The Grant County

Commission owns Grant Memorial Hospital pursuant to W.Va. Code § 7-3-14. Grant Memorial Hospital is a public corporation incorporated in 1963. By statute, the Board of Trustees is the governing body for Grant Memorial Hospital, and its members are appointed by the Grant County Commission. (¶ 4 of Complaint, App. 6) Pursuant to W.Va. Code § 7-3-15, Grant Memorial Hospital was Linville's employer, and its Board of Trustees was vested with the right to hire and terminate hospital employees. Thus, the Whistle-blower claim brought against the Grant County Commission pursuant to W.Va. Code § 6C-1-2(c) and the Human Rights Act claim pursuant to W.Va. Code § 5-11-3(d) must be dismissed against the Grant County Commission as it was not Linville's "employer." Further, the Grant County Commission is not a "health care entity" and is not subject to the Patient Safety Act under W.Va. Code § 16-39-1, *et seq.* Grant Memorial Hospital is a "health care entity" as defined by The Patient Safety Act, W.Va. Code § 16-39-3(6). Therefore, Linville's second count, the Patient Safety Act claim must, be dismissed against the Grant County Commission.

The allegations contained in the four counts against the Grant County Commission assert unspecified discriminatory or retaliatory actions by the Grant County Commission and vicarious liability based upon claims of intentional and/or malicious acts of the CEO of Grant Memorial Hospital for which the Grant County Commission, a political subdivision, is immune pursuant to the general grant of immunity afforded to political subdivisions by the Governmental Tort Claims and Insurance Reform Act, W.Va. Code § 29-12A-4(b)(1). There are no claims of negligence within W.Va. Code § 29-12A-4(c) which could potentially survive the grant of immunity from liability afforded to the Grant County Commission.

IV. STATEMENT REGARDING ORAL ARGUMENT

Because the Circuit Court exceeded its legitimate powers and erred as a matter of law the Petitioner requests oral argument in the matter pursuant to Rule 20(a)(1) and 20(a)(2) of the West Virginia Rules of Appellate Procedure.

V. ARGUMENT

A. Standard For Issuance Of Writ Of Prohibition and Standard for Appeal Pursuant to Collateral Order Doctrine

“The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” W.Va. Code § 53-1-1. “A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers.” State ex rel. Peacher v. Sencindiver, 160 W.Va. 314, 233 S.E.2d 425, Syl. pt. 2 (1977).

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12, Syl. pt. 4 (1996).

This Court has held that “[i]n determining the third factor, the existence of clear error as a matter of law, we will employ a *de novo* standard of review, as in matters in which purely legal issues are at issue.” State ex rel. Gessler v. Mazzone, 212 W.Va. 368, 372, 572 S.E.2d 891, 895 (2002).

The Circuit Court’s denial of the Grant County Commission’s Motion to Dismiss warrants issuance of a writ of prohibition as the Circuit Court’s ruling was clearly erroneous as a matter of law, failing to properly apply the enabling statute by which the hospital was created, W.Va. Code § 7-3-14, and the statute governing the management and administration of the hospital by its Board of Trustees, W.Va. Code § 7-3-15. Statutory claims for a violation of the Whistle-blower law and the Human Rights Act vest “employees” with causes of actions against their “employers.” The Grant County Commission was not the “employer” of Linville. Further, the Patient Safety Act permits causes of action against “health care entities” by “health care workers.” The Grant County Commission plainly is not a “health care entity” under the Patient Safety Act.

A writ of prohibition also is warranted because the Grant County Commission, if it is forced to defend this matter through trial, will be prejudiced as there is no other means of direct appeal. Thus, factors one and two warrant a writ of prohibition. Finally, factor five warrants a writ of prohibition as it is an issue of first impression and addresses the issue of the liability of County Commissions for a county public hospital administration’s relationship with its employees and employment decisions involving its employees and, by analogy, the potential liability of County Commissions for other public corporations that are statutorily created by County Commissions such as development authorities, public service districts, airport authorities, and ambulance authorities.

The second question presented by this Appeal is brought pursuant to the Collateral Order Doctrine given the Circuit Court’s denial of the Motion to Dismiss Plaintiff’s Complaint based upon the immunities afforded to the Grant County Commission, a political subdivision, under the Governmental Tort and

Insurance Reform Act. Under W. Va. Code § 58-5-1, appeals may only be taken from final decisions of a circuit court. A case is final only when it terminates litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined. James M. B. v. Carolyn M., 193 W.Va. 289, 456 S.E.2d 16, Syl. pt. 3 (1995).

This Court has recognized exceptions to the rule of finality which was established by the United States Supreme Court as follows:

The exception [to the rule of finality] referred to as the ‘collateral order’ doctrine, which was established by the United States Supreme Court in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L.Ed. 1528 (1949), may be applied to allow appeal of an interlocutory order when three factors are met: ‘An interlocutory order would be subject to appeal under [the collateral order] doctrine if it (1) conclusively determines the disputed controversy, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment.’ Durm v. Heck’s, Inc., 184 W.Va. 562, 566 n. 2, 401 S.E.2d 908, 912 n. 2 (1991) (internal quotations and citation omitted). *See also Robinson v. Pack*, 223 W.Va. 828, 679 S.E.2d 660 (applying three-part collateral order doctrine to circuit court’s denial of summary judgment on issue of qualified immunity and finding order immediately appealable).

Cabell Cty. Comm’n v. Whitt, __ W.Va. __, 836 S.E.2d 33, 41-42 (2019).

The requisites of a collateral order are met by virtue of the Circuit Court of Grant County’s denial of the Grant County Commission’s Motion to Dismiss based upon the immunity afforded to it under the Governmental Tort and Insurance Reform Act, W.Va. Code § 29-12A-4.

B. Grant County Commission is not the “employer” of Linville under the Human Rights Act, W.Va. Code § 5-11-9, or the Whistle-blower Law, W.Va. Code § 6C-1-2(c), nor is it a “health care entity” under the Patient Safety Act, W.Va. Code § 16-39-4, and therefore the Circuit Court exceeded its legitimate powers and erred as a matter of law in denying Grant County Commission’s Motion to Dismiss.

Linville has alleged that both Grant Memorial Hospital and the Grant County Commission are her “employer” and are vicariously liable² for the allegedly wrongful acts of the hospital CEO in the treatment and termination of Plaintiff. The Whistle-blower Law, W.Va. Code § 6C-1-2(c), and the Human Rights Act, W.Va. Code § 5-11-1 *et seq.*, vest “employees” with causes of action against their “employers”³ for retaliatory or discriminatory conduct. By statute, only Grant Memorial Hospital is the employer of Linville. “A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute.” Meadows v. Wal-Mart Stores, Inc., 207 W.Va. 203, 530 S.E.2d 676, Syl. Pt. 3 (1999). While courts always endeavor to give effect to legislative intent, when a statute is clear and unambiguous it will be applied and not construed. State v. Boatright, 184 W.Va. 27, 28, 399 S.E.2d 57, 58 (1990). Interpreting a statute presents a purely legal question for the Court. Banker v. Banker, 196 W.Va. 535, 543, 474 S.E.2d 465, 473 (1996).

The Circuit Court of Grant County erred as a matter of law in denying the Grant County Commission’s Motion to Dismiss by failing to apply those statutes, W.Va. Code § 7-3-14 and § 7-3-15, which establish that the Grant County Commission was neither the “employer” of Linville

² “It is always incumbent upon one who asserts vicarious [respondeat superior] liability to make a prima facie showing of the existence of the relation of master and servant or principal and agent or employer and employee.” Sanders v. Georgia – Pacific Corp., 159 W.Va. 621, 225 S.E.2d. 218, 222 (1976).

³ W.Va. Code § 6C-1-2(c) defines “Employer” to mean “a person supervising one or more employees, including the employee in question, a superior of that supervisor, or an agent of a public body.” W.Va. Code § 5-11-3(d) defines “employer” to mean “the state, or any political subdivision thereof, and any person employing twelve or more persons within the state for twenty or more calendar weeks in the calendar year in which the act of discrimination allegedly took place or the preceding calendar year.”

nor a "health care entity."

By statute, the Grant County Commission while owning the hospital is not the employer of Linville. Pursuant to W.Va. Code § 7-3-14, the County Commission is

[A]uthorized and empowered to acquire by purchase or construction and to thereafter own, equip, furnish, operate, lease, improve and extend a public hospital, clinic, long-term care facility and other related facilities, with all appurtenances, including the necessary real estate as a site therefore. . . .

The administration and management of a county public hospital, including hiring and terminating employees, is vested with the hospital's board of trustees. W.Va. Code § 7-3-15 provides:

The administration and management of any county public hospital, clinic, long-term care facility or other related facility acquired, equipped, furnished, improved or extended under section fourteen [§ 7-3-14] of this article shall be vested in a board of trustees, consisting of not less than five members appointed by the county commission.

Such board of trustees shall provide for the employment of and shall fix the compensation for and remove at pleasure all professional, technical and other employees, skilled or unskilled, as it may deem necessary for the operation and maintenance of the hospital, clinic, long-term care facility or other related facility; and disbursement of funds in such operation and maintenance shall be made only upon order and approval of such board. The board of trustees shall make all rules and regulations governing its meetings and the operation of the hospital, clinic, long-term care facility or other related facility.

Grant Memorial Hospital Trust Foundation, Incorporated is a nonprofit corporation and

was incorporated in 1963.⁴ Hospitals like Grant Memorial created pursuant to W.Va. Code § 7-3-14 and 15 (and predecessor statutes) have been recognized by this Court to be a “public hospital” and are considered a public corporation, even though the title to the hospital’s property, by statute, is vested in the County Commission. See Shaffer v. Monongalia Gen. Hosp., 135 W.Va. 163, 62 S.E.2d 795 (1950); Wallington v. Zinn, 146 W.Va. 147, 118 S.E.2d 526, 527 (1961). e Whistle-blower Law and Human Rights Act both vest an “employee” with the right to proceed against their “employer.” The Whistle-blower Law provides as follows:

No employer may discharge, threaten, or otherwise discriminate or retaliate against an employee by changing the employee’s compensation, terms, conditions, location, or privileges of employment because the employee, acting on his or her own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report, or is about to report, verbally or in writing, to the employer or appropriate authority, an instance of wrongdoing or waste.

W.Va. Code § 6C-1-3(a).

The West Virginia Human Rights Act, W.Va. Code § 5-11-9, also prohibits unlawful discriminatory practices by employers against any individual regarding his or her employment opportunities irrespective of whether the individual is an employee or seeks work with that employer. v. ARA Szabo, 198 W.Va. 362, 480 S.E.2d 801 (1996). By statute, W.Va. Code § 7-3-15, the Board of Trustees of Grant Memorial Hospital, not the Grant County Commission, is the statutory employer of Linville. As such both the Whistle-blower Law and Human Rights Act claims must be dismissed against the Grant County Commission.

⁴ See West Virginia Secretary of State at:
<http://apps.sos.wv.gov/business/corporations/organization.aspx?org=59732>

At oral argument, Plaintiff relied upon this Court's decision in Burke v. Wetzel Cty. Comm'n, 240 W.Va. 709, 815 S.E.2d 520 (2018), to support Linville's claim seeking to impose vicarious liability upon the Grant County Commission for the actions of the Hospital CEO in terminating her. (App. 1-4) Plaintiff argued the Grant County Commission was the employer of CEO Milvet and/or Plaintiff Linville. Plaintiff's reliance upon Burke is misplaced. Burke involved a lawsuit by a field appraiser supervisor who was employed by the Wetzel County Assessor. Burke was terminated by the County Assessor, which precipitated a lawsuit against the Wetzel County Commission and the Wetzel County Assessor. The Circuit Court dismissed Burke's claims. On appeal, Burke argued that his complaint alleged that both the County Assessor and the County Commission were his joint employers and that those allegations were sufficient to overcome dismissal of the Commission as a party. Id. at 718, 815 S.E.2d. at 529. This Court recognized that employees hired pursuant to W.Va. Code § 7-7-7(a) are joint employees of both the county commission and the county elected officials. Id. at 718, 815 S.E.2d at 529, *citing*, Haney v. Cty. Comm'n of Preston Cty., 212 W.Va. 824, 830, 575 S.E.2d 434, 440 (2002). This Court held that Burke had alleged that he was hired as a joint employee of both the Assessor and County Commission and, therefore, there was an issue that needed to be resolved and should be subject to discovery by the parties. 240 W.Va. at 719, 815 S.E.2d 530.

In the instant case, the Grant County Commission is not the joint employer with Grant Memorial Hospital of Linville or the CEO Milvet. The statute involved in Burke, W. Va. Code § 7-7-7, provides as follows:

- (a) The county clerk, circuit clerk, sheriff, county assessor and prosecuting attorney, by and with the advice and consent of the county commission, may appoint and employ, to assist them in the discharge of their official duties for and during their respective terms of office, assistants, deputies

and employees. The county clerk may designate one or more of his or her assistants as responsible for all probate matters.

The above enumerated elected county officials hire employees, by and with the advice and consent of the county commission. Neither W.Va. Code § 7-7-7 nor the decision in Burke, or its progeny, stand for the principle that a county commission is a joint employer with a county public hospital of those employees of the hospital and is thus subject to liability which may arise from a hospital employees' termination.

Linville can point to no legal authority supporting her argument that an employee of a County public hospital is also an employee of the County Commission which created the hospital. Such a finding by this Court would result in County Commissions potentially being held liable for all employment actions by County public hospitals and, by analogy, could be applied to any public corporation created by a County Commission. Examples would include development authorities, W.Va. Code § 7-12-1, et seq.; airport authorities, W.Va. Code § 8-29A-1, et seq.; parks and recreation commissions, W.Va. Code § 7-11-1, et seq.; and county solid waste authorities, W.Va. Code § 7-16-1, et seq. As with public hospitals, these entities are all public corporations that are separate legal entities from the County Commissions which created them, and appoint their boards and commissions. These entities' boards or commissions are, like a public hospital's board of trustees, responsible for administration and management, including the hiring and termination of employees.

Further, Grant County Commission is not a "health care entity" subject to claims under the Patient Safety Act, W.Va. Code § 16-39-4. The Patient Safety Act prohibits discrimination or retaliation against a health care worker "because the worker, or any person acting on behalf of the worker: (1) Makes a good faith report, or is about to report, verbally or in writing, to the health

care entity or appropriate authority an instance of wrongdoing or waste.” The Patient Safety Act provides that a health care worker who has been retaliated against can file a civil action against the “health care entity and the person believed to have violated section four of this article.” W.Va. Code § 16-39-6(a). “Health care entity” is defined to include “a health care facility, such as a hospital, clinic, nursing facility or other provider of health care services.” W.Va. Code § 16-39-3(6).

As is clear under W.Va. Code § 7-3-14 and § 7-3-15, the Grant County Commission owns Grant Memorial Hospital and appoints the Hospital’s Board of Trustees. The management and control of Grant Memorial Hospital is by its Board of Trustees, and the Hospital would constitute the “health care entity.” The Grant County Commission is not a “health care entity.”

Therefore, the Grant County Commission is not a proper party as it is neither Linville’s “employer,” nor is it a “health care entity.” Further, with regard to count four’s intentional infliction of emotional distress claim, as the County Commission is neither Linville’s “employer” nor a “health care entity” it is not a proper Defendant for the intentional infliction of emotional distress claim which is predicated on the conduct making up counts one through three.

C. Grant County Commission is immune pursuant to the Governmental Tort and Insurance Reform Act, W.Va. Code § 29-12A-4, for claims of intentional acts including discrimination, retaliation and wrongful termination of Linville by the CEO of Grant Memorial Hospital, Milvet, and/or by the Board of Trustees of Grant Memorial Hospital.

As stated *supra*, the Grant County Commission is not the employer of Linville. As such, there is no basis for a claim for vicarious liability against the Grant County Commission for the actions of the CEO of Grant Memorial Hospital in terminating Linville. See Pyles v. Mason Cty. Fair, Inc. 239 W.Va. 882, 806 S.E.2d 806 n.19 (2017). In addition to the lack of any basis for vicarious liability, the trial court erred as a matter of law in failing to dismiss the Plaintiff’s Complaint alleging both liability for unspecified discriminatory or retaliatory actions by the Grant County Commission and

vicarious liability of the Grant County Commission for the acts of the Hospital CEO and/or the Board of Trustees as the Grant County Commission is immune pursuant to the Governmental Tort and Insurance Reform Act.

“[I]n civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff.” Hutchison v. City of Huntington, 198 W.Va. 139, 149, 479 S.E.2d 649, 659 (1996). Claims of immunities, where ripe for disposition, should be summarily decided before trial. Id. W.Va. at 147, S.E.2d at 657. “The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case.” Id. W.Va. at 148, S.E.2d at 658. “The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underline the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.” Hutchison at Syl. pt. 1. A circuit court’s denial of a motion to dismiss based upon immunity is immediately appealable pursuant to the collateral order doctrine. See Hutchison, W.Va. at 147, S.E.2d at 657; Coleman v. Sopher, 194 W.Va. 90, 96, 459 S.E.2d 367, 373, n. 7 (1995).

The Grant County Commission is a political subdivision⁵ entitled to the immunities of W.Va. Code § 29-12A-4 and W.Va. Code § 29-12A-5. W.Va. Code § 29-12A-4(b)(1) provides:

- (1) Except as provided in subsection (c) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function: Provided, That this article shall

⁵ W Va. Code § 29-12A-3(c) defines “political subdivision” in part to mean “any county commission. . .”

not restrict the availability of mandamus, injunction, prohibition, and other extraordinary remedies.

“Only claims of negligence specified in W.Va. Code § 29-12A-4(c) can survive immunity from liability under the general grant of immunity in W.Va. Code. §29-12A-4(b)(1).” Zirkle v. Elkins Rd. Pub. Serv. Dist., 221 W.Va. 409, 414, 655 S.E.2d 155, 160 (2007). W.Va. Code § 29-12A-4(c) enumerates the following claims of negligence for which a political subdivision may be found liable:

(1) Except as otherwise provided in this article, political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent operation of any vehicle by their employees when the employees are engaged within the scope of their employment and authority.

(2) Political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees while acting within the scope of employment.

(3) Political subdivisions are liable for injury, death, or loss to persons or property caused by their negligent failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, or free from nuisance, except that it is a full defense to such liability, when a bridge within a municipality is involved, that the municipality does not have the responsibility for maintaining or inspecting the bridge.

(4) Political subdivisions are liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used by such political subdivisions, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility.

(5) In addition to the circumstances described in subdivisions (1) to (4), subsection (c) of this section, a political subdivision is liable for injury, death, or loss to persons or property when liability is expressly imposed upon the political subdivision by a provision of this code. Liability shall not be construed to exist under another section of this code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued.

The allegations contained in Linville's Complaint allege a sexually hostile work environment and that Linville was discriminated or retaliated against intentionally by Mr. Milvet, and implicitly by her employer, Grant Memorial Hospital, and its owner, the Grant County Commission. W.Va. Code § 29-12A-18 excepts certain civil actions by "employees" of a "political subdivision" from the immunities provided for under the Governmental Tort Claims and Insurance Reform Act. W.Va. § 29-12A-18 provides:

This article does not apply to, and shall not be construed to apply to, the following:

- (a) Civil actions that seek to recover damages from a political subdivision or any of its employees for contractual liability;
- (b) Civil actions by an employee, or the collective bargaining representative of an employee, against his or her political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision;
- (c) Civil actions by an employee of a political subdivision against the political subdivision relative to wages, hours, conditions, or other terms of his or her employment;
- (d) Civil actions by sureties, and the rights of sureties, under fidelity or surety bonds;
- (e) Civil claims based upon alleged violations of the constitution or statutes of the United States except that the provisions of section eleven [§ 29-

12A-11] of this article shall apply to such claims or related civil actions.

Significantly, neither Grant Memorial Hospital nor Linville, its employee, are within the definition of “employees” or “political subdivisions” under Article 12A. Specifically, “political subdivisions” are defined under W.Va. Code § 29-12A-3 to include county commissions and “any separate corporation or instrumentality established by one or more counties or municipalities, as permitted by law.... **Provided, That hospitals of a political subdivision and their employees are expressly excluded from the provisions of this article.**” W.Va. Code § 29-12A-3(c) (emphasis added). Thus, Grant Memorial Hospital and its employees, including Linville and the CEO, are expressly excluded from the provisions under Article 12A, which would include W.Va. Code § 29-12A-18. Section 29-12A-18 preserves the right of employees to sue “his or her political subdivision relative to any matter that arises out of the employment relationship” or the terms and conditions of their employment. Thus, while Linville has the right to maintain a suit against Grant Memorial Hospital arising out of her employment relationship, she does not constitute an “employee” able to bring a claim against the Grant County Commission based upon her employment relationship as the Hospital and its employees are excluded from the definition of “political subdivision.” As such, the Grant County Commission possesses the full range of immunities under the Governmental Tort Claims and Insurance Reform Act against the claims of Linville, a public hospital employee.

Linville in a conclusory fashion alleges that the Grant County Commission acted in a discriminatory and retaliatory fashion without setting forth any facts whatsoever supporting this allegation. And, as noted, Plaintiff Linville filed absolutely nothing in Circuit Court in opposition to Grant County Commission’s Motion to Dismiss. The Grant County Commission is entitled to immunity for any intentional conduct alleged against it in its own right. There are no allegations

of negligence contained in the Complaint within the scope of W.Va. Code § 29-12A-4(c). All the actions alleged by Linville are intentional and/or malicious and as such are within the immunity afforded the Grant County Commission.

The Supreme Court of Appeals of West Virginia recognized that in creating the general grant of immunity contained in W.Va. Code § 29-12A-4(b)(1) “the Legislature did not distinguish between intentional or unintentional acts, but instead used the term ‘any’ as an adjective modifying ‘act or omission.’” Zirkle v. Elkins Rd. Pub. Serv. Dist., 221 W.Va. 409, 414, 655 S.E.2d 155, 160 (2007). The Court held “claims of intentional and malicious acts are included in the general grant of immunity in W.Va. Code 29-12A-4(b)(1).” Id.; Thomas v. Firestone Tire & Rubber Co., 164 W.Va. 763, 266 S.E.2d 905 (1980); See also Mallamo v. Town of Rivesville, 197 W.Va. 616, 477 S.E.2d 525 (1996) (town had no liability where it is alleged police chief committed conspiracy because conspiracy is an intentional act, not negligence).

Accordingly, the Grant County Commission respectfully requests this Court to dismiss Plaintiff’s Complaint against it with prejudice, given the immunity afforded for the alleged tentional discriminatory/retaliatory actions as enumerated in the Plaintiff’s Complaint. None of the alleged claims involve alleged acts of negligence to which the immunity might not apply.

VI. CONCLUSION

Because the Circuit Court exceeded its legitimate powers and erred as a matter of law in failing to grant the Grant County Commission’s Motion to Dismiss, the Petitioner requests that this Court: (1) issue a Writ of Prohibition in this matter prohibiting the Circuit Court from enforcing its July 29, 2020 Order and directing dismissal of Plaintiff’s claims against the Grant County Commission finding the Grant County Commission is neither the “employer” of the Plaintiff or a “health care” entity; (2) find the Grant County Commission is immune from liability

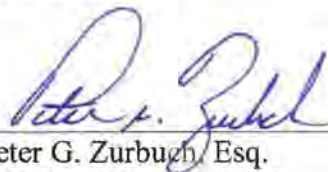
under the Governmental Tort Claims and Insurance Reform Act for all Plaintiff's claims which are predicated upon intentional conduct; and (3) issue a rule to show cause pursuant to Rule 16(j) of the West Virginia Rules of Appellate Procedure and stay the Circuit Court civil action pending consideration of this Petition.

Respectfully submitted,

GRANT COUNTY COMMISSION,

Petitioner,

By counsel,

A handwritten signature in blue ink, appearing to read "Peter G. Zurbuch", is written over a horizontal line.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

STATE OF WEST VIRGINIA, ex rel. GRANT COUNTY COMMISSION, Petitioner,
v.

HONORABLE LYNN NELSON, Judge of the Circuit Court of Grant County, ROBERT
W. "BOB" MILVET, THE BOARD OF TRUSTEES OF GRANT MEMORIAL
HOSPITAL TRUST FOUNDATION, INCORPORATED (otherwise known as GRANT
MEMORIAL HOSPITAL), Respondents.

CERTIFICATE OF SERVICE

I, Peter G. Zurbuch, counsel for Petitioner, Grant County Commission, do hereby certify that the foregoing Verified Petition of Writ of Prohibition and Appeal Pursuant to Collateral Order Doctrine was served upon all parties by email and by depositing true copies thereof in the United States Mail, postage prepaid, in envelopes addressed to:

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Honorable Lynn A. Nelson
21st Judicial Court
Mineral County Courthouse
114 Armstrong Street
Keyser, WV 26726
Respondent Judge

DATED: This 11th day of August, 2020.



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VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF RANDOLPH, TO-WIT:

I, Peter G. Zurbuch, being dually sworn, on his oath deposes and says that the facts and allegations contained within the foregoing *Verified Petition for Writ of Prohibition and Appeal Pursuant to Collateral Order Doctrine* are true to the best of my information and belief.

Date: August 11, 2020.

By: _____


Peter G. Zurbuch

Taken, sworn to and subscribed before me this 11th day of August, 2020, by Peter G. Zurbuch.

My commission expires 12/19/2021.


NOTARY PUBLIC

