

**IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA**

**DOCKET NUMBER 20-0600**

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

**v.**

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

**SUMMARY RESPONSE BY KIM LINVILLE, RESPONDENT, TO  
PETITION FOR WRIT OF PROHIBITION**

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## **STAND OF REVIEW AND JURISDICTION**

Respondent acknowledges jurisdiction in this Court and agrees with the standard of review set out in the *Verified Petition for Writ of Prohibition and Appeal Pursuant to Collateral Order Doctrine*.

## **PROCEEDINGS BELOW**

Petitioner correctly summarizes the proceedings below in aforesaid petition.

## **STATEMENT OF FACTS**

Respondent is in substantial agreement with the statement of facts made by Petitioner in aforesaid petition, except as may be noted in Respondent's argument below.

## **ARGUMENT IN RESPONSE**

Petitioner declares Grant County Commission is not the "employer" of Linville under the Human Rights Act, § W.Va. Code 5-11-9, nor the Whistle-blower Law, W.Va. Code 6-1-2(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. Petitioner further declares 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. Each assignment of error will be addressed in turn. However, fundamental to both assignments of error is a misapplication of pertinent facts and law. Respondent will briefly discuss principal and agency vicarious liability before addressing the Governmental Tort and Insurance Reform Act.

## Vicarious Liability

The Restatement of the Law 3rd – Agency, by the American Law Institute sets forth the following general overview of principal's liability for the liability of its agent, which is the following:

### **Chapter 7. Torts--Liability Of Agent And Principal**

#### **Topic 2. Principal's Liability**

##### **§ 7.03 Principal's Liability--In General**

(1) A principal is subject to direct liability to a third party harmed by an agent's conduct when

(a) as stated in § 7.04, the agent acts with actual authority or the principal ratifies the agent's conduct and

(i) the agent's conduct is tortious, or

(ii) the agent's conduct, if that of the principal, would subject the principal to tort liability; or

(b) as stated in § 7.05, the principal is negligent in selecting, supervising, or otherwise controlling the agent; or

(c) as stated in § 7.06, the principal delegates performance of a duty to use care to protect other persons or their property to an agent who fails to perform the duty.

(2) A principal is subject to vicarious liability to a third party harmed by an agent's conduct when

(a) as stated in § 7.07, the agent is an employee who commits a tort while acting within the scope of employment; or

(b) as stated in § 7.08, the agent commits a tort when acting with apparent authority in dealing with a third party on or purportedly on behalf of the principal.

Petitioner attempts to assert that Grant County Commission is not a principal to its agents, namely, the Board of Trustees and CEO of Grant Memorial Hospital, pursuant to agency law. Petitioner fails to account that the Grant County Commission is the head legal governing body that is statutory bound to appoint and issue revenue bonds for the legal entity of the Grant Memorial Hospital, established under the West Virginia Code as set forth hereinbelow. If the agent's conduct, if that of the principal, would subject the principal to tort liability then the principal is subject to direct liability to a third party harmed by an agent's conduct. The Grant County

Commission is vicariously liable for the acts of the Board of Trustees or CEO of the Grant Memorial Hospital.

### **Grant Memorial Hospital Incorporated**

The Grant County Commission created and owns Grant Memorial Hospital pursuant to W. Va. Code §7-3-14, which sets forth the following:

**§7-3-14. Authority to acquire and operate hospitals, clinics, long-term care facilities and other related facilities; financing.**

The county commission of any county is hereby authorized 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 therefor. Any such county public hospital acquired pursuant thereto may include a nurses home and nurses training school. The county commission is further authorized and empowered, upon acquiring a hospital, clinic, long-term care facility or other related facility, to lease to others any or all such facilities for such rentals and upon such terms and conditions as the county commission may deem advisable. For the purpose of paying all or any part of the costs, not otherwise provided, of acquiring, completing, equipping, furnishing, improving or extending such hospital, clinic, long-term care facility or other related facility, the county commission is hereby authorized and empowered by order duly entered of record, to issue and sell the negotiable revenue bonds of such county, which shall be payable solely and only from all or such part of the net revenues from the operation of such county public hospital, clinic, long-term care facility or other related facility as may be provided by said order; and each such revenue bond so issued shall contain a recital that payment or redemption of the bond and payment of the interest thereon is secured by the revenues pledged therefor, and that such bond does not constitute an indebtedness of such county or the county commission thereof within the meaning of any Constitutional or statutory limitation or provision. Such revenue bonds may bear such date or dates, may mature at such time or times not exceeding thirty-four years from their respective dates, may bear interest at such rate or rates not exceeding twelve percent per annum, may be of such denomination or denominations, may be in such form, may carry such registration privileges, may be made subject to such terms of redemption with or without premium, and may contain such other terms and covenants not inconsistent with this article as may be provided in such order. Such revenue bonds shall be exempt from taxation by the State of West Virginia and the other taxing bodies of the state. In determining the amount of revenue bonds to be issued, there may be included any expenses in connection with and incidental to the issuance and sale of bonds and for the preparation of plans, specifications, surveys and estimates, interest during the estimated construction period and for six months thereafter, and a reasonable amount for working capital and prepaid insurance. Such bonds may be sold in such

manner, at such times and upon such terms as may be determined by the county commission to be for the best interests of the county: Provided, That no bonds may be sold upon terms which will result in the net interest cost of more than thirteen percent per annum computed to maturity of the bonds according to standard tables of bond values. There may be included in any such order authorizing the issuance of revenue bonds such covenants, stipulations and conditions as may be deemed necessary with respect to the expenditure of the bond proceeds, the operation and maintenance of the county public hospital, clinic, long-term care facility or other related facility, and the custody and application of the revenues from such operation. The holder of any bond or bonds may, by mandamus or other appropriate proceedings, require and compel performance of any duties imposed by law in connection with the hospital, clinic, long-term care facility or other related facility, or any covenant, stipulation or condition that may have been expressed in such bond order.

The Grant County Commission has exclusive appointment power of the Board of Trustees of the Grant Memorial Hospital pursuant to W. Va. Code §7-3-15, which sets forth the following:

**§7-3-15. Board of trustees for hospital, clinic or long-term care facility.**

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 of this article shall be vested in a board of trustees, consisting of not less than five members appointed by the county court. Prior to the issuance of any bonds under the provisions of section fourteen of this article, the county court shall appoint two of such trustees for a term of two years, two trustees for a term of four years, and one trustee for a term of six years from the first day of the month during which appointed. Upon the expiration of such initial appointments, the term of each new appointee shall be six years, except that any person appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. Any trustee shall be eligible for reappointment upon the expiration of his term. The trustees shall receive no compensation for their services, but shall be reimbursed for any expenses incurred in the performance of their duties. Any trustee may be removed by the county court for incompetency, neglect of duty or malfeasance in office after an opportunity to be heard at a public hearing before the county court. At the first meeting of the board of trustees, and annually thereafter, it shall organize by designating one of its members as chairman and by appointing a secretary who may, but need not, be a trustee: Provided, That the board of trustees shall designate a treasurer at its first regular meeting subsequent to the effective date of this section.

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.

The Board of Trustees and CEO of Grant Memorial Hospital is an agent of the principal, the Grant County Commission. Grant Memorial Hospital was incorporated in 1963 by the Grant County Commission. Although not established in the record below, due to the premature nature of the Petitioner filing the aforesaid petition, it is believed that the Grant County Commission issued revenue bonds to pay for the establishment of the Grant Memorial Hospital. The Grant County Commission maintains exclusive governing control over the Grant Memorial Hospital by having the exclusive power to appoint the Board of Trustees of Grant Memorial Hospital. The Grant County Commission is the principal to its agents, namely, the Board of Trustees and CEO of Grant Memorial Hospital.

#### **Governmental Tort Claims and Insurance Reform Act**

The purpose of the Governmental Tort Claims and Insurance Reform Act is to provide civil immunity to political subdivisions as set forth in W. Va. Code §29-12A-1, which is the following:

##### **§29-12A-1. Short title; purposes.**

This article shall be known and may be cited as "The Governmental Tort Claims and Insurance Reform Act."

Its purposes are to limit liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs and coverage of insurance available to political subdivisions for such liability.

The legislative findings goes into greater detail in discussing the purpose of the Governmental Tort Claims and Insurance Reform Act, which in essence was to establish certain immunities to protect political subdivisions from the inability to afford sufficient liability

insurance due to their limited public funding to the organization. W. Va. Code §29-12A-2, which is the following:

**§29-12A-2. Legislative findings.**

The Legislature finds and declares that the political subdivisions of this state are unable to procure adequate liability insurance coverage at a reasonable cost due to: The high cost in defending such claims, the risk of liability beyond the affordable coverage, and the inability of political subdivisions to raise sufficient revenues for the procurement of such coverage without reducing the quantity and quality of traditional governmental services. Therefore, it is necessary to establish certain immunities and limitations with regard to the liability of political subdivisions and their employees, to regulate the insurance industry providing liability insurance to them, and thereby permit such political subdivisions to provide necessary and needed governmental services to its citizens within the limits of their available revenues.

The definition of key terms as used in the articles of the Governmental Tort Claims and Insurance Reform Act, pursuant to W.Va. Code § 29-12A-3, are the following:

**§29-12A-3. Definitions.**

As used in this article:

- (a) "Employee" means an officer, agent, employee, or servant, whether compensated or not, whether full-time or not, who is authorized to act and is acting with the scope of his or her employment for a political subdivision. "Employee" includes any elected or appointed official of a political subdivision. "Employee" does not include an independent contractor of a political subdivision.
- (b) "Municipality" means any incorporated city, town or village and all institutions, agencies or instrumentalities of a municipality.
- (c) "Political subdivision" means any county commission, municipality and county board of education; any separate corporation or instrumentality established by one or more counties or municipalities, as permitted by law; any instrumentality supported in most part by municipalities; any public body charged by law with the performance of a government function and whose jurisdiction is coextensive with one or more counties, cities or towns; a combined city- county health department created pursuant to article two, chapter sixteen of this code; public service districts; and other instrumentalities including, but not limited to, volunteer fire departments and emergency service organizations as recognized by an appropriate public body and authorized by law to perform a government function: Provided, That hospitals of a political subdivision and their employees are expressly excluded from the provisions of this article.
- (d) "Scope of employment" means performance by an employee acting in good faith within the duties of his or her office or employment or tasks lawfully assigned by a competent authority but does not include corruption or fraud.

(e) "State" means the State of West Virginia, including, but not limited to, the Legislature, the Supreme Court of Appeals, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges, and universities, institutions, and other instrumentalities of the State of West Virginia. "State" does not include political subdivisions.

The Grant County Commission created and owns Grant Memorial Hospital pursuant to W. Va. Code §7-3-14, as set forth hereinabove.

The Grant County Commission has exclusive appointment power of the Board of Trustees of the Grant Memorial Hospital pursuant to W. Va. Code §7-3-15, as set forth hereinabove.

The Board of Trustees of Grant Memorial Hospital is an "employee" of the Grant County Commission for purposes of the Governmental Tort Claims and Insurance Reform Act, pursuant to W.Va. Code § 29-12A-3(a), which defines the term. The term "Employee" includes officer, agent, employee, or servant, whether compensated or not, whether full-time or not, who is authorized to act and is acting with the scope of his or her employment for a political subdivision. "Employee" also includes any elected or appointed official of a political subdivision. Clearly under the Governmental Tort Claims and Insurance Reform Act, and for purposes of its definition of "employee", the Board of Trustees of Grant Memorial Hospital are an employee of the Grant County Commission.

Further, Petitioner attempts to weave into their second argument of the aforesaid petition that the Grant County Commission is somehow excluded due to Grant Memorial Hospital being expressly excluded from the definition of "political subdivision" pursuant to W.Va. Code § 29-12A-3(c), which states "that hospitals of a political subdivision and their employees are expressly excluded from the provisions of this article." The exclusionary language omits the Board of Trustees and CEO of Grant Memorial Hospital, as standalone legal entity, from being able to raise the statutory protections under the Governmental Tort Claims and Insurance Reform Act, like the



Grant County Commission, it does not change the definition of “employee” as set forth in the Act. The Board of Trustees and CEO of Grant Memorial Hospital are both defined as “employee” under the Governmental Tort Claims and Insurance Reform Act. The Grant County Commission can assert protections under the Governmental Tort Claims and Insurance Reform Act. Whereas, the Board of Trustees and CEO of Grant Memorial Hospital cannot assert the same protections. The distinction in the definitions is on who may qualify for the protections of the said Act. It does not destroy the principal-agent relationship between the Grant County Commission (“employer”) with the Board of Trustees and CEO of Grant Memorial Hospital (“employee”). In the claims asserted by the Respondent, after the discovery process has been completed and facts gathered, the Petitioner may be able to assert immunity protections to a claim or claims in the Respondent’s Complaint that would not pertain to the Board of Trustees and CEO of Grant Memorial Hospital at that time treating them differently. It is premature to grant a motion to dismiss at this time until such discovery has been completed.

The Grant County Commission is vicariously liable for the actions of the board of trustees and CEO of the Grant Memorial Hospital, pursuant to any protections it may have under the Governmental Tort Claims and Insurance Reform Act. The Grant County Circuit Court did not commit an error by accurately interpreting the law by denying the motion to dismiss by Petitioner. Granting any type motion would be premature.

Additionally, this Court with its recent decision in *Burke v. Wetzel Cty. Comm’n*, 240 W.Va. 709, 815 S.E.2d 520 (2018) supports Respondent’s claims that the Grant County Commission can be held vicariously liable for the conduct of the Board of Trustees and CEO of the Grant Memorial Hospital as set forth in the complaint.

"The policy of the rule is thus to decide cases upon their merits, and if the complaint states a claim upon which relief can be granted under any legal theory, a motion under Rule 12(b)(6) must be denied." *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158-59 (1978) (citing *United States Fidelity & Guaranty Co. v. Eades*, 150 W. Va. 238, 144 S.E.2d 703 (1965).)

However, essential material facts must appear on the face of the complaint. *Fass v. Nowasco*, 177 W. Va. 50, 52, 350 S.E.2d 562, 563 (1986) (citing *Greschler v. Greschler*, 71 A.D.2d 322, 325, 422 N.Y.S.2d 718 (1979)).

The complaint must set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exist. *Fass*, 177 W. Va. at 52, 350 S.E.2d at 563 (citing *German v. Killeen*, 495 F.Supp. 822, 827 (E.D.Mich.1980); *see also Jenkins v. McKeithen*, 395 U.S. 411, 423-24, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969); W. Va.R.Civ.P. 8(a)).

Respondent asserted a Whistle-Blower Discrimination and/or Retaliation claim; a Patient Safety Act Discrimination and/or Retaliation claim; a Human Rights Act Retaliation claim; and an Intentional Infliction of Emotional Distress claim. All four counts have been properly pled and no errors alleged regarding the same.

## **CONCLUSION**

When a Court is presented with a Motion to Dismiss, then it must construe the complaint in the light most favorable to the Plaintiff, taking all allegations as true, which warrants a denial of the Grant County Commission's Motion to Dismiss. The Grant County Commission is vicariously liable for the conduct of the Chief Executive Officer and the Board of Trustees of Grant Memorial Hospital by virtue of the fact that Grant County Commission created and owns the hospital pursuant to W.Va. Code §7-3-14 and has the exclusive appointment power of its Board of

Trustees pursuant to W.Va. Code §7-3-15, Grant Memorial Hospital is defined as an employee of the Grant County Commission pursuant to W.Va. Code § 29-12A-3 of the Governmental Tort Claims and Insurance Reform Act. The Grant County Commission is vicariously liable for the conduct of Grant Memorial Hospital pursuant to W.Va. Code § 29-12A-4(c) of the Governmental Tort Claims and Insurance Reform Act. Under the limited facts and law presented, the Circuit Court has jurisdiction over the subject matter in this action and did not exceed its legitimate powers by denying the Petitioner's motion to dismiss.

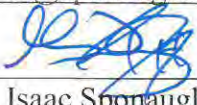
### **PRAYER FOR RELIEF**

For the aforesaid reasons, Respondent respectfully requests that the Supreme Court of Appeals that the Petitioner's Petition for Writ of Prohibition be DENIED.

Dated: September 14, 2020.

Respondent, Kim Linville  
By Counsel

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## VERIFICATION

STATE OF WEST VIRGINIA

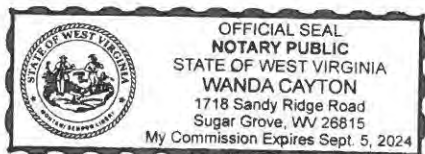
COUNTY OF PENDLETON, to-wit:

I, G. Isaac Sponaugle, III, Counsel for Respondent Kim Linville, named in the foregoing *Summary Response*, being first duly sworn, say that the facts and allegations set forth therein are true and correct, except insofar as they are therein stated to be upon information and belief, and insofar as therein stated to be upon information and belief, they believe them to be true and correct.

G. Isaac Sponaugle, III

Taken, sworn to and subscribed before me, a Notary Public in and for the county and state aforesaid, this the 14<sup>th</sup> day of September 2020.

My commission expires Sept. 5, 2024.



NOTARY PUBLIC

## CERTIFICATE OF SERVICE

I, G. Isaac Sponaugle, III, Counsel for Respondent Kim Linville, do certify that a true copy of the foregoing *Summary Response* was placed in the United States Mail, postage prepaid, on this 14<sup>th</sup> day of September 2020 and served upon the following:

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Honorable Lynn A. Nelson  
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Respondent Judge



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