

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION II

/ a minor, by and through her
Guardian and next friends, SARAH FOX and
DANIEL FOX, individually,

Plaintiffs,

v.

Civil Action No. 20-C-101
Judge Cindy S. Scott

WEST VIRGINIA UNIVERSITY
HOSPITALS, INC., d/b/a RUBY
MEMORIAL HOSPITAL,

Defendant.

**ORDER DENYING DEFENDANT'S PETITION FOR DECLARATORY JUDGMENT
AND MOTION TO DISMISS**

On February 1, 2021 came the Plaintiffs by counsel, Alan H. Peter, Michael G. Simba and Kevin M. Pearl, all of whom appeared via Microsoft Teams; and came the Defendant by counsel, Christine S. Vaglianti who appeared in person, and Kara Rosenthal, who appeared via telephone, for a duly noticed hearing on West Virginia University Hospitals, Inc.'s Petition for Declaratory Judgment and Motion to Dismiss and Strike Plaintiffs' Amended Complaint (Count II (h) Through (k)).

After considering the briefs submitted by counsel, reviewing legal authority, and hearing oral argument, the Court hereby DENIES West Virginia University Hospitals, Inc.'s Petition for Declaratory Judgment, and DENIES West Virginia University Hospitals, Inc.'s Motion to Dismiss and Strike Plaintiffs' Amended Complaint (Count II (h) Through (k)).

In support of its denial of Defendant's Petition for Declaratory Judgment and Motion to Dismiss and Strike Plaintiffs' Amended Complaint (Count II (h) Through (k)), the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. [redacted] was born at West Virginia University Hospitals, Inc. ("WVUH") on October 12, 2017.

2. Plaintiffs filed their Complaint on April 6, 2020. Count I alleges Medical Negligence/Vicarious Liability; Count II alleges Corporate Negligence; and Count III alleges Loss of Services and Parental Loss of Consortium.

3. Plaintiffs allege that a nurse employed by WVUH failed to properly prime intravenous tubing, pump and/or equipment and negligently allowed for the introduction of air bubbles into the intravenous equipment system, which then flowed into a peripheral intravenous line and were infused into [redacted] venous blood and delivered to her heart and brain. *Complaint, ¶ 15.*

4. Plaintiffs allege that as a result of alleged medical negligence by WVUH's agents, servants and employees, [redacted] is neurologically impaired and requires 24-hour care. *Complaint, ¶¶ 40, 49.*

5. Based on these same underlying facts, Plaintiffs allege in Count II that [redacted] was injured as a result of WVUH's "corporate negligence," particularly WVUH's alleged negligent hiring and/or retaining of agents, servants and/or employees; negligent staffing of the neonatal intensive care unit (NICU); negligent failure to train NICU staff; negligent failure to supervise NICU staff; negligent failure to have proper protocols and procedures in place in the NICU to prevent injuries such as those allegedly sustained by [redacted] failure to protect [redacted]

and, failure to prevent, eliminate or correct the intravenous infusion of air. *Complaint, Count II, ¶¶ 54-56.*

6. Based on these same underlying facts, Plaintiffs assert a claim for Loss of Services and Loss of Parental Consortium. *Complaint, Count III, ¶¶ 57-60.*

7. On or about June 8, 2020, Defendant WVUH filed an Answer and Petition for Declaratory Judgment. The Petition asks this Court to declare that West Virginia Code §55-7B-1 *et seq.*, the Medical Professional Liability Act ("MPLA"), is applicable to the allegations asserted in Count II of the Complaint, designated by the Plaintiffs as "Corporate Negligence."

8. On or about October 26, 2020, Plaintiffs amended Count II of their Complaint to assert the following additional alleged acts of "corporate negligence:" failure to purchase and utilize air filters for its pediatric peripheral intravenous systems; failure to identify in the discharge summary the iatrogenic air embolism as the cause of / cardiac arrest and subsequent injuries; spoliation of peripheral line tubing used at the time of the infusion which resulted in the air embolism; and, failure to report any "sentinel event" to the Joint Commission or West Virginia Department of Health and Human Resources. *Amended Complaint, Count II, Paragraph 55 (h) through (k).* Plaintiffs did not set forth any additional or different facts underlying these new alleged acts of corporate negligence but, rather, incorporated by reference the allegations in paragraphs 1-60 of the original Complaint.

9. Plaintiffs did not serve on WVUH a Notice of Claim or screening Certificate of Merit before filing the Amended Complaint.

10. On or about November 6, 2020, Defendant WVUH filed a Motion to Dismiss and Strike Plaintiffs' Amended Complaint, Count II (h) through (k).

CONCLUSIONS OF LAW

1. Pursuant to West Virginia Code Section 55-13-1, *et seq.*, the Court "shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. . . . and such declarations shall have the force and effect of a final judgment or decree."

W. Va. Code § 55-13-1. Generally, the aim of a declaratory judgment action is to avoid the expense and delay which might otherwise result, and in securing in advance a determination of legal questions that is then given legal effect. See Carvey v. West Virginia State Bd. of Educ., 206 W. Va. 720, 527 S.E.2d 831 (1999).

2. "In deciding whether a justiciable controversy exists sufficient to confer jurisdiction for purposes of the Uniform Declaratory Judgment Act, West Virginia Code §§ 55-13-1 to -16, a circuit court should consider the following four factors in ascertaining whether a declaratory judgment action should be heard: (1) whether the claim involves uncertain and contingent events that may not occur at all; (2) whether the claim is dependent upon the facts; (3) whether there is adverseness among the parties; and (4) whether the sought after declaration would be of practical assistance in settling the underlying controversy to rest." Syl. Pt. 4, Husted on Behalf of Adkins v. Ashland Oil, Inc., 197 W. Va. 55 (1996).

3. "Health care means: (1) Any act, service or treatment provided under, pursuant to or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment; (2) Any act, service or treatment performed or furnished, or which should have been performed or furnished, by any health care provider or person supervised by or acting under the direction of a health care provider or licensed professional for, to or on behalf of a patient during the patient's medical care, treatment or confinement, including, but not limited to, staffing, medical transport, custodial care or basic care, infection control, positioning, hydration, nutrition and

similar patient services; and (3) The process employed by health care providers and health care facilities for the appointment, employment, contracting, credentialing, privileging and supervision of health care providers." W.Va. Code § 55-7B-2(e).

4. "Medical professional liability means any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It also means other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services." W.Va. Code 55-7B-2(l).

5. "[W]hile the applicability of the MPLA is based upon the facts of a given case, the determination of whether a particular cause of action is governed by the MPLA is a legal question to be decided by the trial court." Blankenship v. Ethicon, Inc., 221 W.Va. 700, 706 n. 12 (2007).

6. "The failure to plead a claim as governed by the Medical Professional Liability Act, W. Va. Code § 55-7B-1, *et seq.*, does not preclude application of the Act. Where the alleged tortious acts or omissions are committed by a health care provider within the context of the rendering of 'health care' as defined by W. Va. Code § 55-7B-2(e), the Act applies regardless of how the claims have been pled." Syl. Pt. 4, Blankenship.

7. "The critical inquiry is whether the subject conduct that forms the basis of the lawsuit is conduct related to the provision of medical care." Minnich v. MedExpress Urgent Care, Inc., 238 W.Va. 533, 538 (2017).

8. It is undisputed that Defendant WVUH is a health care facility as defined by the MPLA.

9. Defendant contends that the MPLA applies to Plaintiffs' allegations in Count II, as these allegations fall within the MPLA definition of health care as set forth in W.Va. Code § 55-7B-

2(c). Defendant also argues that the corporate negligence claims are based on the same operative facts that allegedly support the medical negligence claims.

10. Defendant further argues that the corporate negligence claims have to do with WVUH's acts or services in furtherance of the treatment of [redacted] and WVUH's employment and supervision of its employees.

11. Plaintiffs assert that the alleged corporate negligence claims fall outside the MPLA and is not subject to the caps on non-economic damages and other provisions of the MPLA.

12. Plaintiffs state that the allegations in Count II – Corporate Negligence of the Amended Complaint are claims against the Defendant for its own corporate conduct and decisions, separate from the individualized health care provided to [redacted]. Plaintiffs allege that the Defendant committed corporate negligence in making overarching corporate decisions that affected hiring, staffing, and training, and which led to a lack of proper protocols and procedures. Plaintiffs further allege that the corporate conduct at issue did not involve medical judgment and skill as related to [redacted] medical condition, but rather was corporate-level conduct outside of her condition or plan of care.

13. In addressing the four factors under the declaratory judgment act, Plaintiffs agree that an actual controversy exists that is not uncertain or contingent and that there is adverseness among the parties. Plaintiffs disagree that the declaration would be of practical assistance at this stage of the proceedings.

14. Plaintiffs acknowledge that the underlying facts of the case have already occurred. However, they argue that a justiciable controversy does not exist at this time for purposes of the Uniform Declaratory Judgment Act, as not all relevant facts are yet before the Court.

15. As such, Plaintiffs maintain that discovery has not progressed to where the Court can make a declaratory determination. The Court agrees. The Court DENIES Defendant's Petition for Declaratory Judgment at this time to allow discovery to proceed. The Court does FIND that a declaratory decree on this issue will be of practical assistance, but that it is premature at this time. Defendant may renew this Petition after discovery is more fully developed.

16. The standard applied to Rule 12(b)(6) motions is well established. In analyzing a complaint, the Court must accept the allegations as true, and construe the same in the light most favorable to the Plaintiff. "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syllabus, Flowers v. City of Morgantown, 166 W. Va. 92 (1980).

17. Defendant seeks dismissal of paragraphs (h) through (k) of Count II the Amended Complaint because they cannot be used to support a negligence claim as a matter of law. Defendants contend specifically that: (1) these allegations are governed by the MPLA and Plaintiffs failed to provide a notice of claim or screening certificate of merit before asserting these claims; (2) there is no duty to document causation of an injury in a discharge summary; (3) West Virginia does not recognize an independent tort for negligent spoliation against a party; and (4) there is no duty to report a "sentinel event" to the Joint Commission or the State Department of Health.

18. In addition, Defendant argues that the Plaintiffs cannot prove a duty, causation, and resulting injury for the claims in Count II(h), (i), and (k).

19. The Plaintiffs insist that their corporate negligence claims do not fall under the MPLA and, therefore, no pre-suit certification is required. Plaintiffs also contend that the Motion to

Dismiss is premature and that Plaintiff's allegations, taken as true at this stage in the case, establish that the decisions and conduct of the Defendant do not constitute health care.

20. The Court FINDS that there are issues that require factual development and will permit Plaintiff's claims to advance to allow discovery.

ORDER

ACCORDINGLY, based on the foregoing, the Court DENIES Defendant, West Virginia University Hospitals, Inc.'s Petition for Declaratory Judgment. It is further ORDERED that West Virginia University Hospitals, Inc.'s Motion to Dismiss and Strike Plaintiffs' Amended Complaint (Count II (h) Through (k)) is DENIED.

The Court directs the Clerk of the Circuit Court of Monongalia County to distribute certified copies of this order to the parties and/or counsel of record

ENTER: February 19, 2021



Cindy S. Scott, Chief Judge
17th Judicial Circuit, Division II.

Feb 19, 2021
101
Circuit Clerk