IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 21-0458

West Virginia University Hospitals, Inc.,
Defendant Below, Petitioner

v.

Rebecca Morris, Administratrix of the
Estate of Bryan Morris,
Plaintiff Below, Respondent

AMICUS CURIAE BRIEF OF THE BOARD OF RISK AND INSURANCE MANAGEMENT OF THE STATE OF WEST VIRGINIA IN SUPPORT OF THE PETITIONER, WEST VIRGINIA UNIVERSITY HOSPITALS, INC.

Prepared by:

Stephen M. Fowler (WVSB# 5113)
Geoffrey Cullop (WVSB# 11508)
Pullin, Fowler, Flanagan, Brown & Poe PLLC
901 Quarrier Street
Charleston, WV 25301
(304) 344-0100
sfowler@pffwv.com
gcullop@pffwv.com

Counsel for the Board of Risk and Insurance Management of the State of West Virginia, *Amicus Curiae*

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

STATUTES

CASES

OTHER

III. IDENTITY OF *AMICUS CURIAE*, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE

The Board of Risk and Insurance Management of the State of West Virginia ("BRIM") respectfully submits this brief as *amicus curiae* urging a reversal of the Circuit Court's Order Denying West Virginia University Hospitals, Inc.'s ("WVUH") Rule 12 Motion to Dismiss.[1] A primary responsibility of BRIM is to acquire casualty insurance coverage for West Virginia state agencies. BRIM acquires insurance coverage for officers and agencies of the State of West Virginia pursuant to the authority of W.Va. Code § 29-12-1, *et seq.* Such coverage includes the acquisition of medical professional liability coverage for the West Virginia University Board of Governors, through which the individually named physician defendants in this matter are provided insurance coverage.

This case poses a question of critical importance to BRIM relative to its authority and obligation to acquire adequate insurance coverage for physicians practicing in the State's medical teaching hospitals. Namely, the case calls into question the ability of BRIM to manage the risks of the physicians fully and adequately through the acquisition of adequate professional liability coverage.

As an agency of the State of West Virginia, BRIM files this *amicus curiae* brief pursuant to Rule 30(a) of the West Virginia Rules of Appellate Procedure. "The State of West Virginia or an officer or agency thereof, or a County or Municipality of the State, may file an amicus curiae brief without the consent of parties or leave of the Court." W.Va. R. of App. Pr. 30(a).

---

1 This brief has not been authored, in whole or in part, by counsel to a party in this case; nor have such counsel or parties made a monetary contribution specifically intended to fund the preparation or submission of this brief. W.Va. R. App. P. 30(e)(5).

IV. ARGUMENT

A. THE NAMED PHYSICIAN DEFENDANTS HAVE PROFESSIONAL LIABILITY COVERAGE IN AN AGGREGATE AMOUNT OF AT LEAST 1 MILLION DOLLARS AS CONTEMPLATED BY W.VA. CODE § 55-7B-9(g).

West Virginia Code § 55-7B-9(g) states, in pertinent part:

> A health care provider may not be held vicariously liable for the acts of a nonemployee pursuant to a theory of ostensible agency unless the alleged agent does not maintain professional liability insurance covering the medical injury which is the subject of the action in the aggregate amount of at least $1 million for each occurrence.

W.Va. Code § 55-7B-9(g). Thus, it is BRIM's position that this section of the West Virginia Code clearly sets forth the minimal amount of insurance coverage required to relieve health care providers from vicarious liability pursuant to ostensible agency theories.

The minimal amount of insurance coverage set forth in the statute that would relieve health care providers from vicarious liability pursuant to ostensible agency theories is $1 million dollars in the aggregate, per occurrence. The Circuit Court erred by failing to uphold this provision of the code, essentially finding that, because there are two alleged agents named in the suit, the statutory language should be changed to require at least $2 million dollars of insurance coverage in the aggregate for this occurrence. In so holding, the Circuit Court seems to focus on the number of alleged agents named in the civil action instead of the aggregate amount of insurance available for the single occurrence found in the fact pattern. This is an interpretation of the statute incompatible with the intent of the subject legislation and reversible error.

The coverage acquired by BRIM for the WVU Board of Governors that covers the named physician defendants provides $1.5 million of coverage for damages arising out of any one

occurrence for claims from a medical injury to a patient. This limit of coverage satisfies the language of W.Va. Code § 55-7B-9(g) in that it provides adequate coverage per occurrence, regardless of the number of individual defendants named in the suit.

Such coverage not only mirrors the language of the statute by providing insurance based on a single occurrence, it is also the most practical method by which BRIM can acquire insurance coverage for medical professionals under this section of the code. Simply stated, BRIM cannot predict the number of individual physician defendants that will be named in any single lawsuit by a Plaintiff. In fact, an interpretation of the statutory language whereby the insurance coverage required to relieve an institution of ostensible agency liability is tied directly to the number of individual physician defendants named in a suit invites unlimited liability exposure for the State's medical teaching hospitals via creative pleading strategies.

In other words, the Circuit Court's interpretation of the statute will lead to the naming of more and more individual defendants in suits for a single occurrence as a specific procedural strategy to set forth an ostensible agency theory in every such lawsuit, fully circumventing the intent and purpose W.Va. Code § 55-7B-9(g). More than that, the incentive for such creative pleading practices circumvents the intent and purpose of the entirety of the MPLA itself, by creating incentive for a Plaintiff to name more and more individual physician defendants in each alleged occurrence in order to make arguments for ostensible agency liability against the State's teaching medical hospitals. The purpose of the MPLA was to limit such broad exposure of medical professionals and health care providers in order to fend off the litigious conditions that previously saw a mass exit of doctors from our State.

The Circuit Court's Order opens the door to unlimited exposure to liability for the State's medical institutions, as well as an increased number of individual physicians being named as

defendants for each alleged occurrence. This resulting potential risk is one that is potentially impossible to manage, as BRIM cannot accurately predict or control the number of individual physician defendants that are named in any one lawsuit. This means that appropriate insurance coverage can never be acquired in these instances because a creative pleader can simply add an additional individual physician defendant to the Complaint in order to bring the per-physician amount of insurance coverage to an amount below the threshold found in W.Va. Code § 55-7B-9(g). For these reasons, BRIM respectfully urges this Honorable Court to reverse the Circuit Court's Order.

B. THE UNDISPUTED MEANINGS OF THE WORDS "AGGREGATE" AND "OCCURRENCE" REVEAL THAT INSURANCE COVERAGE IS PROVIDED FOR THE NAMED PHYSICIAN DEFENDANTS IN AN AMOUNT SUFFICIENT TO RELIEVE WVUH FROM LIABILITY UNDER AN OSTENSIBLE AGENCY THEORY.

The Circuit Court's Order, much like Plaintiff's arguments preceding it, conspicuously avoids any discussion of two important terms found in W.Va. Code § 55-7B-9(g). These terms are "occurrence" and "aggregate."

West Virginia Code § 55-7B-9(g) states, in pertinent part:

> A health care provider may not be held vicariously liable for the acts of a nonemployee pursuant to a theory of ostensible agency unless the alleged agent does not maintain professional liability insurance covering the medical injury which is the subject of the action in the **aggregate** amount of at least $1 million for each **occurrence**.

W.Va. Code § 55-7B-9(g) (**emphasis added**). The definitions of these two terms are key to the interpretation of this section of the code and each will be discussed in turn.

First, "occurrence" is defined by the MPLA at W. Va. Code § 55-7B-2(l):

> "Occurrence" means any and all injuries to a patient arising from health care rendered by a health care facility or a health care provider and includes any continuing, additional or follow-up care provided to that patient for reasons relating to the original health care provided,

> regardless if the injuries arise during a single date or multiple dates of treatment, single or multiple patient encounters, or a single admission or a series of admissions.

W.Va. Code § 55-7B-2(l). The word "occurrence" is one that is found in nearly every insurance policy in existence but was specifically defined by the West Virginia Legislature for purposes of the MPLA. Thus, it is clear what the legislature meant when it used the term because it is explicitly defined by the statute.

Noticeably, the MPLA definition of "occurrence" is based upon the injury of the patient. An "occurrence" explicitly includes all dates of treatment, patient encounters, and admissions of the patient, even if there are multiple such dates, encounters, or admissions. Applying this definition of "occurrence" results in analysis of insurance coverage based on the patient's injury and not the number of physicians named in a pleading. In the underlying case, the named physicians are provided with over $1 million dollars in professional liability insurance coverage for the occurrence. The Circuit Court's Order ties the professional liability insurance coverage to the number of physician defendants named in the Complaint instead of the occurrence as defined by the MPLA and should therefore be reversed.

Second, "aggregate" is not defined as a term by the MPLA and therefore the term should be given its "ordinary acceptance and significance in the meaning commonly attributed to [it]." *State v. Epperly*, 135 W.Va. 877, 884, 65 S.E.2d 488, 492 (1951), *citing* 50 Am. Jur., Statutes, Section 225. Dictionary.com defines the adjective "aggregate" as "formed by the conjunction or collection of particulars into a whole mass or sum; total; combined." *See*, (dictionary.com/browse/aggregate), accessed September 30, 2021. The same source defines the noun "aggregate" as "a sum, mass, or assemblage of particulars; a total or gross amount." *Id.*, accessed on September 30, 2021.

The Circuit Court's Order does not take the insurance coverage into account for both

physician defendants in aggregate. It does not look at the coverage that is available for them in sum, total, or combination. It does not evaluate the coverage for the total or gross amount. Instead, the Circuit Court's Order divides the coverage by the individual physician defendants named. Thus, the result of the Circuit Court's Order is that the plain meaning of the word "aggregate" is wholly ignored or abandoned, despite being clearly and explicitly adopted into the statute governing the issue.

By ignoring key terms in the governing statute, the Circuit Court's Order fails to accurately interpret and apply the statute. The result is an operation of law not intended by the legislature in its adoption of the MPLA and incentive for abuse and unlimited liability exposure through creative pleading methods. For these reasons, BRIM respectfully urges this Honorable Court to reverse the Circuit Court's Order.

V. CONCLUSION

In conclusion, the Circuit Court's Order holding that each named physician defendant is required to have at least $1 million dollars in professional liability insurance coverage in order to relieve WVUH from liability under a theory of ostensible agency is in error because it fails to appropriately apply the definitions of "aggregate" and "occurrence," and encourages creative pleading by creating an incentive to name multiple individual physician defendants in a complaint in order to overcome the W.Va. Code § 55-7B-9(g) restriction on claims based on ostensible agency theories of liability. For these reasons, BRIM respectfully urges this Honorable Court to reverse the Circuit Court's Order.

BOARD OF RISK AND INSURANCE MANAGEMENT OF THE STATE OF WEST VIRGINIA
By Counsel,

STEPHEN M. FOWLER (WVSB # 5113)
GEOFFREY CULLOP (WVSB # 11508)

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
JamesMark Building
901 Quarrier Street
Charleston, WV 25301
Telephone: (304) 344-0100
Facsimile: (304) 342-1545

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 21-0458

West Virginia University Hospitals, Inc.,
Defendant Below, Petitioner

v.

Rebecca Morris, Administratrix of the
Estate of Bryan Morris,
Plaintiff Below, Respondent

CERTIFICATE OF SERVICE

The undersigned counsel for the Board of Risk and Insurance Management of West Virginia, does hereby certify that a true copy of the foregoing ***"Amicus Curiae Brief in Support of the Petitioner, West Virginia University Hospitals, Inc."*** was served upon counsel of record by placing the same in an envelope, properly addressed with postage fully paid and depositing the same in the U.S. Mail, on this the **30th day of September, 2021**.

Arden J. Curry, II
Pauley Curry, PLLC
P.O. Box 2786
Charleston, WV 25330-2786

Christine S. Vaglienti
West Virginia United Health System, Inc.
Legal Services
1238 Suncrest Town Centre
Morgantown, WV 26505

Timothy R. Linkous
Linkous Law, PLLC
10 Cheat Landing, Suite 200
Morgantown, WV 26508

STEPHEN M. FOWLER (WVSB # 5113)
GEOFFREY CULLOP (WVSB # 11508)

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
JamesMark Building
901 Quarrier Street
Charleston, WV 25301
Telephone: (304) 344-0100
Facsimile: (304) 342-1545