

IN THE CIRCUIT COURT OF JACKSON COUNTY, WEST VIRGINIA

**ROSEMARY LAMBERT and
CAROLYN HINZMAN,
Individually, and as
Co-executives of the -
ESTATE OF DELMER P. FIELDS,**

Plaintiffs,

v.

**Civil Action No.: 21-C-32
Judge Lora Dyer**

**ELDERCARE OF JACKSON COUNTY, LLC
D/B/A ELDERCARE HEALTH AND REHABILITATION,
a Tennessee Company;
COMMUNITY HEALTH ASSOCIATION
D/B/A JACKSON GENERAL HOSPITAL,
a West Virginia Corporation,
IRVIN JOHN SNYDER, D.O.; and
DOE DEFENDANTS 1-5,**

Defendants.

ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS

On October 6, 2021, the Court held oral arguments on Defendants' motion to dismiss. Kelly Elswick-Hall and the Masters Law Firm LC appeared on behalf of Plaintiffs Rosemary Lambert and Carolyn Hinzman, individually and as co-executrices of the Estate of Delmer P. Fields. Mark Robinson and the law firm of Flaherty Sensabaugh Bonasso PLLC appeared on behalf of Defendant, Eldercare of Jackson County, LLC d/b/a Eldercare Health and Rehabilitation ("Eldercare"). Jace H. Goins, Christopher S. Etheredge, and the law firm of Steptoe & Johnson PLLC appeared on behalf of Defendants Community Health Association d/b/a Jackson General Hospital ("JGH") and Irvin John Snyder, D.O. ("Dr. Snyder"). Shereen McDaniel and the law firm of Flaherty Sensabaugh Bonasso PLLC, appeared as co-counsel for Dr. Snyder.

After hearing arguments of counsel and considering Defendant Eldercare's Motion to Dismiss and Defendants JGH and Dr. Snyder's Motions to Dismiss (collectively "Defendants' Motions to Dismiss"), Plaintiffs' Response, and Defendants' Replies, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. On January 20, 2020, Eldercare admitted Plaintiffs' Decedent, Delmer P. Fields (the "Decedent" and/or "Mr. Fields") for rehabilitation.
2. In March 2020, Dr. Snyder treated patients at JGH and Eldercare.
3. Plaintiffs allege Dr. Snyder treated multiple residents of Eldercare for fevers but failed to take certain precautionary steps for COVID-19, including placing sick residents into isolation.
4. Plaintiffs further allege on April 9, 2020, they expressed concerns to Eldercare about COVID-19 and its potential impact on Decedent.
5. On April 13, 2020, Plaintiff Lambert moved Decedent from Eldercare and brought him home.
6. On April 14, 2020, Decedent tested positive for COVID-19 at JGH.
7. Plaintiffs assert JGH's emergency room evaluation concluded Decedent had diminished breath sounds bilaterally with wheezing in the lower lung fields and atelectasis (i.e., complete or partial collapse of the lung).
8. While admitted to JGH, Dr. Snyder treated Decedent for a urinary tract infection ("UTI") and placed him on oxygen therapy.

9. On April 18, 2020, Decedent died. JGH's records concluded Decedent died from "multifactorial secondary to complications of aging and dementia exacerbated by acute COVID positive state, UTI with E. coli, and cerebral hemorrhage."

10. Decedent's death certificate lists Decedent's immediate cause of death as "COVID-19."

11. On May 17, 2021, Plaintiffs filed their Complaint, alleging the following claims: (i) fraud, misrepresentation and fraudulent concealment, (ii) civil conspiracy to commit fraudulent concealment, (iii) breach of duties of care, (iv) elder abuse, (v) violations of the Patient Safety Act, and (vi) invalidity of an arbitration clause between Decedent and Eldercare. Plaintiffs' Complaint includes 184 paragraphs.

12. Plaintiffs' Complaint alleges Eldercare, JGH, and Dr. Snyder from late March 2020 through the date of death, April 18, 2020 intentionally failed to report a COVID outbreak at the Eldercare facility. Complaint, 74. In support of that statement, Plaintiffs reference a report stating in August of 2019, governmental inspectors determined that defendant Eldercare had failed to report a prior infectious outbreak at its facility to the local health department and, in fact, did not report it until after inspectors arrived for a surprise inspection of the facility on August 19, 2019. *Id.*

13. Plaintiffs further allege the following:

- i. Defendant Eldercare intentionally downplayed the outbreak at its facility, refusing to test residents when family members requested it, misrepresenting how many residents and staff were COVID positive or suspected COVID positive, and falsely representing at times that none of the staff had tested positive. *Id.* at 80
- ii. Defendants Eldercare and Snyder intentionally, fraudulently, maliciously and otherwise wrongfully misrepresented, concealed and downplayed the dangerous and deadly outbreak of COVID-19 at the defendant Eldercare

- facility to the plaintiffs, government officials, their employees, and others. *Id.* at 94.
- iii. Defendants intentionally failed to disclose, first the fact that there was COVID-19 in the facility, then that there was a serious outbreak of COVID-19, and then that Mr. Fields had been exposed to COVID-19, then that Mr. Fields was likely COVID-19 positive. These facts were known to defendants and are not facts that plaintiffs could have reasonably discovered. *Id.* at 95.
 - iv. Defendants Eldercare, Snyder and DOES 1-5 intentionally, fraudulently, maliciously and otherwise wrongfully conspired to conceal the dangerous and deadly outbreak and extent of the outbreak of COVID-19 at the defendant Eldercare facility and engaged in acts in furtherance of said conspiracy by lying to employees, the plaintiffs, government officials and others, by refusing to test residents symptomatic with COVID-19 so that they could deceptively understate the severity of the outbreak, by intimidating and firing multiple employees who voiced concerns or who defendant Eldercare believed voiced concerns, and by refusing to test all residents and staff until after the whistle was blown upon them and government intervention was imminent. *Id.* at 105.

14. Plaintiffs assert the acts, conduct and omissions of defendants were reckless, intentional, malicious, and grossly negligent, such that plaintiffs are entitled to punitive damages against them. *Id.* at 116.

15. Based on their factual allegations, Plaintiffs assert “Defendants wrongfully, recklessly, intentionally and maliciously refused to acknowledge the dangerous outbreak, refused to test, actively attempted to cover up the outbreak and, therefore, did not provide for proper treatment of plaintiff’s decedent and others.” *Id.* at 147.

16. Plaintiffs also acknowledge Eldercare and JGH were, “at the time of the occurrences herein, . . . engaged in the business of providing health care services to the public, including [Decedent],” and that Dr. Snyder, “at the times complained of herein, was a physician engaged in the business of providing health care services to the public, including [Decedent].”

17. Defendants filed their motion to dismiss on July 6, 2021 asserting the Act provides complete immunity to all of Plaintiff’s claims.

18. Plaintiffs responded in opposition on September 23, 2021 asserting Defendants' intentional, and malicious conduct falls under the exception to the immunity of the Act.

19. Plaintiffs further argue they "expressly pleaded that these wrongful acts and omissions of the defendants constituted actual malice toward plaintiffs and/or such acts and omissions amounted to an intentional, conscious, reckless and outrageous indifference to the health, safety and welfare of Mr. Fields." Compl. 163.

20. Defendants assert "[w]hile Plaintiffs allege, generically, that Defendant acted intentionally or maliciously, the Plaintiffs' factual allegations, when examined in-depth, fail to establish that Eldercare acted in a manner that can be proven as "intentional conduct with actual malice." Def. MTD p. 14.

21. Defendants further request this Court at this stage of the proceeding to adopt "a standard for purposes of the [Act] that defines 'intentional conduct with actual malice' as intent to bring about a result which will invade the interest of another in a way that the law forbids in a manner that shows an intent to inflict an injury or under circumstances that the law will imply an evil intent."

Conclusions of Law

I. Standard of Review

The Supreme Court of West Virginia recently provided a thorough roadmap when a trial court grants or denies a party's motion to dismiss in *Mountaineer Fire & Rescue Equipment, LLC v. City National Bank*, 8954 S.E.2d 870 (2020). *Rule 12(b)(6) of the West Virginia Rules of Civil Procedure* dictates that courts liberally construe pleadings so 'as to do substantial justice.'" *Accord, Cantley v. Lincoln Cty. Comm'n*, 221 W. Va. 468, 470, 655 S.E.2d 490, 492 (2007) ("A trial court considering a motion to dismiss under Rule 12(b)(6) must liberally construe

the complaint so as to do substantial justice.”). The Supreme Court concluded by stating “[t]he 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.” Syl. pt. 3, *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, (1977).

Finally, this Court places a great deal of weight on the following guidance: “[a] court reviewing the sufficiency of a complaint should view the motion to dismiss with disfavor, should presume all of the plaintiff’s factual allegations are true, and should construe those facts, and inferences arising from those facts, in the light most favorable to the plaintiff. *Chapman*, 160 W. Va. at 538, 236 S.E.2d at 212.

II. COVID-19 Jobs Protection Act of 2021.

The COVID-19 Jobs Protection Act of 2021, W. Va. Code § 55-19-1, et seq. (hereinafter “the Act”), provides in applicable part as follows: “[t]his article shall be known and may be cited as the COVID-19 Jobs Protection Act.” Section 55-19-2 states (a) The West Virginia Legislature finds:

- (1) The novel coronavirus, also known as COVID-19, has been deemed a pandemic and the President of the United States has declared a national emergency.
- (2) The Governor issued a State of Preparedness on March 4, 2020, to allow agencies to coordinate and create necessary measures to prepare for COVID-19.
- (3) The Governor proclaimed a State of Emergency on March 16, 2020, finding that the COVID-19 pandemic constitutes a disaster under §15-5-2 of this code.
- (4) To protect public health, safety, and welfare, all nonessential businesses were directed to cease all activities except for minimum basic operations in the state.

- (5) To protect public health, safety, and welfare, and to ensure the health care system is capable of serving all citizens in need, especially those at high risk and vulnerable to COVID-19, all West Virginia residents were directed to stay at home unless performing an essential activity.
- (6) Health care providers have operated with shortages of medical personnel, equipment, and supplies while responding to COVID-19 and were prohibited by Executive Order No. 16-20 from engaging in elective medical procedures.
- (7) There is a critical need for personal protective equipment, such as masks, respirators, ventilators, and other medical equipment and products designed to guard against or treat COVID-19.
- (8) Manufacturers have substantially increased production of essential products and have made products outside their ordinary course of business to aid in response to COVID-19.
- (9) West Virginia is reopening its businesses, including restaurants, retail stores, office buildings, fitness centers, hotels, hair and nail salons, and barber shops, as well as religious institutions.
- (10) Lawsuits are being filed across the country against health care providers and health care facilities associated with care provided during the COVID-19 pandemic and illness of health care workers due to exposure to COVID-19 while providing essential medical care, and against businesses seeking damages associated with a person's exposure to COVID-19.
- (11) The threat of liability poses an obstacle to efforts to reopen and rebuild the West Virginia economy and to continue to provide medical care to impacted West Virginians.
- (12) The diagnosis and treatment of COVID-19 has rapidly evolved from largely uncharted, experimental, and anecdotal observations and interventions, without the opportunity for the medical community to develop definitive evidence-based medical guidelines, making it difficult, if not impossible, to identify and establish applicable standards of care by which the acts or omissions of health care providers can fairly and objectively be measured.

(b) It is the purpose of this article to:

- (1) Eliminate the liability of the citizens of West Virginia and all persons including individuals, health care providers, health care facilities, institutions of higher education, businesses, manufacturers, and all persons

whomsoever, and to preclude all suits and claims against any persons for loss, damages, personal injuries, or death arising from COVID-19.

- (2) Provide assurances to businesses that reopening will not expose them to liability for a person's exposure to COVID-19.

Section 55-19-7, Exception, states in applicable part "the limitations on liability provided in this article shall not apply to any person, or employee or agent thereof, who engaged in intentional conduct with actual malice."

Defendants acknowledge the exception in W. Va. Code 55-19-7 may permit a plaintiff to recover damages if plaintiff can prove "intentional conduct with actual malice". Defendants also acknowledge the West Virginia Legislature did not include a definition of the phrase "intentional conduct with actual malice" in the Act. Instead, Defendants argue "[a]ctual malice" is defined as "[t]he deliberate intent to commit an injury, as evidenced by external circumstances." *Actual Malice*, *Black's Law Dictionary* (10th ed. 2014). Defendants further assert this Court should adopt "a standard for purposes of the [Act] that defines 'intentional conduct with actual malice' as intent to bring about a result which will invade the interest of another in a way that the law forbids in a manner that shows an intent to inflict an injury or under circumstances that the law will imply an evil intent." In other words, Defendants request this Court to adopt a standard that is more fitting for a criminal standard of first-degree murder versus a civil standard of intentional conduct. This Court **FINDS** no law to support a finding of a standard proposed by Defendants of "evil intent" and therefore declines to adopt such a standard.

Instead, this Court adopts the standard for intentional and malicious conduct adopted in *Hayseeds, Inc. v. State Farm Fire & Cas.* where the West Virginia Supreme Court defined actual malice as follows:

By "actual malice" we mean that the company actually knew that the policyholder's claim was proper, but **willfully, maliciously and**

intentionally denied the claim. We intend this to be a bright line standard, highly susceptible to summary judgment for the defendant, such as exists in the law of libel and slander, or the West Virginia law of commercial arbitration. *See, e.g., N.Y. Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and *Board of Education v. Miller*, 160 W.Va. 473, 236 S.E.2d 439 (1977). Unless the policyholder is able to introduce evidence of intentional injury—not negligence, lack of judgment, incompetence, or bureaucratic confusion—the issue of punitive damages should not be submitted to the jury.

Hayseeds, Inc. v. State Farm Fire & Cas., 177 W. Va. 323, 330–31 (1986) (emphasis added).

This Court further notes Plaintiffs' claims against Defendants arise from and are directly related to COVID-19 and the COVID-19 care and health care services which they provided, or which Plaintiffs allege they should have provided, to the Decedent in the midst of the COVID-19 global pandemic. Therefore, this Court **FINDS** the Covid-19 Act contains an immunity provision, which protects a variety of entities and professions, including healthcare providers and health care facilities, from COVID-19 related claims. Specifically, the immunity provision states that

[n]otwithstanding any law to the contrary, except as provided by this article, there is no claim against any person, essential business, business, entity, health care facility, health care provider, first responder, or volunteer for loss, damage, physical injury, or death arising from COVID-19, from COVID-19 care, or from impacted care.

W. Va. Code § 55-19-4.

This Court further **FINDS** the West Virginia Legislature made its intent clear through the following plain language:

It is the purpose of this article to [e]liminate the liability of the citizens of West Virginia and all persons including individuals, health care providers, health care facilities, institutions of higher learning, businesses, manufacturers, and all persons whomsoever, and to preclude all suits and claims against any persons for loss, damages, personal injuries, or death arising from COVID-19.

[b]ut the limitations on liability provided in this article shall not apply to any person, or employee, or agent thereof, who engaged in intentional conduct with actual malice.

W. Va. Code §§ 55-19-2, 55-19-7.

This Court notes the Act provided only one avenue for a lawsuit relating to COVID to proceed when the Legislature stated “[t]he threat of liability [arising from COVID-19] poses an obstacle to efforts to reopen and rebuild the West Virginia economy and to continue to provide medical care to impacted West Virginians.” *Id.* Based upon existing West Virginia law and the principles of statutory construction, this Court finds the only avenue for a lawsuit to survive under COVID 19 Act is for Plaintiff to prove “actual malice”. Here, Defendants ask this Court to ignore the exception to the immunities enacted by the West Virginia Legislature allowing a party to recover damages if that party can prove intentional and actual malice conduct without permitting Plaintiffs to conduct discovery to prove the evidence supports that exception. This Court further notes Defendants acknowledge an exception exists and Defendants further acknowledge Plaintiffs alleged Defendants “acted intentionally or maliciously”. Defendants without any law supporting their request ask this Court to examine **Plaintiffs’ factual allegations in-depth** and after doing so Defendants assert this Court should apply that “in-depth” review to conclude Plaintiffs “fail to establish that Eldercare acted with an evil intent to harm Mr. Fields.” This Court **FINDS** no law supports Defendants’ assertion this Court should examine the factual allegations in-depth to arrive at some form of conclusion whether the Complaint meets a new standard of creation that Plaintiffs have to plead sufficient facts to prove evil conduct.

For the purposes of the COVID-19 Act, this Court **FINDS** “actual malice” requires proof that the defendant acted with the intent to injure or harm the plaintiff and/or decedent. This Court further reiterates the West Virginia Supreme Court in a multitude of decisions has instructed trial

courts “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). Therefore, this Court **FINDS** Plaintiffs have alleged sufficient facts in the Complaint to survive a motion to dismiss.

This Court further notes Plaintiffs’ counsel at the hearing represented Plaintiff did not intend to use language in the response attacking the constitutionality of the statute. Based on Plaintiff’s representation at the hearing, this Court’s Order does not address any potential constitutional issues that may or may not arise from the passage of the Act.

WHEREFORE, Defendants Eldercare, Dr. Snyder’s Motions to Dismiss are hereby **DENIED**.

The objection(s) and exception(s) of Defendants are noted and preserved.

This Court **SHALL** enter a scheduling order establishing deadlines within the next 7 business days.

The Clerk is hereby directed to provide a certified copy of this Order to all parties or counsel of record upon entry.

Entered this 11th day of April, 2022.


Honorable Lora A. Dyer
Chief Circuit Court Judge
Fifth Judicial Circuit of West Virginia