IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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MELISSA K. BOND,
PLAINTIFF BELOW, PETITIONER

V.

UNITED PHYSICIANS CARE, INC.
D/B/A SALEM FAMILY HEALTHCARE,
DEFENDANT BELOW, RESPONDENT.

BRIEF OF RESPONDENT UNITED PHYSICIANS CARE, INC. D/B/A SALEM FAMILY HEALTHCARE

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SUMMARY OF ARGUMENT

Petitioner Melissa Bond was employed as a Medical Assistant by Respondent Salem Family Healthcare. (Appx. p. 1, ¶3) In 2021, Salem Family Healthcare implemented a "COVID-19 Vaccination Program" requiring its employees either to show proof of vaccination against COVID-19, or to apply for and receive a medical or religious exemption, by a March 15, 2022 deadline. (Appx. p. 2, ¶6) Ms. Bond chose not to receive the vaccine, opting instead to "fight for [a] medical exemption" from the vaccine requirement. (Appx. p. 2, ¶11) Her medical exemption request was considered and denied, as was her internal appeal. (Appx. p. at 2, ¶8-10) The day after the deadline, Ms. Bond received a counseling for failing to comply with the policy, (Appx. p. 3, ¶13) followed by a final written warning a week later "for noncompliance" with the vaccination program. (Appx. p. 3, ¶14) On March 29, 2022, her employment was terminated for noncompliance. (Appx. p. 3, ¶15)

Ms. Bond filed a civil action in the Circuit Court of Harrison County asserting two claims under the West Virginia Human Rights Act: (1) disability discrimination, and (2) failure to accommodate, both based on her asserted disability of "adverse reactions to vaccinations" (Appx. p. 3 at ¶19) *see* W.Va. Code §§ 5-11-1, *et seq.;* (*see generally*, Appx. p. at 1-7).[1] The "Damages" provisions of the complaint allege Ms. Bond suffered "injuries, damages and losses," and requested monetary damages for "back pay, front pay, emotional distress, anxiety, fear, embarrassment, humiliation, financial hardship" as well as "attorney fees" and "punitive damages"

[1] For purposes of this appeal, the Court need not decide whether Ms. Bond's medical condition meets the definition of "disability" under the West Virginia Human Rights Act. Ms. Bond alleged in her Complaint that she is disabled. (Appx. p.3 at ¶19) This allegation can be assumed true for purposes of this appeal.

for the "willful, wanton, and malicious and/or reckless and/or reckless disregard for the civil rights of" Ms. Bond. (Appx. p. 5 at ¶33-34)

Salem Family Healthcare moved to dismiss the complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. (Appx. pp. 9-15) The Circuit Court correctly dismissed Ms. Bond's complaint based on a straightforward application of the statutory immunity provided by the COVID-19 Jobs Protection Act, W.Va. Code §§ 55-19-1 *et seq.* In doing so, the Circuit Court relied exclusively on the allegations asserted in the Complaint and did not rely on matters outside the pleading. (Appx. p. 50-55) This appeal followed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent asserts that oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. As explained below, this case involves a straightforward application of an immunity statute to claims clearly within its ambit.

ARGUMENT

Salem Family Healthcare is immune from suit for Ms. Bond's claims under the COVID-19 Jobs Protection Act based on the plain language of the statute and its stated purpose. As set forth below, the Circuit Court did not misapply the Act, did not base its decision on matters outside the pleadings, and did not erroneously conclude that the claims as pleaded in the Complaint do not allege intentional conduct involving actual malice.

A. Standard of Review is De Novo

The West Virginia Supreme Court of Appeals has held that "[a]ppellate review of a circuit court's order granting a motion to dismiss a complaint is de novo." Syl. Pt. 1, *Barber v. Camden Clark Mem'l Hosp. Corp.*, 240 W. Va. 663, 815 S.E.2d 474 (2018) (citing Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995)). Further, it has held that "[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 [her] claim which would entitle [her] to relief." Syl. Pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W. Va. 530, 236 S.E.2d 207 (1977) (citing *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

In addition, "[t]he 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 underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition." *Albert v. City of Wheeling*, 238 W. Va. 129, 792 S.E.2d 628, 629 (2016) (citing Syl. Pt. 1, *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996)).

B. Respondent is immune from suit under the COVID-19 Jobs Protection Act.

Effective "retroactively from January 1, 2020," and applying to "any cause of action accruing on or after that date," one of the COVID-19 Job Protection Act's primary purposes is 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 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." W.Va. Code §§ 55-19-2(b)(1), W.Va. Code § 55-19-9 (emphasis added).

To carry out its stated purpose, in section four of the Act, the Legislature enacted the following broad immunity provision:

> Notwithstanding 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 (2021) (emphasis added). In section three of the Act, the phrase "arising from COVID-19" is defined, in relevant part, as follows:

> For the purposes of this article:
>
> (1) "Arising from COVID-19" means any act from which loss, damage, physical injury, or death is caused by a natural, direct, and uninterrupted consequence of the actual, alleged, or possible exposure to, or contraction of, COVID-19, including services, treatment, or other actions in response to COVID-19, and without which such loss, damage, physical injury, or death would not have occurred, including, but not limited to:
>
> (A) Implementing policies and procedures designed to prevent or minimize the spread of COVID-19 ….

W.Va. Code § 55-19-3(1) (2021). The Circuit Court correctly found that Ms. Bond's claims against Salem Family Healthcare, all of which arise from application of its COVID-19 Vaccination Program, fall squarely within the Act's scope of immunity.

Ms. Bond does not dispute that the Respondent, as a corporation engaged in health care, is both a "person" as defined by W.Va. Code § 55-19-3(11), and a "health care provider" as defined by W.Va. Code § 55-19-3(9) and thus within the scope of the Act. Furthermore, all of Ms.

Bond's claims are ones "arising from COVID-19" as defined by W.Va. Code § 55-19-3(1) because her claims arise as "a natural, direct, and uninterrupted consequence of" Salem Family Healthcare's implementation of "policies and procedures designed to prevent or minimize the spread of COVID-19," specifically its "COVID-19 Vaccination Program." Ms. Bond claims that Salem Family Healthcare violated state law by refusing to exempt her from application of its COVID-19 Vaccination Program, the obvious purpose of which is to protect the health and safety of patients, healthcare personnel, the families of patients and healthcare personnel, and the community as a whole from COVID-19 infection through vaccination. The purpose of Petitioner's suit is to seek damages for a loss of her employment as a direct consequence of Salem Family Healthcare's enforcement of its Covid-19 Vaccination Program.

Ms. Bond's claims are "claim[s]… for loss, [or] damage" under section 4 of the Act because her complaint seeks "injuries, damages and losses, including but not limited to: back pay, front pay, emotional distress, anxiety, fear, embarrassment, humiliation, financial hardship and attorney fees," (Appx. p. 5, ¶ 33) all of which are claims for losses or damages precluded by W.Va. Code § 55-19-4. Because the COVID-19 Act expressly provides that there is "no claim" for such losses or damages arising from a covered person's implementation of COVID-19 policies or procedures, the Circuit Court correctly determined that dismissal of her civil action in its entirety was appropriate.

In her second assignment of error, Ms. Bond argues that the COVID-19 Jobs Protection Act "was not intended to leave employees with disabilities without redress for discrimination and failures to accommodate." (Petitioner's Br. at 12) On the contrary, such claims are barred if, as here, they "aris[e] from COVID-19." W.Va. Code § 55-19-4. The plain language of the Act applies broadly to any "… claim against any person… for loss, damage, physical injury,

or death arising from COVID-19." W.Va. Code § 55-19-4. If a discrimination claim arises out of a covered entity's "[i]mplement[ation] [of] policies and procedures designed to prevent or minimize the spread of COVID-19," then those discrimination claims are barred, whether asserted under common law or statute. During the COVID-19 pandemic, businesses of all kinds attempted to reopen safely by implementing a myriad of policies requiring vaccination, masking, social distancing, limited visitation, capacity maximums and other unprecedented requirements intended to minimize the spread of COVID-19. The Act intended to immunize those businesses from liability for implementing such policies.[2] To the extent a customer, patient, employee, or other person suffered a loss or harm related to such policies, their claims "aris[e] from COVID-19," *see* W.Va. Code § 55-19-3(1)(a), and are barred. W.Va. Code § 55-19-4.

The Act's broad immunity applies "[n]othwithstanding any law to the contrary, except as provided by this article." W.Va. Code § 55-19-4. While the article contains an exception for certain statutory worker's compensation claims, *see* W.Va. Code § 55-19-6, it contains no exceptions for West Virginia Human Rights Act claims. Had the Legislature intended to exempt Human Rights Act claims arising from implementation of COVID-19 policies, it would have provided for such an exception.

The Petitioner also argues that "the West Virginia Covid-19 Jobs Protection Act cannot eliminate the rights provided to the disabled in the ADA," referring to the federal Americans with Disabilities Act. (Petitioner's Br. at 15) However, the Court need not reach the issue of immunity against ADA claims because the Complaint does not assert any claims under

[2] Among the stated purposes of the Act is to "Provide assurances to businesses that reopening will not expose them to liability for a person's exposure to COVID-19." W.Va. Code §§ 55-19-2(b)(2).

the ADA or any other federal law. (See Appx. pp. 1-7) The complaint asserts only state law claims under the West Virginia Human Rights Act. (*Id.*)

C. The Circuit Court did not rely on matters outside the pleading in rendering its decision.

The Petitioner's first assignment of error argues that the Circuit Court erred when it "improperly prompted and allowed consideration of facts outside the Complaint." (Petitioner's Br. at p.8, §B) Specifically, the Petitioner alleges that "the lower Court … spent extensive time discussing alleged facts not stated in the Complaint during the hearing on the Motion to Dismiss" and it "prompted and allowed discussion of Respondent's policy on giving accommodations for the COVID vaccination policy and how it was effectuated in this case." (Petitioner's Br. at p. 11). However, the record before the Court does not support the conclusion that the Circuit Court actually *relied* upon any materials outside the pleading in rendering its decision, and this Court should not assume it did.

In the Order Granting Motion to Dismiss (Appx. pp. 50-55), the Circuit Court limits its factual findings to the relevant facts contained in the Complaint, all of which were assumed true for purposes of considering a motion to dismiss under Rule 12(b)(6). (Appx. pp. 50-51) A circuit court speaks through its orders. *See State v. White*, 188 W.Va. 534, 536 n. 2, 425 S.E.2d 210, 212 n. 2 (1992) ("[H]aving held that a court speaks through its orders, we are left to decide this case within the parameters of the circuit court's order.") (citations omitted). The Circuit Court's order makes no mention of reliance on any facts, arguments or other matters raised during oral argument that were outside of the facts asserted in the pleading. The Petitioner essentially invites this Court to assume that, because the Circuit Court asked certain questions about background matters not material to the motion at a non-evidentiary hearing, that the Circuit Court must have relied on

matters outside the pleadings in rendering its decision. However, the difference between *reviewing* extraneous materials relating to a motion to dismiss and *relying* on them has been commented upon as follows:

> Further, as long as a court does not rely on extraneous documents, even though the documents may have been read, a court is not required to convert a Rule 12(b)(6) motion to a Rule 56 motion. A trial court's order may reference to material outside of the pleadings solely to provide background information, without having to convert the motion to summary judgment, so long as the order does not demonstrate a legal reliance on the information.

Louis J. Palmer, Jr., Robin J. Davis, *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(6)[8][g], p. 418 (5th ed. 2017) (footnotes omitted). Because the Circuit Court did not rely on, and excluded from its order, any matters from the oral argument outside the Complaint in rendering its decision, it did not err in not converting the motion to one for summary judgment. *See* W.Va. R. Civ. P., Rule 12(b)(7) ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to *and not excluded by* the court, the motion shall be treated as one for summary judgment….") (emphasis added).

D. Petitioner's claims do not fall within the "actual malice" exception to the COVID-19 Jobs Protection Act.

Finally, Petitioner alleges in her third assignment of error that the Circuit Court erred by not finding that her claims of discrimination and failure to accommodate fall within the COVID-19 Jobs Protection Act's "actual malice" exception. The provision Petitioner cites, W.Va. Code § 55-19-7, states:

> Excluding the provisions of §55-19-5 and §55-19-6 of this code, 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 § 55-19-7 (2021) (emphasis added). However, the Petitioner has not pleaded any facts that support a claim that Salem Family Healthcare engaged in "intentional" conduct with "actual malice." The doctrine of "actual malice" has been applied by the West Virginia Supreme Court of Appeals in only two types of claims:

> 1. claims for defamation, *see e.g., Crump v. Beckley Newspapers, Inc.,* 173 W. Va. 699, 707, 320 S.E.2d 70, 78 (1983) ("The primary manner in which a qualified privilege to publish defamatory statements may be defeated is by a showing of actual malice."); and
>
> 2. claims for violation of the West Virginia Unfair Trade Practices Act; *See Hayseeds, Inc. v. State Farm Fire & Cas.,* 177 W.Va. 323, 330-331, 352 S.E.2d 73, 80-81 (1986) ("Accordingly, punitive damages for failure to settle a property dispute shall not be awarded against an insurance company unless the policyholder can establish a high threshold of actual malice in the settlement process.)

In the defamation context, "An intent to inflict harm is not actual malice; rather, a plaintiff must prove, by clear and convincing proof, an 'intent to inflict harm through falsehood.'" *State ex rel. Suriano v. Gaughan*, 198 W. Va. 339, 354, 480 S.E.2d 548, 563 (1996) (citing *Henry v. Collins*, 380 U.S. 356, 357, 85 S.Ct. 992, 993, 13 L.Ed.2d 892, 893 (1965) (per curiam)). "It also is worth emphasizing that the actual malice standard is not satisfied merely through a showing of ill will or "malice" in the ordinary sense of the term." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 666–67, 109 S. Ct. 2678, 2685, 105 L. Ed. 2d 562 (1989) (footnote omitted) (citing *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81, 88 S.Ct. 197, 19 L.Ed.2d 248 (1967) (*per curiam*); *Henry v. Collins,* 380 U.S. 356, 85 S.Ct. 992, 13 L.Ed.2d 892 (1965) (*per curiam*).

Even if the Petitioner did intend to plead actual malice, she failed to do so. Actual malice can never be inferred; it must be specifically pleaded and proven by clear and convincing evidence. *See* Syl. Pt. 12, *Pritt v. Republican Nat. Comm.,* 210 W. Va. 446, 449, 557 S.E.2d 853,

856 (2001) ("In order for a public official or a candidate for public office to recover in a libel action, he/she must prove by clear and convincing evidence that the stated or implied facts were false.") The West Virginia Supreme Court of Appeals has held that claims requiring proof of actual malice are subject to a high level of scrutiny when challenged under a motion to dismiss. *Long v. Egnor*, 176 W. Va. 628, 636, 346 S.E.2d 778, 786 (1986) ("Unless the complaint demonstrates **on its face** sufficient facts to support the elements of a defamation action [involving a public official], the complaint should be dismissed under Rule 12(b)(6)." (emphasis added).

The Petitioner's complaint does not allege any facts that reasonably can be construed as pleading actual malice. The "Damages" provision of the complaint alleges Ms. Bond suffered "injuries, damages and losses," due to the "willful, wanton, and malicious and/or reckless and/or reckless disregard for the civil rights of" Ms. Bond. (Appx. p. 5 at ¶33-34) At most, this boilerplate statement is an allegation of "ordinary" malice, not "actual malice." *See Harte-Hanks Commc'ns, Inc., supra.* Furthermore, such allegations are nothing more the legal conclusions which the Court is free to ignore. "[A]lthough the plaintiff enjoys the benefit of all inferences that plausibly can be drawn from the pleadings, a party's legal conclusions, opinions, or unwarranted averments of fact will not be deemed admitted." *Kopelman & Assocs., L.C. v. Collins*, 196 W. Va. 489, 493, 473 S.E.2d 910, 914 (1996); see Louis J. Palmer, Jr. & Robin J. Davis, *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(6)[8] at 407. ("[A] trial court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." (footnote omitted)).

The *Hayseeds* Court articulated the rare nature of the actual malice standard when it explained that

> 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.

Id. (emphasis added) Here, Ms. Bond does not allege that Salem Family Healthcare had "actual knowledge" that her request for exemption was *proper*, yet "willfully, maliciously, and intentionally" denied the request. In fact, at oral argument, her counsel repeatedly referred to Respondent's denial of the accommodation request as simply "arbitrary." (Appx. p. 69, lns.7-10; 17-19 ("What our position is is that we are challenging the defendant's arbitrary and shadowy process of administering their policy for granting medical accommodations. … What we're talking about here is the arbitrary way of implementing their accommodations, and that's what we're discussing in this matter.")) Ms. Bond has alleged facts which, if assumed true, only establish that Salem Family Healthcare was engaged in a process of "implementing policies and procedures designed to prevent or minimize the spread of COVID-19" W.Va. Code § 55-19-3(1)(a) (2021), and was "arbitrary" or wrong in its application of the policy. Petitioner has failed to allege any facts that support an intentional act by Salem Family Healthcare that was done with actual malice. Therefore, the immunity provided by the COVID-19 Jobs Protection Act applies.

CONCLUSION

None of the Petitioner's three assignments of error are meritorious. The Circuit Court did not misapply the law and did not rely on facts outside the pleading. For the foregoing reasons, the Court should affirm the judgment of the Circuit Court dismissing Petitioner's complaint as barred by the immunity conferred upon the Respondent by the COVID-19 Jobs Protection Act.

DATED this 11th day of August 2023.

Respectfully Submitted,

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d/b/a SALEM FAMILY HEALTHCARE,
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CERTIFICATE OF SERVICE

I, Brian M. Peterson, do hereby certify that on August 11, 2023, I served the foregoing "**BRIEF OF RESPONDENT UNITED PHYSICIANS CARE, INC. D/B/A SALEM FAMILY HEALTHCARE"** on counsel of record using the Court's E-Filing System.

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