IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

REBECCA MORRIS, Administratrix of the Estate of BRYAN MORRIS,

Plaintiff,

v. **CIVIL ACTION NO. 20-C-331**

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.; WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS; DR. ALLISON TADROS, and DR. RACHEL POLINSKI,

Defendants.

ORDER

On the 15th day of April, 2021, West Virginia University Hospitals, Inc. (hereinafter "WVUH") brought on its previously filed Rule 12(b)(6) Motion to Dismiss the claims against it that are being asserted by Rebecca Morris, Administratrix of the Estate of Bryan Morris (hereinafter "Morris"). While WVUH styled its pleading as being a "Motion to Dismiss" under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, the Court finds that it is actually a Motion for Summary Judgment under Rule 56 of the West Virginia Rules of Civil Procedure because WVUH's Motion relies upon evidence outside of the pleadings to support it. (*Chapman v. Kane Transfer Co. Inc.*, 236 S.E.2d 207 (W.Va. 1997); *Atlantic Credit and Finance Special Finance Unit, LLC v. Stacey*, 2018 WL 53101172 (W.Va. 2018); *West Virginia Department of Health and Human Resources v. V.P.*, 825 S.E.2d 806 (W.Va. 2019); and *Mountaineer Fire & Rescue Equipment LLC v. City National Bank*, 2020 WL 7223357 (W.Va. Nov. 2020)). Irrespective of whether WVUH's Motion should be considered a Motion to Dismiss under Rule 12(b)(6) or a Motion for Summary Judgment, both this Court and the parties are in agreement that this matter is ripe for decision.

After reviewing the Memoranda filed by both WVUH and Morris, and after hearing oral argument, the Court makes the following findings of fact and conclusions of law.

1. This matter involves a medical malpractice action where Morris asserts that Allison Tadros, MD (hereinafter "Tadros") and Rachel Polinski, MD (hereinafter "Polinski") were negligent in their care and treatment of Bryan Morris when they treated him at the emergency room operated by WVUH at J.W. Ruby Memorial Hospital on November 23, 2019, and that their negligence proximately caused his death.

2. Tadros and Polinski were sued for their independent acts of negligence along with a vicarious liability claim against their employer, the West Virginia University Board of Governors (hereinafter "Board of Governors").

3. Although Tadros and Polinski were not employed by WVUH, suit was also brought against WVUH asserting that it was liable for the independent acts of negligence committed by Tadros and Polinski because those two physicians working in its emergency room were its ostensible agents and as a result WVUH is vicariously liable for their negligent acts under longstanding and well established law. (*Thomas v. General Hospital*, 338 S.E.2d 222 (W.Va. 1987); *Torrence v. Kusminsky*, 408 S.E.2d 684 (W.Va. 1991); and *Burless v. West Virginia University Hospitals, Inc.*, 601 S.E.2d 85 (W.Va. 2004)).

4. Subsequent to the *Thomas*, *Torrence*, and *Burless* decisions, the West Virginia Legislature enacted a limited exception to ostensible agency claims brought under the West Virginia Medical Professional Liability Act (hereinafter "MPLA"). That limited exception is found in West Virginia Code §55-7B-9(g) and provides that, "A healthcare provider may not be held vicariously liable for acts of a non-employee 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 $1,000,000 for each occurrence."

5. Tadros, Polinski, and the Board of Governors are jointly insured under a professional liability combined single limit policy in the amount of $1,500,000. Under that policy, if one physician employed by the Board of Governors commits a negligent action and injures a patient, there is $1,500,000 of coverage to insure that physician. However, if two or more physicians employed by the Board of Governors cause injury to a patient, there is not $1,500,000 of insurance available to each of them, but instead there is only a combined single limit of $1,500,000 of coverage available to all of them, regardless of how many Board of Governors' physicians may have caused a patient's injuries. The parties agree that Tadros and Polinski did not each individually have $1,000,000 of medical professional liability insurance coverage.

6. Morris asserts that the language found in §55-7B-9(g) clearly and unambiguously provides that the limited exception to the presentation of ostensible agency claims found in that Code Section is not applicable unless each alleged ostensible agent has $1,000,000 of medical professional liability coverage. Because neither Tadros nor Polinski individually had that minimum limit of insurance coverage, Morris argues that the ostensible agency claims against WVUH should be allowed to proceed. According to Morris, because the language in §55-7B-9(g) is clear and unambiguous, there is no basis for the application of rules of statutory construction to determine the statute's intent but instead the Court must apply the statute according to its express terms. (*State v. Epperly*, 65 S.E.2d 488 (W.Va. 1951); *Dunlap v. State Comp. Dir.*, 140 S.E.2d 448 (W.Va. 1965); *Appalachian Power Co. v. State Tax Dep't of W.Va.*, 466 S.E.2d 424 (W.Va. 1995); and *Amanda B. v. Hakeem M.*, 2021 WL 1153153 (W.Va. March 2021)).

7. On the other hand, WVUH asserts that "The language of West Virginia Code §55-7B-9(g) is only the beginning point" and as a result the Court must construe the statute as part of a "holistic endeavor." (WVUH Reply Memorandum, p. 10) As a part of that holistic endeavor, WVUH argues that the minimum insurance limits under §55-7B-9(g) in order to preclude ostensible agency claims should apply "without respect to the number of physicians involved" which is language does not exist within the statute itself but is language which WVUH urges the Court to read into it. To support this suggestion, WVUH then argues that, "...tying the amount of insurance coverage to the occurrence rather than to each individual provider is consistent with the way the term 'occurrence' is used in other parts of the MPLA" (WVUH Memorandum, p. 12), citing West Virginia Code §55-7B-8a, §55-7B-8b, and §55-7B-9c. (WVUH Memorandum, p. 13)

8. It is undisputed that Tadros and Polinski are agents, servants, or employees of the West Virginia University Board of Governors (hereinafter "BOG") and are insured for medical professional liability by a policy issued by the West Virginia Board of Risk and Insurance Management (hereinafter "BRIM") pursuant to West Virginia Code §29-12-1, *et seq.*

9. West Virginia Code §29-12-5(a)(1)(c) provides that BRIM "without limitation and in its discretion as it deems necessary for the benefit of the insurance program, general supervision, and control over the insurance of state property, activities, and responsibilities, including...determination of the amount or limits for each kind of coverage."

10. Pursuant to West Virginia Code §55-7H-4, BRIM "shall provide medical professional liability insurance to all of the state's medical and dental schools, state medical school, all of their clinical practice plans, and all of their...employees...in an amount to be determined by [BRIM], but in no event less than $1.5 million for each occurrence after July 1, 2015...The provision of professional liability insurance is not a waiver of immunity that any of

the foregoing entities or person may have pursuant to this article or under any other law. Any judgment obtained for a medical injury to a patient as a result of health care performed or furnished or which should have been performed or furnished, but an employee...of a state's medical school...shall not exceed the limits of medical professional liability coverage provided by [BRIM] pursuant to this section."

11. WVUH asserts that West Virginia Code §55-7H-4 is presumed to have been passed by the Legislature with full knowledge of existing law, pursuant to *State ex rel. Smith v. Maynard*, 193 W.Va. 1, 8-9; 454 S.E.2d 46 (53-54 (1994)).

12. The Court finds, as a matter of law, that the provisions of §55-7B-9(g) are clear, unambiguous, and the statutory language should be given its plain meaning. The statute itself specifically provides that, "A healthcare provider may not be held vicariously liable for acts of a nonemployee (not nonemployees) pursuant to a theory of ostensible agency unless the alleged agent (not agents) does not maintain professional liability insurance covering the medical injury which is the subject of the action in the aggregate amount of at least $1,000,000 per each occurrence." Nowhere does the statute say that the minimum insurance limits apply "without respect to the number of physicians involved" or any similar language. A plain reading of the statute instead shows that claims of ostensible agency against a medical provider, like WVUH, are only barred if each alleged ostensible agent individually has a minimum of $1,000,000 of medical professional liability insurance coverage. Tadros and Polinsky did not each have a minimum of $1,000,000 of medical professional liability coverage per each occurrence and as a result the Court finds that Morris's ostensible agency claims against WVUH are not barred by the provisions found in §55-7B-9(g).

13. Even if the Court adopted WVUH's suggestion that the language in §55-7B-9(g) is ambiguous and is thus subject to various interpretations as to its meaning, the Court's ruling would still be the same for the following reasons:

a. First, if the Court were required to construe the provisions of §55-7B-9(g), the standard of review the Court would be mandated to follow would require the Court to apply the West Virginia Supreme Court ruling in *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 647 S.E.2d 920 (W.Va. 2004). In *Phillips*, the West Virginia Supreme Court held that "...our examination of any portion of the MPLA is guided, at all times, by the recognition of the Act alters the common law and statutory rights of our citizens to compensation for injury or death... In other words, by its own terms, the entire MPLA is an Act designed to be in derogation of the common law." As a result, our Supreme Court went on to hold that when interpreting the MPLA, if there is any doubt about the meaning or intent of any provision then, because it is a statute in derogation of the common law, the MPLA must be interpreted in a manner that makes the least rather than the most change to the common law. ("Statutes which impose duties or burdens or establish rights or provide benefits that were not recognized by the common law have frequently been held subject to strict or restrictive interpretation. Where there is any doubt about their meaning or intent, they are given the effect which makes the least rather than the most change in the common law." *Phillips* at 928) Following this mandate by the West Virginia Supreme Court if this Court was required to construe this statute because its wording was allegedly ambiguous, this Court would conclude that the meaning or intent of the statute, which would make the least rather than the most change in the common law, would be an interpretation that §55-7B-9(g) requires each ostensible agent to have a minimum of $1,000,000 before claims of ostensible agency are precluded.

b. Next, the Court notes that while WVUH argues that the minimum insurance limits under §55-7B-9(g) should apply "without respect to the number of physicians involved" that language does not exist in the statute. Instead, it is language WVUH asks that the Court to read into the statute because according to WVUH "...tying the amount of insurance coverage to the occurrence rather than to each individual provider is consistent with the way the term 'occurrence' is used in other parts of the MPLA." So, in the end, if the Court was required to find that the statute's wording was ambiguous so as to require construction of the statute, WVUH's argument would rise or fall on whether it can show that its interpretation of §55-7B-9(g) is consistent with how the term "occurrence" has been used in other parts of the MPLA.

The other parts of the MPLA which WVUH suggests the Court look to in order to see how the term "occurrence" has been used are West Virginia Code §§55-7B-8a, 8b, and 9c. The problem with WVUH's suggestion that the minimum insurance limits in §55-7B-9(g) should apply "without respect to the number of physicians involved" because "...tying the amount of insurance coverage to the occurrence rather than to each individual provider is consistent with the way the term 'occurrence' is used in other parts of the MPLA" is that the Code Sections it relies upon to make that argument (§§55-7B-8a, 8b, and 8c) each contain the limiting language "regardless of the number of defendants," which wording is simply not found anywhere in §55-7B-9(g). According to West Virginia's well developed law on statutory construction, the fact that the Legislature placed the language "regardless of the number of defendants" in other portions of the MPLA but specifically excluded the same wording from §55-7B-9(g) would dictate that the Court interpret §55-7B-9(g) as requiring each alleged agent to have a minimum of $1,000,000 of professional liability insurance coverage in order to preclude a hospital from being sued under a claim of ostensible agency. As the United States Supreme Court has recognized, when the

Legislature "includes particular language in one section of a statute but omits in another section of same Act, it is generally presumed that (the Legislature) acts intentionally and purposely in the disparate inclusion or exclusion". *Russello v. United States*, 444 U.S. 16 (1983) This holding by the United States Supreme Court is consistent with the West Virginia Supreme Court's recognition that "[i]n the interpretation of statutory provisions the familiar maxim *expressio unius est ex clusio alterious*, the express mention of one thing implies the exclusion of another, applies." *Manchin v. Dunfee*, 327 S.E,2d 710 (W.Va. 1984) Thus, "[e]xplicit direction for something in one provision, and its absence in a parallel provision, implies an attempt to negate it in the second context." *Gibson v. Northfield Insurance Company*, 631 S.E.2d 598 (W.Va. 2005) In *Young v. Apogee Coal*, 753 S.E.2d 52 (W.Va. 2013) the West Virginia Supreme Court declared that "critically, we have found that [t]he *expressio unius est maxim* is premised upon an assumption that certain omissions from the statute by Legislature are intentional." "It is not for the Court arbitrarily to read into (a statute) that which it does not say. Just as Courts are not to eliminate through judicial interpretation words that were purposely included, we are obligated not to add to statute something that Legislature purposely admitted." *Banker v. Banker*, 474 S.E.2d 465 (W.Va. 1996)

As a result, it is a well-accepted cannon of statutory construction that if the Legislature explicitly limits application of a doctrine or rule to one specific factual situation and omits to apply the doctrine to another situation, Courts should assume the omission was intentional; courts should simply not infer the Legislature intended the limited rule would not apply to any other situation. *State ex rel. Riffle v. Ranson*, 464 S.E.2d 763, 770 (W.Va. 1995) And, this rule of statutory construction has specifically been used by the West Virginia Supreme Court when interpreting provisions of the MPLA where in *Phillips v. Larry's Drive – In Pharmacy, Inc.*, 647 S.E.2d 920 (W.Va. 2017) our Supreme Court confirmed that this rule of statutory legislation applies to the

interpretation of the MPLA stating "In the interpretation of statutory provisions that familiar maxim *expressio unius est exclusio alterious*, the expressed mention of one thing implies the exclusion of another, applies". *Syllabus Point 6.*

Because of the well-established West Virginia statutory construction principle of *expressio unius est exclusio* if this Court were required to construe the statute it would be required to find that because the West Virginia Legislature specifically excluded language from §55-7B-9(g) stating that the required minimum limits of professional liability insurance coverage of $1 million apply "**regardless of the number of defendants**" the Legislature must have intentionally and purposely intended that the insurance limit prerequisites not apply to the combined insurance total of insurance for all alleged ostensible agents but instead, the insurance limit prerequisites apply to each specific emergency room physician separately.

c. Finally, if this Court were required to construe §55-7B-9(g), the Court would find that an interpretation that the Code Section requires each ostensible agent to individually maintain $1,000,000 of medical professional liability coverage is the most appropriate construction because doing so is consistent with the purpose of §55-7B-9(g) which is titled "Several liability." When looked at as a whole, the purpose of §55-7B-9 was to make clear that in actions brought under the MPLA, West Virginia's traditional common law rule dealing with joint and several liability was abolished. To accomplish this goal, §55-7B-9(b) provides that, "...if the trier of fact renders the verdict for the plaintiff, the court shall enter judgment as several, but not joint, liability against each defendant in accordance with the percentage of fault attributed to the defendant by the trier of fact." As a result, under §55-7B-9, the jury must be presented with special interrogatories requiring the jury to set forth their findings as to "the percentage of fault, if any, attributable to each of the alleged defendants." A finding that §55-7B-9(g) requires that "the alleged agent [not

the 'alleged agents']" must individually maintain a minimum of $1,000,000 professional liability insurance coverage before a claim of ostensible agency against the hospital for that alleged agent's negligence is precluded is consistent with the purpose of §55-7B-9 which abolished joint and several liability. It only makes sense that the minimum insurance limits under §55-7B-9(g) apply to each individual agent because under §55-7B-9 each agent is only responsible for their own percentage of fault. It would make no sense that the West Virginia Legislature intended that you add up the "joint" insurance limits of all alleged agents under a statute that on its fact abolishes "joint" liability.

14. The Court is of the opinion that there are no genuine issues as to any material fact and for the reasons set forth herein, the Court denies WVUH's Motion and Orders that Morris's claims based upon ostensible agency may proceed. Pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, the Court directs entry of this Order as a final judgment upon Plaintiff's ability to pursue an ostensible agency claim against Defendant WVUH, notwithstanding the provision of West Virginia Code §55-7B-9(g). There is no just reason for delay, and the Court enters this judgment with an express finding that it is a final and appealable Order.

15. Upon entry of this Order, the Clerk is directed to send a certified copy to counsel of record as follows: Arden J. Curry, II, Pauley Curry, PLLC, P.O. Box 2786, Charleston, WV 25330; Timothy R. Linkous and Molly Lewis, Linkous Law, PLLC, 10 Cheat Landing, Suite 200, Morgantown, WV 26508; Christine S. Vaglienti and Melissa Oliverio, WVUHS Legal Services, 1238 Suncrest Towne Centre, Morgantown, WV 26505.

ENTERED this 12th day May, 2021.

JUDGE PHILLIP D. GAUJOT

STATE OF WEST VIRGINIA SS:

Clerk of the Circuit Court and
Monongalia County State
aforesaid, do hereby certify that the attached
Order is a true copy of the original Order
made and entered by said Court.

Circuit Clerk

ENTERED May 12 2021
BOOK ST LINE 50 Jean Friend Clerk

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