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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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WEST VIRGINIA UNIVERSITY HOSPITALS, INC., WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS, ALLISON TADROS, M.D., and RACHEL POLINSKI, M.D.

Defendants Below, Petitioners,

vs.

CASE NO.: 21-0458
From the Circuit Court of Monongalia County, West Virginia
Civil Action No.: 20-C-331

REBECCA MORRIS, Administratrix of the Estate of Bryan Morris,

Plaintiff Below, Respondent.

PETITIONERS' BRIEF

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

I. ASSIGNMENTS OF ERROR

a. The Circuit Court Erred In Ruling That Plaintiff Has A Viable Ostensible Agency Claim Against WVUH Pursuant To West Virginia Code § 55-7B-9(g) Notwithstanding That The Physician Defendants, Who Are Not Employees Of WVUH, Have Available Professional Liability Insurance Covering The Single Medical Injury Which Is The Subject Of The Action In The Aggregate Amount Of $1 Million For Each Occurrence.

b. The Circuit Court Erred In Ruling That Plaintiff Has A Viable Ostensible Agency Claim Against WVUH Notwithstanding That The Physician Defendants, Who Are Employees Of A State Medical School, Have Available Professional Liability Insurance In An Amount Of At Least $1.5 Million Per Occurrence As Required By West Virginia Code § 55-7H-4.

c. The Circuit Court Erred In Ruling That Plaintiff Has A Viable Ostensible Agency Claim Against WVUH Because After the Exhaustion Of The Required Per Occurrence Limits Made Available To The BOG, Dr. Tadros and Dr. Polinski, These Defendants Are Immune From Liability. Given The Undisputed Availability Of Insurance Limits As Required By West Virginia Code §§ 55-7B-9(g) And 55-7H-4, The Circuit Court Cannot Circumvent The Immunity Granted To These Defendants By Subjecting WVUH, A Private Entity, To An Ostensible Agency Claim.

II. STATEMENT OF CASE

a. FACTS

On November 23, 2019, Bryan Morris presented to MedExpress in Morgantown, Monongalia County, West Virginia for the acute onset of chest and neck pain. Following evaluation and some diagnostic testing at MedExpress, Mr. Morris was transported by ambulance to the emergency department at WVUH. Upon arrival at the WVUH emergency department, Mr. Morris came under the care of Dr. Allison Tadros, a faculty physician, and Dr. Rachel Polinski, a resident physician.[1] Both Dr. Tadros and Dr. Polinski are employees of the

[1] Appendix ("APP") 000001-000010.

BOG and are insured for claims of medical negligence by a policy of insurance provided by the West Virginia Board of Risk and Insurance Management ("BRIM").[2] Neither Dr. Tadros nor Dr. Polinski are employed by, or insured by, WVUH.

Plaintiff/Respondent contends that Dr. Tadros and Dr. Polinski should have recognized that Mr. Morris was experiencing a potential aortic dissection at the time he was being treated in the WVUH emergency department. Plaintiff/Respondent further contends that Dr. Tadros and Dr. Polinski should have ordered a CT angiogram; that the CT angiogram would have detected the presence of the aortic dissection; that life-saving surgical treatment of the aortic dissection would have been provided; and, that Mr. Morris would not have died on November 24, 2019, the day after being discharged from the WVUH emergency department by Dr. Tadros and Dr. Polinski.[3]

b. PARTIES

Plaintiff/Respondent: Plaintiff/Respondent is the wife of the late Bryan Morris and Administratrix of his estate.[4]

Defendants/Petitioners BOG, Dr. Tadros and Dr. Polinski: Dr. Tadros and Dr. Polinski are employees of the BOG. Dr. Tadros is a faculty physician for the West Virginia University School of Medicine ("WVU SOM"). Dr. Polinski is a resident physician, whose care and treatment of Mr. Morris in the WVUH emergency department was supervised by Dr. Tadros. Both Dr. Tadros and Dr. Polinski examined and evaluated Mr. Morris while he was in the WVUH Emergency Department on November 23, 2019. The Complaint alleges violations of the standard of care by Dr. Tadros and Dr. Polinski in their care and treatment of Mr. Morris. The

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[2] APP 000011-000015.

[3] APP 000001-000010.

[4] APP 000001.

Complaint also alleges vicarious liability on the part of the BOG as the employer of Dr. Tadros and Dr. Polinski.[5]

The BOG is the governing board of West Virginia University, which includes the WVU SOM. The BOG has the following powers and duties with respect to WVU and its SOM, among others:

i. Determine, control, supervise and manage financial, business and education policies and affairs;

ii. Employ all faculty and staff. The employees operate under the supervision of the President of WVU, but are employees of the BOG;

iii. Maintain a plan to administer a consistent method of conducting personnel transactions, including but not limited to, hiring, dismissal, promotions, changes in salary or compensation and transfers;

iv. The BOG, its activities and its employees are insured against losses by insurance purchased by [BRIM];[6]

v. The BOG and its agents, servants and employees are immune from liability after the exhaustion of insurance limits purchased by [BRIM].[7]

Defendant/Petitioner WVUH: It is undisputed that WVUH does not, and did not, employ Dr. Tadros or Dr. Polinski. Likewise, WVUH does not and did not insure the BOG, WVU SOM, Dr. Tadros, or Dr. Polinski for alleged acts of medical negligence. The Complaint, which is subject to the West Virginia Medical Professional Liability Act, W.Va. Code § 55-7B-1 *et seq.* ("MPLA"), makes no allegations of negligence against WVUH, a WVUH employee, or

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[5] APP 000001-000010.

[6] W.Va. Code § 29-12-1 *et seq.*

[7] W.Va. Code § 18-11C-7; *Pittsburgh Elevator Co. v. WVU Board of Regents,* 172 W.Va. 743, 310 S.E. 2d 675 (1983). *See also* W.Va. Code § 55-7H-3 with respect to immunity afforded to the employees of state medical schools after the limits of insured coverage procured by BRIM arising from a medical injury to a patient, including death resulting, in whole or in part, from the medical injury, while acting within the scope of their authority or employment for a state medical school. The provisions of W.Va. Code § 55-7H-3 apply to the acts and omissions of all full-time or part-time faculty members, residents, fellows, and students, among others.

group of WVUH employees.[8] The Complaint asserts only that WVUH is liable for the alleged negligence of Dr. Tadros and Dr. Polinski under a theory of ostensible agency by "virtue of the fact that Dr. Tadros and Dr. Polinski did not individually maintain at least $1 million of medical professional liability coverage."[9]

Until 1984, the University Hospital was owned and operated by the State of West Virginia. In 1984, the West Virginia Legislature mandated the creation of WVUH to be organized as a nonstock, not-for-profit corporation under the general corporation laws of the state for the purpose of 1) facilitating health sciences education and research; 2) providing patient care, including specialized services not widely available elsewhere in West Virginia, in the most efficient manner and at the lowest practicable cost; and, 3) providing independence and flexibility of management and funding and assuring future economy of operation under changing conditions by separating the business and service functions of the corporation's facilities from the educational functions, and by providing that such facilities will be self-sufficient, removing the tax burden from the state.[10]

The Legislature made the following findings with respect to WVUH:[11]

i. The purpose of the existing facilities [University Hospital] are to facilitate the clinical education and research of the health science schools and to provide patient care, including specialized services not widely available elsewhere in West Virginia. The eventual termination of services in lieu of replacement or

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[8] APP 000001-000010.

[9] APP 000007-000008.

[10] Syl. Pt. 1, *Queen v. WVUH,* 179 W.Va. 95, 365 S.E. 2d 375 (1987).

[11] These findings are the statement of public policy supporting the creation of WVUH and its vital role in medical education, research and patient care. "The sources determinative of public policy are, among others, our federal and state constitutions, our public statutes, our judicial decisions, the applicable principles of the common law...". *Cordle v. General Hugh Mercer Corp.,* 174 W.Va. 321, 325, 325 S.E. 2d 111, 114 (1984) (citations omitted). *See also State ex rel Key Bond,* 94 W.Va. 225, 270, 118 S.E. 2d 276, 283 (1923) ("The Legislature declares public policy, not the courts.").

modernization would create an unreasonable hardship on patients in the area and throughout the state;

ii. These purposes separately and collectively serve the highest public interest and are essential to the public health and welfare, but must be realized in the most efficient manner and at the lowest cost practicable and consistent with these purposes;

iii. It is unnecessarily costly and administratively burdensome for the [BOG] to finance, manage and carry out the patient care activities of an academic institution within the existing framework of a state agency. The patient care operations are more efficiently served by contemporary legal, management and procedural structures utilized by similarly situated private entities throughout the nation;

iv. It is fiscally desirable that the state separate the business and service functions of the hospital from the educational functions of the health science schools, that the [BOG] cease operation of the existing facilities...that the existing facilities be operated by the corporation [WVUH], and subsequently the new facilities owned and operated by [WVUH], be self-sufficient and serve to remove the tax burden of operating the existing facilities from the state;

v. A not-for-profit corporate structure with appropriate governance consistent with the delivery of health care to the patient and the academic need of the university is the best means of assuring prudent financial management and the future economy of operation under rapidly changing market conditions, regulation and reimbursement;

vi. The interests of the citizens of the State will be best met by the [BOG's] entering into and carrying out the provisions of [the long term lease and agreement to be entered into between the BOG and WVUH].[12]

Among others, the Legislature required that the agreement to be entered into by the BOG and WVUH include the following provisions:

i. [WVUH shall have a] leasehold interest in the proposed site for the new facilities...for a period not to exceed ninety-nine years, all in order to acquire [WVUH's] agreement to provide not less than one hundred thousand square feet of space in the new facilities for educational and research purposes, to provide an annual allowance of not less than four million dollars for residents' and interns' expenses and an annual clinical teaching subsidy of not less than six million dollars...

ii. ...the new facilities shall serve as the primary clinical setting for health science

[12] W.Va. Code § 18-11C-2.

schools students to receive educational and research experiences. The university faculty shall have exclusive medical and dental staff privileges...at the new facilities.

iii. All university personnel are university employees in all respects.[13]

The Legislature specifically noted that the obligations of WVUH shall not constitute obligations of the university, the BOG or the State.[14] The Legislature was also careful to note that nothing about the creation of WVUH, or the transfer of certain assets to WVUH, "shall be deemed or construed to waive or abrogate in any way the sovereign immunity of the State or to deprive the board, the university or any officer or employee thereof of sovereign immunity."[15]

WVUH and the BOG are unique as health care providers and in their relationship to one another. WVUH is different from every other hospital in the state by virtue of the enabling statute that created it, which, among other things, limits WVUH's medical staff to physicians who are members of the faculty of the WVU SOM and, thus, employed by the BOG and insured by BRIM.[16] The Legislature has spoken directly to the amount of medical professional liability insurance to be provided to the state's medical and dental schools, all of their clinical practice plans and all of their directors, officers, employees, agents and contractors, *notwithstanding any other provisions of the West Virginia Code.* The Legislature has also made it clear that faculty members and residents, like Dr. Tadros and Dr. Polinski, are only liable up the limits of insurance procured by BRIM, and enjoy immunity after those limits of insurance are exhausted.

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[13] W.Va. Code § 18-11C-4 (emphasis added).

[14] W.Va. Code § 18-11C-8. *See also, Queen,* 179 W.Va. 95, 101, 365 S.E. 2d 375, 381 ("The corporate structure mandated by the Legislature for WVUH reserves valuable state owned assets to the benefit of the State. State assets many not be mortgaged or otherwise encumbered as security for bonds issued by WVUH. The WVUH directors have a fiduciary duty to preserve the assets of the state unencumbered.").

[15] W.Va. Code § 18-11C-7.

[16] West Virginia Code §§ 18-11C-1 *et seq.*; 18-11C-4(c); *Queen v. West Virginia Univ. Hosps.,* 179 W.Va. 95, 365 S.E.2d 375 (1987).

c. PROCEDURAL HISTORY

Prior to filing the instant civil action, and as required by the MPLA, W.Va. Code § 55-7B-6, Plaintiff's counsel served WVUH with a Notice of Claim and Screening Certificate of Merit.[17] In response to the Notice of Claim, counsel for WVUH advised Plaintiff's counsel that as employees of the BOG, Dr. Tadros and Dr. Polinski are provided with at least $1 million in professional liability insurance coverage for each occurrence and, therefore, WVUH is not liable for the alleged negligence of Dr. Tadros and Dr. Polinski by operation of W.Va. Code § 55-7B-9(g).[18] Furthermore, Plaintiff's counsel was advised that Dr. Tadros and Dr. Polinski's insurance coverage increases to account for inflation. Plaintiff's counsel was provided access to a full copy of the policy of insurance at issue. Despite being provided with uncontroverted evidence of the more-than-adequate insurance coverage as defined by W.Va. Code § 55-7B-9(g), Plaintiff disregarded this information and filed her Complaint seeking to impose vicarious liability on WVUH for the alleged negligence of non-employee physicians under a theory of ostensible agency.

On February 2, 2021, WVUH filed a Motion to Dismiss Plaintiff's Complaint on grounds that the physicians, Dr. Tadros and Dr. Polinski, were not employees of WVUH at the time they provided care and treatment to Mr. Morris; that, rather, they were employees of the BOG and were acting within the scope of their employment; that these physicians have professional liability coverage for the injury at issue in the aggregate amount of $1 million per occurrence; and, that these physicians' professional liability coverage for the injury at issue is more than adequate to relieve WVUH of defending an ostensible agency claim pursuant to the provisions

[17] APP 000045-000059; 000148-000150.

[18] APP 000148-000150.

of W.Va. Code § 55-7B-9(g).[19] Plaintiff filed a response in opposition to the Motion to Dismiss.[20]

On April 15, 2021, the Circuit Court held a hearing on WVUH's Motion to Dismiss. On May 12, 2021, the Circuit Court entered an order denying WVUH's Motion to Dismiss. It is this Order which is the subject of the instant appeal.[21]

On or about June 7, 2021, counsel for Petitioners filed a Notice of Appeal,[22] and on or about June 25, 2021, counsel for Petitioners filed a Joint Motion to Stay with the Circuit Court.[23] Thereafter, Plaintiff filed a Motion to Compel discovery responses from WVUH, and filed two additional sets of discovery directed to WVUH seeking information in support of Plaintiff's ostensible agency claim.[24]

On August 4, 2021, this Court entered a Scheduling Order concerning Petitioner's Appeal. Despite having received a copy of this Court's Scheduling Order, the Circuit Court proceeded to conduct a hearing on multiple pending motions on August 5, 2021.[25] In particular, the Circuit Court denied Defendants/Petitioners' Motion to Stay.[26] Following the hearing on August 5, 2010, counsel for WVUH advised the Court of her concern that the Circuit Court lacked jurisdiction to enter orders from the hearing held on August 5, 2021, given this Court's

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[19] APP 000045-000147.

[20] APP 000205-000290.

[21] APP 000305-000328; 000329-000339.

[22] APP 000353-000374.

[23] APP 000375-000379.

[24] APP 000618, line 60; 000619, lines 73 and 79.

[25] APP 000487-000519.

[26] APP 000540-00542.

entry of a Scheduling Order the day before.[27] Ultimately, the Circuit Court determined that it did have jurisdiction over the matter and proceeded to enter orders on August 13, August 17 and August 23, 2021, without leave of this Court.[28] Thereafter, Petitioners filed a Motion for Stay directly with this Court on or about August 24, 2021, and requested expedited relief on the Motion for Stay on or about August 27, 2021.

On September 1, 2021, pursuant to an Order entered by the Circuit Court on August 23, 2021, Plaintiff filed an Amended Complaint to add a claim of medical negligence against WVUH for alleged omissions of WVUH nursing staff who cared for Bryan Morris in the emergency department on November 23, 2019.[29] The nursing staff are (or were) employees of WVUH and are provided medical professional liability insurance by WVUH. Count III of Plaintiff's Amended Complaint reasserts the ostensible agency claim against WVUH which is the subject of this appeal.[30]

III. SUMMARY OF ARGUMENT

Pursuant to W.Va. Code § 55-7B-9(g), Plaintiff may not present an ostensible agency claim against WVUH for the alleged negligence of non-employee physicians unless the non-employee physicians do not maintain professional liability insurance covering the medical injury

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[27] APP 000587-000615.

[28] APP 000520-000533; 000534-000536; 000537-000539; 000540-000542; 000543-000545; 000546-00547.

[29] APP 000548-000559. Plaintiff's reasons for asserting a direct negligence claim against WVUH were described by Plaintiff's counsel at the hearing held on August 5, 2021 and can be described as retaliatory, at best. See APP 000496-00497. Inexplicably, on August 31, 2021, Plaintiff also filed a duplicative, but completely separate cause of action before a different judge in the Circuit Court of Monongalia County, asserting the same claim of medical negligence against WVUH for the alleged omissions of its nursing staff. WVUH is the only defendant named in that separate civil action. *See, Rebecca Morris, Administratrix of the Estate of Bryan Morris, Plaintiff, v. West Virginia University Hospitals, Inc., Defendant,* Civil Action No. 21-C-252. The date for WVUH's responsive pleading to this separate Complaint has not yet passed.

[30] App. 000555-000556.

which is the subject of the action in the aggregate amount of at least $1 million for each occurrence. Petitioners have produced uncontroverted evidence that the non-employee physicians, Dr. Tadros and Dr. Polinski, are provided with professional liability insurance covering the medical injury which is the subject of the action in the aggregate amount of at least $1 million per occurrence.[31]

Moreover, pursuant to W.Va. Code § 55-7H-4, BRIM is required to 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 directors, officers, employees, agents and contractors in an amount no less than $1.5 million for each occurrence, to increase to account for inflation, up to $2 million for each occurrence. Petitioners have, likewise, produced uncontroverted evidence that BRIM has provided the WVU BOG, Dr. Tadros and Dr. Polinski the amount of professional liability insurance required by W.Va. Code § 55-7H-4.[32]

Despite the availability of adequate professional liability insurance coverage to relieve WVUH of an ostensible agency claim, and despite the fact that there is only a single medical injury and, therefore, a single occurrence, the Circuit Court ruled that Plaintiff may present an ostensible agency claim against WVUH because each *individually named* physician does not *separately* maintain $1 million of professional liability insurance. This ruling is based on an erroneous reading of W.Va. Code § 55-7B-9(g), a complete disregard of W.Va. Code § 55-7H-4, which addresses "per occurrence" limits, not individual provider limits, and disregard for the exclusive authority of BRIM to "fix the scope of coverage…by negotiation of the terms of

[31] APP 000153-000195; 000072-000147, in particular 000129-000130.

[32] APP 000129-000130; 000153-000195, in particular 000160-000161. Exhibit 1 referred to at APP 000161 is the same document as APP 000072-000000147 and, therefore, is not duplicated in the Appendix.

particular applicable insurance policies."[33] The Circuit Court's ruling has the effect of improperly circumventing the immunity afforded the BOG, Dr. Tadros, and Dr. Polinski after the exhaustion of the policy limits provided to them by BRIM and, in essence would make WVUH, a private entity, an excess insurance carrier for the BOG, a state entity, and Dr. Tadros and Dr. Polinski, state employees.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Counsel for Petitioners believe this case involves issues of first impression regarding the meaning of the per occurrence limits of professional liability insurance mentioned in W.Va. Code §§ 55-7b-9(g) and 55-7H-4, and the application of per occurrence limits to an ostensible agency claim against a hospital when more than one non-employee health care provider is named as a defendant in a medical negligence action involving a single injury. Therefore, this case is appropriate for oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure.

V. ARGUMENT

a. STANDARD OF REVIEW

The Circuit Court converted WVUH's Motion to Dismiss to a Motion for Summary Judgment and denied the motion by order entered May 12, 2021. The Circuit Court found that "[p]ursuant 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 provisions of [W.Va. Code] § 55-7B-9(g). There

[33] Syl. Pt. 4, in part, *Parkulo v. West Virginia Bd. of Probation and Parole,* 199 W.Va. 161, 483 S.E. 2d 507 (1996).

is no just reason for delay, and the Court enters this judgment with an express finding that it is a final and appealable Order."[34]

Regardless of whether the Circuit Court properly denominated the dispositive motion as a Motion to Dismiss or a Motion for Summary Judgment, this Court's review of the denial of the motion is *de novo*.[35] Also, as is the case here, "[w]here the issue on appeal from the circuit court is clearly a question of law...involving an interpretation of a statute," this Court applies a *de novo* standard of review.[36]

Though interlocutory, the Circuit Court's order is subject to immediate appeal because it was entered pursuant to Rule 54(b) and also because it is subject to the "collateral order" doctrine.[37] The collateral order doctrine "may be applied to allow appeal of an interlocutory order when three factors are met: 'An interlocutory order would be subject to appeal under the [collateral order] doctrine if it (1) conclusively determines the disputed controversy, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively

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[34] APP 000329-000339, in particular 000339, paragraph 14.

[35] Syl Pt. 4, in part, *Ewing v. Board of Education of County of Summers,* 202 W.Va. 228, 503 S.E. 2d 541 (1998) ("[w]hen a party...assigns as error a circuit court's denial of a motion to dismiss, the circuit court's disposition of the motion to dismiss will be reviewed *de novo*."). Syl. Pt. 1, *Findley v. State Farm Mut. Auto Ins. Co.,* 213 W.Va. 80, 576 S.E. 2d 807 (2002) ("[t]his Court reviews *de novo* the denial of a motion for summary judgment, where such ruling is properly reviewable by this Court."].

[36] Syl. Pt. 1, in part, *Crystal R.M. v. Charles A.L.,* 194 W.Va. 138, 459 S.E. 2d 415 (1995); Syl. Pt. 2, *Thomas v. Morris*, 224 W.Va. 661, 687 S.E. 2d 760 (2009).

[37] *Credit Acceptance Corp. v. Front,* 231 W.Va. 518, 522, 745 S.E. 2d 556, 560 (2013) (citing *Coleman v. Sopher,* 194 W.Va. 90, 94, 459 S.E. 2d 367, 371 (1995) ("The usual prerequisite for our appellate jurisdiction is a final judgment, final in respect that it ends the case."). However, this "rule of finality" is not absolute. This Court has carved out a "narrow category of orders that are subject to permissible interlocutory appeal." *Id.* Those include interlocutory orders specifically made appealable by statute or rule; prohibition matters; certified questions; *judgment orders entered pursuant to West Virginia Rules of Civil Procedure 54(b);* and orders that fall within the 'collateral order' doctrine.' *Estate of Gomez by and Through Gomez v. Smith,* 243 W.Va. 491, 503, 845 S.E. 2d 266, 278 (2020) (emphasis added).

unreviewable on appeal from a final judgment."[38] With its May 12, 2021 Order, the Circuit Court (1) conclusively determined that WVUH must respond to an ostensible agency claim, notwithstanding the provisions of W.Va. Code §§ 55-7B-9(g) and 55-7H-4; (2) resolved the meaning of W.Va. Code §§ 55-7B-9(g) and 55-7H-4 completely separate from the merits of the medical negligence case against the BOG, Dr. Tadros and Dr. Polinski; and, (3) the Circuit Court's ruling is effectively unreviewable on appeal from a final judgment. WVUH should not be subject to an ostensible agency claim *at all* given the clear language of W.Va. Code §§ 55-7B-9(g) and 55-7H-4. If WVUH is forced to defend the ostensible agency claim up through and including trial, the very purpose of W.Va. Code § 55-7B-9(g) and the public policy of the MPLA are defeated and the time and resources expended to defend the ostensible agency claim cannot be recovered via an appeal from a final judgment.[39]

b. Inasmuch As The Physician Defendants, Who Are Not Employees Of WVUH, Have Available Professional Liability Insurance Covering The Medical Injury Which Is The Subject Of The Action In The Aggregate Amount Of $1 Million For Each Occurrence, WVUH Is Not Subject To An Ostensible Agency Claim Pursuant To West Virginia Code § 55-7B-9(g).

W. Va. Code § 55-7B-9(g) provides:

> 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.*** (emphasis added).

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[38] *State ex rel. Grant County Comm'n v. Nelson,* 244 W.Va. 649, 856 S.E. 2d 608, 617 (2021), quoting *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949) and citing *Durm v. Heck's, Inc.,* 184 W.Va. 562, 566, n. 2, 401 S.E. 2d 908, 912 n. 2 (1991) and *Robinson v. Pack,* 223 W.Va. 828, 679 S.E. 2d 660 (2009).

[39] *See Keith v. Lawrence,* 2015 WL 7628691 (2015) (unpublished memorandum decision) in which this Court found that a circuit court's order denying a motion to dismiss a medical malpractice claim brought by a patient's estate was appealable pursuant to the collateral order doctrine. The circuit court's order conclusively determined the disputed controversy of the sufficiency of certificates of merit submitted by the patient's estate pursuant to the requirements of the MPLA and, thus, the circuit court's jurisdiction. The circuit court's order resolved an important issue completely separate from the merits and was effectively unreviewable on appeal from a final judgment.

At the time of the events described in the Complaint (and in Count III of the Amended Complaint), Dr. Tadros and Dr. Polinski were—and still are—employed by the BOG. As employees of a state agency, Dr. Tadros and Dr. Polinski are provided with medical professional liability insurance through a policy of insurance purchased by BRIM.[40] The BRIM policy states that the limit of medical professional liability coverage is "$1,500,000 combined for damages arising out of any one "occurrence" for claims arising from a **"medical injury"** to a **"patient"** including death resulting, in whole or in part, from the **"medical injury"**, either through act or omission, or whether actual or imputed.[41],[42] BRIM's $1.5 million limits of coverage are tied to the occurrence of an injury, rather than to the number of plaintiffs or defendants in a malpractice case, which is consistent with the straightforward construction of W.Va. Code § 55-7B-9(g). In the present case, there can be no argument that there is only a single injury at issue—the death of Bryan Morris.

Moreover, 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:

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[40] W.Va. Code § 29-12-1 *et seq.*; APP 000129-000130.

[41] The BRIM policy also states that the "bold/underlined words in the previous paragraph shall be given the meanings ascribed to them in West Virginia Code § 55-7H-2 Definitions." The BRIM policy, therefore, defines **"medical injury"** as "injury or death to a patient arising or resulting from the rendering or failure to render health care." W. Va. Code § 55-7H-2(5). The term **"patient"** is defined as "a natural person who receives or should have received health care from a director, officer, employee, agent or contractor of a state medical school, state's medical and dental schools, or a clinical practice plan under a contract express or implied." W.Va. Code § 55-7H-2(7). See APP 000129 (emphasis in original)..

[42] W.Va. Code § 55-7B-9(g) uses the term "aggregate" while the BRIM policy uses the term "combined." The MPLA does not define the term "aggregate." "To give a clear statute the full force and effect intended by the Legislature, we give the words in the statute "their ordinary acceptance and significance and the meaning commonly attributed to them." *State v. Woodrum,* 243 W.Va. 503, 845 S.E. 2d 278 (2020) citing *State v. Epperly,* 135 W.Va. 877, 884, 65 S.E. 2d 488, 492 (1951). Merriam-Webster defines "aggregate" (adj.) as "taking all units as a whole" and defines "combine" as to unite into a single number or expression. *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/aggregate. Accessed September 27, 2021. *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/combine. Accessed September 27, 2021.

"Medical injury" means **injury or death** to a patient arising or resulting from the rendering of or failure to render health care. W.Va. Code § 55-7B-2(h) (emphasis added);

"In any professional liability action brought against a health care provider pursuant to this article, the maximum amount recoverable as compensatory damages for noneconomic loss may not exceed $250,000 **for each occurrence**, **regardless of** the number of plaintiffs or **the number of defendants or, in the case of wrongful death, regardless of the number of distributees**, except as provided in subsection (b) of this section." W.Va. Code § 55-7B-8(a) (emphasis added);

"The plaintiff may recover compensatory damages for noneconomic loss in excess of the limitation described in subsection (a) of this section, but not in excess of $500,000 **for each occurrence, regardless of** the number of plaintiffs or **the number of defendants or, in the case of wrongful death, regardless of the number of distributees,** where the damages for noneconomic losses suffered by the plaintiff were for: (1) Wrongful death; (2) permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or (3) permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life-sustaining activities." W.Va. Code § 55-7B-8(b) (emphasis added);

"In any action brought under this article for injury to or death of a patient as a result of health care services or assistance rendered in good faith and necessitated by an emergency condition for which the patient enters a health care facility designated by the Office of Emergency Medical Services as a trauma center, including health care services or assistance rendered in good faith by a licensed emergency medical services authority or agency, certified emergency medical service personnel or an employee of a licensed emergency medical services authority or agency, the total amount of civil damages recoverable may not exceed $500,000, **for each occurrence**, exclusive of interest computed from the date of judgment, and **regardless of the number of** plaintiffs or the number of **defendants or, in the case of wrongful death, regardless of the number of distributees**." W.Va. Code § 55-7B-9c (emphasis added).[43]

The MPLA does not require Dr. Tadros and Dr. Polinski to individually maintain separate $1 million limits of medical professional liability coverage in order to relieve WVUH of vicarious liability for the acts or omissions of these physicians under a theory of ostensible

[43] "Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments...Accordingly, we look not just to a lone clause in one paragraph in one statute; we consider the entire statutory scheme as crafted by the Legislature." *Division of Justice and Community Services. v. Fairmont State University,* 242 W.Va. 489, 836 S.E. 2d 456 (2019) (citations omitted).

"[W]here it is possible to do so, it is the duty of the Courts, in the construction of statutes, to harmonize and reconcile laws, and to adopt that construction of a statutory provision which harmonizes and reconciles it with the other statutory provisions...". *Charleston Gazette v. Smithers,* 232 W.Va. 449, 752 S.E. 2d 603 (2013), citing *State v. Williams,* 196 W.Va. 639, 641, 474 S.E. 2d 569, 571 (1996).

agency. Plaintiff/Respondent and the Circuit Court have improperly read into the provisions of W.Va. Code § 55-7B-9(g) the additional requirement that each individual non-employee must have a separate insurance limit of $1 million. The plain language of the MPLA requires only that there be a minimum of $1 million per occurrence without respect to the number of physicians involved.

c. Inasmuch As The Physician Defendants, Who Are Employees Of A State Medical School, Have Available Professional Liability Insurance In An Amount Of At Least $1.5 Million Per Occurrence As Required By West Virginia Code § 55-7H-4, WVUH Is Not Subject To An Ostensible Agency Claim Pursuant To West Virginia Code § 55-7B-9(g).

The mandatory limits of professional liability coverage for physicians like Dr. Tadros and Dr. Polinski who are employed by the BOG are set forth in W.Va. Code § 55-7H-4 which complements W.Va. Code § 55-7B-9(g):

> The State Board of Risk and Insurance Management 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 directors, officers, employees, agents and contractors in an amount to be determined by [BRIM], but in no event less than $1.5 million for each occurrence after July 1, 2015, to increase to account for inflation by an amount equal to the Consumer Price Index published by the United States Department of Labor, up to $2 million for each occurrence.

The Legislature made clear that the limits of insurance are tied to "*a medical injury to a patient*" and apply to the "acts and omissions of *all...faculty members, residents...employees, agents or contractors of a...state medical school*...regardless of whether the persons are engaged in teaching, research, clinical or administrative or other duties giving rise to the medical injury....".[44] Thus, whether a plaintiff chooses to name one faculty member, a faculty member

[44] W.Va. Code § 55-7H-3: "Notwithstanding any other provision of this code, all clinical practice plans, and all employees and contractors of a state's medical and dental schools, state medical school or a clinical practice plan, are only liable up to the limits of insurance coverage procured through [BRIM] arising from a medical injury to a patient, including death resulting, in whole or in part, from the medical injury, either through act or omission, or

and a resident, or three faculty members and three residents as defendants in a medical malpractice case, the Legislature deemed adequate a $1.5 million limit of medical professional liability insurance for a single medical injury to a patient.[45]

The unambiguous statutory requirements for the amount of medical professional liability coverage to be maintained for BOG-employed physicians is $1.5 million per occurrence. For a hospital to be held vicariously liable for the alleged negligence of a non-employee physician under a theory of ostensible agency, Plaintiff must establish that the non-employed physician did not maintain coverage of at least $1 million per occurrence. In the instant case, there is no allegation or evidence that the BRIM policy of insurance 1) was not in effect at the time Dr. Tadros and Dr. Polinski provided medical care to Bryan Morris; 2) does not cover Dr. Tadros and Dr. Polinski; or, 3) does not cover the medical injury which is the subject of Plaintiff's civil action. WVUH cannot be held liable for the alleged negligence of Dr. Tadros and Dr. Polinski because, by operation of W.Va. Code § 55-7H-4, these physicians are provided with per occurrence medical professional liability coverage well in excess of the statutory minimum required by W.Va. Code § 55-7B-9(g) and, by operation of W.Va. Code § 55-7H-3, the $1.5

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whether actual or imputed, while acting within the scope of their authority or employment for a state's medical and dental schools, state medical school or a clinical practice plan. The provisions of this article apply to the acts and omissions of all full-time, part-time, visiting and volunteer directors, officers, faculty members, residents, fellows, students, employees, agents and contractors of a state's medical and dental schools, state medical school or a clinical practice plan, regardless of whether the persons are engaged in teaching, research, clinical, administrative or other duties giving rise to the medical injury, regardless of whether the activities were being performed on behalf of a state's medical and dental schools, state medical school or on behalf of a clinical practice plan and regardless of where the duties were being carried out at the time of the medical injury." (emphasis added).

[45] The $1.5 million limit increases to account for inflation up to $2 million per occurrence per W.Va. Code §55-7H-4 which also notes that '[t]he provision of professional liability insurance is not a waiver of immunity that any of the foregoing persons or entities 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, by any employee...of a state's medical school...shall not exceed the limits of medical professional liability insurance provided by [BRIM] pursuant to this section."

limit is intended to apply to the single medical injury suffered by Bryan Morris, regardless of the number of BOG employees who were involved.

i. Rules of Statutory Construction

The rules of statutory construction are particularly significant to the Court's review of this issue. In *Morrissey v. Diocese of Wheeling Charleston,* __W.Va.__, 851 S.E. 2d 755 (2020), this Court provided a comprehensive review of the rules of statutory construction. The following rules, in particular, are applicable to the construction and application of W.Va. Code §§ 55-7B-9(g) and 55-7H-4:

> Syl. Pt. 4: "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature."[46]
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> Syl. Pt 5. "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute."[47]
>
> Syl. Pt. 6. "Generally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use."[48]
>
> Syl. Pt. 8. "The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled."[49]

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[46] Syllabus Point 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975).

[47] Syllabus Point 5, *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959).

[48] Syllabus Point 4, *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959).

[49] Syllabus Point 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984).

> Syl. Pt. 9. "'Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made.'"[50]
>
> Syl. Pt. 10. "It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity."[51]

By adopting and modifying the MPLA, the Legislature has been consistent in its concern for balancing the rights of individual citizens to adequate and reasonable compensation for injuries caused by acts of medical negligence with the necessity of ensuring that health care providers and facilities can obtain and maintain adequate and reasonably priced medical professional liability coverage.[52] One way of keeping the cost of liability insurance within reasonable bounds is to limit the number of ostensible agency claims that can be brought against hospitals for the alleged negligence of non-employee health care providers who are adequately insured for acts of medical negligence.[53] Reading and applying W.Va. Code § 55-7B-9(g) as the Circuit Court has done in this instance can only serve to encourage the naming of multiple non-employee health care providers as defendants in order to assert an ostensible agency claim against a hospital. This, clearly, is inconsistent with the Legislature's intentions to "encourage and facilitate" the provision of health care services to the citizens of the State; ensure that "health care facilities can obtain the protection of reasonably priced and extensive liability coverage;"

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[50] Syl. Pt. 2, *Newhart v. Pennybacker,* 120 W.Va. 774, 200 S.E. 350 (1938); Syllabus Point 3, *Sheena H. ex rel. Russell H. ex rel. L.H. v. Amfire, LLC*, 235 W. Va. 132, 772 S.E.2d 317 (2015).

[51] Syllabus Point 2, *Click v. Click*, 98 W. Va. 419, 127 S.E. 194 (1925).

[52] W.Va. Code § 55-7B-1.

[53] W.Va. Code § 55-7B-9(g).

"control the increase in the cost of liability insurance;" and, limit "the rights of persons asserting claims against trauma care health care providers" like Dr. Tadros and Dr. Polinski.[54]

Additionally, it is a rule of statutory construction that statutes *in pari* material, that is, statutes which relate to the same subject matter, are to be construed together.[55] Obviously, W.Va. Code §§ 55-7B-9(g) and 55-7H-4 "relate to the same subject matter" and, therefore, should be read, construed and applied together. W.Va. Code § 55-7B-9(g) addresses, generally, the amount of medical professional liability coverage necessary to relieve a hospital of an ostensible agency claim for the alleged negligence of non-employee health care providers, while W.Va. Code § 55-7H-4 addresses the limits of medical professional liability coverage specifically available to health care providers who are employed by the state's medical schools, like Dr. Tadros and Dr. Polinski. The two provisions are harmonious in that the limit available to health care providers employed by the state's medical schools ("in no event less than $1.5 million for each occurrence") is more than adequate to relieve a hospital from defending an ostensible agency claim pursuant to W.Va. Code § 55-7B-9(g) ("at least $1 million for each occurrence").

ii. History of Ostensible Agency Claims in West Virginia

Consideration of the common law of ostensible agency claims against hospitals *and* the subsequent provisions of the MPLA are important to the Court's determination of the legal issue before it. To wit, this sequence:

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[54] W.Va. Code § 55-7B-1.

[55] *Manchin v. Dunfee,* 174 W.Va. 532, 535–36, 327 S.E.2d 710, 713–14 (1984) "[s]tatutes which relate to the same subject should be read and applied together...".

1987: ***Thomas v. Raleigh General Hospital.***[56] This Court ruled that "[w]here a patient goes to a hospital seeking medical services and is forced to rely on the hospital's choice of physician to render those services, the hospital may be found vicariously liable for the physician's negligence." It is important to note that the medical care at issue was rendered in 1981, before the MPLA was enacted by the Legislature.

1991: ***Torrence v. Kusminsky.***[57] This Court ruled that "[w]here a hospital makes emergency room treatment available to serve the public as an integral part of its facilities, the hospital is estopped to deny that the physicians and other medical personnel on duty providing treatment are its agents. Regardless of any contractual arrangements with so-called independent contractors, the hospital is liable to the injured patient for acts of malpractice committed in its emergency room, so long as the requisite proximate cause and damages are present." The medical care at issue was rendered in 1980, before the MPLA was enacted by the Legislature.

2002: ***Hicks v. Gaphery, M.D..***[58] This Court found that the MPLA "enacted a number of changes in the common law surrounding personal injury and wrongful death actions as applied to medical malpractice cases..." The Court also noted "the distinctive provisions of the MPLA" and the "continually evolving nature of the common law".

2004: ***Burless v. West Virginia University Hospitals, Inc..***[59] This Court held that no actual agency relationship existed between physicians employed by the West Virginia University board of trustees (now BOG) and university hospital, and thus the hospital could not be held liable for negligence of physicians under an actual agency theory, but genuine issues of material

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[56] 178 W.Va. 138, 358 S.E.2d 222 (1987).

[57] 185 W.Va. 734, 408 S.E.2d 684 (1991).

[58] 212 W.Va. 327, 571 S.E.2d 317 (2002).

[59] 215 W.Va. 765, 601 S.E.2d 85 (2004).

fact existed with respect to patient's negligence claims under theory of apparent agency.[60] The Court also found that "[f]or a hospital to be held liable for a physician's negligence under an apparent agency theory, a plaintiff must establish that: (1) the hospital either committed an act that would cause a reasonable person to believe that the physician in question was an agent of the hospital, or, by failing to take an action, created a circumstance that would allow a reasonable person to hold such a belief, and (2) the plaintiff relied on the apparent agency relationship.[61] The care at issue in *Burless* was rendered before the 2003 amendments to the MPLA, which included the provision that "[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 one million dollars."[62]

iii. History of W.Va. Code § 55-7B-9(g) and Related Provisions

When the Legislature enacts changes to the provisions of the MPLA, it is presumed to know the full extent of the common law at the time of its enactments, including the common law expressed in *Thomas, Torrence* and *Burless.* "[I]t is a settled principle of statutory construction that courts presume that the Legislature drafts and passes statutes with full knowledge of existing law."[63] Since 2003, the Legislature has made multiple modifications to the common law with its enactment of, and ongoing amendments to, the MPLA. For example, the Legislature made express findings and declared the purpose of the MPLA, specifically with respect to the availability and affordability of medical professional liability insurance:

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[60] "Ostensible agency" and "apparent agency" are commonly used interchangeably. *Burless,* 215 W.Va. 765, 772, 601 S.E.2d 85, 92, n. 7.

[61] Syl. Pt. 7, *Burless,* 215 W.Va. 765, 601 S.E. 2d 85 (2004).

[62] *Burless,* 215 W.Va. 765, 776, 601 S.E.2d 85, 96, n. 13.

[63] *In Re Parsons,* 218 W.Va. 353, 624 S.E.2d 790 (2005)

W.Va. Code § 55-7B-1: The Legislature finds and declares that:...

"It is the duty and responsibility of the Legislature to balance the rights of our individual citizens to adequate and reasonable compensation with the broad public interest in the provision of services by qualified health care providers and health care facilities who can themselves obtain the protection of reasonably priced and extensive liability coverage;

In recent years the cost of insurance has risen dramatically while the nature and extent of coverage has diminished, leaving the health care providers, the health care facilities and the injured without the full benefit of liability insurance coverage; ..."

"The unpredictable nature of traumatic injury health care services often results in a greater likelihood of unsatisfactory patient outcomes, a higher degree of patient and family dissatisfaction and frequent malpractice claims, creating a financial strain on the trauma care system of our state;..."

"The modernization and structure of the health care delivery system necessitate an update of provisions of this article in order to facilitate and continue the objectives of this article which are to control the increase in the cost of liability insurance and to maintain access to affordable health care services for our citizens...."

"...[t]he Legislature has determined that *reforms in the common law and statutory rights of our citizens must be enacted together as necessary and mutual ingredients of the appropriate legislative response relating to:*

(1) *Compensation for injury and death*;..." (emphasis added).

The Legislature also enacted specific provisions of the MPLA to address damages available to a patient who receives care in a trauma center such as WVUH:

W.Va Code § 55-7B-9c: (a) In any action...for injury to or death of a patient as a result of health care services or assistance rendered in good faith and necessitated by an emergency condition for which a patient enters a health care facility designated by the Office of Emergency Medical Services as a trauma center,...the total amount of civil damages recoverable may not exceed $500,000 for each occurrence,...regardless of the number of plaintiffs or the number of defendants, or in the case of wrongful death, regardless of the number of distributes.

(b) On January 1, 2016, and in each year thereafter, the limitation on the total amount of

civil damages contained in subsection (a)...shall increase to account for inflation...Provided, that increases on the limitation of damages shall not exceed one hundred fifty percent of the amounts specified in said subsection.[64]

The Legislature also enacted this specific provision with respect to an ostensible agency claim against a hospital for the alleged negligence of a nonemployee physician and has made changes to it since its original adoption:

W.Va. Code § 55-7B-9(g) (effective March 8, 2003):

"Nothing in this article is meant to preclude a health care provider from being held responsible for the portion of fault attributable by the trier of fact to any person acting as the health care provider's agent or servant or to preclude imposition of fault otherwise imputable or attributable to the health care provider under claims of vicarious liability. *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 one million dollars.*" (emphasis added).

W.Va. Code § 55-7B-9(g) (effective March 10, 2015):

"Nothing in this article is meant to preclude a health care provider from being held responsible for the portion of fault attributable by the trier of fact to any person acting as the health care provider's agent or servant or to preclude imposition of fault otherwise imputable or attributable to the health care provider under claims of vicarious liability. *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 per occurrence.*" (emphasis added).

In 2017, the Legislature again amended the MPLA to provide a definition of "occurrence":

W.Va. Code § 55-7B-2(l) (effective June 29, 2017):

"'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."

[64] Petitioners have asserted the trauma cap as an affirmative defense to Plaintiff/Respondent's claims. See APP. 000011-000033, in particular 0000000025; 000340-000352, in particular 000349.

"It has been a mainstay of Anglo-American jurisprudence that the common law gives way to a specific statute that is inconsistent with it; when a statute is designed as a revision of a whole body of law applicable to a given subject, it supercedes the common law."[65] Thus, West Virginia Code § 55-7B-9(g) was clearly intended by the Legislature to supercede the common law of ostensible agency established by *Thomas, Torrence* and *Burless* with respect to the conditions under which an ostensible agency claim can be brought against a hospital for the alleged negligence of a non-employee health care provider.

Plaintiff/Respondent cannot focus on the phrases "a nonemployee" and "the alleged agent" in W.Va. Code §55-7B-9(g) and, at the same time, ignore the phrase "insurance covering the medical injury which is the subject of the action in the aggregate amount of at least $1 million for each occurrence." The phrase "insurance covering the medical injury which is the subject of the action in the aggregate amount of at least $1 million for each occurrence" is significant considering the MPLA as a whole, which includes multiple references to the "occurrence" in question, rather than the number of plaintiffs, defendants or beneficiaries involved.[66], [67]

The Circuit Court appears to have been persuaded by Plaintiff/Respondent's reliance on *Phillips v. Larry's Drive-In Pharmacy, Inc.,* 220 W.Va. 484, 647 S.E.2d 920 (2007) and the maxim *expression unius est exclusion alterius* (the express mention of one things implies the

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[65] *State ex rel. Riffle v. Ranson,* 195 W.Va. 121, 128, 464 S.E.2d 763, 770 (1995).

[66] W.Va Code §§ 55-7B-8(a); 55-7B-8(b); 55-7B-9c.

[67] *See Forquer v. Walker, M.D., et al.,* No. 04-C-270, 2006 WL 4584366 (W.Va. Circuit Court, June 15, 2006) (unpublished Circuit Court Order). ("Therefore, because defendants Kessel and Walker maintain the appropriate amount of professional liability insurance, and because this civil action was filed after the effective date of the [MPLA], Counts III and IV of the complaint fail as to all claims for vicarious liability against Defendant WVUH.") Defendant Kessel was an anesthesiology resident working under the supervision of Dr. Walker, a faculty anesthesiologist. Both Dr. Kessel and Dr. Walker were employed by the BOG and insured by BRIM, sharing a single per occurrence limit of medical professional liability insurance in the amount of $1 million (before the adoption of W.Va. Code § 55-7H-4).

exclusion of another). However, this maxim is inapposite to the matter before the Court. *Phillips* involved the application of the MPLA to pharmacies and pharmacists, which, at the time of the alleged negligence giving rise to the cause of action, did not include pharmacies and pharmacists in its list of health care providers to whom the MPLA was intended to be applicable.[68] The application of W.Va. Code § § 55-7B-9(g) and 55-7H-4 to the facts of this case do not include a list of items or an omission of an item from a list. This case involves giving effect to the intent of the Legislature as evident from the entirety of the MPLA and reading statutes which relate to the same subject matter *in pari materia.*[69], [70]

The language of W.Va. Code § 55-7B-9(g) is "only the beginning point. To determine legislative intent, we start with the text of the statute in question and then move 'to the structure and purpose of the Act in which it occurs.'"[71] Statutory interpretation "is a holistic endeavor...and, at a minimum, must account for a statute's full text, language as well as punctuation, structure and subject matter."[72] "It is a fundamental principle of statutory construction that the meaning of a word cannot be determined in isolation, but it must be drawn from the context in which it was used.[73]

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[68] W.Va Code § 55-7B-2(c).

[69] Syl. Pt. 1, *Smith v. State Workmen's Comp. Comm'r,* 159 W.Va. 108, 219 S.E.2d 361 (1975); *Manchin v. Dunfee,* 174 W.Va. 532, 535-536, 327 S.E. 2d 710, 713-714 (1984).

[70] After the West Virginia Supreme Court of Appeals decided *Phillips* and found that pharmacies and pharmacists were not included within the MPLA definition of "health care provider," the Legislature amended the MPLA to include pharmacies and pharmacists within the definition of health care facility and health care provider respectively. *See* West Virginia Code §55-7B-2(f) and (g).

[71] *West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital,* 196 W.Va. 326, 338, 472 S.E. 2d 41, 4231 (1996) (citations omitted).

[72] *Id.*

[73] *Id.*

With full knowledge of the common law, the statutory creation of WVUH, the recognized symbiotic relationship between WVUH and the WVU SOM, and the provisions of the MPLA, including W.Va. Code § 55-7B-9(g), the Legislature specifically limited the insurance coverage to be provided to the BOG and its employees, agents and contractors—including the faculty and resident physicians at the WVU SOM—to $1.5 million for each occurrence after July 1, 2015.[74] Thus, this Court must presume that the Legislature intended W.Va Code § 55-7H-4 to prevail if this Court considers it to be somehow in conflict with the common law or with W.Va Code §55-7B-9(g). "[W]hen two statutes conflict, the general rule is that the statute last in time prevails as the most recent expression of the legislative will." [75]

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[74] W.Va. Code § 55-7H-1 *et seq.* This Article is titled "Immunity from Civil Liability for Clinical Practice Plans and Personnel Associated with Medical and Dental Schools." Significant to the consideration of this article are the Legislature's specific findings and declaration of public purpose: "The Legislature finds and declares:

> That the state's medical and dental schools play a vital role in ensuring an adequate supply of qualified and trained physicians throughout the state;
>
> That the education, training and research provided at the state's medical and dental schools and state medical school are an essential governmental function in which the state has a substantial and compelling interest;
>
> That the provision of clinical services to patients by faculty members, residents, fellows and students of the state's medical and dental schools and state medical school, is an inseparable component of the aforementioned education, training and research;
>
> That the provision of clinical services significantly contributes to the ongoing quality, effectiveness and scope of the state's health care delivery system....
>
> That the continued availability of [revenue generated by the provision of clinical services which revenue is need to fund faculty salaries and other costs associated with operation of the medical and dental schools] is compromised by the cost of medical professional liability insurance, the cost of defending medical professional liability claims, and the cost of compensating patients who suffer medical injury or death;
>
> That the state concurrently has an interest in providing a system that makes available adequate and fair compensation to those individual patients who suffer medical injury or death;
>
> That it is the duty and responsibility of the Legislature to balance the rights of individual patients to obtain adequate and fair compensation, with the substantial and compelling state interests set forth herein...".

[75] *West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital,* 196 W.Va. 326,336, 472 S.E.2d 411, 421 quoting Syl. Pt. 2, *Stamper by Stamper v. Kanawha County Bd. of Ed.,* 191 W.Va. 297, 445 S.E.2d 238

d. Upon The Exhaustion Of The Required Per Occurrence Limits Made Available To The BOG, Dr. Tadros And Dr. Polinski, These Defendants Are Immune From Liability. Given The Undisputed Availability Of Insurance Limits As Required By West Virginia Code §§ 55-7B-9(g) And 55-7H-4, WVUH, A Private Entity, Cannot Be Subjected To An Ostensible Agency Claim In Order To Circumvent The Immunity Granted To These Defendants.

In setting forth WVUH's many obligations to the WVU SOM and the State,[76] the Legislature could have mandated that WVUH serve as an excess insurer for the WVU SOM faculty and resident physicians if the Legislature had seen fit to do so. But, the Legislature did not establish WVUH to be an excess insurer for the WVU School of Medicine or its physicians. Making WVUH liable for the alleged medical negligence of WVU SOM physicians, over-and-above the insurance mandated to be provided to the BOG and its employees by BRIM, would usurp the exclusive authority granted to BRIM to determine the kind or kinds of coverage, the amount or limits for each kind of coverage, the conditions, limitations, exclusions, endorsements, amendments and deductible forms of insurance coverage and to negotiate and effectuate settlement of all claims arising or incident to covered state activities and responsibilities.[77]

Making WVUH liable for the alleged medical negligence of WVU SOM physicians after exhaustion of the BRIM-provided limits would also render meaningless the immunity granted to those physicians.[78] Arguably, WVUH should be entitled to "derivative immunity" in this

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(1994); Syl. Pt. 2, *State ex rel. Dept. of Health and Human Resources, etc. v. West Virginia Public Employees Retirement System,* 183 W.Va. 39, 393 S.E.2d 677 (1990).

[76] West Virginia Code § 18-11C-4.

[77] W.Va. Code § 29-12-5.

[78] W.Va. Code §§ 18-11C-7; 55-7H-1. W.Va. Code § 55-7H-3 specifically provides that "Notwithstanding any other provision of this code all clinical practice plans, and all employees and contractors of a state's medical and dental schools...are only liable up to the limits of insurance procured through the State Board of Risk and Insurance Management...arising from a medical injury to a patient, including death resulting, in whole or in part, from the medical injury, either through act or omission, or whether actual or imputed, while acting within the scope of their authority or employment for a sate's medical and dental schools...The provisions of this article apply to the acts and

instance because a) the only allegedly negligent persons in this matter are State employees acting within the scope of their State employment (Drs. Tadros and Polinski); b) there is no allegation of negligence or violation of contractual duties by WVUH;[79] c) the State which employs and controls the allegedly negligent physicians, and the physicians themselves, are entitled to immunity after the exhaustion of the BRIM-provided insurance limits.[80] To the extent WVUH is not alleged to be *independently* negligent but is only made a party to litigation by virtue of its relationship with the BOG and WVU SOM, WVUH should be permitted to share in the immunity of those public bodies.

WVUH does not suggest that it is entitled to immunity from liability for its own negligence or that of its employees. However, WVUH does suggest that Plaintiff/Respondent cannot make an end-run around the immunity granted to the BOG, Dr. Tadros and Dr. Polinski when WVUH is statutorily obligated to limit its medical staff to physicians employed by the BOG and insured by BRIM, and is also statutorily obligated to work with and support a public body for the performance of important public work.[81] If the State cannot be held responsible for the separate obligations of WVUH,[82] then, likewise, WVUH should not be held responsible for

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omissions of all full-time, part-time, visiting and volunteer directors, officers, faculty members, residents, fellows, students employees, agents or contractors of a state's medical and dental schools…".

[79] There are no allegations of negligence against WVUH in the original complaint or in Count III of the amended complaint. See APP 000001-000010; 000548-000559, in particular 000555 and 000556.

[80] *See Cunningham v. General Dynamics Info. Tech,* 888 F. 3d 640, 643 (4th Cir. 2018); *Mangold v. Analytic Svcs.,* 77 F.3d 1442, 1448 (4th Cir. 1996); *Yearsley v. W.Va. Ross Const. Co.,* 309 U.S. 18, 60 S. Ct. 413, 84 L. Ed. 554 (1940).

[81] W.Va. Code § 18-11C-1 *et seq.*; *Queen,* 179 W.Va. 95, 101, 365 S.E. 2d 375, 381 (1987).

[82] W.Va. Code § 18-11C-8.

the obligations of the State over-and-above the limits of insurance the State has deemed appropriate for State activities and State employees.[83]

VI. CONCLUSION

The BOG, Dr. Tadros and Dr. Polinski are provided with at least $1.5 million in medical professional liability coverage for the medical injury to Bryan Morris. As a result of the inflationary increases mandated by W.Va. Code § 55-7H-4, the actual amount of coverage provided by BRIM for this claim is $1,605,000. [84] After the exhaustion of these limits of insurance, the BOG, Dr. Tadros and Dr. Polinski are immune from liability. WVUH is not subject to an ostensible agency claim because Dr. Tadros and Dr. Polinski, who are not WVUH employees, have available professional liability insurance covering the medical injury at issue in this MPLA action in the aggregate amount of at least $1 million for each occurrence. Therefore, Petitioners respectfully request that this Court vacate the May 12, 2021 Order of the Circuit Court of Monongalia County, West Virginia and find that WVUH is not subject to an ostensible agency claim for the alleged negligence of Dr. Tadros and Dr. Polinski.

Respectfully submitted this 29th day of September, 2021.

[83] W.Va. Code §§ 29-12-1 *et seq.*; 55-7H-3; 55-7H-4; *Parkulo,* 199 W.Va. 161, 483 S.E. 2d 507 (1996)

[84] APP 000129-000130; 000153-000195, in particular 000160-000161.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

Defendant Below, Petitioner,

vs.

CASE NO.: 21-0458
From the Circuit Court of
Monongalia County, West Virginia
Civil Action No.: 20-C-331

REBECCA MORRIS, Administratrix of the Estate of Bryan Morris,

Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

I, Christine S. Vaglienti, do hereby certify that I have caused to be served this 29th day of September 2021, the foregoing, **"PETITIONERS' BRIEF"** upon counsel of record by electronic mail and by depositing a true and accurate copy of same in the U.S. Mail, postage paid, in envelopes addressed as follow:

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