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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

**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

**DO NOT REMOVE
FROM FILE**

**REBECCA MORRIS, Administratrix of the Estate of
Bryan Morris,**

Plaintiff Below, Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF

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a. Respondent Relies on a Single, Inapplicable Rule of Statutory Construction in Support of Her Position.

Respondent asserts that *Phillips v. Larry's Drive-In Pharmacy, Inc.*,¹ and the maxim “statutes in derogation of the common law are to be given a narrow construction,” are the only consideration this Court should give to the language contained in W. Va. Code §55-7B-9(g). However, this myopic view ignores the significant changes made to the West Virginia Medical Professional Liability Act (“MPLA”) since *Phillips v. Larry's Drive-In Pharmacy* was decided and also ignores the myriad of rules of statutory construction cited in Petitioners’ brief.²

Phillips v. Larry's Drive-In Pharmacy addressed the omission of pharmacies from the list of health care providers covered by the 1986 version of the MPLA. This Court noted that “[i]n the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies.” Because pharmacies were not included in the list of health providers enumerated in the 1986 version of W.Va. Code §55-7B-2(c), this Court concluded that “[a] pharmacy is not a ‘health care provider’ as defined by the Legislature in W.Va. Code, 55-7B-2(c) [1986].”

The statutory provisions relied upon by Petitioners, W.Va. Code §§55-7B-9(g) and 55-7H-4, do not include a list of items or an omission from a list of items as was the case with the 1986 version of W.Va. Code §55-7B-2(c). Moreover, following the *Phillips v. Larry's Drive-In Pharmacy* decision, the Legislature amended W.Va. Code §55-7B-2 to specifically include pharmacists in the enumerated list of health care providers covered by the MPLA, and otherwise broadened the scope of the definitions of health care facility and health care provider.³ The

¹ 220 W.Va. 484, 647 S.E. 2d 920 (W.Va. 2007).

² Petitioners’ Brief, pp. 18-20; 27.

³ W.Va. Code §55-7B-2(f) and (g).

Legislature has made many other changes to the MPLA since the version of the MPLA considered by the *Phillips v. Larry's Drive-In Pharmacy* decision. It is the 2017 version of the MPLA and the 2015 version of W.Va. Code §55-7H-1 *et seq.*⁴ which this Court must consider in the matter *sub judice*.

No fewer than fifteen times, Respondent's brief urges this Court to read into W.Va. Code §55-7B-9(g) the terms "each" or "individually" to support Respondent's erroneous view that every alleged agent named as a defendant in a medical professional liability action must have a separate insurance limit of one million dollars per occurrence to relieve a hospital of an ostensible agency claim for a non-employee health care provider.⁵ But this is not what W.Va. Code §55-7B-9(g) requires. W.Va Code §55-7B-9(g) requires that there be an aggregate amount of one million per occurrence available in order to relieve a hospital of an ostensible agency claim, and there is no dispute that the per occurrence limit available to Drs. Tadros and Polinski *exceeds* one million dollars.⁶

⁴ Immunity from Civil Liability for Clinical Practice Plans and Personnel Associated With Medical and Dental Schools

⁵ W.Va. Code §55-7B-9(g), must be read in the context not only of the MPLA, but in the immediate context of that particular subsection which is comprised of only two sentences. The first sentence of §55-7B-9(g) refers to "any person acting as the health care provider's agent or servant." The second sentence necessarily relates to the first sentence. The term "the alleged agent" is a definitive reference to the term "a nonemployee" and in this context plainly means that "a nonemployee" and "the alleged agent" as used in the second sentence refer back to "any person" in the first sentence. Thus, the terms alleged agent and nonemployee are not limited in number ("each" as Plaintiff erroneously wants the WVSC to believe through repetition) but are all inclusive of "any person" who is a nonemployee or alleged agent.

⁶ Petitioners' Brief, pp. 14; 17, f.n. 45; APP. 160-161; Respondent's Brief, p. 3, f.n. 2.

b. Tellingly, Respondent Completely Ignores the Effect of West Virginia Code §55-7H-4 on the Issues Before this Court.

Respondent completely fails to address the effect of W.Va. Code §55-7H-1 *et seq.*, and, in particular, §55-7H-4, on the issues to be decided by this Court. The Circuit Court, likewise, afforded W.Va. Code §55-7H-4, little to no consideration.⁷

W.Va. Code §55-7H-1 *et seq.* became effective and applicable prospectively to all claims that occur and are commenced on or after July 1, 2015.⁸ Respondent's claim occurred on November 24, 2019. The provisions of W.Va. Code §55-7H-1 *et seq.* “operate in addition to, and not in derogation of, any of the provisions” of the MPLA.⁹ Therefore, the Circuit Court erred when it failed to consider W.Va. Code §55-7H-1 *et seq.*, and, in particular, W.Va. Code §55-7H-4, when deciding Petitioner West Virginia University Hospitals, Inc.'s (“WVUH”) Motion to Dismiss. According to the rules of statutory construction, W.Va. Code §55-7H-1 *et seq.* is the more specific statute, since it applies only to clinical practice plans and personnel associated with medical and dental schools (personnel like Dr. Tadros and Dr. Polinski), and must be given precedence over the more general MPLA if the two cannot be reconciled.¹⁰

Thus, *even if* W.Va. Code §55-7B-9(g) can be interpreted to mean that each, individually named ostensible agent must separately maintain a medical malpractice insurance limited of one million dollars per occurrence—which would be cost prohibitive and in violation of the public policy set forth in W.Va. Code §55-7B-1—personnel associated with medical and dental schools are clearly only required to maintain that insurance provided to them by the West Virginia Board

⁷ APP. 329-339

⁸ W.Va. Code §55-7H-5

⁹ W.Va. Code §55-7H-6

¹⁰ Syllabus Point 1, *UMWA by Trumka v. Kingdon*, 174 W.Va. 330, 325 S.E.2d 120 (1984) cited by *Morrissey v. Diocese of Wheeling Charleston*, ___ W.Va. ___, 851 S.E. 2d 755 (2020).

of Risk and Insurance Management (“BRIM”), in an amount no less than \$1.5 million per occurrence. After the exhaustion of those insurance limits “[a]ny 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 or contractor of a state’s medical and dental school, state medical school or clinical practice plan shall not exceed the limits of medical professional liability insurance coverage provided by (BRIM) pursuant to this section.” Pursuant to the clear language of this provision, WVUH cannot be held liable for the death of Bryan Morris as a result of health care performed or furnished, or which should have been performed or furnished, by Dr. Tadros or Dr. Polinski because making Dr. Tadros and Dr. Polinski ostensible agents of WVUH based on Respondent’s flawed interpretation of W.Va. Code §55-7B-9(g) would potentially permit a judgment in excess of the limits of medical professional liability insurance coverage provided to Dr. Tadros and Dr. Polinski by BRIM.

c. Respondent’s Brief Makes Multiple Factual Errors or Misrepresentations.

Respondent asserts that “[u]nder West Virginia’s common law ostensible agency claims against hospitals for the negligence of physicians working in their emergency rooms have been freely permitted with no restrictions for decades.”¹¹ This statement is false. Since the Legislature adopted W.Va. Code §55-7B-9(g) in 2003, ostensible agency claims against hospitals have been severely restricted, just as intended by the Legislature.

Respondent asserts that Petitioner WVUH is legally no different than any other 70+ private hospitals operating in the State of West Virginia.¹² This assertion is patently wrong for the reasons set forth in W.Va. Code §18-11C-1 *et seq.* and *Queen v. West Virginia University*

¹¹ Respondent’s Brief, p. 20

¹² Respondent’s Brief, p. 1

*Hospitals.*¹³ WVUH may only choose its medical staff from among the ranks of faculty physicians employed by the WVU School of Medicine.¹⁴ No other private hospital in West Virginia operates under the same limitation with respect to its medical staff. Likewise, the medical staff at WVUH—being restricted to members of the faculty of the WVU School of Medicine—is not like any other medical practice group who can purchase an insurance policy to cover excess liability.¹⁵ The faculty members of the WVU School of Medicine are insured, exclusively, by BRIM as noted above.¹⁶

Moreover, WVUH *is not* covered by primary and excess policies of insurance which “specifically protect it and provide coverage for claims where WVUH may become liable for the negligence of an ostensible agent working in its emergency rooms...”¹⁷ Although not made a part of the Appendix record, counsel for Respondent was provided with a copy of WVUH’s liability policy and, therefore, is aware that it very specifically excludes coverage for personnel associated with the WVU School of Medicine, like Dr. Tadros and Dr. Polinski.¹⁸

Respondent asserts that WVUH failed to raise below the issue of a private entity, such as WVUH, being held liable for the alleged negligence of a state employee.¹⁹ Once again,

¹³ 179 W.Va. 95, 365 S.E. 2d 375 (1987)

¹⁴ W.Va. Code §18-11C-1

¹⁵ Respondent’s Brief, p. 23, f.n. 5

¹⁶ W.Va. Code §55-7H-1 *et seq.*

¹⁷ Respondent’s Brief, p. 23

¹⁸ See APP. 619, Docket Sheet, line 33, showing filing of Certificate of Service for Defendant WVUH, Inc. Response to Plaintiff’s First Set of Requests for Production, March 4, 2021. This discovery response included a complete copy of the Hospital Professional Liability and General Liability Policy applicable to WVUH and Respondent’s claim. Endorsement Number: 2, attached to that policy, specifically provides that “[n]o coverage is extended under this policy, whether primary or excess, to any physician, intern, resident, fellow, or allied health professional insured by other insurance by virtue of being an employee of the State of West Virginia or any state agency or instrumentality.”

¹⁹ Respondent’s Brief, pp. 18-20

Respondent is simply wrong. WVUH raised the issue, and cited to substantive law, in its “Reply to Plaintiff’s Opposition to West Virginia University Hospitals, Inc.’s Motion to Dismiss Plaintiff’s Complaint.”²⁰ Although the issue was properly before the Circuit Court, the Court failed to consider it, just as the Court failed to consider W.Va. Code §55-7H-1 *et seq.* as part of WVUH’s defense to Respondent’s ostensible agency claims. Respondent’s reference to *Monongahela Power v. Buzminsky*, 243 W.Va. 686, 850 S.E. 2d 685 (2020) in inapposite inasmuch as that case dealt with a statute specifically addressing the immunity afforded to emergency service workers, but not to the employer of the emergency service worker.²¹ The case also involved a question of vicarious immunity of an employer for the alleged negligence of its own employee or agent (*respondeat superior*), and not liability, or lack of liability, of a principal for an *ostensible* agent.

d. Conclusion

Based on the foregoing and on the authorities and arguments set forth in Petitioners’ Brief filed on or about September 29, 2021, Petitioners respectfully request that this Court vacate the May 12, 2021 order of the Circuit Court of Monongalia County, West Virginia and find that Petitioner WVUH is not subject to an ostensible agency claim for the alleged negligence of Dr. Tadros and Dr. Polinski.

Respectfully submitted this 2nd day of December 2021.

²⁰ APP. 291-304, in particular, 301-302

²¹ W.Va. Code §15-5-11(a)



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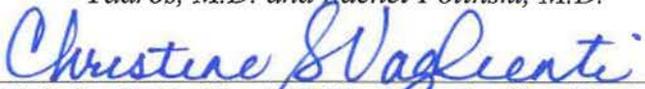
Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

I, Christine S. Vaglianti, do hereby certify that I have caused to be served this 2nd day of December 2021, the foregoing, “**PETITIONERS’ REPLY TO RESPONDENT’S BRIEF 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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