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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.

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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.

RESPONDENT'S BRIEF

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

I. STATEMENT OF CASE AND SUMMARY OF ARGUMENT

The underlying litigation giving rise to this Appeal involves a medical malpractice action where Rebecca Morris, as Administratrix of the Estate of Bryan Morris (hereinafter "Morris"), asserts that Allison Tadros, M.D. (hereinafter "Tadros") and Rachel Polinski, M.D. (hereinafter "Polinski") each committed independent acts of negligence leading to the death of her husband, Bryan Morris, while working as emergency room physicians at Ruby Memorial Hospital (hereinafter "Emergency Room") on November 23, 2019. (Appendix 000001-000010) Morris, who was only 40 years old at the time of his death, is survived by his wife and two infant children. Tadros and Polinski were each sued because of their independent acts of negligence which led to Bryan Morris's death along with a vicarious liability claim against their employer, the West Virginia Board of Governors (hereinafter "Board of Governors"). (Appendix 000001-000010) The Emergency Room where Tadros and Polinski were working was owned and operated by West Virginia University Hospitals, Inc. (hereinafter "WVUH"). Unlike the Board of Governors which is an agency or instrumentality of the State of West Virginia, WVUH is a private, domestic, non-profit corporation that is legally no different than any other 70+ private hospitals operating in the State of West Virginia. (Appendix 000226-000230)

Although Tadros and Polinski were not employed by WVUH, litigation was brought against WVUH asserting that it is vicariously liable under longstanding and well-established West Virginia law for the independent acts of negligence committed by Tadros and Polinski because those two (2) physicians working in its Emergency Room were its ostensible agents. (Appendix 000001-000010) *Thomas v. Raleigh General Hospital*, 358 S.E.2d 222 (W.Va. 1987) ("[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."); *Torrence v. Kusminsky*, 408 S.E.2d 684 (W.Va. 1991) ("Where 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."); *Belcher v. Charleston Area Medical Center*, 422 S.E.2d 827 (W.Va. 1992) ("Liability may be imposed on a hospital where the patient did not choose the treating doctor, but is forced to rely on the hospital's choice. Where 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."); *Glover v. St. Mary's Hospital*, 551 S.E.2d 31 (W.Va. 2001) ("The Estate sought to establish liability against the Hospital on the theory that Dr. Arya was an ostensible agent of the Hospital... Where 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"); *Burless v. West Virginia University Hospitals, Inc.*, 601 S.E.2d 85 (W.Va. 2004) ("In the hospital/physician context, this Court has heretofore established that even where a physician charged with negligence is an independent contractor, the hospital may nevertheless be found vicariously liable where the complained of treatment was provided in an emergency room.").

Subsequent to the *Thomas*, *Torrence*, *Belcher*, *Glover*, and *Burless* decisions, the West Virginia Legislature enacted a limited exception for claims alleging ostensible agency brought

under the West Virginia Medical Professional Liability Act (hereinafter "MPLA"). That limited exception found in W.Va. Code §55-7B-9(g) provides that:

> A healthcare provider may not be held vicariously liable for the 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. [1]

Every party to this appeal agrees that at the time Tadros and Polinski treated Morris they did not each have $1,000,000 of professional liability insurance coverage for Morris's claims. Instead, they were jointly insured under what is known as a professional liability "combined single limit policy" in the amount of $1,500,000. (Appendix 000073-000147, see p. 000129)[2] Under a professional liability "combined single limit policy", the single limit (in this case $1,500,000) is the total amount of insurance (the aggregate amount) available to cover a plaintiff's claims regardless of how many individuals covered by the policy are sued. So, under this combined single limit 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

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[1] The word "aggregate" simply means it is the limit in an insurance policy that sets forth the most the insurance carrier will pay on a claim. (*IRMI Insurance Glossary definition*) So under §55-7B-9(g), a hospital is immune from ostensible agency claims so long as the alleged agent maintains professional liability insurance coverage covering the claim in the amount of at least $1,000,000.

[2] Pursuant to the provisions of the professional liability combined single limit policy that covers Tadros/Polinski/the Board of Governors, there is a provision within the policy that each year raises the combined single limit to account for inflation by an amount equal to the most recently published Consumer Price Index published by the United States Department of Labor. (Appendix 000129-000130) As a result of these increases since the policy was first issued, the current limits of the combined single limits insurance is $1,605,000.

$1,500,000 of coverage available for all of them, regardless of how many physicians may have caused the patient's injuries.

The issue that had to be decided by the Circuit Court, and now ultimately by this Court, is straightforward. On the one hand Morris argues that the provisions of §55-7B-9(g) are clear, unambiguous, and must be applied according to its plain language without the need for the application of rules of statutory construction to determine the statute's intent. *State v. Epperly*, 65 S.E.2d 488 (W.Va. 1951); *Dunlap v. State Comp. Dir.*, 140 S.E.2d 448 (W.Va. 1965); and *Amanda B. v. Hakeem M.*, 856 S.E. 2d 657 (W.Va. 2021) Because the statute clearly provides that if the "alleged agent" against whom a claim is being brought does not have a minimum of $1,000,000 of professional liability insurance to cover the "occurrence" (the injury to the plaintiff) then a claim of ostensible agency against the hospital in whose emergency room the alleged agent is working out of can proceed just like ostensible agency claims have done so under West Virginia's common law for decades. In this case, because the parties agree that Tadros and Polinski did not each have $1,000,000 of insurance coverage - they only had $1,500,000 between the two of them - the Circuit Court correctly held, "as a matter of law":

> [t]hat 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 the acts of a non-employee [not non-employees] 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 for each occurrence." Nowhere does the statute stay 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 coverage. Tadros and Polinski did not each have a minimum of $1,000,000 of medical professional liability coverage for 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). (Appendix 000329-000339)

On the other hand, WVUH argues that the Circuit Court incorrectly concluded that the language found in §55-7B-9(g) is clear and unambiguous thereby requiring application of rules of statutory construction to determine the statute's intent. To make this argument WVUH has been forced to argue that it is irrelevant that Tadros and Polinski do not each have $1,000,000 of coverage because according to WVUH "the MPLA (§55-7B-9(g)) does not require Tadros and Polinski to individually maintain separate $1,000,000 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 agency because the "MPLA only requires that there be a minimum of $1,000,000 per occurrence without respect to the number of physicians involved." (Emphasis added.) (Respondents' Brief, p. 14-15) In other words, it is WVUH's strained interpretation of §55-7B-9(g) that what the Legislature actually meant to say is that when more than one alleged agent is sued for injuries that occur to a patient in a hospital's emergency room, in order to determine if the minimum levels of insurance under §55-7B-9(g) have been met so as to preclude an ostensible agency claim, you take the total amount of insurance available to each agent, add them all together, and if the total equals or exceeds $1,000,000 then a hospital cannot be liable under an ostensible agency claim for the negligence of any of its agents working in its emergency room. So, in a case where a lawsuit (by way of example) is brought against four different emergency room physicians claiming they separately violated the standard of care causing the death of a patient, WVUH would argue that if two of the doctors had no malpractice coverage, the third had $750,000 coverage, and the fourth had $250,000 coverage, then because there is a total of $1,000,000 of coverage available, no claim based on ostensible agency may be made against the hospital for the negligence of any of the emergency room physicians whose negligence injured the patient, even those who had no insurance of any kind.

The Circuit Court rejected this argument (Appendix 000329-000339) finding that even if it were required to adopt WVUH's suggestion that the language in §55-7B-9(g) is not clear and unambiguous thus requiring statutory construction to determine the Legislature's intent, the Court's ruling would still be the same. The Circuit Court came to that conclusion holding that (a) if it was required to construe the statute it would have to do so in the manner that makes the least rather than the most change in the common law, resulting in a finding that §55-7B-9(g) requires that each ostensible agent must have a minimum of $1,000,000 before claims of ostensible agency are precluded (*Phillips v. Larry's Drive-In Pharmacy, Inc.*, 647 S.E.2d 920 (W.Va. 2007); *Blankenship v. Ethicon Inc.*, 656 S.E.2d 451 (W.Va. 2007) (*Starcher concurring and dissenting*); *State ex rel. AmerisourceBergen Drug Corp. v. Moats*, 859 S.E.2d 374 (W.Va. 2011) (*Hutchinson and Jenkins concurring opinion* Footnote 7); *Manor Care Inc. v. Douglas*, 763 S.E.2d 73 (W.Va. 2014) (*Benjamin concurring*); *State of WV ex rel. Morgantown Operating Co. v. Gaujot*, 859 S.E.2d 358 (W.Va. 2021); and *Musick v. Pennington, MD*, 2021 WL 1614340 (W.Va. Feb. 26, 2021) (Memorandum Decision)), (b) under the statutory construction principle of *expressio unius est exclusio*, the Court would be required to conclude that the West Virginia Legislature intentionally and purposely intended that the insurance limit prerequisites necessary to preclude ostensible agency claims does not apply to the combined amounts of insurance of all alleged ostensible agents but instead the insurance limit prerequisite in W.Va. Code §55-7B-9(d) applies to each specific alleged agent separately (*Russello v. United States*, 464 U.S. 16 (1983), *Manchin v. Dunfee*, 327 S.E.2d 710 (W.Va. 1984), *Gibson v. Northfield Insurance Company*, 631 S.E.2d 598 (W.Va. 2005), *Young v. Apogee Coal Co., LLC*, 753 S.E.2d 52 (W.Va. 2013), *Banker v. Banker*, 474 S.E.2d 465 (W.Va. 1996), *State ex rel. Riffle v. Ranson*, 464 S.E.2d 763, 770 (W.Va. 1995), and *Phillips v. Larry's Drive – In Pharmacy, Inc.*, 647 S.E.2d 920 (W.Va. 2007)), and (c)

an interpretation of W.Va. Code §55-7B-9(g) requiring that each ostensible agent must individually maintain $1,000,000 of medical professional liability coverage in order to preclude ostensible agency claims is the most appropriate construction because doing so is consistent with the purpose of that Code Section which is titled "Several liability." (Appendix 000329-000339)

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Morris agrees with Petitioners' assertion that this case is appropriate for oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure and joins in with Petitioners' request that oral argument be granted in this matter.

III. ARGUMENT[3]

a. Tadros and Polinski Did Not Maintain the Minimum Levels of Professional Liability Insurance Coverage Required by W.Va. Code §55-7B-9(g) to Relieve WVUH of Vicarious Liability Under an Ostensible Agency Claim

The pertinent portion of W.Va. Code §55-7B-9(g) that the Court must consider is the following:

> A healthcare 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 $1,000,000 for each occurrence. (Emphasis added.)

On its face the professional liability insurance policy insuring Tadros and Polinski does not individually provide each of those physicians with $1,000,000 of professional liability insurance and WVUH does not argue otherwise. (Appendix 000072-000147) That concession is dispositive of WVUH's claim because the statute itself specifically provides that a claim of vicarious liability

[3] The argument section of Morris's Brief is intended to and specifically responds to each assignment of error asserted by WVUH, each of which Morris takes exception to.

made pursuant to a theory of ostensible agency may not be brought "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. The statute does not say "alleged agents," nor that the insurance limits apply "regardless of the number of defendants," and it does not require or even suggest that in order to determine if the minimum levels of insurance coverage have been met you add up the policies of every alleged agent and if they jointly total $1,000,000 then ostensible agency claims are precluded, all of which is the nonexistent language WVUH wants this Court to read into the statute. So, because neither Tadros nor Polinski each individually have $1,000,000 of coverage but instead have only $1,500,000 in combined coverage between them, the Circuit Court correctly ruled that:

> A plain reading of the statute instead shows that claims of ostensible agency against a medical provider, like WVUH, are only barred if each ostensible agent individually has a minimum of $1,000,000 of medical professional liability coverage. Tadros and Polinski did not each have a minimum of $1,000,000 of medical professional liability coverage for 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). (Appendix 000329-000339)

Because the language in §55-7B-9(g) is clear and unambiguous there is simply no basis for the application of rules of statutory construction to determine the statute's intent because prior pronouncements from this Court make clear that under such circumstances a reviewing court must apply the statute according to its express terms. *State v. Epperly*, 65 S.E.2d 488 (W.Va. 1951) ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect."); *Dunlap v. State Comp. Dir.*, 140 S.E.2d 448 (W.Va. 1965) ("...a rule of construction can be applied only in case of ambiguity... A statutory provision which is clear and unambiguous and which plainly expresses legislative intent will not be interpreted by the courts, but must be applied in accordance with the

legislative intent plainly expressed."); and *Amanda B. v. Hakeem M.*, 856 S.E. 2d 657 (W.Va. 2021) ("We look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed.") In the end, this Court does not sit as the super Legislature or commission to pass upon the political, social, economic, or scientific merits of statutes pertaining to proper subjects of legislation. *Huffman v. Goals Coal Co.*, 679 S.E.2d 323 (W.Va. 2009) As a result, this Court cannot read into §55-7B-9(g) the nonexistent language WVUH wishes the Legislature had placed in it but did not. That is because "It is not for this 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," the Court is "obligated not to add to statutes something the Legislature purposely omitted."); *Brooke B. v. Ray*, 738 S.E.2d 21 (W.Va. 2013); *State v. Butler*, 799 S.E.2d 718 (W.Va. 2017). In the end, "...courts are not free to read into the language what is not there, but rather should apply the statute as written." *State ex rel. Frazier v. Meadows*, 454 S.E.2d 65 (W.Va. 1994)

b. Even if the Court were to Determine that the Language Found in §55-7B-9(g) is Ambiguous Thus Requiring Statutory Construction, it would Still be Required to Conclude that Tadros and Polinski Did Not Maintain the Minimum Levels of Professional Liability Insurance Coverage Required to Relieve WVUH of Vicarious Liability Under an Ostensible Agency Claim.

Realizing that a plain reading of §55-7B-9(g) does not support its argument that Morris's ostensible agency claims against it should be barred, WVUH has been forced to argue that it is irrelevant that Tadros and Polinski do not each have $1,000,000 of coverage because according to it "the MPLA (§55-7B-9(g)) does not require Dr. Tadros and Dr. Polinski to individually maintain separate $1,000,000 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 agency" but instead "...the MPLA requires only that there be a minimum of $1,000,000 per occurrence

without respect for the number of physicians involved." (WVUH Brief, p. 15-16) In other words, as was previously noted, it is WVUH's strained interpretation of §55-7B-9(g) that what the Legislature actually meant to say is that when more than one alleged agent is sued for injuries that occur to a patient in a hospital's emergency room in order to determine if the minimum levels of insurance under §55-7B-9(g) have been met, so as to preclude ostensible agency claims, you take the total amount of insurance available to each alleged agent, add them all together, and if the total equals or exceeds $1,000,000 then a hospital cannot be liable under an ostensible agency claim for the negligence of any of its agents working in its emergency room.

It is important for the Court to recognize that while WVUH argues that the minimum insurance limits under §55-7B-9(g) should be interpreted to apply "without respect to the number of physicians involved" (WVUH Brief, p. 16), neither that language nor anything similar is found within the Statute itself. Instead, it is nonexistent, fictional language that WVUH has made up and now wants this Court to read into the Statute. To support its argument (reading into the Statute nonexistent, fictional language), WVUH suggests that "The language of W.Va. Code §55-7B-9(g) is only the beginning point" in trying to determine what the Legislature meant when it adopted this Code Section and then it claims that an interpretation "...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 Brief, p. 14) relying upon the following portions of the MPLA.

> 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)

In the end (if the Court finds the statute is ambiguous), WVUH's argument solely rises or falls 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. If it is not, then WVUH's appeal must be dismissed and Morris's Estate should be permitted to proceed with its ostensible agency claim.

Before conducting the review that WVUH incorrectly suggests is necessary, this Court must at all times remember that it is required to follow its prior decisions which have uniformly and unambiguously declared that because the entire MPLA is legislation designed to be in derogation of the common law, if statutory construction is necessary, any questioned provisions of the MPLA must be interpreted in the manner that makes the least rather than the most change to the common law. *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 647 S.E.2d 920 (W.Va. 2007) ("In other words, by its own terms, the entire MPLA is an act designed to be in derogation of the

common law. It is a longstanding maxim that '[s]tatutes in derogation of the common law are strictly construed'... In light of these authorities, we conclude that, where there is any doubt about the meaning or intent of a statute in derogation of the common law, the statute is to be interpreted in the manner that makes the least rather than the most change in the common law."); *Blankenship v. Ethicon Inc.*, 656 S.E.2d 451 (W.Va. 2007) (*Starcher concurring and dissenting*) ("We recently found that the 'MPLA is in derogation of the common law and its provisions must generally be given a narrow construction... Where there is any doubt about the meaning or intent of a statute in derogation of the common law, the statute is to be interpreted in the manner that makes the least rather the most change in the common law.'"); *Manor Care Inc. v. Douglas*, 763 S.E.2d 73 (W.Va. 2014) (*Benjamin concurring*) ("It is a long-standing maxim that '[s]tatutes in derogation of the common law are strictly construed... As the leading commentator in statutory construction states: Statutes which impose duties or burdens or establish rights or provide benefits which are 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."); *State of West Virginia ex rel. Morgantown Operating Co. v. Gaujot*, 859 S.E.2d 358 (W.Va. 2021) ("...the MPLA is in derogation of the common law and as such its provisions must be given narrow construction. In recognizing the MPLA as in derogation of common law, we cited Syl. pt. 3 of *Bank of Weston v. Thomas*: '[s]tatutes in derogation of the common law are allowed effect only to the extent clearly indicated by the terms used. Nothing can be added otherwise and by necessary implication arising from such terms." We thus concluded in *Phillips*, '[w]here there is any doubt about the meaning or intent of a statute in derogation of the common law, the statute is to be interpreted in the manner that makes the least rather than the most change in the common law.'"); *Musick v. Pennington,*

MD, 2021 WL 1614340 (W.Va. Feb. 26, 2021) (Memorandum Decision) (Memorandum Decision) ("...The [MPLA] alters the common law and statutory rights of our citizens to compensation for injury and death and is, by its own terms 'an act designed to be in derogation of the common law.' The *Phillips* court noted that 'where there is any doubt about the meaning or intent of a statute in derogation of the common law, the statute is to be interpreted in the manner that makes the least rather than the most change in the common law' and must 'generally be given a narrow construction.'"); *State ex rel. AmerisourceBergen Drug Corp. v. Moats*, 859 S.E.2d 374 (W.Va. 2011); (*Hutchinson and Jenkins concurring opinion* Footnote 7) ("To the extent the statute seeks to change the common law, it is a long-standing maxim that '[s]tatutes in derogation of the common law are strictly construed...' 'Statutes in derogation of the common law are allowed effect only to the extent clearly indicated by the terms used. Nothing can be added otherwise then by necessary implication arising from such terms.' 'Where there is any doubt about the meaning or intent of a statute in derogation of the common law, the statute is to be interpreted in the manner that makes the least rather than the most change to the common law.'")

When these mandatory principles of statutory construction are applied, this Court must reject WVUH's arguments and find that Tadros and Polinski did not maintain the minimum levels of professional liability insurance coverage required by §55-7B-9(g) to relieve WVUH of vicarious liability under an ostensible agency claim for the following reasons:

1. The problem with WVUH's argument suggesting that the minimum insurance limits in §55-7B-9(g) 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" (WVUH Brief, p. 14-15) is that the code sections (§55-7B-8(a),(b), and (c)) that it relies upon to

make that argument each contain the limiting language "**regardless of the number of defendants**" which wording is simply not found anywhere in W.Va. Code §55-7B-9(g).[4] Instead, §55-7B-9(g) specifically makes its provisions applicable to the hospital's "alleged agent" not the hospital's "alleged agents" and the $1 million insurance requirement contains no limiting language stating that it applies "**regardless of the number of defendants**".

The reason why our Legislature inserted the language "**regardless of the number of defendants**" into Sections 55-7B-8(a), (b), and (c) was because it wanted to make clear that the damage limitations found in each of those code sections do not apply on an individual basis for each physician who is sued but instead apply on a combined basis for all defendant physicians. The West Virginia Legislature could have easily inserted that exact same language into §55-7B-9(g) if it had intended that the minimum levels of professional liability coverage were not required for each alleged ostensible agent but instead were only required for each occurrence "**regardless of the number of defendants**".

According to West Virginia's well-developed rules of statutory construction the fact that the Legislature placed the language **"regardless of the number of defendants"** in other portions of the MPLA (§55-7B-8(a),(b), and (c)), but specifically excluded that same wording from §55-7B-9(g), mandates that this Court interpret §55-7B-9(g) as requiring each alleged agent to have a minimum of $1 million of professional liability insurance coverage in order to preclude a hospital from being sued under a claim of ostensible agency for the negligence of that specific agent. As the United States Supreme Court has recognized, when a Legislature "includes particular language in one section of a statute but omits it in another section of same Act, it is generally presumed that (the Legislature) acts intentionally and purposely in the disparate inclusion or exclusion". *Russello*

[4] The Court is referred to page(s) 10-11 of Respondent's Brief for a full quote of the statutory provisions WVUH is relying upon found in §55-7B-8(a),(b), and (c).

v. United States, 464 U.S. 16 (1983) That holding by the United States Supreme Court is consistent with this 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 Co., LLC*, 753 S.E.2d 52 (W.Va. 2013) this 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 obliged not to add to statutes something the Legislature purposely omitted." *Banker v. Banker*, 474 S.E.2d 465 (W.Va. 1996)

Under this well-accepted cannon of statutory construction, if the West Virginia 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. In other words, the Courts should 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) This rule of statutory construction has specifically been applied by this Court when interpreting provisions of the MPLA where in *Phillips v. Larry's Drive – In Pharmacy, Inc.*, 647 S.E.2d 920 (W.Va. 2007) it 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* the Circuit Court found (Appendix 000329-000339) and this Court is required to hold 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.

2. Interpreting §55-7B-9(g) so as to require that each alleged ostensible agent must have a minimum of $1 million of professional liability insurance coverage before claims of ostensible agency against a hospital can be brought is consistent with how this Court has directed that the MPLA, as a statute in derogation of the common law, must be interpreted. As was previously set forth in this Brief, a statute in derogation of the common law like the MPLA must be strictly construed, it must be given a narrow construction, and it is to be "given the effect which makes the least rather than the most change in the common law". *Phillips*, *Keller*, and *Bank of Weston supra.*

Under West Virginia's common law, injured patients have for decades traditionally been permitted to freely and without any limitations assert ostensible agency claims against hospitals for the alleged negligent actions of their non-employee emergency room physicians. *Thomas*, *Torrence*, *Belcher*, *Glover*, and *Burless supra.* §55-7B-9(g) modifies that common law rule through a limited exception which precludes an ostensible agency claim against a hospital for the

alleged negligent actions of a "non-employee" emergency room physician if that "alleged agent" maintains certain minimum levels of professional liability insurance coverage. The least restrictive way to read that provision, the way to read that provision so that it makes the least rather than the most change to the common law (which previously permitted ostensible agency claims against hospitals with no restrictions), is to interpret it to require that each alleged ostensible agent must have a minimum of $1 million of professional liability insurance coverage before claims of ostensible agency are barred for that particular physician's negligence. Tadros and Polinski simply do not each have a minimum of $1 million of professional liability insurance coverage for the claims asserted in this litigation and as a result this Court should allow Morris' Estate's claims of ostensible agency against WVUH to proceed.

3. Finally, the above interpretation of §55-7B-9(g) is consistent with the purpose of §55-7B-9 which is titled "Several liability". The underlying 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 being abolished for claims brought against a medical provider. Instead, under the MPLA as is set forth in §55-7B-9 "if the trier of fact renders a 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, pursuant to §55-7B-9 the jury must be presented with special interrogatories requiring that it set forth their finding as to "The percentage of fault, if any, attributable to each of the defendants". Finding that §55-7B-9(g) requires that each "the alleged agent" (not the "**alleged agents**") must individually maintain a minimum of $1 million of professional liability insurance coverage before a claim of ostensible agency against a hospital for that "alleged agents(s)" negligence is precluded is consistent with the whole purpose of §55-7B-9 which abolished joint and severed liability. As

a result, it only makes sense that the minimum insurance limits requirements under §55-7B-9(g) apply for each individual defendant because under §55-7B-9 each agent is only responsible for their own percentage of fault. It is simply illogical that the Legislature intended that you add up the "joint" insurance limits together under a statute that on its face abolishes "joint" liability.

c. WVUH's Final Assignment of Error that as a Private Entity It Cannot be Subjected to an Ostensible Agency Claim Where the Alleged Agent is a State Employee May Not be Addressed by the Court Because it was Not Raised at the Circuit Court Level.

In its final assignment of error WVUH asserts, without citing any substantive case law, that because Tadros and Polinski as state employees are immune beyond the amounts of insurance that are available to them it should not be held responsible for any awards beyond the limits of insurance that the Board of Governors has purchased to insure Tadros and Polinski. While Morris believes there is no merit to the argument by WVUH, the bottom line is that it is simply a matter that this Court is not permitted to consider because it involves a non-jurisdictional question that was not raised let alone decided at the trial court level. *Whitlow v. Board of Education of Kanawha County*, 438 S.E.2d 15 (W.Va. 1993) ("The plaintiff raises a constitutional question regarding the validity of W.Va. Code 29-12A-6. The defendant contends that the issue was not raised below, and, consequently, we should not address it. Our general rule in this regard is that, when non-jurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal."); *Wang-Yu Lin v. Shin Yi Lin*, 687 S.E.2d 403 (W.Va. 2009) ("The appellants clearly did not raise this issue in their cross motion for summary judgment below. In the exercise of its appellate jurisdiction, this court will not decide non-jurisdictional questions which were not considered and decided by the court from which the appeal has been taken."); *Klein v. McCullough*, 858 S.E.2d 909 (W.Va. 2021) ("Our general rule is that

when a non-jurisdictional question has not been decided at the trial court level, and is then first raised before this court, it will not be considered on appeal... This court will not review questions that have not been decided by the lower court. The reasons behind this rule are many, including that 'it is manifestly unfair for a party to raise new questions on appeal.'"); *Wilkinson v. West Virginia State Office of Governor*, 857 S.E.2d 599 (W.Va. 2021) ("In the exercise of its appellate jurisdiction, this court will not decide non-jurisdictional questions which were not considered and decided by the court from which the appeal has been taken... Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal.")

Nonetheless as a substantive response, it appears that WVUH's argument is easily disposed of as a result of this Court's recent decision in the case of *Monongahela Power Co. v. Buzminsky*, 850 S.E.2d 685 (W.Va. 2020). In that case, Buzminsky brought a personal injury claim against Monongahela Power seeking to recover damages for injuries he sustained as a result of an electrocution at a wastewater treatment plant for which the power company had restored power after a flood. Monongahela Power argued, among other things, that because its employee(s) that had restored power to the treatment plant was immune from liability under W.Va. Code §15-5-11(a), it should likewise be immune under a theory of "vicarious immunity." In other words, Monongahela Power argued that, as an employer, it should derive immunity vicariously through any immunities that its employee(s) individually held. This is essentially what WVUH is arguing in this case where it asserts that because Tadros and Polinski are individually immune except up to the limits of their insurance policy, WVUH should likewise have immunity for any claims beyond their insurance limits as well. In other words, WVUH should be able to vicariously benefit from Tadros' and Polinski's personal immunity. This Court rejected that type of argument in

Buzminsky finding instead that our law was in accord with the Restatement "Second" of Agency §217 which provides that:

> In an action against a principal based on the conduct of a servant in the course of employment...[t]he principal has no defense because of the fact that...the agent had an immunity from civil liability as to the act.

As a result, this Court declared that:

> Rather, we find that our historical treatment of joint tortfeasors in the context of *respondeat superior* suggests that West Virginia is in accord with the Restatement view that, unless otherwise provided by law, '[i]mmunities, unlike privileges, are not delegable and are available as a defense only to persons who have them.' *Restatement, supra §217 cmt.* b. We likewise concur with the policy ramifications of this conclusion as statement by the District Court in *Garcia*:
>
> > The court finds this result is consistent with the policies undergirding the doctrine of resondeat superior. If societal goals require the employer to bear the risk that its tortfeasor-employee is judgment proof, then, in the absence of a clear legislative statement to the contrary, the employer should also bear the similar risk that its tortfeasor-employee is immune from suit.

It would appear that the ruling in *Monongahela Power* would be equally applicable to the facts of the current litigation. The mere fact that Tadros and Polinski are entitled to certain immunities because they are in effect employed by the State of West Virginia does not mean that WVUH may vicariously benefit from the immunities that solely belong to Tadros and Polinski. For these reasons, this last argument by WVUH, just like the other arguments made in its appeal, must fail.

IV. CONCLUSION

Under 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. *Thomas, Torrence, Belcher, Glover, Burless, supra.* The limited exception to this rule provided for in §55-7B-9(g) is simply inapplicable under the current facts

because neither Tadros nor Polinski maintained the minimum levels of professional liability insurance coverage required to bar ostensible agency claims against WVUH. Even if the Court were to find that the statutory language in that Code Section is ambiguous, it would still nonetheless be required to construe that statutory provision in the manner that makes the least rather than the most change to the common law (*Phillips, Blankenship, Manor Care Inc., State of West Virginia ex rel. Morgantown Operating Co., Musick, State of West Virginia ex rel. AmerisourceBergen Drug Corp, supra.*) and when doing so would have to reach the same conclusion. In the end, this Court must reject WVUH's attempt to have the Court read into §55-7B-9(g) language which the West Virginia Legislature elected to omit because "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." Indeed this Court is "obligated not to add to statutes something the legislature purposely omitted." *Brook, State of West Virginia,* and *State ex rel. Frazier, supra.*

The fatal flaw in WVUH's argument is that it acts as if the Legislature specifically drafted the provisions of §55-7B-9(g) solely to protect it. That is far from the truth. Instead, the limited exception under §55-7B-9(g) applys to any "healthcare provider" which by definition (see W.Va. Code §55-7B-2(g)) includes any person, partnership, corporation, professional limited liability company, healthcare facility, entity or institution licensed by, or certified, in the State of West Virginia or another state, that provides healthcare or professional healthcare services. All §55-7B-9(g) was intended to do was to provide a limited exception to West Virginia's decades old traditional common law rule permitting claims based upon ostensible agency. If any healthcare provider can meet the limited exception now permitted, then claims of ostensible agency are barred against it. And if, on the other hand, the terms of the limited exception are not met, then the

healthcare provider merely remains in the same position it was before the enactment of the Code Section. Some healthcare providers are able to comply with the statutory requirements and are therefore entitled to its protections. Others, based upon their unique circumstances, are unable to do so and as a result remain subject to West Virginia's common law which permits ostensible agency claims such as that being asserted by Morris. WVUH is not somehow being punished. It just simply does not meet the requirements of the limited exception and therefore is not entitled to claim its protections.

Lastly, in a final attempt to persuade the Court, WVUH and its *amicus curiae* resort to the tactic of attempting to invoke the imaginary fear that allowing Morris's ostensible agency claim to proceed will somehow catastrophically affect hospitals supplying emergency room care in West Virginia. That type of argument has no place in a brief to this Court. But now that it has been raised, it is important to point out that allowing Morris's ostensible agency claim to proceed simply will not result in the disastrous ripple effect that is suggested. Hospitals like WVUH already have in effect and utilize multiple methods to protect themselves from the occasional ostensible agency claim like Morris's that arises. They do so by implementing medical staff bylaws that require "each" medical provider working within the hospital to individually have at least $1,000,000 of medical professional liability insurance. So if they enforce their own rules, ostensible agency claims will simply not exist. Or, as the *amicus curiae* Mountain Health Network Inc., et al. explained in its brief, hospitals can and do protect themselves by requiring medical practice groups to have excess insurance policies, eliminating scenarios where any one particular physician would have less than $1,000,000 of coverage even when the primary insurance is in the form of a

"combined single limit" policy.[5] And, hospitals can and do purchase their own professional liability policies that insure them against the potential of ostensible agency claims being brought. That, in fact, is what WVUH itself has done. In the *Morris* litigation it is covered by both a $10,000,000 primary policy and a $20,000,000 excess policy both of 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 because the alleged agent lacks adequate insurance coverage in order for WVUH to be able to invoke the protections of §55-7B-9(g).

For the reasons set forth, herein, Morris respectfully the Court for an Order denying the appeal of WVUH.

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[5] "In the uncommon instance in which a plaintiff's damages exceed $1,000,000 for a single occurrence, healthcare practice groups typically purchase excess policies to allow for additional coverage. It is exceedingly rare in the present climate that a practice group lacks a policy to account for excess liability." *Amicus* Brief Mountain Health Network, Inc., p. 11

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

REBECCA MORRIS, Administratrix of the Estate of Bryan Morris,

Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

I, Arden J. Curry, II, attorney for the within named Respondent, Rebecca Morris, Administratrix of the Estate of Bryan Morris, do hereby certify that I have this 12th day of November, 2021 served true copies of the ***Respondent's Brief*** upon the parties by mailing the same, postage prepaid, to the following addressees:

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