No. 33006 *Larry D. Elmore, Individually and as administrator of the Estate of Dorothy Mae Elmore, deceased, v. Triad Hospitals, Inc., a Delaware corporation, d/b/a Greenbrier Valley Medical Center; John M. Johnson, D.O., and BJSM Med, Inc., a West Virginia corporation*

FILED

December 14, 2006

released at 10:00 a.m.

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, Justice, concurring, in part, and dissenting, in part:

I dissent from the majority opinion in this matter to the extent it indicates that receipt of a notice of claim by a person having *absolutely no authority*, *express or implied*, to accept the same on behalf of a medical provider is sufficient to satisfy the requirements of W. Va. Code § 55-7B-6 (2001). The Appellant mailed, via certified mail, his notice of claim as to Dr. Johnson to Greenbrier Valley Medical Center (hereinafter "GVMC"). This notice of claim was signed for by GVMC employee Teresa Shinn-Morgan. Ms. Shinn-Morgan worked in the GVMC business office as a refund clerk/mail clerk. Dr. Johnson provides emergency medical services in the GVMC emergency room by virtue of GVMC's contract with BJSM, Inc. (hereinafter "BJSM"). Dr. Johnson is an employee of BJSM, not GVMC. The record contains no evidence that GVMC or its employees had actual or apparent authority to act or accept service on behalf of Dr. Johnson. Therefore, neither GVMC nor Ms. Shinn-Morgan had the authority to accept the notice of claim on Dr. Johnson's behalf. The majority erred by implying that such authority existed.

Even assuming, arguendo, that an apparent agency relationship might exist

between Dr. Johnson and GVMC under this Court's case law, the same is not, in my view, sufficient to permit GVMC to accept any form of service on behalf of Dr. Johnson. *See*, *Burless v. West Virginia University Hospitals, Inc.*, 215 W. Va. 765, 601 S.E.2d 85 (2004) (finding apparent agency relationship may exist between physician and hospital in certain situations where there is no actual agency relationship); *Torrence v. Kusminsky*, 185 W. Va. 734, 408 S.E.2d 684 (1991) (finding emergency room physician may be deemed ostensible agent of hospital where no actual agency relationship exists). Such a relationship may permit the hospital to be held liable for the acts of the physician, but it does not permit the hospital to act on behalf of the physician. I have been unable to locate a single case permitting a hospital to accept service on behalf of an emergency room physician. To the contrary, courts uniformly reject such service. *See*, *Jackson v. County of Nassau*, 339 F.Supp.2d 473 (E.D.N.Y. 2004) (Under New York law, a county medical center's designated agent was not authorized to accept service of process for physician formerly employed by the medical center, absent evidence that he was ever appointed as physician's agent for service of process or for any other purpose.); *Neely v. Eshelman,* 507 F.Supp. 78 (D.C.Pa. 1981) (quashing service of process upon physician where complaint was served on individual at the hospital other than the physician and the physician did not have an authorized agent for service at the hospital); *Brown v. Carolina Emergency Physicians, P.A.*, 560 S.E.2d 624 (S.C. Ct. App. 2001) (under South Carolina law, plaintiffs' service of process was ineffective for purposes of medical malpractice action brought against company

employing emergency room doctor, hospital, and emergency room doctor where service was made upon employee of the hospital who was not authorized to accept service on behalf of company or doctor); *C.f.*, *LaPalme v. Romero*, 621 N.E.2d 1102 (Ind. 1993) (service upon manager of defendant's employer was insufficient as to defendant because employer did not have legal authority to accept service on behalf of defendant). Simply put, the mere mailing of a notice of claim to a hospital where a physician provides medical services cannot suffice to establish service of the notice of claim upon the physician unless the notice is received by a person designated by the physician as having the authority to accept such service on the physician's behalf. The purpose of the notice of claim provision found in W. Va. Code § 55-7B-6 is to provide notice to the physician of an impending medical malpractice claim and to provide the physician with thirty days in which to respond before suit is filed. Recognizing that the Legislature failed to define the term "service" as used in W. Va. Code § 55-7B-6, I do not believe that providing notice to a person who is a non-authorized agent of the physician in the hopes that it will eventually reach the physician himself can, by any stretch of the imagination, satisfy the legislature's intent under any definition of service.

Although I dissent to the majority's determination that the notice at issue was properly served upon Dr. Johnson, I agree and concur with the majority's discussion regarding the legislature's authority with respect to pre-suit notice of claims as a pre-requisite to filing a medical malpractice action. The legislature is empowered to define

common law causes of action, including prerequisites which must be satisfied before a court's jurisdiction to entertain the action is triggered.