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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

YVONNE REYES PANGELINAN as Guardian Ad Litem for M.P. (d.o.b. xxxx 2020), minor child, HOPE LEILANI REYES GOMEZ, and JIMMY POLK, **Plaintiffs,** **v.** **HELEN TARO-ATALIG, M.D., HEALTH PROFESSIONAL CORPORATION dba SAIPAN HEALTH CLINIC, and COMMONWEALTH HEALTHCARE CORPORATION,** **Defendants.**	**CIVIL CASE NO. 22-0095** **ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTIONS TO DISMISS AND ISSUING FINAL CERTIFICATION AND DETERMINATION OF NO JUST CAUSE FOR DELAY**

I. INTRODUCTION

This lawsuit involves claims of medical malpractice and violations of equal protection of the law. The case came before the Court for oral arguments on the motions to dismiss these claims on January 24, 2023 at 10:00 a.m. in the Guma' Hustisia, Courtroom 223A. Plaintiffs Yvonne Reyes Pangelinan, as Guardian Ad Litem for M.P., a minor child ("M.P."), Hope Leilani Reyes Gomez ("Plaintiff Gomez") and Jimmy Polk ("Plaintiff Polk") (collectively "Plaintiffs") were present through their attorney, Matthew J. Holley.

Defendants Helen Taro-Atalig, M.D. ("Defendant Taro-Atalig") was present through her attorney, Samuel I. Mok Commonwealth Healthcare Corporation ("Defendant CHCC") was present through its attorney, Assistant Attorney General Stephen Anson. Health Professional Corporation d.b.a. Saipan Health Clinic ("Defendant SHC") was present through its attorney, Brien Sers Nicholas.

Presently at issue are: (i) Defendant Taro-Atalig's Motion to Dismiss Plaintiffs' First and Third Causes of Action in the Third Amended Complaint ("TAC") against her pursuant to NMI R. Civ. P. 12(b)(6); and (ii) Defendant CHCC's NMI R. Civ. P. 12(b)(6) Motion to Dismiss all three causes of action in the TAC brought against CHCC.

II. BACKGROUND AND FACTS

1. Plaintiffs Gomez and Polk sought the medical services of Defendant SHC and Defendant Taro-Atalig for delivery of their child, M.P.
2. On or about May 7, 2020, Plaintiff Gomez gave birth to M.P. at the Commonwealth Healthcare Corporation medical facility.
3. Defendant Taro-Atalig was the attending physician to Plaintiff Gomez at all times material to the incidents involved in this case.
4. Defendant SHC denies that Defendant Taro-Atalig was at the times material to the incident an employee and/or agent.
5. Various nurses and/or employees of Defendant CHCC assisted in providing medical care during the birth of M.P.
6. As alleged by Plaintiffs, on May 7, 2020, Defendant Taro-Atalig and Defendant CHCC fell beneath the standard of care by failing to properly obtain informed consent, failing to properly monitor Plaintiff Gomez during birth, failing to properly apply vacuum and forceps, failing to give proper and adequate alternative care and treatment, failing to properly move M.P. from delivery to neonatal care, and failing to care for M.P.'s Hypoxic Ischemic Encephalopathy (*among other assertions and claims*).
7. On May 5, 2022, Plaintiffs brought the present lawsuit.
8. On September 9, 2022, Plaintiffs filed their TAC alleging three causes of action in total: (i) a medical malpractice claim against all defendants; (ii) an equal protection claim

against Defendant CHCC as to 7 CMC § 2202(a)(1)("Government Liability Cap"); and (iii) an equal protection claim against all Defendants as to 7 CMC § 2922 ("Personal Injury Compensation Cap").

9. On September 30, 2022, Defendant SHC filed its Answer to the TAC.

10. On October 14, 2022, Defendant CHCC filed its Rule 12(b)(6) Motion to Dismiss all three causes of action against it set out in the TAC.

11. On October 28, 2022, Defendant Taro-Atalig filed her Motion to Dismiss the first and third causes of action listed in the TAC as to Defendant Helen Taro-Atalig, M.D.

12. Oral arguments on the fully briefed motions were heard on January 24, 2023.

III. LEGAL

Rule 12(b)(6) of the Northern Mariana Islands Rules of Civil Procedure provides that a claimant may file a motion to dismiss a cause of action for "failure to state a claim upon which relief can be granted." NMI R. CIV. P. 12(b)(6). In a Rule 12(b)(6) motion to dismiss, "the court reviews the complaint for sufficient allegations necessary to support a party's legal claims upon which relief can be granted." *Claassens v. Rota Health Ctr.*, 2021 MP 9 ¶ 13. In order to survive a Rule 12(b)(6) motion to dismiss, "a 'complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.'" *Syed v. Mobil Oil Mariana Islands, Inc.*, 2012 MP 20 ¶ 19 (quoting *In re Adoption of Magofna*, 1 NMI 449, 454 (1990); *see also* NMI R. CIV. P. 8 (a pleading "shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."). The purpose of Rule 12(b)(6) is to remove from before the Court groundless claims that could ***never*** win even assuming all the factual allegations in the complaint are

true. *See Claassens v. Rota Health Ctr.*, 2021 MP 9 ¶ 16 (citing *Foley v. Wells Fargo Bank*, 772 F.3d 63, 72 (1st Cir. 2014)).

IV. DISCUSSION

In the TAC, Plaintiffs bring two separate equal protection causes of action asking this Court—in effect—to declare the Government Liability Cap unconstitutional as set out in 7 CMC § 2202 and the Personal Injury Compensation Cap unconstitutional as set out in 7 CMC § 2922. This Court initially notes that these statutory provisions limiting potential monetary recoveries for damages for personal injury claims against the Commonwealth Government and private individuals present significant legal and societal issues which many states and courts nationwide have—and continue to—struggle to properly resolve.

a. Plaintiffs' Equal Protection Claim Against Defendant CHCC Concerning the Government Liability Cap

In response to Plaintiffs' TAC, Defendant CHCC first asks this Court to confirm that 7 CMC § 2202 is constitutional and, second, that 7 CMC § 2922 does not apply in any way to the CNMI's public health corporation. These two arguments are addressed separately.

Defendant CHCC relies heavily on the long-standing Trust Territory case *Gower v. Commonwealth*, 2 CR 413, 420 (D. NMI, Dec. 31, 1985), for the proposition that under the Government Liability Cap, the concept of sovereign immunity means that this Court must honor governmental immunity where the legislature has clearly provided for such and that the Commonwealth has not consented to be sued for more than $100,000 in situations of tort liability. (Defendant CHCC's Mot. to Dismiss at 9.) Further, Defendant CHCC argues, Plaintiffs have not met the requirements needed to find the statute unconstitutional as a violation of equal protection as the Government Liability Cap does not affect a fundamental right and Plaintiffs do not belong to a suspect class. (*Id*. at 10-11.)

Defendant CHCC concludes, therefore, that lacking a suspect class or a violation of a fundamental right, this Court should employ a "rational basis" review of the Government Liability Cap and confirm that, because conserving government resources is directly connected to the purpose and effect of the Government Liability Cap, it passes the "rational basis" review. (*Id*. at 11-12.)

In their Opposition, Plaintiffs argue that, in effect, there are three groups or classes of people that are treated differently based on the type of injury sustained in relation to the '*alleged*' unconstitutional classification systems. Plaintiffs argue the first group is a class of injured persons with slight or only minor injuries compared to those who have been severely injured. The next group would be those individuals damaged by the Commonwealth—as compared to individuals who have suffered damages caused by private parties. The final group are those that suffer personal injury compared to those only suffering economic injury. (Pl's Opp. to Motion to Dismiss at 8-10.) Plaintiffs argue that these classifications created by the Legislature do not pass a rational basis test as they are based on arbitrary and unreasonable ideas and numbers. (*Id*. at 11.)

Plaintiffs continue that the reasoning in *Gower* for upholding the low monetary-value cap was, when enacted, fundamentally reliant on the Commonwealth's position as a young and struggling territory, but that the situation has changed as both the Commonwealth and inflation of the dollar has grown. (*Id*. at 6.) Plaintiffs argue further that the annual budget today is roughly eight (8) times larger than in 1985 when the Government Liability Cap was first enacted and that there is no 'rational' basis for the Commonwealth paying economic damage judgments several times greater than potential payments under the Government Liability Cap. (*Id*.) Plaintiffs additionally provide a list of cases nationwide where state courts have found medical malpractice liability caps unconstitutional for being too low. (*Id*. at 12-21.)

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As an initial observation, this Court recognizes that Plaintiffs' injuries to their child as alleged will possibly require lifelong treatment at great costs. However, the Government Liability Act limits potential recovery for any personal injuries caused by the Commonwealth in tort to not more than $50,000 in an action for wrongful death and liability in all other tortious occurrences to $100,000 per person, or $200,000 per occurrence. 7 CMC § 2202(a)(1). This capped amount was, as Plaintiffs point out, set in 1983 and was not changed by the CNMI Legislature's 2006 amendment to the GLA. *See* PL 15-22, § 2. With only $100,000 available by law to address Plaintiffs' potentially lifelong injuries, Plaintiffs ask for the statutory caps on the Commonwealth's tort liability to be declared unconstitutional due to being too low to provide equal protection.

Although this Court is sympathetic to Plaintiffs circumstances, ultimately, as a general proposition of law, it is not the role for a trial court to invalidate or hold as unconstitutional well-established statutory law concerning sovereign immunity. As noted above, the concept of sovereign immunity and liability caps are significant legal issues of great social importance. The CNMI Legislature has, for better or worse, articulated what the law is and, in sum, the legal foundation presented by Plaintiffs encouraging this Court to declare the Government Liability Cap unconstitutional is less than totally convincing within the controlling legal framework.

Specifically, Plaintiffs' arguments against Defendant CHCC are grounded on equal protection rights under Article 1, Section 6 of the NMI Commonwealth Constitution, which states that "[n]o person shall be denied the equal protection of the laws" and "[n]o person shall be denied the enjoyment of civil rights or be discriminated against in the exercise thereof on account of race, color, religion, ancestry or sex." In the CNMI, as in other states, the "Equal Protection clause protects those similarly situated who are treated differently." *Office of the Attorney Gen. v. Estel*, 2004 MP 20 ¶ 19 (internal citations omitted). Valid equal protection challenges include a showing that members of a

certain group are being treated differently than other persons based upon their membership in that group. *Id.*

Plaintiffs maintain unequal protection or application of the Government Liability Cap exists because there are three groups or classifications of injured persons that are treated differently based upon the type or monetary value of the damages a person suffers and who the actor was that caused those injuries. Plaintiffs find this differing treatment is evidenced by the differences in the percentage of compensation for damages and/or medical expenses that are recoverable. Plaintiffs continue that people injured by a private party will have a greater percentage of their losses covered compared to people injured by the Commonwealth (though Plaintiffs believe the liability amount for torts against private parties is also unconstitutionally low as discussed below). The arguments appear well-meaning and somewhat plausible because those only slightly injured can have all of their medical expenses covered while those severely injured will have only a small fraction of their medical expenses covered.

Unfortunately, in this Court's opinion, these legal arguments disregard what the law actually sets out. Plaintiffs here are ultimately similarly situated among a group of people that have a tort claim against the Commonwealth. Public Law 3-51, as enacted by the CNMI Legislature, has set a limit on the amount of money that can be recovered from a tort claim against the government. All persons with tort claims against the Commonwealth are subject to the same liability cap enacted by the CNMI Legislature and there is no sub-group that actually affects how the statute in question is legally applied. The measure of damages and compensation available are separate factual details unique to each case, but not based on an unequal application of law.

Accordingly, as Plaintiffs are to be treated the same as others that are similarly situated, Plaintiffs do not, in this Court's opinion, have a viable equal protection claim and Defendant CHCC's 12(b)(6) motion should be granted. *See Office of the Attorney Gen. v. Estel*, 2004 MP 20 ¶ 19.

In further support of this conclusion, it must be noted that even if the Court accepted Plaintiffs' alleged classifications argument, these groups are not founded upon any of the *suspect* classifications, such as race or national origin, and tort recovery is not a fundamental right, such as marriage or speech; therefore, this use of legislative power receives a rational basis review. *See e.g. In re Blankenship*, 3 N.M.I. 209, 219 (1992) ("[t]raditional equal protection analysis under the U.S. Constitution scrutinizes laws which (a) affect a 'suspect class,' or (b) violate a fundamental right."). The rational reason for placing a limit on the Commonwealth's liability is set out by the 2006 amendment in the Findings and Purpose section of the Government Liability Act. While the Findings and Purpose section of the law is somewhat ambiguous concerning the decision for the $50,000 and the $100,000 caps, PL 15-22 does explain that the $200,000 cap per tort occurrence exists for the purpose of "limit[ing] the government's liability to a reasonable amount in cases with multiple claimants."

The CNMI Legislature's concern for the government's potential liability is telling and when interpreting a statute, the Court must acknowledge every word and every clause to determine the general intent of the whole statute. *See Rebuenog v. Cruz Aldan*, 2010 MP 1 ¶ 35 (citing *Hennepin County Med. Ctr. v. Shalala*, 81 F.3d 743, 748 (8th Cir. 1996)). Accordingly, this would mean that the same reasoning for the $200,000 cap per occurrence would apply to the other tort liability caps: to allow the CNMI Legislature to use its legislative knowledge and control over the CNMI budget to prevent unreasonable liability. A government should properly legislate to prevent its own insolvency; this is clearly a rational basis or purpose for the Government Liability Cap and the Government Liability Cap is sufficiently related to that purpose. Therefore 7 CMC § 2202(a)(1) passes the low bar of the rational basis test.

Finding that Plaintiffs have not been treated differently than other injured people in their same general situation, it is this Court's conclusion that Plaintiffs are unable to succeed on their Second

Cause of Action against Defendant CHCC as the law is presently interpreted. For this reason, it is vulnerable to a Rule 12(b)(6) dismissal under the *Claassens*'s standard articulated by our Supreme Court as discussed above. The Court is not unsympathetic to Plaintiffs and the injuries they have sustained. Nonetheless, it is CNMI Legislature's role (or perhaps the citizens' role to effect change through the political process)—not the CNMI Judiciary's—to redress the monetary cap of potential government liability in personal injury cases. For these reasons, this Court hereby grants CHCC's Motion to Dismiss the Second Cause of Action in the TAC against it.

b. Plaintiffs' Equal Protection Claims Against Defendant CHCC Under the Personal Injury Compensation Cap

In Plaintiffs' Third Cause of Action in the TAC, Plaintiffs claim that the Personal Injury Compensation Cap as set out in 7 CMC § 2922 and as considered against Defendants—CHCC and Dr. Taro-Atalig—is unconstitutional. This Court must therefore separately analyze this claim against Defendant CHAA and Defendant Taro-Atalig under their motions to dismiss. First, as to Defendant CHCC and as recognized by Plaintiffs in the TAC—Defendant CHCC is a public corporation organized and existing under the laws of the CNMI. *See* 3 CMC § 2823(a).[1]

Defendant CHCC is represented by legal counsel working in the Office of the Attorney General and, to properly start this lawsuit, Plaintiffs were required to send Notice of Claims to the Office of the Attorney General pursuant to 7 CMC § 2202. As such, Defendant CHCC argues that as the CNMI's only public health corporation—it can only be sued and/or be found liable for damages only consistent with the Commonwealth's waiver of sovereign immunity (i.e., subject to the liability caps found within 7 CMC § 2202(a)(1)). Defendant CHCC therefore claims that there is no legal way in which Plaintiff can present this Third Cause of Action in the TAC under 7 CMC § 2922 against

[1] A public corporation is a juristic person organized by a government to accomplish certain ends, which may be public or quasi-public. *Hopkins Fed. Sav. & Loan Asso. v. Cleary*, 296 U.S. 315, 327 (1935).

it and that therefore this cause of action must be dismissed in accordance with its Rule 12(b)(6) motion as it will never succeed.

In short, this Court agrees and finds specifically with respect to Defendant CHCC that lawsuits against that public corporation must be in accordance with, and that damages against it are limited to, the waivers of sovereign immunity noted in the discussion above. The remedy against CHCC under the Government Liability Act is exclusive of any other civil action or proceeding for money damages, and precludes any other civil action or proceeding for money damages arising out of or relating to the same subject matter. *See* 7 CMC § 2208(b)(1)("the remedy against the Commonwealth provided for by this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Commonwealth while acting within the scope of his office or employment ***is exclusive*** of any other civil action or proceeding for money damages, by reason of the same subject matter, against the employee whose act or omission gave rise to the claim, or against the estate of such employee . . . .")(emphasis added).

Plaintiffs' equal protection claim brought against Defendant CHCC based on an application of 7 CMC § 2922 fails because that statutory provision does not apply to that CNMI governmental body.

c. Plaintiffs' Equal Protection Claims Against Defendant Taro-Atalig Under the Personal Injury Compensation Cap

In a similar vein, Defendant Taro-Atalig argues that, while the Personal Injury Compensation Cap would apply to the malpractice claim raised against her individually or perhaps as an employee or agent of Defendant SHC, Plaintiffs' Third Cause of Action in the TAC raising a violation of equal protection against her personally—a non-governmental body—is inappropriate and/or legally deficient because an equal protection claim cannot be brought against a private party. In other words, Defendant Taro-Atalig argues that Plaintiffs cannot bring an equal protection claim against her as a

challenge to the liability cap because the equal protection clause limits discrimination only by governmental entities, not by private parties. *See Black v. Barberton Citizens Hosp*., 134 F.3d 1265, 1267 (6th Cir. 1998) (equal protection claims prohibit discrimination by the State, not by a private actor). As alleged in the TAC, what is indisputable is that Defendant Taro-Atalig was acting at all times material as either a private actor (or in the alternative, as an employee/agent of Saipan Health Clinic).

In their Opposition, Plaintiffs do not specifically counter this argument or address the procedural accuracy of bringing an equal protection claim against Defendant Taro-Atalig as a private citizen in its effort to defeat the statutory limitation on the amount damages which can be recovered against her. Instead, Plaintiffs cite as persuasive a considerable number of cases where various courts from different jurisdictions have struck down general medical malpractice liability caps on equal protection (*and other*) grounds.

However, with respect to the cases cited, this Court notes that exclusively it was a state supreme court—not a trial court—which declared unconstitutional the medical malpractice cap. As noted above, in general, trial courts do not declare longstanding statutes as unconstitutional. Moreover, the underlying factual and legal postures of the cases cited in support by Plaintiffs are not the same as the case presently at issue. Further, this Court's review of case law overturning tort liability caps shows that many of these cases were specifically moved through the judicial process by a request for a declaratory judgment on the law. *See e.g. Wright v. Cent. Du Page Hosp. Ass'n*, 347 N.E.2d 736, 737 (Ill. 1976); *Estate of McCall v. United States*, 134 So. 3d 894, 897 (Fla. 2014). This appears in part to be because when a private party has an equal protection claim asserted against it, the claim must be dismissed as the Fourteenth Amendment of the U.S. Constitution does not protect against private discrimination. *E.g., Dullen v. Pres. Mgmt.*, No. 15-cv-30-LM, 2015 U.S. Dist. LEXIS 146873, at *2 (D.N.H. Oct. 6, 2015).

Plaintiffs' TAC somewhat addresses this issue by stating, at the very end of their claim ***against all Defendants***, that "Child is entitled to a declaratory judgment that 7 CMC § 2922 is unconstitutional and that he is entitled to recovery of the full measure of his damages." (Complaint at 9 (emphasis added)).[2] This seems like an afterthought and none of the TAC's three causes of action are specifically addressed as seeking declaratory judgments. Nonetheless, during oral argument, following specific questioning on this issue from this Court, Plaintiffs did assert they were actually seeking *declaratory relief* against all Defendants because all the Defendants in this case benefitted from the Personal Injury Compensation Cap.

Therefore, upon full review, the substance of Plaintiffs' Third Cause of Action does then ask or seek declaratory relief despite Plaintiffs' Third Cause of Action in the TAC actually being framed as an equal protection claim against all Defendants. Accordingly, in order to promote judicial efficiency and bring the essence of Plaintiffs case too bear, this Court shall construe Plaintiffs' pleading as to this cause of action as a request for a declaratory *and* final judgment against all Defendants.[3]

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Nonetheless, despite this Court's cognizance of Plaintiffs' challenging situation, the instant issue then with respect to the Third Cause of Action in the TAC against Defendant Taro-Atalig is whether the equal protection claim against a private citizen can stand. Under the circumstances, the controlling legal framework today requires this Court to find that Plaintiffs' equal protection claim

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[2] As clarified during oral arguments, *all* Defendants would also therefore include Defendant SHC, even though it has filed an Answer to the TAC.

[3] A final judgment and certification under the practical finality doctrine set in *Gillespie v. United States Steel Corp*., 379 U.S. 148 (1964) is consequently included in the final section of this Order.

under 7 CMC § 2922 against Defendant Taro-Atalig is improper because she is a private citizen. *See Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

In further support of this Court's denial of Plaintiffs' request for declaratory judgment against Defendant Taro-Atalig, it must be noted that the Injury Compensation Act was passed in 2004 and was for the specific purpose of maintaining the availability of insurance in the Commonwealth.

> The purpose of the Injury Compensation Act is to further the Commonwealth's interests in maintaining the availability of liability insurance in the Commonwealth, fostering competition in the insurance market, reducing the cost of liability insurance, increasing the types and scope of liability coverage, encouraging the widespread acquisition of liability insurance by individuals and businesses, increasing sources of compensation for victims of personal injuries, and preserving commercial and economic stability in the Commonwealth and preserving a legal environment of fairness to plaintiffs, defendants and insurers. . . . This statute is in part designed to dissuade insurers from discontinuing the provision of liability insurance in the Commonwealth, to reduce the significant rise premiums and increase the types and amount of coverage available for CNMI risks. ***There has been a decrease in the types of coverage being made available in relation to certain CNMI risks. Premiums for some types of coverage that have risen so high that they are no longer available to or affordable by individuals and businesses in the CNMI. Several insurers have commenced the process of completely ceasing to provide liability insurance in the CNMI and other have expressed an intention to do the same.*** The Legislature finds that, without passage of this Act, Commonwealth commerce decline and there would be a significant risk of substantial negative impact on the people and infrastructure of the CNMI.
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> PL 14-46 § 2 (emphasis added).

The CNMI Legislature is branch of government that is responsible for passing laws in the interest of the Commonwealth and is the best situated branch of government for determining laws that will assist in the economic health of the CNMI. Plaintiffs have made several valid arguments concerning whether it is a rational fact that a liability cap encourages a healthy insurance market nationwide, (Pl's Opp. to Mot. to Dismiss at 12-21), but as the bolded section above indicates, it is apparent that the CNMI Legislature considered those arguments and was privy to information specific

to insurers' opinions and actions ***in the CNMI*** and of insurers' intention to withdraw offering insurance to the CNMI.

Again, the rational basis test is a low bar to pass, and while Plaintiffs have cited legal opinions that have relied on nationwide studies to find there to be no rational connection between tort liability caps and available and competitive insurance coverage, the Findings section of PL 14-46 states the exact opposite when looking into the specific circumstances of the CNMI. There was no general tort limitation previous to 2004 and the Legislature appears to be informed that it was this lack of a private injury cap that was being listed as the reason why insurance companies were contemplating or threatening to leave the CNMI. Under these facts, the Court finds there to be a rational basis for the Personal Injury Compensation Act.

As Plaintiffs are unable to succeed on their Third Cause of Action/Request for Declaratory Judgment, this Court hereby partially grants Defendant Taro-Atalig's Motion to Dismiss as to Plaintiffs' equal protection claim. The Court additionally denies Plaintiffs' request for declaratory judgment as substantively contained within Plaintiffs' Third Cause of Action.

d. Plaintiffs' Medical Malpractice Claims Against Defendants CHCC and Taro-Atalig

The final issue to consider is whether Plaintiffs' medical malpractice claims should be dismissed. As acknowledged by our Supreme Court, medical malpractice claims are a subset of negligence claims and follow the same requirements of duty, breach of duty, causation, and damages. *Owens v. Commonwealth Health Center*, 2012 MP 5 ¶ 3 n. 2. In a medical malpractice context, duty begins when the patient/physician relationship is formed as a "physician owes his patient a duty to employ that degree of knowledge, skill, and care ordinarily possessed by members of the medical profession." *Toogood v. Owen J. Rogal, D.D.S., P.C.*, 824 A.2d 1140, 1150 (Pa. 2003) (citing *Hodgson v. Bigelow*, 7 A.2d 338 (Pa. 1939)). Breach of duty arises when ". . . under the management

of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care . . . ." *Id*. at 1146. Additionally, a plaintiff must allege that the breach of duty was what caused the alleged damages. *See generally Antonio v. Baek*, 2023 MP 2 ¶ 22-23.

Defendants have each posited different arguments as to the inadequacy or legal insufficiency of the complaint in alleging facts to support the required material points of a medical malpractice claim. Defendant Taro-Atalig claims that there are insufficient allegations to support any finding that the claimed negligence caused any of the alleged injuries. Defendant CHCC argues that there are insufficient facts to show CHCC had a duty of care when its staff was merely following the instructions of a private attending physician chosen by the patient.

As to Defendant Taro-Atalig, Plaintiffs allege that Plaintiff Gomez had a previous agreement with Defendant SHC that Defendant SHC, through its agent or employee, Defendant Taro-Atalig, would be providing medical care before, during, and after Plaintiff Gomez's pregnancy. These facts, if true as alleged, are sufficient to establish at this stage that Defendant Taro-Atalig had formed a patient-physician relationship and was required to provide the associated duty of care.

Plaintiffs specifically allege that Defendant Taro-Atalig violated the required duty of care when she: failed to provide informed consent for healthcare, medical services, evaluation, diagnosis, care, and treatment; failed to provide and obtain informed consent relating to alternative care and treatment; failed to properly identify, monitor, and assess M.P.'s ***and*** Plaintiff Gomez's condition during labor; failed to properly apply the vacuum and forceps, failed to provide adequate alternative care and treatment; failed to create adequate medical notes and recordings; failed to provide adequate and proper testing; failed operative vaginal delivery; failed to adequately transfer M.P. from delivery to neonatal care; and failed to provide the care and treatment that would have prevented M.P.'s Hypoxic Ischemic Encephalopathy ("HIE").

Defendant Taro-Atalig asserts that these are vague and insufficient to indicate what wrongful actions Defendant Taro-Atalig is being asked to answer for. Plaintiffs respond that the specific details regarding which defendant exactly was responsible for which action will come out during discovery and the allegations were sufficient for the pleading stage of litigation. The Court disagrees and finds that the list of allegations is sufficient to act as a short and plain statement and contain sufficient allegations from which inferences may be drawn that additional evidence on all material points will be presented at trial. *See Claassens v. Rota Health Ctr.*, 2021 MP 9, ¶ 17 ("[p]roviding a short and plain statement saves courts time and gives fair notice to other parties on what grounds a claim rests."); *Syed v. Mobil Oil Mariana Islands, Inc.*, 2012 MP 20, ¶ 34 (finding a complaint sufficient when inferences may be drawn that evidence will be produced at trial).

Plaintiffs further allege that because of these breaches of duty, Plaintiff M.P. has suffered HIE, life-long physical injuries, emotional distress, economic losses, and non-economic losses. The connection between the alleged improper delivery and care preventing HIE is clearly causally connected to M.P. suffering from HIE, as are the associated distress and losses. Plaintiff Gomez likewise claims injury, emotional distress, economic losses, and non-economic losses, which would plainly follow the alleged breaches of duty concerning improper conduct during delivery and the injuries to her child. The same applies to Plaintiff Polk's claim of economic damages, which would follow the injuries claimed by his child.

As Plaintiffs have alleged facts on all material points, or the inferences of the alleged facts presented are clear to see, a Rule 12(b)(6) dismissal of Plaintiffs' medical malpractice claim against Defendant Taro-Atalig is inappropriate at this time.

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Plaintiffs have also leveraged these same underlying factual allegations regarding medical malpractice against Defendant CHCC. Plaintiffs claim Defendant CHCC's employees and/or staff all

had an independent duty of care that was breached during their care of Plaintiffs M.P. and Gomez. Although a somewhat complex legal issue, at this stage the Court understands that while nurses may not have an independent ability to practice medicine in the same way that a doctor might, nurses are licensed by the CNMI for their advanced medical knowledge above that of an ordinary person. The duties of a licensed nurse are outlined in 3 CMC § 2310(k) and state that to retain their license, a nurse must "demonstrate competence to resume the practice of nursing with reasonable skill and safety to patients."

Sister jurisdictions have understood that this license imposes an independent duty of care. *E.g. Berdyck v. Shinde*, 613 N.E.2d 1014, 1022 (Ohio 1993); *Huelskamp v. Patients First Health Care, LLC*, 475 S.W.3d 162, 168 (Mo. Ct. App. 2014); *Mactavish v. R.I. Hosp.*, 795 A.2d 1119, 1121 (R.I. 2002). "Because nurses are persons of superior knowledge and skill, they must employ that degree of care and skill that a nurse practitioner of ordinary care, skill and diligence should employ in like circumstances." *Berdyck v. Shinde*, 613 N.E.2d 1014, 1022 (Ohio 1993). It is also commonly accepted that "nursing practice include a duty to keep the attending physician informed of a patient's condition so as to permit the physician to make a proper diagnosis of and devise a plan of treatment for the patient." *Id*. at 1021-22. As nurses have an independent duty to provide competent nursing services, Defendant CHCC's argument that nurses do not when there is an independently employed attending physician is unpersuasive, particularly as the allegations contain failures of duty that typically fall to nursing staff.

Plaintiffs' Complaint specifically alleges that CHCC staff were acting as nursing assistants during delivery, thereby establishing sufficiently for this Court <u>*at this stage*</u> to find that CHCC could potentially be liable for any breaches of the duty its nurses may have violated under the facts of this case. Plaintiffs allege that the nurses failed in their duty to adequately monitor and transfer patients, and failed to provide adequate preventative care; facts which go towards breach of duty. The causal

connection analysis between the breaches of duty and the alleged injuries would be similar to the analysis of the legal relationship between Defendant Taro-Atalig's breaches of duty and Plaintiffs' injuries. For all these reasons, a Rule 12(b)(6) dismissal is likewise inappropriate for Plaintiffs' medical malpractice claim against Defendant CHCC.

V. FINAL CERTIFICATION AND DETERMINATION OF NO JUST CAUSE FOR DELAY

Lastly, as noted above, the substance of Plaintiffs' case and equal protection claims appear—as was argued during oral arguments—to be a request for a final declaratory judgment ruling/certification on the challenges to the Government Liability Cap as set out in 7 CMC § 2202 and the Personal Injury Compensation Cap set out in 7 CMC § 2922 against all Defendants. Under these unique circumstances, and given the fact that our Supreme Court has recognized the use of the "practical finality doctrine" in *Pacific Amusement, Inc. v. Villanueva*, 2005 MP 11 ¶ 14, which is the doctrine of law that allows for an appellate court may review an otherwise non-final decision under the holding set out *Gillespie v. United States Steel Corp*., 379 U.S. 148 (1964), this Court must consider whether certification of this Order as final is proper and whether there is no just cause for delay of appellate review of the equal protection claims raised in the TAC.

The test for usage of the practical finality doctrine, as explained by our Supreme Court in *Pacific Amusement, Inc.* and *Bowie v. Apex Constr., Inc.*, is whether "an otherwise non-final order can be appealed under the *Gillespie* doctrine' if: (1) the decision is a marginally final order; (2) the order disposes of an unsettled issue of national significance; and (3) the finality issue is not presented to the appellate court until argument on the merits (thereby ensuring that policies of judicial economy would not be served by remanding the case with an important unresolved issue)." 2020 MP 5, ¶ 11 (citing *Pacific Amusement, Inc. v. Villanueva*, 2005 MP 11 ¶ 16 (citing *Way v. County of Ventura*, 348 F.3d 808, 811 (9th Cir. 2003))).

Moreover, as explained in *Friends of Marpi v. Commonwealth*, the Commonwealth Rule of Civil Procedure 54(b) carves out an exception to the finality of judgments requirement when multiple claims and/or multiple parties are involved. 2012 MP 9, ¶ 8, (citing *Commonwealth Dev. Auth. v. Camacho*, 2010 MP 19 ¶ 5); *see also Ito v. Macro Energy, Inc*., 2 NMI 459, 464-65 (1992) (dismissing appeals because the appealed orders were not final within the meaning of Rule 54(b)).

In short, Rule 54(b) allows the trial court to certify an order as final and ready for appeal "'upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.'" *Commonwealth Dev. Auth*., 2010 MP 19 ¶ 5 (quoting NMI R. Civ. P. 54(b)). Accordingly, for the reasons set out below, this Court hereby makes a Rule 54(b) determination in this case directing entry of a final judgment as to Plaintiffs' equal protection claims raised against all Defendants.

Here, the issue of the constitutionality of the Commonwealth's liability caps is a marginally final issue as that term is legally defined. Marginally final issues are ones that do not involve the same issues and causes of actions as the remaining issues in a case. *See id.* at ¶ 12. Plaintiffs' equal protection claims against Defendants CHCC, Taro-Atalig, and SHC are completely separate from the First Cause of Action in the TAC—medical malpractice.

The First Cause of Action involves issues of the facts of Plaintiffs' treatment at CHCC, by Plaintiff Gomez's private physician and her possible employer/principle and the attending nursing staff at the hospital while Plaintiffs' Second and Third Causes of Action accuse the government of using the Government Liability Cap and the other Defendants as improperly benefiting from the Personal Injury Compensation Cap to improperly compensate people injured in the CNMI differently based upon class membership. The resolution of the Second and Third Causes of Action therefore are completely separate from the determination of liability, and would only influence the damages that could be awarded after the completion of a trial.

Plaintiffs' Second and Third Causes of Action also speak to issues of national importance: Can the government maintain a low cap of liability that was considered 'low' in 1983. *See Gower v. Commonwealth of the Northern Mariana Islands*, 2 CR 413, 428 (D. NMI, Dec. 31, 1985) (finding the small cap amount appropriate for that moment of time when the Commonwealth was in its infancy). Further, can the government limit damage awards to people severely injured in possible violation of the equal protection of the law—which is a constitutionally protected right. If these issues are not, for once, formally considered and resolved by the NMI Supreme Court, then these important questions of law shall avoid reconciliation because—as argued—the parties will likely settle the case.

Finally, certification as explained by our Supreme Court would be appropriate if "immediate review would serve the purpose of judicial economy." *Pac. Amusement, Inc. v. Villanueva*, 2005 MP 11 ¶ 17. This Court has already heard the parties' oral arguments and been fully briefed on the merits of the Second and Third Causes of Action, therefore there is no issue regarding undeveloped arguments or piece-meal litigation. This Court notes, also in the interest of judicial economy, that the currently pending case *Arayanee Ann Sablan Maratita v. Commonwealth Health Center/Commonwealth Healthcare Corporation*, Supreme Court Case No. 22-SCC-0020-CIV, contains the same and/or similar issues regarding whether the application and use of the Government Liability Cap is a violation of Equal Protection. This Court finds it essential and in the best interest of judicial economy that the NMI Supreme Court be given the opportunity to consider the full possible spectrum of challenges to the Government Liability Cap and the Personal Injury Compensation Cap that are also under consideration in *Arayanee Ann Sablan Maratita v. Commonwealth Health Center/Commonwealth Healthcare Corporation.* Fuller guidance by the Supreme Court under the facts presented in this case would greatly assist the Superior Court in deciding on the merits of equal protection claims such as those present in the instant case and promote judicial efficiency.

Accordingly, this Court finds that there is no just cause for delay of an appeal of Plaintiffs' equal protection claims against all three Defendants under the *Gillespie* doctrine.[4] Therefore, as provided for by Rule 54(b) of the Northern Mariana Islands Rules of Civil Procedure, this Court hereby certifies that this dismissal of Plaintiffs' Second and Third Causes of Action is a final judgment as there is no just cause for delay.

VI. CONCLUSION

FOR THE FOREGOING REASONS, this Court Orders:

1. Defendant CHCC's Rule 12(b)(6) Motion to Dismiss all claims against CHCC is hereby **DENIED IN PART** as to Plaintiffs' First Cause of Action for medical malpractice.
2. Defendant CHCC's Rule 12(b)(6) Motion to Dismiss all claims against CHCC is hereby **GRANTED IN PART** as to Plaintiffs' Second and Third Causes of Action as they involve equal protection claims against CHCC under 7 CMC § 2202 and 7 CMC § 2922.
3. Defendant Taro-Atalig's Rule 12(b)(6) Motion to Dismiss all claims against her is hereby **DENIED IN PART** as to Plaintiffs' First Cause of Action for medical malpractice.
4. Defendant Taro-Atalig's Rule 12(b)(6) Motion to Dismiss all claims against her is hereby **GRANTED IN PART** as to Plaintiffs' Third Cause of Action as it involves equal protection claims against Defendant Taro-Atalig under 7 CMC § 2922.

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FURTHER, as set out above, this Court finds this decision is a practically final order. This Order disposes of a claim that is marginal to the other causes of action; it determines an unsettled issue of national significance; and the merits of this Constitutional argument have been fully briefed

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[4] To be absolutely clear, Defendant SHC has Answered and denied that Plaintiffs' Second Cause of Action concerning an alleged violation of Equal Protection applies to it as a private entity and also denied that Plaintiffs' Third Cause of Action can be raised or used to challenge application of the cap set out in Personal Injury Compensation Act against it.

and argued. Therefore, this Order is appropriate for possible consideration by the CNMI Supreme Court because the only remaining cause of action against all three defendants is the medical malpractice claim set out in Plaintiffs' First Cause of Action.

SO ORDERED this 30th day of March 2023.

/s/
WESLEY M. BOGDAN, Associate Judge