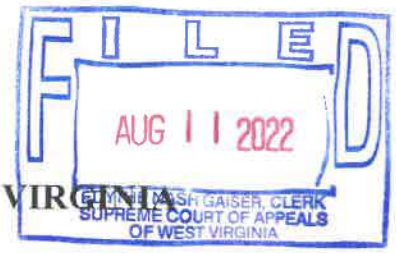

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-0362

ELDERCARE OF JACKSON COUNTY, LLC
d/b/a ELDERCARE HEALTH AND REHABILITATION,
a Tennessee Company,
COMMUNITY HEALTH ASSOCIATION,
d/b/a JACKSON GENERAL HOSPITAL,
a West Virginia Corporation, and
IRVIN JOHN SNYDER, D.O.,
Defendants Below, Petitioners,

v.

ROSEMARY LAMBERT and
CAROLYN HINZMAN, individually and
as Co-Executrices of the
ESTATE OF DELMER FIELDS,
Plaintiffs Below, Respondents.

Honorable Lora Dyer
Circuit Court of Jackson County
Civil Action No.: 21-C-32

PETITIONERS' BRIEF

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I. ASSIGNMENT OF ERROR

The Circuit Court below erred in denying Petitioners' Motions to Dismiss because Respondents have not and cannot plead any specific allegations demonstrating that Petitioners intended to harm or kill Mr. Fields or the Respondents. Accordingly, Respondents cannot establish that Petitioners committed "intentional conduct with actual malice" and thus have failed as a matter of law to overcome Petitioners' statutory immunity.

II. STATEMENT OF THE CASE

This appeal arises from a purported wrongful death action which Respondents filed individually and as co-executrices of the estate of their father, Delmer P. Fields (hereinafter "Mr. Fields"). According to Respondents, Mr. Fields contracted COVID-19[1] while admitted at Petitioner Eldercare Health and Rehabilitation (hereinafter "Eldercare") and later died from that infection while admitted at Petitioner Jackson General Hospital (hereinafter "JGH"). Respondents further allege that Petitioner Irvin John Snyder, D.O. (hereinafter "Dr. Snyder") was responsible for Mr. Fields's care at both Eldercare and JGH.

In March 2020, during the earliest stages of the COVID-19 global pandemic,[2,3] Dr. Snyder was actively treating patients at both JGH and Eldercare. Respondents claim that during this time, Dr. Snyder treated multiple residents of Eldercare for fevers but did not test them for COVID-19 or place them into isolation. *See* Pls.' Compl., JA0011 at ¶ 41. Respondents further allege that on

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[1] *See* W. Va. Code § 55-19-3(2) (defining "COVID-19" or "coronavirus" as "the novel coronavirus identified as SARS-CoV-2, the disease caused by the novel coronavirus SARS-CoV-2 or a virus mutating therefrom, and conditions associated with the disease").

[2] The first reported case of COVID-19 in West Virginia was on March 17, 2020. *See COVID-19 Daily Update*, W. Va. Dep't of Health & Hum. Res. (March 17, 2020), https://dhhr.wv.gov/News/2020/Pages/COVID-19-Daily-Update---March-17%2c-2020.aspx.

[3] The first reported death in West Virginia resulting from COVID-19 was not until March 29, 2020. *See COVID-19 Update*, W. Va. Office of the Governor (March 29, 2020), https://governor.wv.gov/News/press-releases/2020/Pages/COVID-19-UPDATE-Governor-and-First-Lady-Justice-issue-statement-after-learning-of-first-West-Virginian-to-pass-away-from-C.aspx.

April 9, 2020, they began expressing concerns to Eldercare about COVID-19 and its potential impact on Mr. Fields. *See id.*, JA0008 at ¶ 24. Respondents contend that Eldercare and Dr. Snyder intentionally downplayed the severity of a purported "outbreak of COVID-19" at Eldercare. *See id.*, JA0020 at ¶ 94–95.

Respondents allege that on April 13, 2020, Respondent Lambert decided to remove Mr. Fields from Eldercare and bring him home. *See id.*, JA0009 at ¶ 27. However, on April 14, 2020, within 24 hours of leaving Eldercare, Mr. Fields was taken to JGH, where he tested positive for COVID-19. *See id.* at ¶ 30. According to the Complaint, during his emergency room evaluation, Mr. Fields was discovered to have diminished breath sounds bilaterally with wheezing in the lower lung fields and atelectasis. *See id.* at ¶ 32. While admitted at JGH, Mr. Fields was treated by Dr. Snyder for a urinary tract infection ("UTI") and placed on oxygen therapy. *See id.* at ¶ 32. Over the ensuing four days, Mr. Fields's oxygen saturation decreased from 92% to 87%. *See id.*

Respondents allege that despite Mr. Fields's increasing respiratory distress, Dr. Snyder minimized the impact of Mr. Fields's COVID-19 diagnosis and suggested that Mr. Fields could be discharged back to Eldercare. *See id.*, JA0010 at ¶ 34. On April 18, 2020—while still admitted to JGH—Mr. Fields perished, with a cause of death listed as "multifactorial secondary to complications of aging and dementia **exacerbated by acute COVID positive state**, UTI with E. coli, and cerebral hemorrhage." *Id.* at ¶ 35 (emphasis added). Notably, Mr. Fields's death certificate lists his immediate cause of death as "COVID-19." *Id.*

On May 17, 2021, Respondents filed their Complaint, alleging the following claims: (I) fraud, misrepresentation, and fraudulent concealment, (II) civil conspiracy to commit fraudulent

concealment, (III) breach of duties of care, (IV) elder abuse, (V) violations of the Patient Safety Act, and (VI) invalidity of an arbitration clause between Mr. Fields and Eldercare.[4]

The Complaint relates solely to medical treatment that Mr. Fields received from Eldercare, JGH, and Dr. Snyder from late March 2020 through the date of his death, April 18, 2020. Respondents acknowledge that JGH and Eldercare were "at the time of the occurrences herein . . . engaged in the business of providing health care services to the public, including [Mr. Fields]," and that Dr. Snyder, "at the times complained of herein, was a physician engaged in the business of providing health care services to the public, including [Mr. Fields]." *Id.*, JA0005–06 at ¶¶ 5–7.

On June 25, 2022, Petitioners JGH and Dr. Snyder jointly filed their Motion to Dismiss, arguing that the West Virginia COVID-19 Jobs Protection Act (hereinafter the "Act") barred Respondents' claims because they all arise from COVID-19 and/or COVID-19 health care services and further setting forth independent grounds for which each of the counts alleged in the Complaint must be dismissed as to JGH and Dr. Snyder. *See* JGH & Dr. Snyder Mot. to Dismiss, JA0038. On July 6, 2021, Petitioner Eldercare filed its Motion to Dismiss, arguing that the Act barred each of Respondents' claims. *See* Eldercare Mot. to Dismiss, JA0064.

The Circuit Court heard oral arguments on Petitioners' respective motions to dismiss on October 6, 2021. *See* Order, JA0206. On April 11, 2022, the Circuit Court entered its Order Denying Defendants' Motions to Dismiss. *See id.* Therein, the Circuit Court recognized that "Plaintiffs' claims against Defendants arise from and are directly related to COVID-19 and the COVID-19 care and health care services which they provided, or which Plaintiffs allege they

[4] The Circuit Court below did not make any rulings with respect to the arbitration clause claim. Thus, this appeal does not address Count VI of the Complaint, which would in any case be rendered moot if this Court grants the relief sought herein.

should have provided, to the Decedent in the midst of the COVID-19 global pandemic." *Id.* at JA0214. The Circuit Court's Order went on to find that "[f]or the purposes of the [Act] . . . 'actual malice' requires proof that the defendant acted with the intent to injure or harm the plaintiff and/or decedent." *Id.* at JA0215. Notwithstanding this conclusion, the Circuit Court found that "Plaintiffs have alleged sufficient facts in the Complaint to survive a motion to dismiss." *Id.* at JA0216. Accordingly, the Circuit Court denied Petitioners' respective motions to dismiss. *See id.*

III. SUMMARY OF THE ARGUMENT

Counts I through V of the Complaint are barred by the laws of West Virginia as to Petitioners because the Act provides immunity for claims arising from COVID-19 and COVID-19 health care services. Although the Act does contain one exception to the immunities set forth therein, that exception requires proof that a defendant "engaged in intentional conduct with actual malice," which requires specific evidence that the defendant intended to kill or injure the plaintiff or the plaintiff's decedent. Here, Respondents have failed to establish or specifically allege that any of the Petitioners intended to injure or harm Mr. Fields or Respondents. As such, Petitioners are statutorily immune from liability, and Respondents have failed to state a claim upon which relief may be granted. Accordingly, the judgment of the Circuit Court below should be vacated and the matter remanded with instructions to dismiss the Complaint with prejudice as to each of the Petitioners.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners request that this matter be set for oral arguments pursuant to Rule 20 of the *West Virginia Rules of Appellate Procedure* because the issues identified herein—namely, the circumstances under which parties are entitled to dismissal under the Act—are issues of first impression for this Court and are of fundamental public importance.

V. ARGUMENT

A. Standard of Review

This Court "reviews a circuit court's denial of a motion to dismiss a complaint under a de novo standard." *Hess v. West Virginia Div. of Corrections*, 227 W. Va. 15, 17, 705 S.E.2d 125, 127 (2010) (citing Syl. Pt. 4, *Ewing v. Bd. of Educ.*, 202 W. Va. 228, 503 S.E.2d 541 (1998)).

B. Background

On March 19, 2021, Governor Jim Justice enacted the Act, W. Va. Code § 55-19-1, et seq., the express purpose of which is to "[e]liminate the liability of the citizens of West Virginia and all persons including individuals, **health care providers, health care facilities**, . . . and all persons whomsoever, and **to preclude all suits and claims against any persons for loss, damages, personal injuries, or death arising from COVID-19**." W. Va. Code § 55-19-2 (emphasis added). The Act arose based, in part, on the West Virginia Legislature's express acknowledgment that COVID-19 related research and developments were evolving so rapidly that it was "difficult, if not impossible," for the medical community "to develop definitive evidence-based medical guidelines." W. Va. Code § 55-19-2(a)(12).[5] The Act was made effective from its passage on March 11, 2021, and it "applies to any cause of action accruing on or after [January 1, 2020]." W. Va. Code § 55-19-9(a).

One of the most significant sections of the Act is a broad immunity provision, which protects a variety of entities and professions, including healthcare providers and healthcare facilities, from COVID-19 related claims. Specifically, the immunity provision states:

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[5] In full, this statutory subsection recognizes that "The diagnosis and treatment of COVID-19 has rapidly evolved from largely unchartered, experimental, and anecdotal observations and interventions, without the opportunity for the medical community to develop definitive evidence-based medical guidelines, making it difficult, if not impossible, to identify and establish applicable standards of care by which the acts or omissions of health care providers can fairly and objectively be measured." W. Va. Code § 55-19-2(a)(12).

> [n]otwithstanding any law to the contrary, except as provided by this article, **there is no claim against any person, essential business, business, entity, health care facility, health care provider, first responder, or volunteer for loss, damage, physical injury, or death arising from COVID-19, from COVID-19 care, or from impacted care.**

W. Va. Code § 55-19-4 (emphasis added). For the purposes of the Act,

> (1) "Arising from COVID-19" means any act from which loss, damage, physical injury, or death is caused by a natural, direct, and uninterrupted consequence of the actual, alleged, or possible exposure to, or contraction of, COVID-19, including services, treatment, or other actions in response to COVID-19, and without which such loss, damage, physical injury, or death would not have occurred, including, but not limited to:
>
> (A) Implementing policies and procedures designed to prevent or minimize the spread of COVID-19;
>
> (B) Testing;
>
> (C) Monitoring, collecting, reporting, tracking, tracing, disclosing, or investigating COVID-19 exposure or other COVID-19-related information;
>
> (D) Using, designing, manufacturing, providing, donating, or servicing precautionary, diagnostic, collection, or other health equipment or supplies, such as personal protective equipment;
>
> (E) Closing or partially closing to prevent or minimize the spread of COVID-19;
>
> (F) Delaying or modifying the schedule or performance of any medical procedure;
>
> (G) Providing services or products in response to government appeal or repurposing operations to address an urgent need for personal protective equipment, sanitation products, or other products necessary to protect the public;
>
> (H) Providing services or products as an essential business, health care facility, health care provider, first responder, or institution of higher education; or
>
> (I) Actions taken in response to federal, state, or local orders, recommendations, or guidelines lawfully set forth in response to COVID-19.
>
> . . .
>
> (3) **"COVID-19 Care" means services provided by a health care facility or health care provider, regardless of location and whether or not those services were provided in-person or through telehealth or telemedicine, that relate to the testing for, diagnosis, prevention, or treatment of COVID-19, or the assessment, treatment, or care of an individual with a confirmed or suspected case of COVID-19.**
>
> . . .
>
> (7) "Health care" means any act, service, or treatment as defined by § 55-7B-2 of [West Virginia Code];[6]

[6] "'Health care' means: (1) Any act, service or treatment provided under, pursuant to or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment; (2) Any

> (8) "Health care facility" means a facility as defined by § 55-7B-2 of [West Virginia Code] . . . ;[7]
> (9) "Health care provider" means a person, partnership, corporation, professional limited liability company, health care facility, entity, or institution as defined by § 55-7B-2 of [West Virginia Code] . . . ;[8]
> (10) "Impacted care" means care offered, delayed, postponed, or otherwise adversely affected at a health care facility or from a health care provider that impacted the health care facility or health care provider's response to, or as a result of, COVID-19 or the COVID-19 emergency . . .

W. Va. Code § 55-19-3 (emphasis added).

The only exception to the Act's broad grant of immunity provides that "the limitations provided in [the Act] shall not apply to any person, or employee or agent thereof, who engaged in **intentional conduct with actual malice**." W. Va. Code § 55-19-7 (emphasis added).

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act, service or treatment performed or furnished, or which should have been performed or furnished, by any health care provider or person supervised by or acting under the direction of a health care provider or licensed professional for, to or on behalf of a patient during the patient's medical care, treatment or confinement, including, but not limited to, staffing, medical transport, custodial care or basic care, infection control, positioning, hydration, nutrition and similar patient services; and (3) The process employed by health care providers and health care facilities for the appointment, employment, contracting, credentialing, privileging and supervision of health care providers." W. Va. Code § 55-7B-2(e).

[7] "'Health care facility' means any clinic, hospital, pharmacy, nursing home… regulated or certified by the State of West Virginia under state or federal law and any state-operated institution or clinic providing health care and any related entity to the health care facility." W. Va. Code § 55-7B-2(f).

[8] "'Health care provider' means a person, partnership, corporation, professional limited liability company, health care facility, entity or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, including, but not limited to, a physician, osteopathic physician, physician assistant, advanced practice registered nurse, hospital, health care facility, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, speech-language pathologist, audiologist, occupational therapist, psychologist, pharmacist, technician, certified nursing assistant, emergency medical service personnel, emergency medical services authority or agency, any person supervised by or acting under the direction of a licensed professional, any person taking actions or providing service or treatment pursuant to or in furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment; or an officer, employee or agent of a health care provider acting in the course and scope of the officer's, employee's or agent's employment." W. Va. Code § 55-7B-2(g).

C. The Circuit Court below erred in denying Petitioners' Motions to Dismiss because Respondents have not pleaded any specific allegations to overcome Petitioners' affirmative defense of statutory immunity.

Respondents have not alleged that any of the Petitioners intended to harm or kill Mr. Fields or Respondents. In point of fact, based upon the facts asserted in the Complaint, Respondents could never establish that Petitioners acted with a specific intent to harm any individual. Accordingly, Respondents have failed as a matter of law to overcome Petitioners' statutory immunity, and the Complaint against them must be dismissed.

Under West Virginia law, a complaint should be dismissed when the plaintiff has failed to state a claim upon which relief may be granted. *See* W. Va. R. Civ. P. 12(b)(6). More specifically, a motion to dismiss should be granted "where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Albright v. White*, 202 W. Va. 292, 297, 503 S.E.2d 860, 865 (1998). However, "a plaintiff may not 'fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint,' **or where the claim is not authorized by the laws of West Virginia**." *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995) (emphasis added) (citations omitted) ("A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits."). In determining whether the complaint states a viable claim, "a trial court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Forshey v. Jackson*, 222 W. Va. 743, 756, 671 S.E.2d 748, 761 (2008) (citing Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(6)[2], at 347 (footnote omitted)).

While it is true that West Virginia has not adopted the more prescriptive federal pleading standards announced by the United States Supreme Court in *Twombly* and *Iqbal*, it is clear as a

general principle that a plaintiff must do more than simply recite a claim accompanied by a bare assertion that the defendant is liable in damages for it. *See Highmark West Virginia, Inc. v. Jamie*, 221 W. Va. 487, 491, 655 S.E.2d 509, 513 n.4 (2007) ("Under Rule 8 [of the *West Virginia Rules of Civil Procedure*], a complaint must be intelligibly sufficient for a circuit court or an opposing party to understand whether a valid claim is alleged and, if so, what it is.") (quoting *McGraw*, 194 W. Va. at 776, 461 S.E.2d at 522); *Fass v. Nowsco Well Service, Ltd.*, 177 W. Va. 40, 52, 479 S.E.2d 339, 351 (1996) (noting that in order to survive a motion to dismiss, "essential material facts must appear on the face of the complaint.").

However, in cases involving statutory immunity, "the entitlement is an *immunity from suit* rather than a mere defense to liability; and like absolute immunity, it is effectively lost if the case is erroneously permitted to go to trial." *Hutchison v. City of Huntington*, 198 W. Va. 139, 147, 479 S.E.2d 649, 657 (1996) (emphasis in original) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815 (1985)). Indeed, "**The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case.**" *Hutchison*, 198 W. Va. at 148, 479 S.E.2d at 658 (emphasis added); *see also Dimon v. Mansy*, 198 W. Va. 40, 47, 479 S.E.2d 339, 346 at n.5 (1996) ("[T]he singular purpose of a Rule 12(b)(6) motion is to seek a determination whether the plaintiff is entitled to offer evidence to support the claims made in the complaint."). Accordingly, this Court has long held that "**the need for early resolution in cases ripe for summary disposition is particularly acute when the defense is in the nature of an immunity.**" *Hutchison*, 198 W. Va. at 147, 479 S.E.2d at 657 (emphasis added).

In light of the discrepancy between the relatively relaxed requirements of notice pleading and the inherently fact-specific prerequisites necessary to overcome statutory immunity, the Supreme Court of Appeals of West Virginia has adopted a heightened pleading standard for

plaintiffs alleging claims against individuals for whom immunities may apply. *See id.* at 149–50, 479 S.E.2d at 659–60 ("[I]n civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff."). Under the heightened pleading standard, a party which has properly pleaded statutory immunity is entitled to such immunity "unless it is shown by **specific allegations** that the immunity does not apply." *Id.* at 148–49, 479 S.E.2d at 658–59 ("[W]hether . . . immunity bars recovery in a civil action turns on the objective reasonableness of the action assessed, in light of the legal rules that were clearly established at the time it was taken.").

> Thus, where a defendant has properly asserted the defense of statutory immunity:
>
> > the trial court should first demand that a plaintiff file a short and plain statement of his complaint, a complaint that rests on more than conclusion alone. Next, the court may, on its own discretion, insist that the plaintiff file a reply tailored to an answer pleading the defense of statutory or qualified immunity. The court's discretion not to order such a reply ought to be narrow; where the defendant demonstrates that greater detail might assist an early resolution of the dispute, the order to reply should be made.

Id. at 150, 479 S.E.2d at 660 (citations omitted). However, where "the individual circumstances of the case indicate that the plaintiff has pleaded his or her best case, there is no need to order more detailed pleadings. If the information contained in the pleading is sufficient to justify the case proceeding further, the early motion to dismiss should be denied." *Id.* It stands to reason that if information contained in the pleading is *not* sufficient to justify the case proceeding further, then the motion to dismiss must be granted. *See id.* (dismissing case where the plaintiff failed to plead specific facts sufficient to overcome the defendants' claim of statutory immunity). This is even more apparent when a plaintiff has pleaded his or her **best case** in the initial complaint but has still failed to allege specific facts to justify the case moving forward.

Here, as a preliminary matter, the circumstances of the proceedings below did not require the Circuit Court to specifically require Respondents to plead a more definite statement of their Complaint. Respondents' Complaint is extraordinarily detailed and consists of 184 individually numbered paragraphs over some 31 pages. Without question, the Complaint is artful, logically organized, and sets forth exhaustive facts purporting to support the relief sought therein. Respondent's Response to Petitioners' Motions to Dismiss was equally exhaustive, spanning some 32 pages and responding individually to each of the points Petitioners raised in support of their entitlement to statutory immunity. Most significantly, Respondents directly addressed Petitioners' statutory immunity arguments in their written submission and had the benefit of oral arguments to better solidify their position.

The purpose of the mechanism specifically set forth in *Hutchison* was to provide an avenue for plaintiffs to address any deficiencies in their initial pleadings in response to a defendant's assertion of an immunity defense. Where, as here, a plaintiff has been permitted through some alternative means to develop its arguments in response to a defendant's immunity defense, the procedures set forth by *Hutchison* would be duplicative and wasteful of judicial resources. Thus, as a practical matter, the manner in which the proceedings evolved below resulted in a process sufficiently analogous to the process set forth by the *Hutchison* Court such that the Circuit Court was well within its discretion not to order Respondents to clarify their Complaint. Accordingly, neither this Court nor the Circuit Court below would be aided by requiring Respondents to further develop their Complaint.

Respondents' Complaint makes perfectly plain the grounds upon which Respondents seek relief. The Complaint is rife with allegations concerning the many harms Respondents allege Petitioners intended to cause. Indeed, the facts section of the Complaint alone spans 89 paragraphs

over some 16 pages. Therein, Respondents set forth a detailed chronology of the events which they contend gave rise to the Complaint and portends to preview purportedly harmful testimony from certain of Petitioners' former employees. The Complaint alleges six specific counts under a variety of legal theories and evinces a clear and concerted effort on Respondents' part to carefully assess the merits of their claim. There simply can be no question that Respondents have already pleaded their best case—their problem is that the case they have pleaded is explicitly forbidden under West Virginia law.

As further developed above, the immunity provided for by the Act is remarkably broad. It explicitly provides that "there is **no** claim against **any** person, essential business, business, entity, **health care facility**, **health care provider**, first responder, or volunteer for loss, damage, physical injury, **or death** resulting from COVID-19, from COVID-19 care, or from impacted care." W. Va. Code § 55-19-4. The Act sets forth detailed definitions for COVID-19, COVID-19 care, and "impacted care" which fully encompass every conceivable scenario under which a lawsuit could arise as a result of the COVID-19 global pandemic. The Act immunizes an unprecedentedly broad swath of conduct and extends immunities typically reserved for government officials to every corner of the medical field.

But however unprecedented the immunities provided by the Act, the circumstances necessitating its enactment were exponential in measure. The incidents which are the subject of Respondents' Complaint occurred during the very earliest stages of the COVID-19 pandemic, when medical guidance was nascent, inconsistent, and in many ways nonexistent. Indeed, the first reported case of COVID-19 in West Virginia was not until March 17, 2020,[9] and the first reported death resulting from COVID-19 in West Virginia was not until March 29, 2020,[10] just sixteen days

[9] *See* COVID-19 Daily Update, *supra* note 2, at 3.
[10] *See* COVID-19 Update, *supra* note 3, at 3.

before Mr. Fields was diagnosed with COVID-19. At all times relevant to the Complaint, West Virginia was operating under a "State of Emergency" and "Stay at Home Order" which Governor Justice proclaimed by executive order on March 16, 2020 for the express purpose of allowing "agencies to coordinate and create measures to prepare for and respond to the outbreak of respiratory disease caused by a novel coronavirus now known as COVID-19." *See* Exec. Order. No. 9-20 (Mar. 23, 2020). Both the State of Emergency and Stay at Home Orders remained in effect through Mr. Fields's date of death and persisted thereafter as state agencies, medical professionals, and state and local officials clambered to formulate a response to among the most unprecedented and disruptive public health emergencies in generations. *See Stewart v. Justice*, 518 F.Supp.3d 911, 917 (S.D. W. Va. 2021) (citations omitted) (noting that the COVID-19 "public health emergency is unprecedented in the past century"). Recognizing the need to enact legislation to ameliorate the societal disruption which accompanied this unprecedented public health crisis, the West Virginia Legislature passed the Act during its first legislative session after the crisis began.

The Act explicitly sets forth the findings and conclusions which guided the Legislature's decision to eliminate COVID-19-related claims in all but the most egregious of situations. *See* W. Va. Code § 55-19-2 ("Health care providers have operated with shortages of medical personnel, equipment, and supplies while responding to COVID-19"; "There is a critical need for personal protective equipment, such as masks, respirators, ventilators, and other medical equipment and products designed to guard against or treat COVID-19"; **"Lawsuits are being filed across the country against health care providers and health care facilities associated with care provided during the COVID-19 pandemic and illness of health care workers due to exposure to COVID-19 while providing essential medical care**"; "The threat of liability poses an obstacle to

efforts to reopen and rebuild the West Virginia economy and to continue to provide medical care to impacted West Virginians"; "**The diagnosis and treatment of COVID-19 has rapidly evolved from largely unchartered, experimental, and anecdotal observations and intentions, without the opportunity for the medical community to develop definitive evidence-based medical guidelines, making it difficult, if not impossible, to identify and establish applicable standards of care by which the acts or omissions of health care providers can fairly and objectively measured.**") (emphasis added).

Accordingly, the Legislature endeavored to "[e]liminate the liability of the citizens of West Virginia and all persons including individuals, health care facilities, institutions of higher education, business, manufacturers, and all persons whomsoever, and to preclude all suits and claims against any person for loss, damages, personal injuries, or death arising from COVID-19." *Id.* As developed above, the Legislature provided **only one exception** to the Act's immunity provision— the extraordinarily high standard of actual malice—which Respondents have not and cannot establish. Here, there simply are no allegations, explicit or implicit, which could even remotely suggest that any of the Petitioners intended to harm or kill Mr. Fields or the Respondents. And given the extraordinary detail and length of their pleadings, Respondents certainly would have pleaded facts sufficient to establish actual malice if they had any credible basis to do so. Of course, they did not and do not.

At bottom, Respondents' Complaint glosses over the extraordinary circumstances under which Petitioners were operating at all times relevant to the same. Indeed, the events which are the subject thereof took place during the earliest days of the COVID-19 global pandemic. In response,

the West Virginia Legislature—like the majority of legislatures in the United States[11]—enacted extensive protections against liability for damages resulting from health care services which were rendered in the midst of the total confusion brought about by an unprecedented global pandemic. To permit Respondents to proceed with their claims would signal a green light to would-be litigants everywhere in this state that despite the Legislature's express intent to foreclose all COVID-19-related claims except where the plaintiff can establish the defendant's intent to kill or harm, parties are nevertheless free to proceed with COVID-19-related litigation and discovery so long as they allege that the defendant failed to respond to the COVID-19 crisis as well as the party would have preferred. This is precisely the outcome which the West Virginia Legislature sought to prevent when it enacted the Act, and that is precisely the reason why the Complaint must be dismissed.

VI. CONCLUSION

Respondents' Complaint is wholly void of any allegations which could even implicitly be read as suggesting that any of the Petitioners actually intended to harm or kill Mr. Fields or Respondents. The Complaint's deficiency in this respect would not be ameliorated by further pleadings because there simply is no basis to infer such intent consistent with the facts already alleged. What *is* clear from the Complaint is that Petitioners were at all times relevant thereto acting in their respective capacities as health care providers and health care facilities and that each of Respondents' claims arose from COVID-19, COVID-19 care, and/or care which was impacted by COVID-19. Accordingly, the broad immunities provided for by the Act apply to Respondents' claims, and Petitioners are thus immune from liability for any damages resulting therefrom unless Respondent can establish that Petitioners "engaged in intentional conduct with actual malice." As

[11] *See* Anthony Sebok, *The Deep Architecture of American COVID-19 Tort Reform 2020–21*, 71 DePaul L. Rev. 473 (2022) (indicating that "thirty-two states (including the District of Columbia) have adopted tort reform in response to COVID-19, and an additional six have issued executive orders by no legislation").

further developed above, Respondents cannot establish any such claim, and thus the Complaint must be dismissed with prejudice as to each of the Petitioners as a matter of law.

ELDERCARE OF JACKSON COUNTY, LLC, d/b/a ELDERCARE HEALTH AND REHABILITATION; COMMUNITY HEALTH ASSOCIATION d/b/a JACKSON GENERAL HOSPITAL; and IRVIN JOHN SNYDER, D.O.,
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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of August, 2022, I served a true and exact copy of the foregoing **"Petitioners' Brief"** by placing the same in the regular course of the United States mail, postage prepaid, addressed to counsel as follows:

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