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' REPLY BRIEF

Jace H. Goins (WVSB No. 6894)
Christopher S. Etheredge (WVSB No. 13835)
Steptoe & Johnson PLLC
P.O. Box 1588
Charleston, WV 25326-1588
Telephone: (304) 353-8000
Jace.Goins@steptoe-johnson.com
Christopher.Etheredge@steptoe-johnson.com
Counsel for Community Health Association d/b/a Jackson General Hospital and Co-Counsel for Irvin John Snyder, D.O.

Salem C. Smith (WVSB No. 7798)
Shereen Compton McDaniel (WVSB No. 12282)
Flaherty Sensabaugh Bonasso PLLC
P.O. Box 3843
Charleston, WV 25338-3843
Telephone: (304) 345-0200
ssmith@flahertylegal.com
smcdaniel@flahertylegal.com
Co-Counsel for Irvin John Snyder, D.O.

Mark A. Robinson (WVSB No. 5954)
Flaherty Sensabaugh Bonasso PLLC
P.O. Box 3843
Charleston, WV 25301-3843
Telephone: (304) 345-0200
mrobinson@flahertylegal.com
Counsel for Eldercare of Jackson County, LLC d/b/a Eldercare Health and Rehabilitation

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I. Summary of Argument

Respondents' Brief devotes considerable space to questioning Petitioners' intent in focusing their arguments on whether Respondents can establish actual malice under the definition adopted by the Circuit Court of Jackson County, West Virginia ("the Circuit Court") rather than focusing on what Respondents describe as "the primary issue—the proper interpretation of the language of the statutory exception to immunity enacted in W. Va. Code § 55-19-7."[1] In support thereof, Respondents repeatedly claim that Petitioners "simply presume their interpretation of the exception is the correct one, which it is not."[2] Respondents' contentions in this respect appear to arise from a misunderstanding of the Circuit Court's Order and the procedural posture under which that Order was entered.

On June 25, 2021 and July 6, 2021, respectively, Petitioners filed their motions to dismiss Respondents' Complaint, each arguing that they were entitled to statutory immunity under the COVID-19 Jobs Protection Act ("the Act") because Respondents failed to plead specific facts sufficient to establish that Petitioners engaged in "intentional conduct with actual malice."[3] However, because that term was not defined by the Act, Petitioners focused their arguments on what the law requires under that standard. Although the language ultimately proposed by the respective Petitioners differed slightly, each agreed that proof of "intentional conduct with actual malice" under the Act requires proof that the defendant intended to injure or harm either the

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[1] Resp. Br. 18 (noting that "[i]t is unclear whether Petitioners agree with the interpretation of the standard enunciated by the Circuit Court"). As further set forth herein, Petitioners agree with the Circuit Court that "actual malice" under the Act requires proof that the defendant acted with the intent to injure or harm the plaintiff and/or decedent.

[2] *See, e.g., id.* at 1.

[3] W. Va. Code § 55-19-1, *et seq.*; *see* Jackson General Hospital ("JHG") and Irvin John Snyder, D.O.'s ("Dr. Snyder") Mot. to Dismiss, JA0061; Eldercare's Mot. to Dismiss, JA0077.

plaintiff or the plaintiff's decedent.[4] After extensive briefing and oral arguments on that question, the Circuit Court specifically and unambiguously adopted the standard proposed by JGH and Dr. Snyder; "**[f]or the purposes of the COVID-19 Act, this Court FINDS 'actual malice' requires proof that the defendant acted with the intent to injure or harm the plaintiff and/or decedent.**"[5] However, the Circuit Court declined to dismiss the case, finding that Respondents had pled facts sufficient to survive a motion to dismiss under the standard the Circuit Court adopted.[6] It was from the latter finding that Petitioners filed their appeal, and it was on that finding that Petitioners necessarily focused their arguments.

Notably, Respondents appear to concede that they have failed to state a claim for which relief may be granted under the "actual malice" definition adopted by the Circuit Court.[7] Indeed, Respondents have not at any stage in these proceedings—whether before this Court or the Circuit Court—pled or asserted that they can establish that any of the Petitioners intended to injure or harm Respondents or their Decedent, Mr. Fields. Accordingly, Petitioners were entitled to dismissal under the definition of "intentional conduct with actual malice" the Circuit Court adopted.

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4 *See* JGH & Dr. Snyder's Mot. to Dismiss, JA0059–61 (arguing that "'actual malice' evinces an intent to bring about a particular end result—here, intending to harm Mr. Fields or cause his death . . . the Legislature intended the [actual malice] exception to apply only where the defendant acted with a specific intent to bring about the complained of injury"); *but cf.* Eldercare's Mot. to Dismiss, JA0077 (proposing "the adoption of a standard for purposes of [the Act] that defines 'intentional conduct with actual malice' as intent to bring about a result which will invade the interest of another in a way that the law forbids in a manner that shows an intent to inflict an injury or under circumstances that the law will apply an evil intent.").

5 JA0215.

6 *See* JA0215–0216.

7 *See* Resp. Br. 22 (acknowledging that the definition of actual malice is "critical because that definition determines the sufficiency of Respondents' complaint"); *see also W. Va. R. App. Proc.* 10 ("Unless otherwise provided by the Court, the argument section of the respondent's brief must specifically respond to each assignment of error, to the fullest extent possible. If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue.").

As further developed below, Respondents' cross-assignments of error are unavailing.[8] The Circuit Court's Order unambiguously adopted the appropriate standard of "intentional conduct with actual malice," and its adoption of that standard did not render the Act unconstitutional because the Legislature had a rational basis to believe the Act would serve a legitimate governmental purpose. Accordingly, the Circuit Court erred in refusing to dismiss Respondents' Complaint as to each of the Petitioners. Thus, its decision should be reversed, and the matter remanded with instructions to enter an order dismissing Respondents' Complaint with prejudice.

II. Argument

A. The Circuit Court's Order properly and unambiguously defined "actual malice" in the context of the Act as requiring "proof that the defendant acted with the intent to injure or harm the plaintiff and/or decedent."

Respondents' first assignment of error claims that the Circuit Court's Order is ambiguous as to the definition it adopted of "intentional conduct with actual malice."[9] While Petitioners concede that the Order contains some ambiguities, namely the Circuit Court's decision to define "intentional and malicious conduct" despite the fact that the Act sets forth an entirely different standard (i.e., intentional conduct with *actual* malice), the Order sets forth a clear standard for application of the Act's exception. Specifically, the Circuit Court's Order found that "**[f]or the purposes of the COVID-19 Act, this Court FINDS 'actual malice' requires proof that the defendant acted with the intent to injure or harm the plaintiff and/or decedent.**"[10] As further developed below, the Circuit Court's adoption of this standard is wholly appropriate and *required* by case law, existing code, and the Legislature's express intent in passing the Act. Moreover,

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8 Petitioners note that because Respondents asserted cross-assignments of error, "the applicable page limitation for [this Reply Brief] is extended to forty pages, and the time for filing [this Reply Brief] is automatically extended, without need for further order, until thirty days after the date the respondent's brief containing cross-assignments of error was filed." *W. Va. R. App. Proc.* 10.

9 *See* Resp. Br. 1–2.

10 JA0215 (emphasis added).

Respondents have failed to establish that they could meet *either* of the standards adopted by the Circuit Court insomuch as both require specific proof that the Petitioners intended to harm Mr. Fields, which Respondents have not pled and cannot establish. Accordingly, and because Respondents have not disputed that they cannot plead sufficient facts to establish that Petitioners intended to injure or harm Mr. Fields,[11] Petitioners are entitled to dismissal as a matter of law.

(1) It is well-established that "actual malice" requires proof of a specific intent to harm the plaintiff.

This Court has never expressly defined the term "intentional conduct with actual malice." However, it has interpreted and applied the term "actual malice" in two contexts: (1) punitive damages related to insurance bad faith claims, and (2) defamation and libel claims involving public figures. While neither definition is entirely on point, as neither arose in the context of the Act, both are instructive insomuch as both require a plaintiff to establish that the defendant intended to injure the plaintiff.

First, in *Hayseeds, Inc. v. State Farm Fire & Cas. Co.*, this Court considered "actual malice" as it relates to punitive damages for an insurance company's failure to settle property disputes with its policyholders. In holding that punitive damages should not be awarded except where "[t]he policyholder can establish a high threshold of actual malice in the settlement process," this Court defined actual malice as follows:

> By "actual malice" we mean that the company actually knew that the policyholder's claim was proper, but **willfully, maliciously, and intentionally** denied the claim. We intend this to be a bright line standard, highly susceptible to summary judgment for the defendant, such as exists in the law of libel and slander, or the West Virginia law of commercial arbitration. *See, e.g., N.Y. Times v. Sullivan*, 376 U.S. 254, 84

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[11] *See* W. Va. R. App. Proc. 10(d) ("Unless otherwise provided by the Court, the argument section of the respondent's brief must specifically respond to reach assignment of error, to the fullest extent possible. **If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue.**") (emphasis added). Here, Respondents did not respond to Petitioners' assignment of error at all; they simply responded with two cross-assignments of error which Petitioners address herein.

> S. Ct. 710, 11 L.Ed.2d 686 (1964) and *Board of Education v. Miller*, 160 W. Va. 473, 236 S.E.2d 439 (1977). Unless the policyholder is able to introduce evidence of **intentional injury—not negligence, lack of judgment, incompetence, or bureaucratic confusion**—the issue of punitive damages should not be submitted to the jury.

Hayseeds, Inc. v. State Farm Fire & Cas. Co., 177 W. Va. 323, 330–31, 352 S.E.2d 73, 80–81 (1986) (emphasis added). This is the test which the Circuit Court adopted for "intentional and malicious conduct."[12] Notably, in *Hayseeds*, this Court *reversed* the award of punitive damages from the trial court below explicitly because this Court "[did] not believe that the plaintiffs presented sufficient evidence of malicious intent to injure or defraud" the plaintiffs. *Hayseeds*, 177 W. Va. at 331, 352 S.E.2d at 81. In other words, even under the standard Respondents propose, Petitioners are entitled to dismissal of Respondents' Complaint unless Respondents can establish that Petitioners intended to injure or harm Mr. Fields.

Second, as a result of the Supreme Court of the United States's decision in *New York Times Co. v. Sullivan*, this Court has also interpreted "actual malice" in the context of defamation and libel suits involving public figures. 376 U.S. 254, 84 S. Ct. 710 (1964). Specifically, in *State ex rel. Suriano v. Gaughan*, this Court clarified that actual malice, in the libel context, requires more than proof of intent to harm or proof of deliberate falsehood. 198 W. Va. 339, 480 S.E.2d 548 (1996). Rather, "a plaintiff must prove, by clear and convincing proof, an '**intent to inflict harm** through falsehood.'" *Id.* at 339, 354 S.E.2d at 563 (emphasis added) (quoting *Henry v. Collins*, 380 U.S. 356, 357, 85 S. Ct. 992, 993 (1965).

Similarly, in *Sprouse v. Clay Communications, Inc.*, this Court held that

> [i]n libel actions 'malice' does not connote the mere dislike of one party for another or the intent of one party to injure another . . . In libel law 'malice' has a much narrower definition and requires not only a **deliberate intent to injure**, but also an **intent to injure** through the publication of false or misleading defamatory statements known by the publisher or its agents to be false, or an **intent to injure**

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12 *See* JA0213.

> through publication of such defamatory statements with reckless and willful disregard for their truth.

158 W. Va. 427, 433, 211 S.E.2d 674, 681–682 (1975) (emphasis added).

Taken together, this Court's prior interpretations of "actual malice" clarify that proof thereof requires a specific showing that the defending party acted with a specific intent to harm the claimant. In *Hayseeds*, this Court specifically found that "actual malice" is intended to provide a bright line standard which requires proof of **intentional injury** as opposed to negligence, lack of judgment, incompetence, and bureaucratic confusion. Moreover, in libel cases, this Court has found that actual malice requires proof of a **deliberate intent to injure** the claimant. These findings, though made outside the context of the Act, have logical application in the present case, where the express intent of the applicable statutory authority (*i.e.*, the Act), is to eliminate causes of action arising from COVID-19.

Respondents' reliance on these lines of cases—and on *Hayseeds* in particular—is puzzling, insomuch as the standards set forth in each expressly require plaintiffs "to introduce evidence of **intentional injury, not negligence, lack of judgment, incompetence, or bureaucratic confusion** . . . ." *Hayseeds*, 177 W. Va. at 331, 352 S.E.2d at 81 (emphasis added). As Petitioners have repeatedly asserted in all stages of this action, Respondents have not pled and cannot establish that any of the Petitioners intended to cause harm to Mr. Fields or anyone else; they were simply responding to an unprecedented global phenomenon which quite literally upended every conceivable aspect of life as we once knew it.

Respondents contend that the definitions of actual malice set forth in *Hayseeds* and *Sprouse* allow for a finding of actual malice where the plaintiff can establish recklessness and willful disregard.[13] That is simply not true. As developed above, each line of cases specifically require

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[13] *See* Resp. Br. 22–23.

that the defendant intended to cause some injury to the plaintiff. In *Hayseeds*, the requisite injury concerned an insurance company's refusal to honor insurance claims despite knowing such claims were valid. In *Sprouse*, the injury concerned reputational damage resulting from a newspaper having published misleading headlines about a gubernatorial candidate. While it is true that *Sprouse* contains the words "reckless" and "willful disregard," each are simply thresholds for *one* of the elements required to establish actual malice in the context of libel and defamation claims involving a public figure:

> [I]t is permissible for a plaintiff in the position of Sprouse to recover punitive damages because of the high standard of proof required of a candidate for public office to sustain any action for libel. As it is necessary for a candidate for office to prove that false or misleading statements were published with knowledge on the part of the publisher of their falsity or with willful and reckless disregard of their truth, ***and further to prove that they were published with a deliberate intent to injure***, punitive damages may be recovered.

Sprouse, 158 W. Va. at 453, 211 S.E.2d at 692 (emphasis added). In other words, the words "reckless" and "willful disregard" as contemplated in *Sprouse* are culpability thresholds for the "knowledge" element of defamation, which is in addition to the "intent" element thereof. A public figure plaintiff cannot establish a claim for defamation without establishing that the defendant intended to harm the public figure plaintiff, and a plaintiff seeking to overcome the statutory immunity set forth in the Act cannot establish that claim without establishing that the defendant intended to harm the plaintiff or the plaintiff's decedent.[14] This, Respondents cannot do.

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[14] Certainly, the Legislature did not intend to create an exception to the Act which would be satisfied simply by showing that the defendant published a statement—any statement—concerning the plaintiff which the defendant knew or should have known was false. Indeed, Respondents' arguments serve only to highlight the absurd results which would stem from their interpretation of "actual malice." If, as Respondents suggest, "actual malice" under the Act means only "that the defendant made a statement 'with knowledge that it was false or with reckless disregard of whether it was false or not,'" then plaintiffs would be unable to establish a violation of the Act *unless* there was some false statement made. In other words, under Respondents' theory, a physician could intentionally infect a vulnerable patient with COVID-19, with the intent to kill said patient, but be free from suit simply by refraining from making any false claims about the patient. This clearly was not what the Legislature intended.

While it is true that the West Virginia Pattern Jury Instruction for punitive damages states that "'[a]ctual malice' may be found where you find [name of defendant] acted with a state of mind shown by conduct that was intended or was substantially certain to injure [name of plaintiff], without any just cause or excuse,"[15] those instructions are misleading insomuch as they are expressly based on West Virginia Code, which explicitly differentiates between "actual malice" and "a conscious, reckless and outrageous indifference to the health, safety and welfare of others."[16] That the portion of West Virginia Code providing for punitive damages differentiates between actual malice and a recklessness standard is strong evidence that the Legislature intended the phrase "intentional conduct with actual malice" *not* to include recklessness. *See generally Cmty. Antenna Service, Inc. v. Charter Communications VI, LLC*, 227 W. Va. 595, 604–05, 712 S.E.2d 504, 513–14 (2011) (explaining that "statutes are not to be construed in a vacuum" because the Legislature is presumed to be "familiar with existing law, applicable to the subject matter, whether constitutional, statutory or common . . . .") (quoting Syl. Pt. 5, *State v. Snyder*, 64 W. Va. 659, 63 S.E.2d 385 (1908)).

However, to the extent that this Court views the pattern instruction for punitive damages as consistent with the underlying punitive damages statute, then the addendum in the punitive damages instruction of "without any just cause or excuse" expressly contemplates that there are certain circumstances under which a defendant is justified in acting in a way that is substantially certain to injure. Here, the Legislature has expressly acknowledged the unprecedented circumstances leading to the Act's enactment, including reopening the State despite the potential

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15 § 1500 PUNITIVE DAMAGE, W. Va. Pattern Jury Instr. Civ.

16 W. Va. Code § 55-7-29 ("An award of punitive damages may only occur in a civil action against a defendant if a plaintiff establishes by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff ***or*** a conscious, reckless and outrageous indifference to the health, safety, and welfare of others.") (emphasis added).

increase of COVID-19 spread[17]; unprecedented shortages in medical personnel, equipment, and supplies[18]; an outright statewide ban on the performance of certain medical procedures[19]; and a paucity of 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). The Legislature could not have been more clear as to what it intended in enacting the Act:

> It is the purpose of [the Act] to . . . [e]liminate the liability of the citizens of West Virginia and all persons including individuals, health care providers, health care facilities, institutions of higher education, businesses, manufacturers, 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(b)(1). Clearly, the Legislature contemplated that its concerted efforts to reopen the State in the midst of the COVID-19 pandemic would result in additional COVID-19 exposure and that intentional decisions by health care providers and facilities, in light of "unchartered, experimental, and anecdotal observations and interventions" concerning the applicable standard of care regarding COVID-19, could result in additional COVID-19 infections. Thus, to the extent that this Court views the punitive damages pattern jury instruction as consistent with the underlying statute upon which it is based, then Petitioners have established that there was just cause or excuse for their alleged actions.

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17 *See* W. Va. Code § 55-19-2(a)(11) ("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***.") (emphasis added).

18 *See* W. Va. Code § 55-19-2(a)(6) ("Health care providers have operated with shortages of medical personnel, equipment, and supplies while responding to COVID-19 and were prohibited by Executive Order No. 16-20 from engaging in elective medical procedures.").

19 *See id.*

Throughout their Response, Respondents attempt to piecemeal a definition of actual malice by resorting to the isolated meanings of intent[20] and simple malice.[21] But those are not the standards that the Legislature chose to adopt, and there can be no dispute that "actual malice" is a far greater threshold than simple "intent." Similarly, Respondents' contention that the terms "malice" and "actual malice" "are not materially different" is unavailing.[22] *See Cmty. Antenna*, 227 W. Va. 595 at 604, 712 S.E.2d at 513 ("Our rules of statutory construction require us to give meaning to ***all*** provisions in a statutory scheme, if at all possible. We must apply statutes so that no legislative enactment is meaningless, and to read them to harmonize with legislative intent.") (emphasis added).

To the extent that the Circuit Court's Order is at all ambiguous, such ambiguities are wholly irrelevant to determination of the instant action. Under either of the definitions the Circuit Court adopted, Respondents must establish that Petitioners intended to harm either Respondents or Mr. Fields. As Petitioners have consistently asserted at all stages in this litigation, and as Respondents have apparently conceded, Respondents cannot establish that any of the Petitioners intended to harm or injure anyone. Accordingly, the Circuit Court erred in refusing to dismiss Respondents' Complaint.

(2) The canons of statutory construction support a finding that proof of actual malice requires proof of a specific intent to cause the harm alleged.

"The primary rule of statutory construction is to ascertain and give effect to the intention of the Legislature." Syl. Pt. 6, *Barber v. Camden Clark Mem'l Hosp. Corp.*, 240 W. Va. 663, 815 S.E.2d 474 (2018) (citation omitted). "Where it is possible to do so, it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws, and to adopt that construction of a

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20 *See* Resp. Br. 23.
21 *See id.* at 23–24.
22 *Id.* at 24.

statutory provision which harmonizes and reconciles it with other statutory provisions." *State v. Williams*, 196 W. Va. 639, 641, 474 S.E.2d 569, 571 (1996). In keeping with these principles, this Court has recognized that "[g]enerally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use." Syl. Pt. 11, *Steager v. Consol Energy, Inc.*, 242 W. Va. 209, 832 S.E.2d 135 (2019). This Court has noted:

> There are four traditional methods of judicial definitions of words used in statutes and constitutions and not specifically defined in them: dictionary definitions current at the time, and those now extant; pronouncements by courts; reliable extra-judicial commentary; and definitions set or inferable from debates and proceedings of the bodies drew the documents.

Pauley v. Kelly, 162 W. Va. 672, 699, 255 S.E.2d 859, 874 (1989). Importantly for the purposes of this Reply, it is a "cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 364, 120 S. Ct. 1495, 1498 (2000); *see Wilson v. Hix*, 136 W. Va. 59, 68, 65 S.E.2d 717, 723 (1951) ("[I]n the construction of a statute every word must be given some effect and the statute must be construed in accordance with the import of its language."). In other words, courts must afford independent weight and meaning to each and every word in a given statute, and they must, where possible, read and apply the statute in a congruent manner such as to give effect to the statute as a whole as opposed to mere segments thereof. *See Williams*, 529 U.S. at 364, 120 S. Ct. at 1498; *Wilson*, 136 W. Va. at 68, 65 S.E.2d at 723. Courts are not free, as Respondents would lead this Court to believe, to ignore words which a party finds inconvenient.

Here, the West Virginia Legislature made its intent clear through the Act's plain language:

> It is the purpose of this article to [e]liminate the liability of the citizens of West Virginia and all persons including individuals, health care providers, health care facilities, institutions of higher learning, business, manufacturers, 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 . . . [but] the limitations on liability provided in this article shall not apply to any person, or employee or agent thereof, who engaged in intentional conduct with actual malice.

W. Va. Code §§ 55-19-2, 55-19-7.

Given the wide breadth and absolute nature of the Act's prohibitions against *all* claims arising from COVID-19, the Legislature's decision to include a solitary exception, which applies only in the most egregious cases, appears to have been a conscious one. Indeed, the West Virginia Senate was presented with the opportunity to extend the exception to instances where an individual "acts with actual malice *or a conscious, reckless, and outrageous indifference to the health, safety, and welfare of others*" by virtue of a floor amendment which was offered by Sen. Richard Lindsay (D-08).[23] That amendment was rejected by a voice vote.[24] Once the bill reached the House floor, Del. Brandon Steele (R-Raleigh) introduced an identical amendment.[25] That amendment failed as well.[26]

In light of the Legislature's decision not to define "actual malice," Petitioners point to the term's ordinary and familiar significance and meaning. Black's Law Dictionary defines "actual malice" as "[t]he deliberate intent to commit an injury, as evidenced by external circumstances."[27]

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23 *See* SB277 SFA Lindsay 2-18#1 (https://www.wvlegislature.gov/legisdocs/chamber/2021/RS/floor_amends/SB277%20SFA%20LINDSAY%202-18%20_1%20rejected.htm).

24 *See* Senate Bill 277 History (https://www.wvlegislature.gov/Bill_Status/bills_history.cfm?INPUT=277&year=2021&sessiontype=RS).

25 *Id.*

26 *Id.*

27 Respondents contend that "actual malice is alternatively defined in Black's to also include recklessness: "The deliberate intent to commit an injury, as evidenced by external circumstances . . . Knowledge (by the person who utters or publishes a defamatory statement) that a statement is false, or reckless disregard about whether the statement is true." Resp. Br. 23 (quoting *Actual Malice*, *Black's Law Dictionary* (11th Ed. 2019). However, the portion of the definition upon which Respondents rely applies specifically to defamation claims involving public figures and is labeled as such by *Black's* to establish the context in which that definition applies. As further developed above, "actual malice" in the context of libel and defamation claims *also* requires proof of intent to cause an injury.

Actual Malice, *Black's Law Dictionary* (10th Ed. 2014). Contrarily, "malice" is defined as "[t]he intent, without justification or excuse, to commit a wrongful act," "[r]eckless disregard of the law or of a person's legal rights," or "[i]ll will; wickedness of heart." *Malice*, *Black's Law Dictionary* (10th Ed. 2014). The plain language of the statute signifies that the Legislature intended to create an exception only where the defendant "engaged in intentional conduct with actual malice." W. Va. Code § 55-19-7. Its decision to modify "malice" with "actual" cannot be overlooked, and the importance thereof cannot be overstated. The phrases "malice" and "actual malice" have two very different meanings under the law. Where "malice" results simply from a party's intention to bring about an act—here, allegedly engaging in a coverup of COVID-19 related circumstances—"actual malice" evinces an intent to bring about a particular end result—here, intending to harm Mr. Fields.

The term "actual" as used in the Act modifies the word "malice" and is no more disposable nor any less operative than the word "intentional" as a modifier to the word "conduct." Indeed, courts and legislatures alike have repeatedly recognized a distinction between the terms "malice" and "actual malice," and the terms have been defined separately and apart by both case law and myriad legal authorities. To hold, as Respondents suggest, that there is no difference between the terms would be to ignore the Supreme Court of the United States and this Court's repeated admonitions that courts tasked with interpreting a statute must afford weight to each and every word contained therein. Because "malice" and "actual malice" are different terms with different meanings and different applications, this Court must view the allegations in this matter through the lens which was prescribed by the Legislature—that Respondents may establish a claim under the Act if and only if they can establish that Petitioners acted with actual malice, *i.e.*, "[t]he *deliberate intent to commit an injury*, as evidenced by external circumstances." *Actual Malice*, *Black's Law Dictionary*, (11th ed. 2019) (emphasis added).

To the extent that the Legislature included "actual" as a precondition for "malice" in an attempt to distinguish the malice it intended for purposes of the Act from common law and legal definitions thereof, it can be presumed that the Legislature intended to create an exception under the Act only where plaintiffs could establish that the defendant engaged in intentional conduct with malice as understood in its usual, non-legal context—*i.e.*, "desire to cause pain, injury, or distress to another". *Malice, Merriam-Webster Dictionary* (Internet Ed. 2022).

Had the Legislature desired to make an exception for constructive malice, recklessness, or willful disregard, it would have done so. Indeed, in addition to the broad immunities set forth by the Act which have been discussed at length in the instant action, the Act also immunizes individuals who design, manufacture, label, sell, distribute, or donate supplies or equipment in response to COVID-19. *See* W. Va. Code § 55-19-5. However, unlike the portions of the Act which are relevant to the instant action, Section 5 sets forth *two* exceptions to the immunities described therein:

> The limitations on liability provided in the section shall not apply to any person, or any employee or agent thereof, that: (1) Had actual knowledge of a defect in the product when put to the use for which the product was manufactured, sold, distributed, or donated; ***and acted with conscious, reckless, and outrageous indifference to a substantial and unnecessary risk that the product would cause serious injury to others***; or (2) ***Acted with actual malice***.

W. Va. Code § 55-19-5(c). By defining the exception to immunity for claims involving product liability differently, the Legislature intended to set a higher standard for conduct that triggers the exception to immunity in other non-liability contexts. In the context of product liability, the Legislature chose to adopt language which is virtually identical to the statutory standard governing punitive damages:

> An award of punitive damages may only occur in a civil action against a defendant if a plaintiff establishes by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual

> malice toward the plaintiff ***or*** a conscious, reckless, and outrageous indifference to the health, safety, and welfare of others.

W. Va. Code § 55-7-29(a) (emphasis added). Importantly, this Court has acknowledged that there is a distinction between actual malice and conduct that shows conscious, reckless, and outrageous indifference. *See* Syl. Pt. 15, *TXO Prod. Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992) (noting that a higher award of punitive damages may be constitutional upon proof that a defendant acted "with actual evil intention" as opposed to "extreme negligence or wanton disregard but with no actual intention to cause harm").

As demonstrated herein, each of the traditional methods of judicial definitions of words used in statutes as described by this Court support a finding that the Legislature intended the Act's sole exception to apply only where a plaintiff can establish that the defendant acted with the intent to harm or injure the plaintiff or the plaintiff's decedent. This fact is made clear by the dictionary definitions now existing and which existed at the time the Act was passed, the Court's repeated admonition that courts must treat each and every word in a statute as having independent meaning, and the painstaking efforts which the Legislature devoted toward drafting the Act to ensure that it comports with the Legislature's express intent to "[e]liminate the liability of the citizens of West Virginia and all persons including individuals, health care providers, health care facilities, institutions of higher education, businesses, manufacturers, 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(b)(1).

Here, Respondents have pled intentional torts (*e.g.*, fraud, misrepresentation, abuse, *etc.*) in a strategic attempt to bypass the Act's immunity provision. However, artful pleading alone is not enough to overcome the fact that W. Va. Code § 55-19-4 prohibits Respondents' claims. Rather, specific facts must be alleged to demonstrate that Petitioners engaged in intentional

conduct with actual malice—a subjective and deliberate attempt to cause injury or harm to Mr. Fields. No such allegations have been raised. Indeed, even taking Respondents' Complaint as true, the facts merely demonstrate that while Mr. Fields was admitted to Eldercare, in the early days of the pandemic, he was not tested for COVID-19. However, immediately upon his admission to JGH, he was tested for COVID-19, diagnosed with COVID-19, and then received treatment for COVID-19. Moreover, although Respondents allege that Dr. Snyder suggested that Mr. Fields could be discharged back to Eldercare, the undisputed fact is that he never was. Instead, due to COVID-19, Mr. Fields passed away at JGH on April 18, 2020.

Viewing these facts, even in the light most favorable to Respondents, there is clearly no contention that Eldercare, Dr. Snyder or JGH deliberately intended to harm Mr. Fields. At most, Respondents have alleged a claim of negligence against Petitioners, which is prohibited by W. Va. Code § 55-19-4. Respondents have not pled any facts sufficient to establish that Petitioners acted with actual malice towards Mr. Fields. Accordingly, the Circuit Court erred in refusing to grant Petitioners' Motions to Dismiss.

B. The Act was not rendered unconstitutional due to the definition of "actual malice" the Circuit Court adopted because the Legislature had a rational basis to believe that it would serve a legitimate governmental purpose.

Respondents contend that if the Act's exception for intentional conduct with actual malice were interpreted to foreclose all COVID-19 related claims except where the plaintiff has pled that the defendant acted with the intent to injure or harm the plaintiff and/or decedent, then the Act would be unconstitutional. In support thereof, Respondents cite to (a) the Due Process and Equal Protection Clauses of the 14th Amendment to the United States Constitution, (b) the Due Process and Equal Protection Clauses as set forth in Article III, Section 10 of the West Virginia Constitution, and (3) the so-called "Certain Remedies Clause" set forth by Article III, Section 17

of the West Virginia Constitution. As further developed below, the Act does not violate any of those provisions and is wholly constitutional as a legitimate exercise of legislative powers.

(1) The Act is constitutional because the provisions set forth therein are reasonably related to a legitimate governmental function.

> In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.

Syl. Pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965); *see also* Syl. Pt. 6, *Gibson v. West Virginia Dep't of Highways*, 185 W. Va. 214, 406 S.E.2d 449 (1991) ("There is a presumption of constitutionality with regard to legislation . . . ."). "It is beyond dispute that the legislature has the power to alter, amend, change, repudiate, or abrogate the common law." *Verba v. Gaphery*, 210 W. Va. 30, 35, 552 S.E.2d 406, 411 (2001) (citing W. Va. Const. art. VIII, § 13).

Statutes which limit judicial remedies to recover for damages are economically based. *See Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 690, 408 S.E.2d 634, 640 (1991) (noting that "the right to recover damages is economically based"). And under well-established law, economic-based legislation does not implicate any suspect classifications or fundamental rights under either state or federal law:

> Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protection clause.

Id. at 691–92, 408 S.E.2d at 641–42 (1991) (internal citations omitted).

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313, 113 S. Ct. 2096, 2101 (1993).

"On rational-basis review, a classification in a statute . . . bear[s] a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it." *Id.* at 314–15, 113 S. Ct. at 2101–02 (internal quotations and citations omitted). Rational basis review requires courts to consider only whether the statute at issue may "rationally further a legitimate state interest." *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 2331 (1992); *see Marcus v. Holley*, 217 W. Va. 508, 523, 618 S.E.2d 517, 523 (2005) ("[T]he rational basis test essentially directs that a classification . . . must bear a rational relationship to a legitimate governmental objective.").

Here, Respondents argue that the Act violates the Due Process and Equal Protection clauses of the United States and West Virginia Constitutions because the Legislature "eliminate[d] any remedy for . . . people who have wrongfully suffered COVID-19 related injuries and deaths."[28] Respondents cannot allege that there is a fundamental right for people who have wrongfully suffered COVID-19 related injuries and deaths to recover damages in a court of law, nor have they established that the Act targets a suspect class. Thus, rational basis review applies to the issues in the present action. Indeed, Respondents appear to acknowledge as much in their Response.[29]

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28 Compl. ¶ 27, JA0009.

29 *See* Resp. Br. 28 (applying rational basis review to the facts of this case).

The Act is very plainly rationally and reasonably related to a legitimate governmental interest. As further developed by the Act itself, COVID-19 has had a devastating effect on both state and national economies and has upended every conceivable aspect of our daily lives.[30] Federal, state, and local governments alike have issued myriad directives requiring businesses and schools to close and to fundamentally change the manner in which human beings interact with one another.[31] Over a million Americans have died as a result of COVID-19,[32] over 7,000 of whom were West Virginians.[33] All the while, health care facilities and their staffs have remained steadfast in their commitment to provide the best health care possible in light of dangerous, unprecedented, unpredictable, and often deadly consequences. There have been wide-spread equipment shortages, and the personal protective equipment upon which health care providers rely in order to keep themselves and their patients safe have been subject to rationing, production delays, and logistical challenges.[34]

As the Act acknowledges, "[l]awsuits 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 . . . ." W. Va. Code § 55-19-2. "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." *Id.* Perhaps most importantly for purposes of this action,

> [t]he diagnosis and treatment of COVID-19 has rapidly evolved from largely unchartered, experimental, and anecdotal observations and interventions, without

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30 *See* W. Va. Code § 55-19-2.

31 *See id.*

32 *See* Centers for Disease Control and Prevention, COVID-19 Data Tracker , https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html (last visited October 12, 2022),

33 *See* West Virginia Department of Health & Human Resources, West Virginia COVID-19, https://dhhr.wv.gov/COVID-19/Pages/default.aspx (last visited October 12, 2022)

34 *See* W. Va. Code § 55-19-2.

> 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.

Id.

Respondents cannot seriously contend that the Legislature has no legitimate interest in sustaining the state economy, protecting the job market, promoting the health and welfare of the citizenry, and ensuring that essential businesses have the resources they need to continue providing for the citizens of this State. Nor can Respondents establish that the means the Legislature chose were not rationally connected to its stated purpose. Indeed, the Act's protections are directly related to the social, economic, historic, and geographic factors which created the need for the Act in the first place. The Act expressly recognizes the social and economic impacts that prolonged, extensive, and unimaginably numerous lawsuits would have on this State and its essential businesses. It acknowledges the historic fact that it was impossible to develop a standard a care for COVID-19 during the earliest stages of the pandemic, when the events which are the subject of Respondents' Complaint occurred.

At bottom, the Legislature recognized that without the Act, essential businesses and healthcare providers of every kind and type would face rampant litigation and untold liability issues arising from circumstances over which they had no control, in which they were directed to operate in a prescribed manner, and during which there was no scientific consensus—let alone a cognizable standard of care—to guide their decisions. In order to alleviate these disastrous and inevitable results, the Legislature eliminated liability altogether in all but the most egregious of cases. There could be no more reasonable or rational manner to address liability arising from a global pandemic and the myriad scenarios by which litigants could bring claims arising from such an unprecedent event than to eradicate liability altogether. The Act—which does exactly that—is

reasonably and rationally related to a legitimate governmental interest, and Respondents' Complaint must accordingly be dismissed.

(2) The Act does not violate the Certain Remedies Clause because it reasonably eliminates and curtails a clear social and economic problem.

Article III, Section 17 of the Constitution of West Virginia provides in relevant part that "every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law." W. Va. Const. Art. III, § 17 (emphasis added). This so-called "Certain Remedies Clause" is implicated only "when a legislative enactment either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication of cases . . . ." *Gibson*, 185 W. Va. at 225, 406 S.E.2d at 451. "The term "vested right," as used in the certain remedy provision, means that an actual cause of action which was substantially affected existed at the time of the legislative enactment." *Id.*

> When legislation either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication, thereby implicating the certain remedy provision of article III, section 17 of the Constitution of West Virginia, the legislation will be upheld under that provision if, first, a reasonably effective alternative remedy is provided by the legislation or, second, if no such alternative remedy is provided, the purpose of the alteration or repeal of the existing cause of action or remedy is to eliminate or curtail a clear social or economic problem, and the alteration or repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose.

Lewis, 185 W. Va. at 695, 408 S.E.2d at 645 (upholding an act of the Legislature where "the obvious purpose of the Act was to eliminate or to curtail a clear economic problem for ski area operators and, therefore, for the economy of the state, specifically, exposure to liability for the inherent risks of skiing which the operators essentially cannot eliminate.").

Here, there is no question that the Act was enacted after the accrual of Respondents' cause of action. Thus, the Certain Remedies Clause is implicated. Assuming, *arguendo*, that there are no alternative remedies by which Respondents can seek remediation for the allegations which are the

subject of their Complaint, then Respondents must establish that the Act's purpose was not "to eliminate or curtail a clear social or economic problem" and that "the alteration or repeal of the existing cause of action or remedy is [not] a reasonable method of achieving such purpose." *Id.* In other words, Respondents must establish that the Legislature did not have a rational basis for passing the Act. As demonstrated above, the Act is very plainly rationally and reasonably related to a legitimate governmental purpose. Accordingly, the Act does not violate the Certain Remedies Clause, and the Complaint must be dismissed with prejudice.

C. The Act applies to and governs each of the claims set forth in Respondents' Complaint.

In their Response, Respondents contend that because their Complaint pleads intentional torts, then the Act and its concomitant immunities do not apply. Indeed, Respondents assert that "[t]here is a good argument to be made that claims of fraud, civil conspiracy and the like are not intended to be precluded by [the Act] at all."[35] As demonstrated below, each of the claims set forth in Respondents' Complaint are barred as to Petitioners as a matter of law.

(1) Count I: Fraud, Misrepresentation, and Fraudulent Conduct

Count I of Respondents' Complaint arises from Respondents' allegations that Dr. Snyder was purportedly aware that certain Eldercare residents were exhibiting symptoms of COVID-19 before Mr. Fields tested positive and that he was required to disclose other residents' symptoms to Respondents. Moreover, according to Respondents' Complaint, after Mr. Fields was admitted to JGH, Dr. Snyder downplayed the severity of Mr. Fields's condition and inaccurately indicated that Mr. Fields was safe for discharge back to Eldercare. Notably, Mr. Fields was never transferred back to Eldercare. Nevertheless, according to Respondents, these collective actions and inactions amounted to "fraud" on the part of Petitioners. In other words, Respondents allege that Petitioners

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35 Resp. Br. 29 at n.7.

committed an "act [i.e., purportedly "downplaying" the dangers of COVID-19] from which loss, damage, physical injury, or death [was] caused by a natural, direct, and uninterrupted consequence of the actual, alleged, or possible exposure to, or contraction of, COVID-19." *See* W. Va. Code § 55-19-3. Pursuant to the Act, such claims are forbidden as a matter of law short of a showing that Petitioners intended to harm Mr. Fields. As developed above, Respondents can make no such showing.

Although Respondents attempt to characterize Petitioners' conduct as "misrepresentations" concerning COVID-19 based upon the factual contentions raised in the Complaint, Respondents are essentially alleging that Petitioners should have adopted better COVID-19 related policies and procedures; better testing procedures; better monitoring, collecting, reporting, tracking, tracing, disclosing, and investigating of COVID-19 exposure or other COVID-19 related information; better use of personal protective equipment; and generally that they should have provided better services in their roles as health care facilities and health care providers. The Act specifically prohibits claims arising from each of these alleged actions and/or inactions. *See* W. Va. Code § 55-19-3(1). Respondents cannot use artful pleading to avoid application of the Act because at its core, their Complaint alleges that Petitioners' response to the COVID-19 crisis was lacking, which is clearly conduct "arising from COVID-19."

Even if Petitioners had made "fraudulent" statements, Respondents would still be barred from recovery. Not only does Respondents' argument rely on the false premise that Dr. Snyder was required to disclose sensitive medical information to Respondents concerning *other* Eldercare residents about whom Respondents had no right to inquire (and which, if disclosed, could subject Petitioners to liability for a HIPAA violation), Respondents explicitly ground their theory for recovery on circumstances which would not have existed absent COVID-19. Indeed, the very

circumstances which Petitioners are alleged to have fraudulently misrepresented arose from policies and procedures which Petitioners adopted (or allegedly failed to adopt) in light of the unprecedented COVID-19 pandemic.

Overall, each of the statements or representations which Respondents allege Petitioners fraudulently made were related to the testing for, diagnosis, prevention, and treatment of COVID-19 or the assessment, treatment, and care of an individual with a confirmed or suspected case of COVID-19, and each of these alleged statements were made while Petitioners were providing health care services under the definition provided by W. Va. Code § 55-19-3. Because claims for damages resulting from these health care services are explicitly prohibited by the Act, the Circuit Court erred in refusing to dismiss Count I of Respondents' Complaint.

(2) Count II: Civil Conspiracy

Count II of Respondents' Complaint broadly alleges that Petitioners "intentionally, fraudulently, maliciously and otherwise wrongfully conspired to conceal the dangerous and deadly outbreak and extent of the outbreak of COVID-19 at the defendant Eldercare facility and engaged in acts in furtherance of said conspiracy . . . ."[36] In other words, Respondents allege that Petitioners misrepresented the severity of COVID-19 and otherwise failed to adopt certain procedural safeguards to prevent the spread of the virus. Clearly, these alleged acts fall squarely within the definition of conduct for which no liability can attach pursuant to the Act. In fact, Respondents acknowledge that their claimed damages arise from the fact that Mr. Fields was infected with, and died from, COVID-19. Because each allegation giving rise to Count II arose from COVID-19, COVID-19 care, and healthcare services which were, or allegedly should have been, rendered in

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36 Compl. at ¶ 105, JA0022.

light of Mr. Fields's COVID-19 diagnosis, the Circuit Court erred in refusing to dismiss Count II of Respondents' Complaint.

(3) Count III: Breach of Duties of Care

Count III of Respondents' Complaint solely relates to the medical care and treatment rendered to Mr. Fields for treatment of COVID-19. Specifically, Respondents allege that Dr. Snyder "failed to appropriately monitor, assess, adequately and timely test, and obtain timely and proper medical care for [Mr. Fields] when his condition deteriorated,"[37] that he "was under a statutory duty to comply with all applicable laws and regulations governing nursing homes in West Virginia," and that his "violations of these laws and regulations were a contributing factor to the death of [Mr. Fields]."[38] Respondents further allege that JGH and Dr. Snyder "failed to provide adequate, proper, and safe care, advice, assessment, monitoring, and treatment to [Mr. Fields] during the course of his admission starting April 14, 2020,"[39] and that they "failed to recognize, properly assess and treat [Mr. Fields's] increasing respiratory distress and hypoxemia caused by COVID-19 to reasonably prevent his death from COVID-19."[40] Finally, Respondents broadly allege that Petitioners failed to exercise a reasonable degree of care, provide adequate staffing levels, and properly train their staff to properly assess and respond to COVID-19.[41]

Clearly, every allegation in Count III arises from COVID-19, COVID-19 care, and healthcare services which were, or allegedly should have been, rendered in light of Mr. Fields's COVID-19 diagnosis. As with Counts I and II, the relief sought in Count III is specifically barred

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37 *Id.* at ¶ 120, JA0025.
38 *Id.* at ¶ 130, JA0026.
39 *Id.* at ¶ 132, JA0027.
40 *Id.* at ¶ 133, JA0027.
41 *See id.* at 139–145, JA0028.

by the Act. Accordingly, the Circuit Court erred in refusing to dismiss Count III of Respondents' Complaint.

(4) Count IV: Elder Abuse

Like Counts I through III, the relief which Respondents seek in Count IV arises from COVID-19, COVID-19 care, and healthcare services which were, or allegedly should have, been rendered in light of Mr. Fields's COVID-19 diagnosis. Relief for such claims is explicitly barred by the Act. *See* W. Va. Code § 55-19-4. Accordingly, the Circuit Court erred in refusing to dismiss Count IV of Respondents' Complaint.

However, even if Count IV of Respondents' Complaint was not barred by the Act—which it undoubtedly is—it still fails to state a claim for which relief may be granted because the code section upon which Respondents rely is a criminal statute which does not provide for a private cause of action.

In *Hurley v. Allied Chemical Corporation*, this Court announced the following four-part test to determine whether a private cause of action exists pursuant to W. Va. Code § 55-7-9:

> (1) the plaintiff must be a member of the class for whose benefit the statute was enacted; (2) consideration must be given to the legislative intent, express or implied, to determine whether a private cause of action was intended; (3) an analysis must be made of whether a private cause of action is consistent with the underlying purposes of the legislative scheme; and (4) such private cause of action must not intrude into an area delegated exclusively to the federal government.

Syl. Pt. 1, *Hurley v. Allied Chemical Corp.*, 164 W. Va. 268, 262 S.E.2d 757 (1980). Here, Respondents cannot establish any of the *Hurley* factors except perhaps for the fourth.

Respondents cannot establish the first *Hurley* factor because they are not among the class of individuals for whose benefit the statute was enacted. While Petitioners concede that the code section upon which Respondents rely could conceivably be viewed as designed to protect incapacitated adults, it clearly was not designed to extend to representatives of their estates. At

common law, "all actions for personal injuries, being personal actions, died with the person whether such person received or committed the injury and no such action could be maintained either by or against his personal representative." *City of Wheeling ex rel. Carter v. American Cas. Co.*, 131 W. Va. 584, 576, 48 S.E.2d 404, 406 (1948). Because common law did not provide for survivability of actions for personal injuries, Respondents can establish the first *Hurley* factor only to the extent that they are entitled by positive law (*i.e.*, a statute) to maintain an action for elder abuse in Mr. Fields's stead. Under West Virginia law, "[i]n addition to the causes of action which survive at common law, causes of action for injuries . . . to the person and **not resulting in death** . . . shall also survive; and such actions may be brought notwithstanding the death of the person entitled to recover or the death of the person liable." W. Va. Code § 55-7-8A(a) (emphasis added).

Here, of course, Respondents allege that Mr. Fields died as a result of the allegations set forth in Respondents' Complaint.[42] Accordingly, Respondents have failed to establish that they are among the class of individuals for whose benefit W. Va. Code § 61-29-2 was designed to protect. Respondents would be equally unable to establish the second and third *Hurley* factors because there is nothing in the criminal statute upon which they rely to suggest that Legislature intended—expressly or otherwise—to create a private cause of action. Nor is there any indication that the Legislature intended for the criminal chapter of West Virginia Code at large to create private causes of action. *See generally Arbaugh v. Board of Educ., County of Pendleton*, 214 W. Va. 677, 591 S.E.2d 235 (2003) (declining to find that a similar statute concerning failure to report

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42 *See, e.g., id.* at ¶ 21, JA0008 ("Mr. Fields died on April 18, 2020 at defendant Jackson General due to COVID-19 contracted at Eldercare and as a result of a failure to treat the sequalae of his COVID-19 infection.").

child abuse created a private cause of action) Accordingly, Count IV of Respondents' Complaint fails to state a claim for which relief may be granted.

(5) Count V: Patient Safety Act

Like Counts I through IV, the relief which Respondents seek in Count V arises from COVID-19, COVID-19 care, and healthcare services which were, or allegedly should have, been rendered in light of Mr. Fields's COVID-19 diagnosis. Relief for such claims is explicitly barred by the Act. *See* W. Va. Code § 55-19-4. Accordingly, the Circuit Court erred in refusing to dismiss Count V of Respondents' Complaint.

However, even if Count V of Respondents' Complaint was not barred by the Act—which it undoubtedly is—it still fails to state a claim for which relief may be granted because the code section upon which Respondents rely does not provide for a private cause of action. More specifically, Count V of Respondents' Complaint alleges a claim arising under the Patient Safety Act, the expressed statutory purpose of which is to prohibit retaliation and discrimination against health care workers or anyone acting on their behalf for (1) reporting wrongdoing or waste, (2) advocating on behalf of a patient with respect to the care, services, or conditions of a health care entity, and (3) participating in an investigation relating to the care, services, or conditions of a health care entity. *See* W. Va. Code § 61-39-2.

Here, Respondents are not members of the class for whose benefit the Patient Safety Act was intended to benefit because they are not health care workers, nor were they acting on behalf of health care workers at any time relevant to the Complaint. In an apparent attempt to encompass themselves within the Patient Safety Act, Respondents cite to W. Va. Code § 16-39-2(b) for the proposition that the Patient Safety Act was designed "to protect patients by providing protections

for those health care workers with whom the patient has the most direct contact."[43] The section of code to which Respondents cite, however, was repealed upon the passage of House Bill 2368 on April 10, 2021. As presently codified, the Patient Safety Act makes no mention of the Legislature's intent to protect anyone other than health care workers and individuals acting on their behalf. Nor does the Patient Safety Act make any mention whatsoever—explicitly or implicitly—about private causes of action for individuals whom that act is not designed to protect. Thus, Respondents have failed to establish that the Legislature intended to provide for the cause of action which they allege.

Because each of the allegations in Count V arise from care which Petitioners provided or which Respondents allege Petitioners should have provided in light of the COVID-19 pandemic, together with the fact that Count V is not legally cognizable as to Respondents, the Circuit Court erred in refusing to dismiss Count V of Respondents' Complaint.

III. CONCLUSION

As demonstrated herein, Respondents have failed to state a claim upon which relief may be granted. The Act eliminates liability for any injury or death arising from COVID-19, COVID-19 care, and care which was impacted as a result of COVID-19 except where the actor engaged in intentional conduct with actual malice. Respondents have failed to allege any facts that demonstrate, or even suggest, that Petitioners intended to harm Respondents or Mr. Fields, and thus Respondents cannot establish that Petitioners acted with actual malice. Nor have Respondents established that the Act is unconstitutional because the Act meets the minimal constitutional threshold of being reasonably related to a legitimate purpose. Indeed, Respondents' arguments would lead to the precise result which the Legislature expressly sought to prevent from

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43 *Id.* at ¶ 168, JA0033.

occurring—health care workers and facilities being held liable for the manner in which they provided care during the earliest waves of an unprecedented global pandemic.

Because each of Respondents' claims arises from COVID-19 and COVID-19 care, and because Respondents cannot establish that Petitioners acted with actual malice nor that the Act is unconstitutional, they have failed to state a claim for which relief may be granted. Accordingly, Respondents' Complaint must be dismissed with prejudice.

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.,
By counsel,

Jace H. Goins (WVSB No. 6894)
Christopher S. Etheredge (WVSB No. 13835)
Steptoe & Johnson PLLC
P.O. Box 1588
Charleston, WV 25326-1588
Telephone: (304) 353-8000
Jace.Goins@steptoe-johnson.com
Christopher.Etheredge@steptoe-johnson.com
Counsel for Community Health Association d/b/a Jackson General Hospital and Co-Counsel for Irvin John Snyder, D.O.

Salem C. Smith (WVSB No. 7798)
Shereen Compton McDaniel (WVSB No. 12282)
Flaherty Sensabaugh Bonasso PLLC
P.O. Box 3843
Charleston, WV 25338-3843
Telephone: (304) 345-0200
ssmith@flahertylegal.com
smcdaniel@flahertylegal.com
Co-Counsel for Irvin John Snyder, D.O.

Mark A. Robinson (WVSB No. 5954)
Flaherty Sensabaugh Bonasso PLLC
P.O. Box 3843
Charleston, WV 25301-3843
Telephone: (304) 345-0200
mrobinson@flahertylegal.com
Counsel for Eldercare of Jackson County, LLC d/b/a Eldercare Health and Rehabilitation

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of October, 2022, I served a true and exact copy of the foregoing **"Petitioners' Reply Brief"** by placing the same in the regular course of the United States mail, postage prepaid, addressed to counsel as follows:

Kelly Elswick-Hall, Esq.
The Masters Law Firm, LC
181 Summers Street
Charleston, WV 25301
Counsel for Respondents

Mark A. Robinson, Esq.
Flaherty Sensabaugh Bonasso PLLC
P.O. Box 3843
Charleston, WV 25338-3843
Counsel for Eldercare of Jackson County, LLC
d/b/a Eldercare Health and Rehabilitation

Salem C. Smith, Esq.
Shereen Compton McDaniel, Esq.
Flaherty Sensabaugh Bonasso PLLC
P.O. Box 3843
Charleston, WV 25338-3843
Co-Counsel for Irvin John Snyder, D.O.

Jace H. Goins (WVSB No. 6894)
Christopher S. Etheredge (WVSB No. 13835)
Steptoe & Johnson PLLC
P.O. Box 1588
Charleston, WV 25326-1588
Telephone: (304) 353-8000
Jace.Goins@steptoe-johnson.com
Christopher.Etheredge@steptoe-johnson.com
Counsel for Community Health Association
d/b/a Jackson General Hospital and
Co-Counsel for Irvin John Snyder, D.O.