IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal 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;
IRVIN JOHN SNYDER, D.O.; and
DOE DEFENDANTS 1-5,

Defendants' Below/Petitioners,

v.

Civil Action No. CC-18-2021-C-32
Honorable Lora Dyer
Circuit Court of Jackson County

ROSEMARY LAMBERT
and CAROLYN HINZMAN,
Individually, and as
Co-Executrices of the
ESTATE OF DELMER P. FIELDS,

Plaintiffs Below/Respondents.

BRIEF OF RESPONDENTS WITH CROSS ASSIGNMENT OF ERROR

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I. RESPONDENTS' CROSS ASSIGNMENT OF ERROR

Come now the Respondents/Plaintiffs Below, by counsel, Kelly Elswick-Hall and the Masters Law Firm, l.c. in opposition to the Petition for Appeal of Petitioners/ Defendants Below Eldercare of Jackson County, LLC, d/b/a Eldercare Health and Rehabilitation ("Eldercare"), Community Health Association d/b/a Jackson General Hospital ("Jackson General"), and Irvin John Snyder, M.D. ("Snyder") and respectfully request that the relief requested in that petition be denied. In their brief the Petitioners do not address the primary issue—the proper interpretation of the language of the statutory exception to immunity enacted in W.Va. Code § 55-19-7. Petitioners simply presume their interpretation of the exception is the correct one, when it is not.

The Circuit Court undertook an analysis of the language of the exception in light of West Virginia case law, and adopted the standard for intentional and malicious conduct stated in *Hayseeds, Inc. v. State Farm Fire & Casualty,* 177 W. Va. 323, 330–31, 352 S.E.2d 73, 80–81 (1986), a case cited and argued by the Petitioners in their briefing:

> 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., NY. Times* v. *Sullivan,* 376 U.S. 254, 84 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.

The Circuit Court correctly determined that Respondents' complaint states a claim upon which relief may be granted under the Circuit Court's interpretation of the exception.

However, while the Circuit Court expressly adopted the standard in *Hayseeds*, which by its language as quoted by the Circuit Court would not require a specific intent to kill plaintiffs' decedent, the Circuit Court then said "actual malice" requires proof that the defendant acted with the intent to injure or harm the plaintiff and/or decedent. This and other language in the order, along with a reading of *Hayseeds*, create somewhat of an ambiguity. Therefore, the Petitioners presume that the statute requires specific intent to kill plaintiffs' decedent. This interpretation of the statute is not consistent with

applicable common law and, if it were accepted, would render the statute unconstitutional. Consequently, should the Circuit Court's order require specific intent to kill plaintiffs' decedent, as presumed by the Petitioners, then the Circuit Court erred in its interpretation of the statute.

In addition, the Circuit Court noted that Respondent did not intend to attack the constitutionality of the statute and, therefore, the Court's Order did not address any potential constitutional issues that may or may not arise from the passage of the Act. The Circuit Court's characterization was not complete in this regard. It is correct that the Respondents/Plaintiffs Below were not requesting that the statute be declared unconstitutional *per se*. Instead, Respondents/Plaintiffs Below argued that their proffered interpretation of the statute would be constitutional, whereas the standard proffered by the Petitioner/ Defendants Below would render the statute unconstitutional. Since the Respondents do not wish to waive that argument, Respondents assert a second cross-assignment of error. Consequently, should the standard require specific intent to kill plaintiffs' decedent, as presumed by the Petitioners, then the statute would be unconstitutional.

II. STATEMENT OF THE CASE

This case involves one of the worst and deadliest single-site COVID-19 outbreaks in West Virginia, with reports of seventy-one (71) of the eighty-six (86) Eldercare residents infected, thirty-two (32) staff members infected, and a reported fifteen (15) elderly residents dead in the one-hundred twenty bed facility. Compl. 18. Respondents' father, Delmer P. Fields is one of the individuals that suffered a wrongful death. Compl. 19.

Mr. Fields was admitted to defendant Eldercare in January of 2020. He was admitted for rehabilitation due to back fractures and dementia with potential long-term placement. Compl. 20. Mr. Fields died on April 18, 2020, at defendant Jackson General Hospital due to COVID-19 contracted at Eldercare and as a result of a failure to treat the sequalae of his COVID-19 infection. Compl. 21. His wife, Phoebe Fields was also a patient/resident at Eldercare, admitted in June of 2019 for COPD and strokes. She died on April 17, 2020, while also positive for COVID-19. Compl. 22.

In addition to Eldercare, Petitioner Irvin Snyder, M.D., was responsible for the medical

management of Mr. Fields while he was at the Eldercare facility, as one of three doctors in the same medical group that Eldercare required the residents to see for care. Compl. 23.

Prior to the death of both of her parents, when Respondent Rosemary Lambert learned of COVID-19 being in nursing homes, she contacted Petitioner Eldercare. She spoke with nurses there, and with the administrator, Todd Kimball and with the director of Nursing, Bobbie Jo Nichols. She was falsely told on approximately April 9, 2020, that there was only one positive case, and that person was isolated in a different area from her father and mother, in "lock down." Respondent Lambert was assured that her father and mother were fine and had no symptoms. Respondent Lambert asked whether she should take them home and was falsely told that she should not do that because they were safer at Eldercare. Compl. 24.

Respondents and family were not able to visit the nursing home due to COVID-19, but were able at times to look through the windows at the nursing home. During those times, Respondent Lambert observed that the residents were all together like they normally were before COVID, they were not separated by six feet of distance, or really any distance. Many if not all of the staff Respondent Lambert saw were not wearing masks and none of the residents she saw were wearing masks. There did not appear to be any observable attempts by Petitioner Eldercare to keep the residents separate when she was looking into the facility. Petitioner Eldercare was not taking basic precautions—even when the facility was in lock-down to visitors. Compl. 25.

Respondent Lambert asked Eldercare staff whether they should test her father for COVID. She was falsely told that he was fine and did not meet the criteria for testing because he was fine. Compl. 26.

Respondent Lambert decided to take her father out of Eldercare and bring him home with assistance. Eldercare personnel tried to talk her out of it. Compl. 27. When Mr. Fields was picked up from Eldercare on April 13, 2020, he was in terrible shape. He had multiple bruises. He smelled of urine. He was so sick, he had to be carried into the house. Eldercare said he just had a UTI. Respondents had to call EMS within less than 24 hours of him coming home. Compl. 28. Eldercare

never tested Mr. Fields or his wife for COVID while they were there. Compl. 29.

EMS took Mr. Fields to Petitioner Jackson General on April 14, 2020. He was treated there by Petitioner Snyder, who was the same doctor who was supposed to be caring for him at Eldercare. However, in the ER, Mr. Fields was tested for COVID ordered by another physician. The test was positive. They found that Mr. Fields also had a head injury with hemorrhage from a fall at Eldercare. Comp. 30.

The documents further reflect that Delmer Fields presented to Jackson General Hospital by ambulance, on April 14, 2020. COVID-19 exposure was noted in the records of Mr. Fields due to positive cases at the nursing home from where he was discharged. Yet Respondent Lambert was never told by Petitioner Eldercare that there were positive "cases" at the nursing home or that Mr. Fields was exposed. Compl. 31.

During his emergency room evaluation on April 14, 2020, Mr. Fields had diminished breath sounds bilaterally with wheezing in the lower lung fields, a symptom of COVID-19. His chest x-ray showed atelectasis. He was admitted and being treated by Petitioners Jackson General and Snyder for presumed UTI and blood in his urine. By early on April 15, 2020, he was placed on 2 liters of oxygen, which progressed that day to 4 liters of oxygen with only 92% oxygen saturation on the 4 liters. On April 16, 2020, he progressed from 4 liters to 6 liters with 91% oxygen saturation on 6 liters. He died on April 18, 2020, with notation prior to that on April 17, 2020, that he had 87% oxygen saturation on 5 liters. Compl. 32.

Despite Mr. Fields's increasing respiratory distress, from the records, there was no work up for hypoxemia in the three days and no repeat chest x-ray performed by Petitioners Snyder or Jackson General. There is no meaningful discussion of his COVID positive status by Petitioners Snyder or Jackson General. On April 17, 2020, Petitioner Snyder first acknowledges the COVID positive status, but nevertheless stated that Mr. Fields was clinically stable and his UTI could be treated with over-the-counter antibiotics, indicating that Mr. Fields could be discharged. He died the next morning. His immediate cause of death was listed as COVID-19. Compl. 33.

During Mr. Fields's hospital stay at Jackson General, Petitioner Snyder kept falsely minimizing the COVID to Respondent Lambert, even suggesting at one point that Mr. Fields could be discharged back to Eldercare, but Respondent Lambert said no. Compl. 34.

Contrary to what was falsely represented by Petitioner Snyder, Mr. Fields died on April 18, 2020, in the hospital. Petitioner Snyder said in the discharge summary that his cause of death was "multifactorial secondary to complications of aging and dementia exacerbated by acute COVID positive state, UTI with E. coli, and cerebral hemorrhage." His immediate cause of death was listed as COVID-19 on his death certificate. Compl. 35.

A. What was really happening at Eldercare that led to the death of Delmer Fields.

Contrary to Petitioner Eldercare's false representations to Respondents, government officials, and the public in the media, -- that there was only one positive case and the first case was not until April 6, 2020, and that Eldercare was taking all proper precautions, -- the reality at the facility was different. Compl. 36.

When the COVID-19 pandemic began, Petitioner Eldercare staff were told that they would be notified of any positive cases of COVID-19 in the Eldercare facility for the protection of residents and staff. Compl. 37. After the COVID-19 pandemic began, Petitioner Eldercare residents started getting fevers and other symptoms. Compl. 38. Eldercare employees were told by Petitioner Eldercare management that the symptoms were just the flu and not COVID. Compl. 39.

1. A twenty-year Eldercare employee confirms Petitioners' intentional and malicious misconduct.

A resident at Petitioner Eldercare on C Hall developed a really high fever in March of 2020 and died there. Eldercare staff was not told whether the resident was COVID positive. However, a day or so later, which was in mid-March, some staff were each given one paper surgical mask and told to wear it when you went into a resident's room, nothing was mentioned about the common areas or dining area. Those staff were given only one mask and they were required to wear it for multiple days. Prior to that, mask use was not mentioned in meetings. Compl. 40.

In the two weeks or more before April 9, 2020, there were multiple residents who were sick,

but, to a twenty-year Eldercare employee's knowledge, the residents were not tested to determine whether or not they were positive. Incredibly, the residents would develop fevers, but Petitioners Eldercare and Snyder would not test them and instead would give them Tylenol and wait until they got worse and developed other symptoms, like a cough or breathing problems. In the meantime, the resident was not placed in isolation. Instead, Petitioner Eldercare would leave these residents in their room with another resident, rather than moving them out. Then when the resident developed additional symptoms, Petitioner Eldercare would move the other resident out, who had spent days in the room with the symptomatic resident. That exposed resident would then be moved into another room with another resident, where the same thing would happen. Compl. 41.

Petitioner Eldercare management basically took an intentional "head in the sand" approach to it. They did not want to test residents, even though they had signs and symptoms of COVID, because they intentionally did not want to know they were positive. Compl. 42. During this time frame, at least two or three residents died. Petitioner Eldercare claimed to staff that the deaths were not due to COVID. Compl. 43.

In the lead up prior to April 9, 2020, an Eldercare employee caring for the residents asked management whether patients had COVID because many were sick. The employee was concerned for the safety of residents and for family. The employee was falsely told by Petitioner Eldercare management, Todd Kimball "it's not COVID, it's not the plague, you're not going to catch it." Compl. 44. During this time prior to April 9, 2020, Petitioner Eldercare staff were caring for these sick residents, and then going into a room to care for other residents wearing only a mask and not changed. It wasn't until a couple of days before April 9, 2020, that Petitioner Eldercare gave some employees one N-95 mask, which they had to wear for multiple days with multiple patients, but others still used only a cloth or paper mask and others none. Eldercare did not tell employees caring for residents who or that anyone was positive. Compl. 45.

On or about April 9, 2020, an Eldercare employee was instructed to work on C Hall with another employee. One wore the same N-95 mask with cloth mask over it, but the other employee was

not provided with an N-95 mask that morning. A resident on C Hall was sick as were other patients. That morning at the start of their shift at 7:00 a.m., the employee was not told the resident was COVID positive or that Petitioner Eldercare suspected the resident was COVID positive. The resident was not wearing a mask when the employee cared for said resident. When the employee entered the room, the resident was coughing. The employee then went on to care for other residents, as said employee was required to do by Petitioner Eldercare. Compl. 46. After seven hours of caring for the sick resident and others, Petitioner Eldercare management Todd Kimball told the employee that the resident was positive, which meant that Petitioner Eldercare either knew it or suspected it prior to that day, and intentionally never told the employee. Eldercare management Kimball still falsely represented that everyone was safe, and that no one was going to catch it. Compl. 47.

The Eldercare employee called an immediate supervisor on or about April 9, 2020, about the exposure. The Eldercare employee assumed she would need to quarantine. The Eldercare employee did not feel it was safe to return to Eldercare, for the residents or herself. The person at Eldercare the employee spoke with said she understood and would speak with Petitioner Eldercare management Todd Kimball. She later called the employee back and told the employee that Todd Kimball said no to quarantine and that he was "accepting her resignation." Said employee had worked at Petitioner Eldercare for twenty years. She was never provided with or instructed to test by anyone at Eldercare. Compl. 48.

It turned out that the Eldercare employee had spent approximately two weeks caring for COVID positive patients without the employee's knowledge, and during this time residents were out in the facility around other residents. Compl. 49. The Eldercare employee obtained a test on her own as soon as she was able to get one, and without the assistance of Petitioner Eldercare, which was about four days after her last exposure at Eldercare. The employee tested positive for COVID, which she contracted at Eldercare. Compl. 50.

Petitioner Eldercare was not doing sufficient testing for COVID and not doing proper infection control and isolation. It appeared to Eldercare employees that Eldercare did not want to know whether a

resident was positive. Compl. 51.

2. Petitioners attack another Eldercare employee who they believed blew the whistle on them.

Another Eldercare employee, whose job included delivering food trays to residents, was in contact with many residents daily. This Eldercare employee went from room to room and was not told by Petitioner Eldercare that he should wear a mask. The employee was not provided any mask or personal protective equipment. The Eldercare employee continued to deliver trays, room to room without a mask up until his last day on or about April 5, 2020. Compl. 52. About a week before this Eldercare employee's last day, Petitioner Eldercare management started closing doors to certain halls at the facility. Still, Petitioner Eldercare management kept falsely telling employees it was the flu, not COVID. Compl. 53.

Also during this time, the Eldercare residents who were symptomatic and those without symptoms, were out in the facility and eating together in the dining hall. Petitioner Eldercare did not shut down the dining hall until sometime after April 5, 2020. Compl. 54.

Eldercare was very frequently understaffed. They would have only 1 or 2 CNA's on a hall for approximately 20 to 28 patients or more. Respondents are informed and believe that there were supposed to be 4 CNA's and a charge nurse on each hall. During the five years prior to the incident that is the subject of this case, Petitioner Eldercare expected one CNA to care for 16 or more residents each, which was too many to do everything that needed to be done much of the day. Respondents are informed and believe that Petitioner Eldercare was supposed to have five RN's per site, but they were lucky if they had two. The administration would pretty much stay in their offices all day unless there were state inspectors in the facility. Compl. 55.

Shortly before the last day of said employee on April 5, 2020, Petitioner Eldercare management and director, Todd Kimball, called a meeting of a few people at a time. In that meeting, Kimball said that Eldercare was going to give some N-95 masks to the nurses, but not to him. Petitioner Eldercare management Kimball said that the last thing he wanted was the media to get ahold of this place.

Petitioner Eldercare management Kimball never told said employee in that meeting that residents were COVID positive. Compl. 56.

This Eldercare employee was called into Petitioner Eldercare management Kimball's office. Kimball accused said employee of calling the local health department to confidentially report a COVID outbreak there. Kimball's face was bright red, and he was angry because of the reporting. The Eldercare employee, who felt scared and intimidated by Petitioner Eldercare management Kimball, in fact did not make the call and told Kimball so. Compl. 57.

The next week, Petitioner Eldercare management Kimball called said employee back to his office. Kimball said that he knew it was said employee who called the Health Department, because he improperly, and likely illegally, listened to the Health Department voicemail message and could distinctly identify it was said employee's voice. Said employee again told Kimball that it was not him who called. Petitioner Eldercare management Kimball said that he would fire said employee right there, but he wanted to check with corporate first to see if he could. Not once during either meeting with said employee did Petitioner Eldercare management Kimball say that calling the Health Department was the right thing for someone to do or permissible to do. Instead, he was angry about it and wanted to fire said employee. Compl. 58. During that same meeting, said employee was given two separate write ups, and then suspended. The next day said employee was terminated by Petitioner Eldercare. Compl. 59.

3. Another thirty-year Eldercare employee confirms Petitioners' intentional and malicious misconduct.

Yet a third Eldercare employee, on approximately April 7, 2020, was assigned to work with a resident who was "total care" and not feeling well and had a fever. Said employee had to brush the resident's teeth three times a day and do other personal care. Said employee only wore her one paper surgical mask given to staff, and did not have a face shield or N-95 mask. The resident was not wearing a mask. Said employee cared for this resident for two days. During this time this resident was out of her room and around the facility all day long. Said employee also went on to care for other residents as normal, as required by Petitioner Eldercare. Compl. 60.

The second day said employee learned that someone had tested positive for COVID. Said employee called the Petitioner Eldercare director, Todd Kimball, and Kimball falsely assured said employee that it was not the resident said employee cared for and that said employee was nowhere around the patient who was positive. Petitioner Eldercare management Kimball refused to give said employee the name of the COVID positive resident. Compl. 61. The next morning, said employee was advised in confidence by someone not in management that the resident said employee had cared for was, in fact, positive for COVID, contrary to what said employee was falsely told by Petitioner Eldercare management Kimball. Compl. 62. This employee had spent two entire days caring for other residents after being directly and closely exposed to the COVID positive resident and that COVID positive resident was out in the facility around other residents. Compl. 63.

Said employee called Petitioner Eldercare to tell Petitioner that said employee learned about her exposure to a COVID positive resident and would, she assumed, need to quarantine and/or would be tested. Said employee did not feel it was safe to return to Eldercare. The person said employee spoke with said they understood. Petitioner Eldercare did not tell said employee to go get tested, did not arrange for any testing, and did not offer any testing. Compl. 64. A couple of days later, which was at the end of the week, said employee called Eldercare to see what the next step was, and was told by Eldercare Human Resources that said employee did not show up for two days, was no longer an employee, and she was "on your own." Petitioner Eldercare's policy was if you were exposed to COVID, you still come to work, there was no quarantine. Said employee worked for Petitioner Eldercare for over thirty years. Compl. 65.

During the entire time said employee worked there, Petitioner Eldercare had the same employees care for the COVID positive patients and then go into the next room to care for patients who were not COVID positive. Compl. 66.

4. Family members begged Petitioners to take action, but they refused.

It was reported that one Eldercare resident had been symptomatic for weeks, with a fever on March 29, 2020, and when a family member asked for a COVID test, Petitioner Eldercare refused and

instead tested the resident only for flu. It was reported that this resident also died of COVID-19 on April 18, 2020. Compl. 68. It was reported that even after Petitioner Eldercare admitted to its first positive COVID case, yet another Eldercare resident for more than two weeks was experiencing symptoms. It was reported that his wife begged them to get him tested, and Petitioner Eldercare kept telling his wife the resident was fine. It was reported that this resident died of COVID just weeks later. Compl. 69.

B. Petitioners lie to the government, the public, the residents, their families, and their employees.

By contrast, Petitioner Eldercare prior to April 13, 2020, was falsely and intentionally representing to health officials, family members and the public, including the Respondents that all staff are wearing full PPE and the facility is taking strong action to assure control measures are in place, and the facility continues to take strong infection control measures, has adequate PPE, and is issuing the same for all staff. Compl. 70. Petitioner Eldercare management Todd Kimball falsely and intentionally represented to the public, including the Respondents, that stringent health protocols were being put in place at the home. Eldercare management Kimball falsely represented to the public, including the Respondents: "We were proactive," and "Our top priority is to keep our patients and residents safe. They deserve the highest level of care at all times, but now more than ever." Compl. 71. Later, Petitioner Eldercare management Kimble falsely represented to the public, including the Respondents, that patients testing positive were quarantined within the facility as per CDC guidelines and that Eldercare has not let any employee work if they were ill or pending test results. Compl. 72

Despite the goings on inside the Eldercare facility, with multiple, symptomatic residents, Petitioner Eldercare did not report a positive case to Jackson County Health Department until April 6, 2020, and only after Petitioner Eldercare management Kimball had learned the anonymous caller had made the report to said Health Department. Compl. 73.

C. Petitioners had a pattern and practice of not reporting outbreaks until caught.

Petitioner Eldercare's intentional failure to report the outbreak until caught was a plan, scheme, pattern and practice of the Eldercare facility. In August of 2019, governmental inspectors determined

that Petitioner Eldercare had failed to report a prior infectious outbreak at its facility to the local health department and, in fact, did not report it until after inspectors arrived for a surprise inspection of the facility on August 19, 2019. According to the report, an unknown respiratory illness resembling the flu was discovered through infection control tracking on August 12, 2019, and observed between August 19, 2019, and August 21, 2019. Eldercare was required to report the outbreak to the local health department. However, the report was only made after the governmental surveyor asked the director and assistant director of nursing at Eldercare whether the outbreak had been reported. Compl. 74. Petitioner Eldercare likewise had a pattern and practice of failing to ensure an effective infection control program designed to prevent the development and/or transmission of disease and infection to the extent possible and was cited by governmental inspectors in reports dated July of 2017 and in August of 2019. Compl. 75.

According to an inspection report by the U.S. Department of Health and Human Services Centers for Medicare and Medicaid Services (CMS) dated Aug. 21, 2019, Petitioner Eldercare was cited 17 times for health violations – reportedly five more violations than the average number of citations for West Virginia nursing homes and 8.8 more than the U.S. average, with inspectors determining, "Based on observation and staff interview, the facility failed to establish and maintain an effective infection control policy," and "This deficient practice has the potential to affect all residents residing in the facility." Compl. 76.

This is not a situation where a well-run nursing home was caught off guard by the pandemic—Petitioner Eldercare's deficient and dangerous practices predate the pandemic and, in the care of Mr. Fields and others, Eldercare failed to meet and follow the standards of care for proper infection control **that were in place even before COVID-19 existed**. Compl. 77. The industry standard for long-term care facilities at the relevant time consistently supported the testing of all residents and staff in any facility where COVID-19 is detected. Compl. 78. The industry standard for long-term care facilities at the relevant time consistently supported that long term care providers implement necessary isolation procedures, help to curb the spread of the COVID-19 virus, and provide transparency to

residents, staff, and their loved ones. Compl. 79. Nevertheless, Petitioner Eldercare continued to intentionally downplay the outbreak at its facility, refusing to test residents when family members requested it, misrepresenting how many residents and staff were COVID positive or suspected COVID positive, and falsely representing at times that none of the staff had tested positive. Compl. 80.

D. The Governor sends in the National Guard.

On or about April 16, 2020, after finding out about the positive cases at Petitioner Eldercare, after the anonymous leak, the Governor of West Virginia activated and sent the National Guard to the Petitioner Eldercare facility to carry out COVID-19 testing of Eldercare residents and staff. The Governor stating, "I am upset because if someone has purposefully or hid something or made a bad decision that's not acceptable...that's all there is to it," and "These are the most vulnerable of the vulnerable people. And we have told our people point blank that when we have one person — one, one person — in an outbreak in a nursing home to run to the fire and test everybody there, all the employees and everybody there," You know, over and over I said one thing and that is this loud and clear," and "When we have any issue whatsoever at a nursing home I said test everybody. Run to the fire. Absolutely don't hesitate," and "Everyone can come up with a thousand different reasons and grow a thousand bushes to hide behind." This help came too late for Mr. Fields and many of the other residents to prevent their deaths. Compl. 81.

Petitioner Snyder reported to the media that he rejected the governor's decision to classify Jackson County as a COVID "hotspot" specifically because the surge of new cases at the time had been linked to facilities, like Petitioner Eldercare, where he was providing the medical care to Mr. Fields and other residents. Compl. 82. While the National Guard was deployed to Petitioner Eldercare in mid-April, Petitioners Eldercare and Snyder knew that there was a serious outbreak at the facility far sooner, including in March 2020 when residents were having unexplained fevers and symptoms, yet Petitioner Eldercare chose not to test its residents and staff for COVID-19. The fraudulent concealment of the conditions was overwhelming. Compl. 83.

E. Petitioners knew what would happen as a result of their misconduct.

Although Petitioners were on high-alert for COVID-19 since at least February 2020, they lacked a proper plan of action leading to a systemic failure. Compl. 84. It was entirely foreseeable, and eventually known by Petitioners Eldercare and Snyder that COVID-19 would spread through Eldercare, given that there were not enough staff to isolate and care for symptomatic and positive residents. When staff are forced to travel between symptomatic and COVID-19 positive and COVID-19 negative seniors, they spread highly infectious disease in their wake. Compl. 85.

As pleaded by the Respondents, it was entirely foreseeable, and known by Petitioner Eldercare and Snyder that COVID-19 would spread through Eldercare, when the residents would develop fevers, but Petitioners Eldercare and Snyder would not test them and instead would give them Tylenol and wait until they got worse and developed other symptoms, like a cough or breathing problems. In the meantime, the resident was not placed in isolation, **even though the 120-bed facility reportedly had only 86 residents at the time.** Instead, Petitioner Eldercare would leave these residents in their room with another resident, rather than moving them out. Then when the resident developed additional symptoms, Petitioner Eldercare would move the other resident out, who had spent days in the room with the symptomatic resident. That exposed resident would then be moved into another room with another resident, where the same thing would happen. These were intentional decisions made by Petitioner Eldercare. Compl. 86.

It was entirely foreseeable, and known by Petitioner Eldercare that COVID-19 would spread throughout Eldercare, when symptomatic residents would be out and about in the facility and the dining hall. Compl. 87. It was entirely foreseeable, and known by Petitioner Eldercare that COVID-19 would spread throughout Eldercare, when Petitioner Eldercare intentionally hid, and misrepresented the COVID positive or suspected COVID positive status from employees and others. Compl. 88. It was entirely foreseeable, and known by Petitioner Eldercare that COVID-19 would spread throughout Eldercare, when Petitioner Eldercare intentionally refused to test its symptomatic residents. Compl. 89.

In fact, prior to Mr. Fields's death, Petitioners Eldercare and Snyder became aware of multiple

residents exhibiting symptoms of COVID-19 and of COVID positive or suspected COVID positive residents, and knew of their duty to truthfully and fully disclose these matters to the Respondents, government officials, their employees, and others. Compl. 92. Instead, Respondents were falsely told that Mr. Fields was safer at Eldercare, and later that there was only one COVID case and that person was fully isolated, that Petitioners were taking all proper precautions, and that Mr. Fields was fine, all of which were false. Compl. 93.

F. Petitioners intentionally and maliciously misrepresented and concealed the deadly COVID outbreak at Eldercare, leading to the death of up to fifteen people, including Delmer Fields.

Petitioners Eldercare and Snyder intentionally, fraudulently, maliciously and otherwise wrongfully misrepresented, concealed and downplayed the dangerous and deadly outbreak of COVID-19 at the Petitioner Eldercare facility to the Respondents, government officials, their employees, and others. Compl. 94. Petitioners intentionally failed to disclose, first the fact that there was COVID-19 in the facility, then that there was a serious outbreak of COVID-19, and then that Mr. Fields had been exposed to COVID-19, then that Mr. Fields was likely COVID-19 positive. These facts were known to Petitioners and are not facts that Respondents could have reasonably discovered. Compl. 95.

Respondents and others relied upon the false and fraudulent representations of Petitioners in deciding to keep Mr. Fields and his wife at the Eldercare facility. Compl. 96. As a result of the Petitioners' fraud, misrepresentation and concealment, Respondent Rosemary Lambert did not remove Mr. Fields from the Eldercare facility and, as a result, Mr. Fields remained there in imminent danger as the COVID-19 virus spread unchecked throughout the Eldercare facility. Compl. 97.

Respondents did not learn that Mr. Fields was not provided proper care until Respondent Rosemary Lambert decided to take him from the facility, and found him in terrible shape. He had multiple bruises. He smelled of urine. He had a head injury. He had COVID-19. He was so sick, he had to be carried into the house. Yet Eldercare falsely stated he just had a UTI. Respondents had to call EMS within less than 24 hours of him coming home.

Respondents did not learn that Mr. Fields was COVID-19 positive until he was taken to the

emergency room at Petitioner Jackson General. Even then, Petitioners Snyder and Jackson General intentionally and falsely downplayed his COVID-19 infection, did not treat the increasing respiratory distress caused by the COVID-19, and falsely indicated that Mr. Fields was safe for discharge back to Eldercare the day before he died of COVID-19. Compl. 98.

Had Petitioners fulfilled their duties to disclose these facts to Respondents and others, and had not engaged in the concealments and misrepresentations with the intention of deceiving and misleading Respondents and others, Respondents would have behaved differently, including that Respondent Rosemary Lambert would have insisted that Mr. Fields receive a COVID-19 test earlier, and that he be treated for COVID-19, and would have removed him earlier from Petitioner Eldercare facility. Compl. 99. Had Petitioners fulfilled their duties to disclose these facts to Respondents and others, and had not engaged in the above-listed, fraud, concealments and misrepresentations with the intention of deceiving and misleading Respondents and others, Mr. Fields more likely than not, would not have died. Compl. 100.

Respondents pleaded that Petitioners Eldercare and Snyder intentionally, fraudulently, maliciously and otherwise wrongfully conspired to conceal the dangerous and deadly outbreak and extent of the outbreak of COVID-19 at the Petitioner Eldercare facility and engaged in acts in furtherance of said conspiracy by lying to employees, the Respondents, government officials and others, by refusing to test residents symptomatic with COVID-19 so that they could deceptively understate the severity of the outbreak, by intimidating and firing multiple employees who voiced concerns or who Petitioner Eldercare believed voiced concerns, and by refusing to test all residents and staff until after the whistle was blown upon them and government intervention was imminent. Compl. 105.

Petitioners intentionally failed to disclose, first the fact that there was COVID-19 in the facility, then that there was a serious outbreak of COVID-19, and then that Mr. Fields had been exposed to COVID-19, then that Mr. Fields was likely COVID-19 positive. Respondents pleaded that, in taking action to aid and abet and substantially assist the commission of their wrongful acts and other wrongdoings, each of the Petitioners acted with an awareness of his/her primary wrongdoing and

realized that his/her conduct would substantially assist the accomplishment of the wrongful conduct, wrongful goals, and wrongdoing. Compl. 107.

The documents reflect that the facility had knowledge of the risk of COVID-19 by at least March of 2020, when multiple states, including West Virginia, had issued stay at home or safer at home orders to prevent the spread of COVID-19. The records and documents reviewed reflect that Eldercare eventually began taking temperatures of residents to determine whether they were potentially infected with COVID-19. However, according to employees, patients who developed temperatures were given Tylenol and then nothing else was done. Compl. 122. According to employees, no steps were taken to isolate those potentially infected residents from asymptomatic residents. Instead, the employees explain that the symptomatic patients were left with asymptomatic patients until the symptomatic patients developed increasing symptoms, such as coughs or shortness of breath. At that point, the asymptomatic resident, who had been exposed to a symptomatic patient for days, would be moved into another room with another resident, leading to that resident being exposed. These were intentional decisions made by Petitioner Eldercare. This materially and unreasonably increased the risk of spread of COVID-19 from resident to resident. Compl. 123.

Petitioner Eldercare was required to, but failed to, advise staff directly caring for, and therefore exposed to, residents of the status of COVID-19 positive residents or suspected COVID-19 positive residents. Dietary aids were interacting with residents, both symptomatic and asymptomatic without the requirement or instruction of management to wear proper protective equipment, including a mask. This materially and unreasonably increased the risk of spread of COVID-19 from resident to resident. Compl. 124. According to employees, symptomatic residents were taken throughout the facility around other residents and in the dining hall because Petitioner Eldercare failed to have in place any protocols or instruction otherwise. Compl. 125. According to a long time Eldercare employee, Eldercare did not have any protocol in place for quarantine of employees who had been exposed to known positive COVID-19 patients and insisted that those employees come to work. Compl. 126.

G. Petitioners violated West Virginia statutory law and are guilty of Elder Abuse and violations of the Patient Safety Act.

Like the other residents at Eldercare, Mr. Fields was entirely dependent on Petitioners Eldercare and Snyder. Eldercare's most important duty was to protect its residents from health and safety hazards. Petitioner Eldercare failed to provide adequate care and Mr. Fields contracted COVID-19, succumbed to the disease, and died. Compl. 153. Importantly, Petitioners wrongfully, recklessly, intentionally and maliciously refused to acknowledge the dangerous outbreak, refused to test, actively attempted to cover up the outbreak and, therefore, did not provide for proper treatment of Respondent's decedent and others. Compl. 154. This constituted Elder Abuse in violation of W. Va. Code § 61-2-29 and W. Va. Code § 61-2-29a. Compl. 155-162. Petitioner Eldercare further violated the West Virginia Patient Safety Act at §16-39-1 et seq., which statutes were enacted, *inter alia*, for the protection of the public, and the Respondents' decedent. Compl. 166-171.

Respondents expressly pleaded that these wrongful acts and omissions of the Petitioners constituted actual malice toward Respondents and/or such acts and omissions amounted to an intentional, conscious, reckless and outrageous indifference to the health, safety and welfare of Mr. Fields. Compl. 163.

III. SUMMARY OF ARGUMENT

In their brief, the Petitioners do not address the primary issue—the proper interpretation of the language of the statutory exception to immunity enacted in W.Va. Code § 55-19-7. Petitioners simply presume their interpretation of the exception is the correct one, when it is not.[1] The Circuit Court undertook an analysis of the language of the exception in light of West Virginia case law, and adopted the standard for intentional and malicious conduct stated in *Hayseeds, Inc. v. State Farm Fire & Casualty,* 177 W. Va. 323, 330–31, 352 S.E.2d 73, 80–81 (1986), a case cited and argued by the Petitioners in their briefing:

[1] It is unclear whether Petitioners agree with the interpretation of the standard enunciated by the Circuit Court, as they do not address it directly in their brief. Petitioners' learned counsel may have done this as a matter of strategy, in order to use its reply brief to address the core issues in the case, so that the Respondents will not be able to address the specific arguments Petitioners make. Respondents are entitled to fair chance to respond to Petitioners' arguments on appeal.

> 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., NY. Times* v. *Sullivan,* 376 U.S. 254, 84 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.

The Circuit Court correctly determined that Respondents' complaint states a claim upon which relief may be granted under the Circuit Court's interpretation of the exception.

However, while the Circuit Court expressly adopted the standard in *Hayseeds*, which by its language as quoted by the Circuit Court would not require a specific intent to kill plaintiffs' decedent, the Circuit Court then said "actual malice" requires proof that the defendant acted with the intent to injure or harm the plaintiff and/or decedent. This and other language in the order, along with a reading of *Hayseeds*, create somewhat of an ambiguity. Therefore, the Petitioners presume that the statute requires specific intent to kill plaintiffs' decedent. This interpretation of the statute is not consistent with applicable common law and, if it were accepted, would render the statute unconstitutional. Consequently, should the Circuit Court's order require specific intent to kill plaintiffs' decedent, as presumed by the Petitioners, then the Circuit Court erred in its interpretation of the statute.

In addition, the Circuit Court noted that Respondent did not intend to attack the constitutionality of the statute and, therefore, the Court's Order did not address any potential constitutional issues that may or may not arise from the passage of the Act. The Circuit Court's characterization was not complete in this regard. It is correct that the Respondents were not requesting that the statute be declared unconstitutional *per se*. Instead, Respondents/Plaintiffs Below argued that their proffered interpretation of the statute would be constitutional, whereas the standard proffered by the Petitioner/ Defendants Below would render the statute unconstitutional. Since the Respondents do not wish to waive that argument, Respondents assert a second cross-assignment of error. Consequently, should the standard require specific intent to kill plaintiffs' decedent, as presumed by the Petitioners, then the statute would be unconstitutional.

The facts pleaded show that the Petitioners knew that residents were symptomatic with COVID, and that it was proper to test them and isolate them, but willfully, maliciously and intentionally did neither. The facts pleaded show that the Petitioners knew that residents were positive for COVID, and it was proper to tell employees, but willfully, intentionally and maliciously lied to employees so that those employees exposed other fragile residents, including Delmer Fields, to COVID. The facts pleaded show that Petitioners knew that COVID was running rampant through its facility, and it was proper to tell government authorities, Delmer Fields and the Respondent family member, but willfully, intentionally and maliciously did not. The facts pleaded show that the Petitioners knew that Delmer Fields had COVID, and that it was proper to treat his increasing respiratory distress, but willfully, intentionally and maliciously did not, instead intentionally downplaying it and representing that he was okay to be discharged from the hospital right before he died. These satisfy the standard for intentional conduct and actual malice as stated in *Hayseeds,* which was the standard adopted by the Circuit Court, and satisfies standards discussed in other relevant case law.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents agree with Petitioners that a Rule 20 oral argument is appropriate in this case because of the novelty and importance of the issues in this case.

V. ARGUMENT

A. Standard for Review of Motion to Dismiss Under WVRCP 12(b)(6)

The standard for a trial court's review of a defendant's motion to dismiss made pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is well-established:

> The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Syllabus, *Flowers v. City of Morgantown*, 166 W. Va. 92, 272 S.E.2d 663 (1980); *accord* Syllabus Point 2, *Stricklen v. Kittle*, 168 W. Va. 147, 287 S.E.2d 148 (1981); *Fass v. Nowsco Well Service, Ltd.*, 177 W. Va. 50, 350 S.E.2d 562 (1986); Syllabus Point 3, *Wilhelm v. West Virginia Lottery*, 198 W. Va. 92, 479 S.E.2d 602 (1996); *Howell v. City of Princeton*, 210 W. Va. 735, 559 S.E.2d 424 (2001). Further,

the West Virginia Supreme Court has stated that:

> [b]ecause of our policy of favoring the determination of actions on the merit[s], we generally view motions to dismiss with disfavor, and therefore, **construe the complaint in the light most favorable to the plaintiff and consider its allegations as true.**

Wilhelm, 198 W. Va. at 96, 479 S.E.2d 606 (emphasis added) (citations omitted). *Accord, Sesco v. Norfolk and Western Ry. Co.,* 189 W.Va. 24, 427 S.E.2d 458 (1993) (per curiam); *Chapman v. Kane Transfer Co., Inc.,* 160 W.Va. 530, 236 S.E.2d 207 (1977); *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W.Va. 603, 245 S.E.2d 157 (1978); *Stricklen v. Kittle*, 168 W.Va. 147, 287 S.E.2d 148 (1981). Facial plausibility of plaintiff's claims is established where the facts alleged in the complaint "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" and this context- specific test does not require "detailed factual allegations," *Conklin v. Jefferson Cty. Bd. of Educ.*, 205 F. Supp. 3d 797, 803 (N.D.W. Va. 2016). Accepting the facts in Respondents' complaint as true, Respondents have stated a cause of action upon which relief may be granted.

B. The COVID Act does not create total immunity.

The COVID act at W.Va. Code § 55-19-4, enacted on March 11, 2021, states:

> Notwithstanding 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.

(Emphasis added.) The substantive provisions of the COVID act provide for liability under multiple circumstances. W.Va. Code § 55-19-5 preserves liability of product suppliers who:

> (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 § 55-19-6 preserved the rights of workers to file Workers' Compensation claims for contraction of COVID.

Importantly, W.Va. Code § 55-19-7 expressly provides that:

> Excluding the provisions of § 55-19-5 and § 55-19-6 of this code, **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.** (Emphasis added.)

C. Respondents can maintain a cause of action against the Petitioners.

As such, the Respondents here can maintain a cause of action against the Petitioners under the statute if they have pleaded facts which state, or facts from which it can be inferred, that the Petitioners have engaged in intentional conduct with actual malice. As pointed out by the Circuit Court, the West Virginia Legislature did not include a definition of the phrase "intentional conduct with actual malice" in the Act.

Therefore, the Circuit Court was tasked with defining, ""intentional conduct with actual malice." An analysis and definition of the terms are critical because that definition determines the sufficiency of Respondents' complaint. However, the Petitioners do not undertake any such analysis in their briefing to this Court. Instead, Petitioners incorrectly presume that the trial court's definition is consistent with a "specific intent" to harm or kill Delmer Fields, arguing, "Respondents could never establish that Petitioners acted with specific intent to harm any individual. Accordingly, Respondents have failed as a matter of law" and that the standard requires "specific evidence that the defendant intended to kill or injure plaintiff of plaintiff's decedent." Pet. Br. p.8 and 4, respectively.

This is similar to the standard that Petitioners argued to the Circuit Court, akin to a first-degree, planned murder. However, the Circuit Court did not adopt Petitioners' standard: "Defendants request this Court to adopt a standard that is more fitting for a criminal standard of first-degree murder versus a civil standard of intentional conduct. This Court **FINDS** no law to support a finding of a standard proposed by Defendants of "evil intent" and therefore declines to adopt such a standard." Order JA 0213.

D. The definition of intentional conduct does not require a specific intent to kill Delmer Fields.

The Circuit Court was correct on this point. The COVID act is a civil statute, and nowhere does the act refer to any definitions contained in criminal law. The cases Petitioners cited to the Circuit Court do not require such a high standard, with nearly all of them defining malice, including actual

malice, to include reckless and willful disregard. *See, e.g., Sprouse v. Clay Communications, Inc.,* 158 W. Va. 427, 427, 211 S.E.2d 674, 679 (1975). As another example, Petitioners Snyder and Jackson General in their briefing below relied on Black's Law Dictionary, claiming that its definition requires specific intent to injure Delmer Fields. However, actual malice is 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." ACTUAL MALICE, Black's Law Dictionary (11th ed. 2019).

The definition of intentional conduct in civil cases is discussed Restatement (Second) of Torts § 8A (1965) as follows:

> All consequences which the actor desires to bring about are intended, as the word is used in this Restatement. **Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.**

Restatement (Second) of Torts § 8A (1965) (emphasis added.) *Accord, Funeral Servs. by Gregory, Inc. v. Bluefield Cmty. Hosp.*, 186 W. Va. 424, 427, 413 S.E.2d 79, 82 (1991), overruled on other grounds by *Courtney v. Courtney*, 190 W. Va. 126, 437 S.E.2d 436 (1993) "The word "intent" in the Restatement denotes that "the actor desires to cause the consequences of his act, *or* that he believes that the consequences are substantially certain to result from it."

This is precisely what occurred in this case. The Petitioners Eldercare and Snyder[2] knew that the consequences of their actions, fragile residents contracting COVID, was certain or substantially certain to occur. Respondents pleaded as such. Compl. 87-89, 93-95, 98, 105-107, 123, 154-163, 166-171. The Court certainly can infer this from the facts pleaded in the complaint.

E. The definition of malice does not require a specific intent to kill a person.

Likewise, the definition of malice does not require a specific intent to kill a person. The West

[2] Respondents further pleaded that Snyder was an agent, servant and/or employee of Jackson General and, therefore, Jackson General is liable for his wrongful conduct.

Virginia Supreme Court addressed the standard for malice in the long-standing case of *Raines v. Faulkner*, 131 W. Va. 10, 17, 48 S.E.2d 393, 397 (1947), explaining where a defendant's conduct was **"willfully committed with such reckless, wanton and criminal indifference and disregard of plaintiff's rights[,] the jury could infer malice therefrom**." *Raines v. Faulkner*, 131 W. Va. 10, 17, 48 S.E.2d 393, 397 (1947). The term malice has been defined in the context of punitive damages by the West Virginia Supreme Court in the seminal case of *TXO Production Corp. v. Alliance Resources Corp.,* 187 W.Va. 457, 419 S.E.2d 870 (1992), where the Court stated:

> Originally, punitive damages were awarded only to deter malicious and mean-spirited conduct. However, **the punitive damages definition of malice has grown to include not only mean-spirited conduct, but also extremely negligent conduct that is likely to cause serious harm.** . . .

TXO Production Corp., 419 S.E.2d at 887 (emphases added; footnote omitted).

The West Virginia Supreme Court discussed actual malice in the W.Va. Pattern Jury Instructions for Civil Cases: "Actual malice" may be found where you find [name of defendant] acted with a state of mind **shown by conduct** that was intended to **or was substantially certain to injure** [name of plaintiff], without any just cause or excuse. §1500 PUNITIVE DAMAGE, W.V. Pattern Jury Instr. Civil. § 1500 (emphases added). The facts in Respondents' complaint, which must be considered true and construed liberally in favor of the Respondents, exceed the common law definition of malice under West Virginia law.

Even if the criminal definitions were used, "Malice is defined as the intent to kill, the intent to cause great bodily harm, or **the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm**." *State v. Davis*, 220 W. Va. 590, 594, 648 S.E.2d 354, 358 (2007) (emphasis added) (internal citation omitted). It does not require specific intent to kill a person. The conduct pleaded here constitutes a wanton and willful disregard of the likelihood of that conduct to cause death or great bodily harm.

In the Circuit Court, Snyder and Jackson General argued that actual malice is different than malice. However, the terms are not materially different. The United States Supreme Court defined actual malice in the historic case of *The New York Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S. Ct.

710, 726, 11 L. Ed. 2d 686 (1964), where the Supreme Court determined that for a publicly-known figure to succeed on a defamation claims, the public-figure plaintiff must show that the false, defaming statement was said with "actual malice." The Supreme Court expressly held that "actual malice" means that the defendant made a statement **"with knowledge that it was false or with reckless disregard of whether it was false or not."** *Id. Accord, Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 718, 320 S.E.2d 70, 90 (1983). This is what occurred in this case. Statements were made by Petitioners with knowledge that they were false *and* with reckless disregard of whether they were false or not, with deadly consequences.

Our Court has long held that statutes need to be applied to be consistent with and harmonize with existing law:

> A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

Cmty. Antenna Serv., Inc. v. Charter Commc'ns VI, LLC, 227 W. Va. 595, 604-05, 712 S.E.2d 504, 513-14 (2011) (footnotes omitted).[3]

Further, an act in derogation of the common law of a state must be strictly construed. *Newhart v. Pannybacker*, 120 W.Va. 774, 200 S.E. 350 (1938); *Peters v. Hajacos*, 91 W.Va. 88, 112 S.E. 233 (1922); *State ex rel. Keller v. Grymes*, 65 W.Va. 451, 456, 64 S.E. 728 (1909); *Kellar v. James*, 63

[3] Moreover, this Court must assume that the legislature knew the existing law when it enacted the COVID act, including the U.S. Supreme Court definition and West Virginia common law definition of actual malice. *Cmty. Antenna Serv., Inc. v. Charter Commc'ns VI, LLC*, 227 W. Va. 595, 604-05, 712 S.E.2d 504, 513-14 (2011) (explaining that it is presumed that the legislators who drafted and passed a new statute were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same.) The defendants cannot supplant their own presumption for common law in existence at the time. In addition, West Virginia Code § 2-2-12 specifies that abstracts of bills or proposed changes of existing statutes, explanatory notes and declarations of purpose attached to bills when introduced or subsequently appended are not to be construed as indicating legislative intent. "The intention of the draftsmen of the act or the individual members of the legislature who voted for and passed it, if not properly expressed in the act, has nothing to do with its construction. The meaning of the statute should be arrived at from its own language and not from the declaration of the draftsmen." *Walker v. Boggess*, 41 W.Va. 588, 23 S.E. 550 (1895). "We do not attach decisive significance to the unexplained disappearance of one word from an unenacted bill because "mute intermediate legislative maneuvers" are not reliable indicators of congressional intent." *Trailmobile Co. v. Whirls*, 331 U.S. 40, 61, 67 S.Ct. 982, 992, 91 L.Ed. 1328 (1947).

W.Va. 139, 60 S.E. 939 (1907). Where there is any doubt about the meaning or intent of a statute in derogation of the common law, the statute is to be interpreted in the manner that makes the **least** rather than the most change in the common law. *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 491-92, 647 S.E.2d 920, 927-28 (2007).

Therefore, under the COVID act and the relevant common law, Respondents can maintain a cause of action if from the facts it may be inferred that the Petitioners made decisions, knowing that the consequences of their actions—fragile patients contracting COVID-- were substantially certain to result from their acts and still went ahead, or made statements with knowledge that they were false or with reckless disregard of whether they were false or not, and those actions or falsities were substantially certain to cause injury.

Such a radical departure from the common law in the definition presumed by Petitioners would require an express new definition of actual malice by the legislature. In absence of it, the common law defining intentional conduct and malice controls. The definition of actual malice expressed by the United States Supreme Court and the definitions of malice and actual malice of the West Virginia Supreme Court in case law and its pattern jury instruction, along with longstanding learned jurisprudence, do not support the interpretation presumed by Petitioners.

F. The correct analysis of the Circuit Court's definition of "intentional conduct with actual malice."

It bears repeating that the Circuit Court's rejected the first-degree murder standard: "Defendants request this Court to adopt a standard that is more fitting for a criminal standard of first-degree murder versus a civil standard of intentional conduct. This Court **FINDS** no law to support a finding of a standard proposed by Defendants of "evil intent" and therefore declines to adopt such a standard." Order JA 0213. If you look at the analysis done by the Court, along with the *Hayseeds* case, stating the standard adopted by the Circuit Court, the correct interpretation does not, or at least should not, require specific intent to kill Delmer Fields.

Instead of the standard presumed by Petitioners, the Circuit Court adopted the standard for intentional and malicious conduct set forth in *Hayseeds, Inc. v. State Farm Fire & Casualty,* where the West Virginia Supreme 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., NY. Times* v. *Sullivan,* 376 U.S. 254, 84 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.

Order JA0213-214, *citing Hayseeds, Inc.* v. *State Farm Fire & Cas.,* 177 W. Va. 323, 330-31, 352 S.E.2d 73, 80–81 (1986) holding modified by *Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997) (emphasis in original).

Hayseeds is a case involving punitive damages in a bad faith insurance practices claim that Petitioner Eldercare cited and argued in its briefing below. *Hayseeds* went on to give examples of actual malice: "One example of "actual malice" would be a company-wide policy of delaying the payment of just claims through barraging the policyholder with mindless paperwork. For example, in a claim for household contents in a burned out house, the company should simply pay the face amount of the policy. Since the companies themselves often require a certain level of insurance on contents, it shows actual malice to require the policyholder to fill out form after form and argue for months over what, in nearly every case, is a foregone conclusion. Here the actual malice is a desire to keep millions of dollars in claims money at interest within the company. But the same reasoning, of course, would not apply to the fluctuating inventory of an insured warehouse or any other situation where it is reasonable to assume that the value of the insured property—contents of a jewelry store, for example—will fluctuate seasonally and the annual premium has been calculated accordingly." Id. at 81. Thus, *Hayseeds* not only adopted the standard as it existed in *New York Times v. Sullivan*, supra, the examples given are hardly akin to specific intent to kill Delmer Fields.

From which of the many facts in the complaint may this Court choose to show the conduct that

meets this standard? Was it the lying to everyone? Was it their refusal to test symptomatic residents, so they would not have to tell people about their rampant COVID outbreak? Was it the intentional decision not to quarantine symptomatic residents? Was it the intentional decision to refuse to follow basic infection control protocols in place before COVID even existed, knowing the dangers of COVID in their elderly charges? Was it the active and continuing cover up? Was it the deliberate attempt to silence whistleblower employees? Was it the decision not to treat the inevitable results of their actions and falsely telling their patient and his family that Delmer Fields was good to go back to Eldercare, right before he died? Was it the devastating results that Petitioners knew were substantially certain to occur, with one of the largest and deadliest outbreaks of COVID in West Virginia?[4]

The facts pleaded show that the Petitioners knew that residents were symptomatic with COVID, and that it was proper to test them and isolate them, but willfully, maliciously and intentionally did neither. The facts pleaded show that the Petitioners knew that residents were positive for COVID, and it was proper to tell employees, but willfully, intentionally lied to employees so that those employees exposed other fragile residents, including Delmer Fields, to COVID. The facts pleaded show that Petitioners knew that COVID was running rampant through its facility, and it was proper to tell government authorities, Delmer Fields and the Respondent family member, but willfully, intentionally and maliciously did not. The facts pleaded show that the Petitioners knew that Delmer Fields had COVID, and that it was proper to treat his increasing respiratory distress, but willfully, intentionally and maliciously did not, instead intentionally downplaying it and representing that he was okay to be discharged from the hospital right before he died. These facts satisfy the standard for actual malice as stated in *Hayseeds,* and other relevant case law, particularly for purposes of a motion to dismiss.

Petitioners argue that allowing this case to proceed means that cases will be free to proceed where "the defendant failed to respond to the COVID-19 crisis as well as a party would have preferred." Pet. Brief 15. In other words, they argue that allowing this case would allow negligence cases to proceed.

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[4] These allegations are made against Eldercare *and* Snyder, who was the agent, servant and/or employee of Jackson General and who was in charge of the medical care for the residents of Eldercare.

Did all these actions breach the duty of care owed by the Petitioners to their patients? Of course they did, but this case is not a simple medical negligence claim or a failure to have better COVID-related policies, as argued by Petitioners. Rather, the intentional acts and omissions of the Petitioners at the root of this action were accomplished by a fraudulent scheme of concealment, thus constituting the torts of fraud and civil conspiracy, which are actionable under the COVID statute. The standard of care can be breached by intentional acts with actual malice, and that is what occurred here. Fraud,[5] misrepresentation, fraudulent concealment, civil conspiracy, and violations of the Patient Safety Act[6] are all intentional torts and, therefore, meet the COVID act standard.[7] Elder abuse carries criminal penalties, including felony charges, and likewise meets the COVID act standard.

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[5] The West Virginia Supreme Court of Appeals has acknowledged:

> "Fraud" is a generic term, encompassing many different and ever-innovative forms:
> [W]hile it has often been said that fraud cannot or should not be precisely defined, the books contain many definitions, such as unfair dealing; malfeasance, a positive act resulting from a **willful intent to deceive**; an artifice by which a person is deceived to his hurt; a willful, **malevolent act, directed to perpetrating a wrong to the rights of others;** anything which is calculated to deceive, whether it is a single act or a combination of circumstances, or acts or words which amount to a suppression of the truth, or mere silence; deceitful practices in depriving or endeavoring to deprive another of his known right by means of some artful device or plan contrary to the plain rules of common honesty; ... and making one state of things appear to a person with whom dealings are had to be the true state of things, while acting on the knowledge of a different state of things. Fraud has also been said to consist of conduct that operates prejudicially on the rights of others and is so intended; a deceitful design to deprive another of some profit or advantage; or deception practiced to induce another to part with property or to surrender some legal right, which accomplishes the end desired. . . . **Fraud may be said to be an action of a more affirmative evil nature, such as proceeding or acting dishonestly, intentionally, and deliberately**, with a wicked motive, to cheat or **deceive one party** to a transaction with respect to the situation or operations, or such as an action which results to his damage or loss and to the advantage or gain of the other party.

Wallace v. Wallace, 170 W.Va. 146, 147-48, 291 S.E.2d 386, 387-88 (1982), citing 37 Am.Jur.2d, Fraud and Deceit§ 1 (1968) (footnotes omitted)(emphases added). Moreover, regarding Plaintiffs' claims of fraud, including fraudulent concealment, it is important to recognize that West Virginia has long held that fraud may be proven by circumstantial evidence as well as direct evidence. Indeed, the Court has noted that circumstantial evidence may be the only evidence of fraud. *Ridenour v. Roach*, 77 W.Va. 551, 87 S.E. 881, 883 (1916), *accord*, Syl. Pt. 3, *Knight v. Nease*, 53 W.Va. 50, 44 S.E. 414, 419 (1903); *Work v. Rogerson*, 152 W.Va. 169, 181, 160 S.E.2d 159, 167 (1968).

[6] Defendants Snyder and Jackson General argued below that violations of the **Patient** Safety Act are not actionable because the statute was not intended to protect patients, just health care workers. The title of the act disposes of defendants' argument. Furthermore, the act constitutes a standard to be followed at the relevant time, which defendants knew they were violating.

[7] There is a good argument to be made that claims of fraud, civil conspiracy and the like are not intended to be precluded by the COVID act at all. However, the Court need not address this, since plaintiffs' claims meet the standard assuming the causes of action fall under the COVID act.

Allowing a case to proceed under these exceptionally aggravated set of facts, with the heightened standard, does not "green light" negligence cases, as argued by Petitioners. In how many medical negligence cases is there widespread lying, fraud and coverup, the firing of multiple employees, a reported fifteen deaths, and the calling in of the National Guard? As much as Petitioners want this to be simple negligence, it is much more than that. Importantly, the Court must accept all of the detailed pleaded facts as true, and construe those facts in favor of the Respondents, not accept Petitioners' (mis)characterization of Respondents' facts. This precludes dismissal.

The Petitioners do not provide a real analysis of the facts in the Respondents' complaint. They simply make blanket declarations that the complaint does not meet their presumed standard. This is not sufficient to support a motion to dismiss, upon which Petitioners bear the heavy burden. The Circuit Court agreed, reasoning:

> Here, Defendants ask this Court to ignore the exception to the immunities enacted by the West Virginia Legislature allowing a party to recover damages if that party can prove intentional and actual malice conduct without permitting Plaintiffs to conduct discovery to prove the evidence supports that exception. This Court further notes Defendants acknowledge an exception exists and Defendants further acknowledge Plaintiffs alleged Defendants "acted intentionally or maliciously". Defendants without any law supporting their request ask this Court to examine **Plaintiffs' factual allegations in-depth** and after doing so Defendants assert this Court should apply that "in-depth" review to conclude Plaintiffs "fail to establish that Eldercare acted with an evil intent to harm Mr. Fields." This Court FINDS no law supports Defendants' assertion this Court should examine the factual allegations in-depth to arrive at some form of conclusion whether the Complaint meets a new standard of creation that Plaintiffs have to plead sufficient facts to prove evil conduct.

Order JA 0215 (Emphasis in original). The Circuit Court went on to explain, "the West Virginia Supreme Court in a multitude of decisions hasinstructed trial courts "should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syllabus, *Flowers v. City of Morgantown,* 166 W.Va. 92, 272 S.E.2d 663 (1980). Therefore, this Court **FINDS** Plaintiffs have alleged sufficient facts in the Complaint to survive a motion to dismiss."

In their brief to this Court, Petitioners cite information outside of the Complaint to support their

arguments that the Complaint should be dismissed. See Pet. Brief FN 2-3.[8] They also use the purported outside facts to argue the merits of the underlying claim. Pet. Brief 12-13. For example, they cite outside documents for the purported date of the first case of COVID in West Virginia and date of the first death, for the premise, or at least to imply, that the Petitioners were "clambering" during this time, and could not have been expected to take action. First, lying to everyone and engaging in a cover up are far more than clambering and, second, the Petitioners knew plenty enough, *based upon facts pleaded in the complaint*, to show their actions that met the standard. They had plenty of guidance based on infection protocols in place before COVID even existed, and the facts of this case show the Petitioners knew it, all as pleaded in the complaint. These facts must be taken as true for purpose of a motion to dismiss. Importantly, it is not proper for the Petitioners to cite purported facts outside of the complaint to support a Rule 12(b)(6) dismissal.

G. Petitioners' interpretation of the statute is inconsistent with case law and would make it unconstitutional.

However, while the Circuit Court expressly adopted the standard in *Hayseeds*, which by its language as quoted by the Circuit Court would not require a specific intent to kill plaintiffs' decedent, the Circuit Court then said "actual malice" requires proof that the defendant acted with the intent to injure or harm the plaintiff and/or decedent. This and other language in the order, along with a reading of *Hayseeds*, create somewhat of an ambiguity. Therefore, the Petitioners presume that the statute requires specific intent to kill plaintiffs' decedent. This interpretation of the statute is not consistent with applicable common law as discussed above and, if it were accepted, would render the statute unconstitutional. Consequently, should the Circuit Court's order require specific intent to kill plaintiffs' decedent, as presumed by the Petitioners, then the Circuit Court erred in its interpretation of the statute.

The Circuit Court noted that Respondent did not intend to attack the constitutionality of the statute and, therefore, the Court's Order did not address any potential constitutional issues that may or may not arise from the passage of the Act. The Circuit Court's characterization was not complete in this

[8] Petitioners further state that the Circuit Court did not make any rulings on the arbitration clause claim, so their appeal does not address it. Note that the Petitioners did not assert the arbitration clause as a basis for its motion to dismiss.

regard. It is correct that the Respondents were not requesting that the statute be declared unconstitutional, *per se*. Instead, Respondents/Plaintiffs Below argued that their proffered interpretation of the statute would be constitutional, whereas the standard proffered by the Petitioner/ Defendants Below would render the statute unconstitutional. Respondent argued that Petitioners' extreme interpretation of it, inconsistent with the case law, would be unconstitutional.[9] Consequently, should the standard require specific intent to kill plaintiffs' decedent, as presumed by the Petitioners, then the statute is unconstitutional.

Simply put, a legislative body may not deprive injured persons of all potential remedies without running afoul of protections contained in the United States Constitution and the West Virginia Constitution.

Nearly, if not every state that has a COVID law preserves liability for certain types of exceptional or intentional conduct, most commonly for willfulness, recklessness and gross negligence, in order to avoid constitutional infirmity. The Fourteenth Amendment's Due Process Clause forbids any state from depriving any person "of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. It further provides a right to equal protection: "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Similarly, the West Virginia Constitution provides that "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." W. Va. Const. art. III, § 10.

The West Virginia Constitution, like many other state constitutions, further provides to its citizens an express right of access to the courts for an injury done to them: "The courts of this state shall be open, and **every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law**; and justice shall be administered without sale, denial or delay. W. Va. Const. art. III, § 17 (emphasis added). Learned jurisprudence explains these provisions:

> A provision guaranteeing to every person a remedy by due course of law for injury done to his or her person or property (and usually also for injury done to the person's reputation) is found in the constitutions of many states. It means that for such wrongs as are recognized by the law of the

[9] As such, Respondents do not have to establish there are no set of circumstances under which the legislation would be valid. Respondents here argue it is valid if interpreted correctly.

> land, the courts shall be open and afford a remedy, or that laws shall be enacted giving a certain remedy for all injuries or wrongs. This provision was designed to implement the maxim that for every wrong there is a remedy and to effectuate the security and enjoyment of the "inalienable rights" guaranteed by the Constitution.
>
> Such a provision assumes that for every injury done to an individual in his or her lands, goods, person, or reputation there is a remedy provided by law either by the statutes or by the common law in effect at the time the state constitution was adopted. "Remedy by due course of law" means the reparation for injury ordered by a tribunal having jurisdiction, in the due course of procedure, after a fair hearing.

16B Am. Jur. 2d Constitutional Law § 669 (internal citations omitted). "An open courts provision of a state constitution acts as an additional due process guarantee granted in the Constitution and **prohibits the legislature from arbitrarily withdrawing all legal remedies from anyone having a well-defined cause of action under the common law**. 16B Am. Jur. 2d Constitutional Law § 666 (internal citations omitted).

A statute that eliminates any remedy for a certain class of people runs afoul of guarantees of due process, equal protection of the laws, and access to the Courts. When laws improperly single out a particular group of people—here, people who have wrongfully suffered COVID-19-related injuries and deaths—and treat them unequally by eliminating their legal right to obtain any compensation through the tort system, this violates due process, equal protection and the right of access to the courts provided by the United States and state constitutions.

The Kansas Supreme Court explained the due process right to a remedy as follows:

> It is not an easy task to deduce either from reason or the authorities a satisfactory definition of ...due course of law." We feel safe, however, ... in saying these terms do not mean any act that the Legislature may have passed if such act does not give to one opportunity to be heard before being deprived or property, liberty, or reputation, **or having been deprived of either does not afford a like opportunity of showing the extent of his injury and give an adequate remedy to recover therefor**. Whatever these terms may mean more than this, **they do mean due and orderly procedure of courts in the ascertainment of damages for injury, to the end that the injured one "shall have remedy"—that is, proper and adequate remedy."** *Hanson v. Krehbiel*, 68 Kan. 670, 75 P. 1041, 1043 (1904) (emphasis added).

Kentucky's state constitution has an access to the courts clause in its constitution that is substantially identical to West Virginia's clause. Interpreting this clause, the Kentucky Supreme Court held: "access to courts was 'clearly indicative of the duty which the functionaries of the government

owe to the citizens' and that if 'it shall occur that the right of the citizen has been invaded contrary to the constitution, it is the duty of the judiciary to shield him from oppression.' We have held that Section 14 protects "[t]he right of every individual in society to access a system of justice to redress wrongs," and such protection "is basic and fundamental to our common law heritage." and "**The most widespread and important ... provision [of states' bills of rights] is probably the guarantee of a right of access to the courts to obtain a remedy for injury**." *Commonwealth of Kentucky v. Claycomb by & Through Claycomb*, 566 S.W.3d 202, 207, 210 (Ky. 2018) (internal citations omitted) (emphasis added). The Kentucky Supreme Court further noted that "The right to a remedy protected in Section 14 [access to the courts clause] applies to actions for death and personal injuries, among other types of actions and medical-malpractice claims fall under this category of claims." *Id.*

In jurisprudence analyzing laws that curtail remedies, Courts have upheld certain statutory schemes where there the law carves out several *significant* exceptions. *See Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 324 (Mo. 2016) (holding that even though the Protection of Lawful Commerce in Arms Act ("PLCAA") defeated the plaintiff's negligence claim, the statute did not unconstitutionally "eliminate a remedy" because it did not foreclose the plaintiff's state law negligent entrustment claim) and *Gilland v. Sportsmen's Outpost, Inc.*, 2011 WL 2479693, at *19-20 (Conn. Super. Ct. May 26, 2011) ("The PLCAA preempts certain categories of claims that meet specified requirements, but it also carves out several significant exceptions to that general rule. Some claims are preempted, but many are not.")

Such was the case in *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 408 S.E.2d 634, 643 (1991), where this Court upheld a statute that granted certain immunities to ski area operators. This Court explained that under W.Va. Code, 20–3A–6 [1984] a ski area operator was still liable for injuries caused by the failure to follow the ski area operator's duties set forth in W.Va. Code, 20–3A–3 and that the Act also requires the ski area operator to "[m]aintain the ski areas in a reasonably safe condition." *Lewis*, 185 W.Va. at 692-3, 408 S.E.2d at 642-3. For those reasons the court held that the legislation passed the "rational basis" equal protection test. In other words, there were significant exceptions to the

immunity that provided a remedy to injured persons. This Court also explained that it interpreted each of the provisions of that statute to avoid an application of it in a manner which would violate equal protection principles. *Lewis,* 185 W.Va. at 693, 408 S.E.2d at 643.

The Petitioners' interpretation of the statute here would eliminate all remedies for victims of serious, even intentional misconduct leading to a COVID-related disability or death, would leave no significant exceptions and, thus, render it unconstitutional. Respondents' interpretation, supported by the common law and learned jurisprudence, would not. Respondents' interpretation comports with the proper balance between the constitutional rights of citizens to a remedy, and the economic interest in reopening of businesses during the COVID pandemic by limiting actions to certain aggravated circumstances like those that occurred here.

In addition, Courts will strike down statutes under the Due Process Clause where they conclude that the governmental action does not rationally help further the government's goal. For example, in a Fifth Circuit case, the court of appeals struck down a municipality's refusal to connect utilities to beach houses. Though the city had a legitimate interest in protecting the public's access to the water, the court concluded that the methods the city used were not rationally calculated to further the goal. *Mikesa v. City of Galveston*, 451 F.3d 376, 380 (5th Cir. 2006). Thus, even when there is an argument that the goal of the COVID act is to help businesses reopen during the pandemic,[10] the means by which the statute attains those goals cannot be irrational. The Petitioners' interpretation of the statute, to preclude all claims short of intentional murder, effectively creating an absolute bar to recovery of damages, would make the way the statute meets any stated goals irrational and unreasonable.

It is the duty of the Court to interpret statutes in a manner that does not produce an absurd or unconstitutional result. *See Charter Communs. VI, PLLC v. Cmty. Antenna Serv., Inc.*, 211 W.Va.

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[10] There was not a rash of COVID lawsuits when the statute was enacted, and there aren't now, even in states where there is no form of COVID immunity. Here, eliminating any remedy for exceptionally aggravated conduct as suggested by Petitioners is not a reasonable method of achieving the economic purpose. It is too extreme, not rational, and goes too far to meet constitutional scrutiny. Petitioners' interpretation infringes upon a fundamental constitutional right to a remedy and therefore, would violate due process.

71, 561 S.E.2d 793 (2002) and *State v. Morris,* 128 W.Va. 456, 37 S.E.2d 85 (1946). Courts may even venture beyond the plain meaning of a statute in instances in which a literal application of the statute would produce an absurd or unconstitutional result. *United States v. Amer. Trucking Ass'ns*, 310 U.S. 534, 543–44, 60 S.Ct. 1059, 1063–64, 84 L.Ed. 1345, 1351 (1940). *Accord Taylor–Hurley v. Mingo County Bd. of Educ.,* 209 W.Va. 780, 787, 551 S.E.2d 702, 709 (2001) (quoting *State ex rel. Frazier v. Meadows,* 193 W.Va. 20, 24, 454 S.E.2d 65, 69 (1994)); *Newhart v. Pannybacker,* 120 W.Va. 774, 200 S.E. 350 (1938) (Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made).

So even assuming the COVID act spelled out a standard akin to the one presumed by Petitioners here, which it does not, this Court is bound to either declare it unconstitutional or interpret it in such a manner as to make it constitutional, consistent with the overall statutory purpose.

After completion of discovery, the Petitioners are free to make the argument on summary judgment, if they can, that the facts do not meet the appropriate, constitutional standard. However, on a motion to dismiss where the pleadings claim intent and malice, and go further and support it with facts from which it can be inferred that Petitioners' conduct met that standard, the Petitioners cannot obtain dismissal.

VI. PRAYER FOR RELIEF

WHEREFORE, Respondents respectfully request 1) that Petitioners' request for relief be denied; 2) that this Court interpret the standard as specified herein, consistent with case law, learned jurisprudence, and constitutional protections; and 3) alternatively, should the Court find the statute requires specific intent to kill a person, declare the COVID act standard unconstitutional.

ROSEMARY LAMBERT and
CAROLYN HINZMAN,
Individually, and as

Co-Executrices of the
ESTATE OF DELMER P. FIELDS
By Counsel,

/s/ Kelly Elswick-Hall
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal 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;
IRVIN JOHN SNYDER, D.O.; and
DOE DEFENDANTS 1-5,

Defendants Below/Petitioners,

v.

Civil Action No. CC-18-2021-C-32
Honorable Lora Dyer
Circuit Court of Jackson County

ROSEMARY LAMBERT
and CAROLYN
HINZMAN, Individually,
and as
Co-Executrices of the
ESTATE OF DELMER P. FIELDS,

Plaintiffs Below/Respondents.

CERTIFICATE OF SERVICE

I, Kelly Elswick-Hall, counsel for Respondents, do hereby certify that a true and exact copy of "BRIEF OF RESPONDENTS WITH CROSS ASSIGNMENT OF ERROr" was served upon:

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via U.S. Mail, postage pre-paid, this 16th day of September, 2022.

/s/Kelly Elswick-Hall
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