IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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No. 24-ICA-68

Heidi Price, Administratrix of the Estate of Ellis Wayne Price,

Petitioner,

v.

DOCKET NO. 24-ICA-68

(Appeal from Order Entered by the Circuit Court of Raleigh County) Civil Action No. 23-C-331

Raleigh General Hospital, LLC, And Philip Bailey,

Respondents.

PETITIONER HEIDI PRICE'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

The Circuit Court of Raleigh County granted the Defendants' motions to dismiss Plaintiff's Complaint, holding that the medical care at issue in the Complaint was "impacted" by COVID-19 and that dismissal was therefore necessary under W. Va. Code §§ 55-19-3(10), -4. This Court should reverse the circuit court's order and remand for further proceedings, based on the following:

A. The circuit court erred in failing to allow Plaintiff limited discovery concerning the issue of whether the death of her husband was the result of "impacted care" within the meaning of the West Virginia COVID-19 Jobs Protection Act, W. Va. Code §§ 55-19-3(10), -4.

B. The Act, as interpreted and applied by the circuit court, violated Plaintiff's right to procedural due process and is otherwise unconstitutional, in that it directly conflicts with the procedural rules permitting discovery in civil cases that were adopted by the Supreme Court of Appeals of West Virginia pursuant to Article VIII, Section 3 of the West Virginia Constitution.

C. The circuit court erred in dismissing Plaintiff's Complaint, as the record does not support a finding that Defendants met their burden of establishing "impacted care."

II. INTRODUCTION

This appeal arises from the Circuit Court of Raleigh County's order dismissing Plaintiff Heidi Price's medical malpractice action against Raleigh General Hospital and physician's assistant Phillip Bailey ("Defendants"), which sought damages in connection with the wrongful death of Mrs. Price's husband, Ellis Price. The court below dismissed Mrs. Price's Complaint under the provisions of West Virginia's COVID-19 Jobs Protection Act, W. Va. Code §§ 55-19-1, *et seq.* (the "Act"), which generally bars claims against health care providers for losses "arising from COVID-19, from COVID-19 care, or from impacted care." W. Va. Code § 55-19-4.

The Defendants each moved to dismiss Mrs. Price's case on the basis that her husband's medical care was allegedly "impacted" by the COVID-19 pandemic. The court stayed all discovery upon the filing of the Defendants' motions, thus precluding Mrs. Price from gathering any evidence to challenge the Defendants' "impacted care" assertions. Following a hearing at which no

witnesses testified on behalf of the Defendants, the circuit court granted the motions to dismiss, relying solely on conclusory affidavits submitted by the Defendants. The lower court erred in many respects — not least because it made factual determinations that Mrs. Price was powerless to challenge without the aid of discovery. This Court should reverse the lower court's dismissal and remand this case so that the parties may engage in meaningful discovery.

III. STATEMENT OF THE CASE

A. Statement of Facts

Ellis Price arrived at Defendant Raleigh General Hospital's Emergency Department on December 10, 2021 at approximately 1:13 p.m., complaining of chest pain. J.A. 8, ¶ 13. Mr. Price was triaged by Emergency Department staff, who performed an initial electrocardiogram ("EKG"). *Id.* at 8, ¶¶ 14-15. Mr. Price's EKG results were classified as abnormal, a reading that was acknowledged by "PSB, PA-C" — the signature of Defendant Bailey. *Id.* at 82. Shortly thereafter, a bloodwork order was issued, and the ensuing tests revealed that Mr. Price's levels of Troponin I (a protein found in the cells of the heart muscle) were elevated, indicating cardiac damage. *Id.* at 8, ¶ 15. Emergency Department staff understood these test results to indicate that Mr. Price had a high risk of an evolving myocardial infarction — that is, a heart attack. *Id.* at 8, ¶ 14. Shortly after 3:00 p.m., a 162-mg dose of aspirin and an 80-mg dose of Lovenox, a blood thinner, were ordered for Mr. Price. *Id.* at 82-83. Aspirin and Lovenox are together known as first-line treatments for suspected heart attacks. *Id.*

Those medications, however, were never given to Mr. Price by Defendant Bailey or other nursing staff. J.A. 8, 83. Instead, Emergency Department staff directed Mr. Price to sit in the waiting room without admission, any additional treatment, or any further cardiac evaluation. *Id.* at 8, ¶ 16. No follow-up bloodwork was done, nor were any other standard treatments, such as a beta-blocker, administered. *Id.* at 8. Mr. Price was simply left to languish with no medical attention in

the Emergency Department's waiting room, where, over the course of several hours, he deteriorated into a full-blown myocardial infarction. *Id.*

Eventually, staff conducted another EKG on Mr. Price, which confirmed an ST-elevation myocardial infarction, a particularly serious type of heart attack that carries greater risks of complications and death. After the second EKG was administered, staff submitted orders for heparin, aspirin, and Brilinta (another blood thinner). J.A. 9. Those medications were ordered between 7:37 and 7:50 p.m., but were not administered — even in the face of a full-blown and dangerous heart attack — until an hour after they were ordered. *Id.* By that time, the opportunity to treat Mr. Price medically had passed, and an emergent catheterization with a stent placement was required. *Id.* Because of the excessive delays allowed by Defendant Bailey and Defendant Raleigh General's staff, Mr. Price experienced complications from the cardiac intervention, specifically in the form of acute stent thrombosis. *Id.* Mr. Price suffered further complications from the procedure in the ensuing days, and ultimately died on December 13, 2021. *Id.*

B. Procedural History

After serving both Defendants with Notices of Claim and Certificates of Merit as required by West Virginia's Medical Professional Liability Act, W. Va. Code § 55-7B-6, Mrs. Price filed suit against the Defendants on October 6, 2023, pursuing claims for negligence and vicarious liability as the administratrix of her husband's estate. Both Defendants answered the Complaint and contemporaneously filed "Motions to Stay Proceedings," which formally sought dismissal of the case under the COVID-19 Jobs Protection Act. J.A. 35 (Defendant Raleigh General's motion), 66 (Defendant Bailey's motion).

The Defendants' motions specifically asserted that the deficient care provided to Mr. Price was "impacted" by a surge in COVID-19 cases in late 2021, such that the Act's affirmative defense shielded the Defendants from any liability. J.A 37, ¶ 7 ("Price's alleged loss . . . arose out of

COVID-19 impacted care and therefore Plaintiff's claims are barred pursuant to the provision of the Covid 19 Jobs Protection Act."). Defendant Raleigh General filed an affidavit from one of its administrators alongside its motion, which generally described the effects of the late-2021 uptick in cases on the hospital and again concluded that Mr. Price's "alleged treatment delay was directly related to a census increase and staffing shortage caused by a surge in COVID-19 infection within Raleigh County and the surrounding localities." *Id.* at 79, ¶ 15.

As the circuit court described below, the Act's stated legislative purpose is to "[e]liminate the liability of the citizens of West Virginia and all persons including individuals, health care providers, health care facilities, institutions of higher education, businesses, manufacturers, and all persons whomsoever, and to preclude all suits and claims against any persons for loss, damages, personal injuries, or death *arising from* COVID-19." W. Va. Code § 55-19-2(b)(1) (emphasis added). To achieve that purpose, the Act — among other things — provides health care providers with an affirmative defense in certain situations, providing that "there is no claim against any person, essential business, business entity, health care facility, health care provider, first responder, or volunteer for loss, damage, physical injury, or death arising from COVID-19, from COVID-19 care, or from *impacted care*." *Id.* § 55-19-4 (emphasis added). The Act goes on to define "impacted care" as "care offered, delayed, postponed, or otherwise adversely affected at a health care facility or from a health care provider that impacted the health care facility or health care provider's response to, or as a result of, COVID-19 or the COVID-19 emergency." *Id.* § 55-19-3(10).

The Act's definition of "impacted care" additionally directs that, if a defendant in a medical malpractice action raises the "impacted care" issue under Section 55-19-4, the circuit court "shall, upon motion by the defendant, stay the proceedings, including any discovery proceedings, and, as soon as practicable, hold a hearing to determine whether the care offered" was in fact "impacted"

by the COVID-19 emergency. *Id.* If the court resolves that question in the affirmative, the Act specifies that "the cause of action shall be dismissed under § 55-19-4." *Id.* Importantly, the "impacted care" definition explicitly carves claims that are *not* related to COVID-19 out of the Act's scope, providing that the Act "does not prohibit [medical malpractice] claims that may otherwise be brought . . . so long as such claims for loss, damage, physical injury, or death are unrelated to COVID-19 or the COVID-19 emergency and the care provided." *Id.* The Act therefore sets up an inherently factual inquiry for the circuit court to resolve — whether the medical care at issue was or was not "related to" or "impacted by" COVID-19.

On November 27, 2023, following the Defendants' submissions of their motions and without allowing Mrs. Price an opportunity to respond, the court stayed Mrs. Price's case and all discovery, setting a hearing on the "impacted care" issue. *See* J.A. 72. Recognizing that the court's order had cut off her ability obtain any evidence relevant to a potentially decisive issue, Mrs. Price filed a motion to lift the stay, or, in the alternative, to permit limited discovery on the issue of whether Mr. Price's medical care was "impacted care" within the meaning of the Act. *See id.* at 81. By that motion, Mrs. Price asserted — as she now does on appeal — that discovery was needed on the "impacted care" affirmative defense prior to any ruling on that factual issue, and that the Defendants' submission of materials outside the pleadings required that she be permitted to present rebuttal evidence; that the Act's limitation on discovery interferes with due process rights and the courts' ability to set their own rules of procedure; and that, in any event, there was an insufficient factual basis on which to resolve that Mr. Price's care was indeed "impacted" by COVID-19.

The Defendants filed replies in support of their motions prior to the court's hearing, along with additional affidavits from Raleigh General employees that generally described the number of COVID-19 patients admitted to the hospital in December 2021 and associated impacts on the

hospital's staff, but stopped short of tying those issues to the hospital's response to Mr. Price's heart attack. *See* J.A. 227, 230. The court considered the parties' motions at a hearing on January 10, 2024, and, by its order of January 25, dismissed Mrs. Price's case under the Act. The court's order credited the allegations set out in the Defendants' affidavits, addressing Mrs. Price's motion for limited discovery only by criticizing Mrs. Price for "fail[ing] to introduce any evidence in opposition to the affidavits submitted by [Raleigh General], which were also relied upon by Defendant Bailey." *Id.* at 246. In short, the court made a factual determination that the care provided to Mr. Price "was adversely impacted by the COVID-19 emergency," and accordingly resolved "that this matter should be and is hereby DISMISSED pursuant to W. Va. Code § 55-19-4." *Id.* at 247. On February 23, 2024, Mrs. Price timely filed her notice of appeal. *Id.* at 249.

IV. SUMMARY OF ARGUMENT

The Supreme Court of Appeals of West Virginia conceives of "broad discovery" as being "essential to the fair disposition of both civil and criminal lawsuits." *State ex rel. W. Va. State Police v. Taylor*, 201 W. Va. 554, 565 n.16, 499 S.E.2d 283, 294 n.16 (1997). The discovery tools made available by the Rules of Civil Procedure therefore serve to allow the parties to a case to develop a fulsome factual record that "makes litigation less of a game of blindman's bluff and more of a contest that seeks a fair and adequate resolution of a dispute." *State ex rel. Pritt v. Vickers*, 214 W. Va. 221, 226, 588 S.E.2d 210, 215 (2003) (quoting Franklin D. Cleckley et al., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 26, at 540 (2002)). The finder of fact will naturally have "the best opportunity to hear and evaluate all of the relevant evidence, thus increasing the chances of a fair verdict" *after* that evidence has been collected, shared among the parties, and carefully evaluated. *Graham v. Wallace*, 214 W. Va. 178, 185, 588 S.E.2d 167, 174 (2003).

No such gathering or consideration of the relevant evidence occurred in Mrs. Price's case. "A game of blindman's bluff" was instead the chosen method of weighing the merits of her Complaint — rather than permitting even limited discovery on the affirmative defense raised by the Defendants, the circuit below convened a hearing and ruled on a factual, dispositive question without the benefit of *any* significant record evidence. *Vickers*, 214 W. Va. at 226, 588 S.E.2d at 215. This was not the sort of well-informed, "fair and adequate resolution" of the litigation envisioned by the Supreme Court of Appeals and the Rules of Civil Procedure. *Id.*

The circuit court's order dismissing Mrs. Price's Complaint should be reversed by this Court for at least three reasons. First, the circuit court erred in refusing Mrs. Price any opportunity to take discovery on the issue of fact that proved decisive in her case, denying her the due process of gathering evidence relevant to her own litigation. The court also went awry in this regard by affirmatively relying on the Defendants' conclusory affidavits in ruling that Mr. Price's care was "impacted" by COVID-19, thus converting the Defendants' motions to motions for summary judgment and ruling on them without allowing Mrs. Price to submit rebuttal evidence — a black-and-white violation of the Rules. *See* W. Va. R. Civ. P. 12(b)(7), 12(c). Second, if the court properly interpreted the relevant provisions of the Act, it erred in dismissing a case under a statute that denies medical malpractice plaintiffs due process by forbidding discovery on a decisive issue and likewise abridges separation-of-powers principles by prescribing rules of procedure for the courts. Finally, the court's order was in error on the merits, as absolutely nothing in the record conclusively established that "impacted care" was to blame for Mr. Price's sudden death. The court's dismissal was premature and offends well-established precedent and numerous Rules of Civil Procedure — this Court should reverse, so that this case may be resolved on a properly developed record.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rule of Appellate Procedure 18(a), Mrs. Price respectfully requests oral argument under Rule 20. Rule 20 argument is appropriate here because this case involves issues of first impression and constitutional questions concerning the validity of a statute. The Supreme Court of Appeals has not yet interpreted the relevant provisions of the Act, and specifically has not resolved whether a circuit court may conclude, at the pleadings stage and prior to any meaningful discovery, that medical malpractice claims arose "from impacted care" and must therefore be dismissed. W. Va. Code §§ 55-19-3(10), -4. This case presents an opportunity to address these issues related to the Act's interpretation and validity.

VI. STANDARD OF REVIEW

Though formally styled as "Motions to Stay Proceedings," the Defendants' motions that underlie this appeal ultimately sought (and obtained) a dismissal with prejudice of Mrs. Price's Complaint, thus having the function — if not necessarily the form — of motions for judgment on the pleadings or motions to dismiss for failure to state a claim. This Court should therefore review the circuit court's order granting those motions *de novo*. *See* Syl. Pt. 1, *Copley v. Mingo Cnty. Bd. of Educ.*, 195 W. Va. 480, 466 S.E.2d 139 (1995); *Kopelman & Assocs., L.C. v. Collins*, 196 W. Va. 489, 494 n.6, 473 S.E.2d 910, 915 n.6 (1996) ("We are not bound by the label employed below, and we will treat the dismissal as one made pursuant to the most appropriate rule." (internal quotation marks omitted)). The circuit court's rulings on questions of law and matters of statutory interpretation are likewise reviewed *de novo*. *Miller v. WesBanco Bank, Inc.*, 245 W. Va. 363, 376, 859 S.E.2d 306, 319 (2021).

The Defendants' motions "present[ed] a challenge to the legal effect of given facts rather than on proof of the facts themselves," thereby having the effect of motions for judgment on the pleadings, which the Supreme Court of Appeals has explained are "essentially a delayed motion

to dismiss." Syl. Pt. 2, *Copley*, 195 W. Va 480, 466 S.E.2d 139. "The West Virginia Rules of Civil Procedure approach the motion [for judgment on the pleadings] essentially as a motion to dismiss for failure to state a claim in that the motion will not be granted except when it is apparent that the deficiency could not be cured by an amendment." *Id.*; *see also* Syl. Pt. 2, *Burch v. Nedpower Mount Storm, LLC*, 220 W. Va. 443, 647 S.E.2d 879 (2007) ("A circuit court, viewing all the facts in a light most favorable to the nonmoving party, may grant a motion for judgment on the pleadings only if it appears *beyond doubt* that the nonmoving party can prove *no set of facts* in support of his or her claim or defense." (emphasis added)). Moreover, under Rule of Civil Procedure 12(c), where "matters outside the pleadings are presented to and not excluded by the court, the motion [for judgment on the pleadings] shall be treated as one for summary judgment and disposed of as provided in Rule 56," such that "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion" and the motion "should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." W. Va. R. Civ. P. 12(c); Syl. Pt. 2, *Painter v. Peavy*, 192. W. Va. 189, 451 S.E.2d 755 (1994).

VII. ARGUMENT

A. The Circuit Court Erred in Failing to Allow Limited Discovery on Whether Mr. Price's Care Was "Impacted" by COVID-19 Prior to Ruling on that Issue.

The circuit court wrongly dismissed Mrs. Price's Complaint by ruling on an inherently factual question without allowing any discovery on the same, and its error in that regard was two-fold. First, the court misapplied the Act and denied Mrs. Price due process by opting to resolve a fact-bound affirmative defense without permitting any collection of evidence on the issue. Second, by taking stock of and relying upon the affidavits submitted by the Defendants in support of their motions to dismiss, the court converted the motions into motions for summary judgment and ruled

on the motions without allowing Mrs. Price the opportunity to present rebuttal evidence, in plain violation of the West Virginia Rules of Civil Procedure. The court could not and should not have ruled on the "impacted care" question in these circumstances, and its dismissal order must be reversed.

The Rules of Civil Procedure allow — and indeed require — the parties to an action to engage in meaningful discovery to develop the evidence relevant to any given claim or defense, so that the claim or defense can be properly ruled upon when the time comes. *See* Syl. Pt. 1, *Evans v. Mutual Mining*, 199 W. Va. 526, 485 S.E.2d 695 (1997) ("The Rules of Civil Procedure generally provide for broad discovery to ferret out evidence which is in some degree relevant to the contested issue."); *Vickers*, 214 W. Va. at 226, 588 S.E.2d at 215 ("The overarching purpose of discovery is to clarify and narrow the issues in litigations, so as to efficiently resolve disputes." (quoting Cleckley et al., *Litigation Handbook*, § 26, at 540)). The need for a sufficient body of facts does not change where, as here, an affirmative defense is presented for resolution in a motion to dismiss — as the Supreme Court of Appeals has explained, "an affirmative defense may be adjudicated on a motion to dismiss" only when "[t]wo conditions [are] met . . . . First, the facts that establish the defense must be definitively ascertainable from the allegations of the complaint, the documents (if any) incorporated therein, matters of public record, and other matters of which the court may take judicial notice. Second, the facts so gleaned must conclusively establish the affirmative defense." *Forshey v. Jackson*, 222 W. Va. 743, 746 n.8, 671 S.E.2d 748, 751 n.8 (2008) (quoting Cleckley et al., *Litigation Handbook*, § 12(b)(6)([2], at 349).

That test is not met here. Nothing in the pleadings before the circuit court (or other matters of which the court could have taken notice) "conclusively established" that Mr. Price's medical care was "impacted" by Raleigh General's response to COVID-19. To the contrary, *no* factual

record on that issue had yet been built by the parties, and the court was left only — and, as described below, improperly — to rely on the Defendants' conclusory, self-serving affidavits in resolving the "impacted care" question. In passing the Act in 2021, members of the West Virginia Legislature expressed their understanding that Section 55-19-4 afforded a fact-based affirmative defense on which discovery would be needed prior to any hearing or ruling, confirming that the Act must not be read to flatly prohibit discovery. In discussing "mechanically, how [the affirmative defense] works," Senators Richard Lindsay and Charles Trump agreed that "this is an affirmative defense" and that "in support of that particular defense, there would be some discovery on that particular issue," especially in light of the "proviso in the definition of 'impacted care' . . . that says, if the care is *not* impacted by COVID, the claim may move forward." *See* West Virginia Senate Channel, *Senator Lindsay Seeks Clarification of House Amendments to Senate Bill 277* (Mar. 11, 2021), https://www.youtube.com/watch?v=ZyYO_D_w8vM&t=29s (last visited May 22, 2024). As Senator Trump explained, "the only way that any court could decide any factual question like that would be taking evidence." *Id.* Given the legislative intent underpinning the Act, as well as the fact that a contrary reading would — as discussed below — raise due process and separation-of-powers issues, the court should have construed the Act to allow for limited discovery prior to a fact-based ruling on the "impacted care" question. Syl. Pt. 3, *Frazier v. McCabe*, 244 W. Va. 21, 851 S.E.2d 100 (2020) ("[E]very reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality.").

Yet no evidence of the sort contemplated by the Legislature was allowed to be taken here — and so the circuit court was not properly equipped to arrive at a "yes" or a "no" conclusion on the "impacted care" question. Mrs. Price's right to take discovery on a fact-intensive and outcome-determinative issue is a simple matter of procedural due process. W. Va. Const. art. III, § 10; Syl.

Pt. 2, *North v. W. Va. Bd. of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977). The circuit court denied Mrs. Price that process, putting the discovery devices for the fair prosecution and defense of claims otherwise provided by the Rules of Civil Procedure outside of her reach.

Mrs. Price was also entitled to discovery on the "impacted care" question for a separate reason — the circuit court's explicit reliance on the Defendants' affidavits, which converted the pending motions into motions for summary judgment. The Rules governing motions to dismiss and motions for judgment on the pleadings explain as much:

> If, on a motion [to dismiss] asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are *presented to and not excluded by* the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.
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> * * *
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> If, on a motion for judgment on the pleadings, matters outside the pleadings are *presented to and not excluded by* the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

W. Va. R. Civ. P. 12(b)(7), 12(c) (emphases added); *see also Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 61, 459 S.E.2d 329, 338 (1995) (emphasizing the "general principle that summary judgment is appropriate only after the opposing party has had adequate time for discovery" (internal quotation marks omitted)); *Board of Ed. of Ohio Cnty. v. Van Buren & Firestone, Architects, Inc.*, 165 W. Va. 140, 144, 267 S.E.2d 440, 443 (1980) ("[A] decision for summary judgment before discovery has been completed must be viewed as precipitous.").

By submitting affidavits in support of their motions to dismiss — or motions for judgment on the pleadings, however they may be characterized — the Defendants presented the circuit court with information outside of the four corners of the pleadings. And by "not exclud[ing]" that

information and in fact relying on it in dismissing the Complaint, the court made a summary judgment ruling — but it declined, as required by the Rules, to afford Mrs. Price the opportunity to develop and present her own relevant evidence. Indeed, the court repeatedly criticized Mrs. Price for "fail[ing] to introduce any evidence in opposition to the affidavits," which it described as "largely uncontested at this time by the Plaintiff," and for failing to "subpoena[] witnesses to challenge the assertions contained in the affidavits." J.A. 245-46. Yet as Mrs. Price's counsel explained at the court's hearing, "his inability to conduct discovery prohibited him from being able to adequately evaluate potential witnesses," *id.* at 246 — indeed, the only discovery responses Mrs. Price ever received uniformly declined to identify potential witnesses or other relevant information because "the Court has entered an Order Staying Further Proceedings," *id.* at 318-25.

The circuit court's decision to rely on the Defendants' extrinsic evidence and to bar Mrs. Price from assembling her own evidence is reversible error. The Supreme Court of Appeals has repeatedly explained that

> [w]hen a motion for judgment on the pleadings . . . is converted into a motion for summary judgment . . . a circuit court is required to give the parties *notice of the changed status* of the motion and a *reasonable opportunity to present all material made pertinent* to such a motion by Rule 56. In this way, no litigant will be taken by surprise by the conversion. . . . Once the proceeding becomes one for summary judgment, the moving party's burden changes and the moving party is obliged to demonstrate that there exists no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Syl. Pt. 1, *Kopelman & Assocs., L.C. v. Collins*, 196 W. Va. 489, 473 S.E.2d 910 (1996); *see also Dantzic v. Dantzic*, 222 W. Va. 535, 540, 668 S.E.2d 164, 169 (2008) (same). Mrs. Price received neither the required "notice of the changed status" nor any "opportunity to present" rebuttal evidence, and as the Court held in its *Kopelman* decision, "to treat a motion for judgment on the pleadings as a motion for summary judgment without permitting the adverse party a reasonable opportunity to submit pertinent material is error." 196 W. Va. at 494, 473 S.E.2d at 915.

At bottom, the circuit court wrongly made a final ruling disposing of all of Mrs. Price's claims based on an incomplete, one-sided record. Other courts, in this State and elsewhere, have recognized the impropriety of ruling on the applicability of fact-intensive affirmative defenses provided in COVID-19-related statutes, instead allowing the parties to proceed to at least limited discovery. In *Blake v. Camden-Clark Memorial Hospital Corp.*, for instance, the defendant — as here — moved to dismiss the plaintiff's medical negligence claim under the Act, generally asserting that its operations had been impacted by COVID-19 at the time the care at issue occurred. In response to the defendant's motion, the Circuit Court of Wood County — like the circuit court here — set an evidentiary hearing to resolve the "impacted care" issue. But unlike the court here, the court in *Blake* correctly interpreted the Act and specifically directed that "[t]he plaintiff shall have 90 days to *conduct limited discovery on the issue of 'impacted care*,'" including written discovery and depositions of relevant hospital personnel. *See Blake v. Camden-Clark Mem'l Hosp. Corp*., No. CC-54-2022-C-152 (W. Va. Cir. Ct. Jan. 3, 2023); J.A. 327 (emphasis added).

In another case, *Lambert v. Eldercare of Jackson County, LLC*, the defendants moved to dismiss the plaintiffs' medical malpractice claims under the Act, but there, the plaintiffs specifically alleged that the defendants' conduct was intentional and conducted with actual malice — triggering another exception to the Act's affirmative defense. *See* No. CC-18-2021-C-32, 2022 WL 21781398, at *2-4 (W. Va. Cir. Ct. Apr. 11, 2022). The Circuit Court of Jackson County denied the motion to dismiss, explaining that the "Defendants ask this Court to ignore the exception to the immunities enacted by the West Virginia Legislature . . . *without permitting Plaintiffs to conduct discovery* to prove the evidence supports that exception." *Id.* at *5 (emphasis added).

In a similar vein, the Court of Appeals of North Carolina affirmed the denial of motions to dismiss premised on North Carolina's version of the Act in *Land v. Whitley*. The *Land* plaintiffs

had alleged that the defendants' conduct was grossly negligent, again triggering an exception to the operation of the North Carolina statute's affirmative defense. The court of appeals explained that discovery would be needed for a jury to resolve the issue of gross negligence, and that, in any event, affidavits and other materials filed with the defendants' motions failed to "offer[] evidence as to how Mrs. Land's follow-up care was directly or indirectly *impacted by* the pandemic." *Land v. Whitley*, 898 S.E.2d 17, 25 (N.C. Ct. App. 2024) (emphasis added). This Court should follow the approach of the *Blake*, *Lambert*, and *Land* courts, and require that proper discovery be taken prior to any dispositive ruling on the "impacted care" issue.

B. To the Extent the Circuit Court Properly Interpreted and Applied the Act, It Erred in Applying a Statute that Interferes with Plaintiffs' Procedural Due Process Rights and the Ability of the Courts to Set Their Own Procedural Rules.

1. The Act Deprives Medical Malpractice Plaintiffs of Due Process.

As interpreted and applied by the circuit court below, the Act essentially requires the resolution of an inherently factual question at the very outset of a case — potentially any and every medical malpractice case arising between 2020 and 2023 — without allowing any discovery on the issue. As explained above, this reading of the statute serves to deprive a medical malpractice plaintiff of due process in defending against a motion to dismiss, in that absolutely no rebuttal evidence can be gathered to challenge an outcome-determinative issue. *See* Syl. Pt. 1, *Evans*, 199 W. Va. 526, 485 S.E.2d 695; Syl. Pt. 2, *North*, 160 W. Va. 248, 233 S.E.2d 411.

This is a patently absurd result — and, under rules established by the Legislature, the courts of this State are obliged to construe statutes "to avoid absurd results." W. Va. Code § 2-2-10(b)(11); *see also* Syl. Pt. 2, *Conseco Fin. Serv. Corp. v. Myers*, 211 W. Va. 631, 567 S.E.2d 641 (2002) ("It is the duty of a court to construe a statute according to its true intent, and to give it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction,

though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity."). The circuit court's interpretation of the Act undoubtedly yielded an absurd result, but if the court's reading of the statute was not in error, the Act itself serves to abridge plaintiffs' due process rights.

2. The Act Violates the West Virginia Constitution's Separation-of-Powers Principles.

The Act also intrudes on the authority of the courts of this State to establish and enforce their own rules of procedure, dictating how courts must handle dispositive motions and discovery in a particular subset of cases. The Rules of Civil Procedure are the province of the courts, and the Act improperly attempts to modify them as applied to medical malpractice cases arising during the COVID-19 pandemic. *See* W. Va. Const. art. V, § 1; art. VIII, §§ 1, 3. The Supreme Court of Appeals holds "the exclusive constitutional authority to promulgate administrative rules for the effective management of the judicial system," which "have the force and effect of statutory law and operate to supersede any law that is in conflict with them." *State ex rel. Workman v. Carmichael*, 241 W. Va. 105, 132, 819 S.E.2d 251, 278 (2018); Syl. Pts. 9-10, *Teter v. Old Colony Co.*, 190 W. Va. 711, 441 S.E.2d 728 (1994) (same). Importantly, "[i]f a statute purports to regulate a matter that is within the exclusive control of the judiciary under a specific grant of constitutional authority . . . the statute [cannot] prevail over conflicting provisions of a court rule implementing the constitutional authority in question." *Louk v. Cormier*, 218 W. Va. 81, 91 n.13, 622 S.E.2d 788, 798 n.13 (2005).

In this case, if the lower court was correct in interpreting the Act as prohibiting discovery on the issue of "impacted care," then the Act clearly conflicts with West Virginia Rules of Civil Procedure 26 through 37 as promulgated by the Supreme Court of Appeals. The circuit court below

erred in relying upon the Act to dismiss Mrs. Price's Complaint without any opportunity to obtain discovery on the narrow issue raised by the Defendants' motions.

C. The Circuit Court Erred in Dismissing Mrs. Price's Complaint, as the Record Is Incomplete and the Defendants Failed to Meet Their Burden of Establishing "Impacted Care."

Lastly, the circuit court erred on the merits in dismissing Mrs. Price's Complaint, as the exceedingly limited evidence put forward by the Defendants was wholly inadequate to establish that Mr. Price's medical care was, as a matter of law, "impacted" by COVID-19. As explained above, by relying on the Defendants' barebones affidavits in granting their motions, the court made a summary judgment ruling, and did so prior to any significant discovery and with factual disputes abound as to the "impacted care" issue. Summary judgment, of course, is appropriate only when "it is clear that there is no genuine issue of fact to be tried" and when "inquiry concerning the facts is not desirable." Syl. Pt. 2, *Painter v. Peavy*, 192. W. Va. 189, 451 S.E.2d 755 (1994). Further factual development is not simply "desirable" here — it is essential.

The three affidavits relied on by the Defendants broadly describe the impacts that COVID-19 had on Raleigh General's day-to-day operations in December 2021, failing to identify anything more than a temporal relationship between those impacts and the substandard care given to Mr. Price. The affidavits describe a "patient census increase" as a result of heightened levels of COVID-19 transmission; explain that most of the hospital's ventilators were in use at the time Mr. Price was in the hospital, and that staffing shortages resulted from the spike in cases; and generally contend that "patient wait times were longer than usual due to COVID-19 infection rates." J.A. 78 ¶¶ 7-11; 227-28 ¶¶ 5-10; 232 ¶¶ 12-18. But the affidavits do not even begin to explain how the logistical difficulties experienced at Raleigh General stood in the way of providing the very basic care that Mr. Price needed when he first arrived at the hospital — largely the administration of blood thinners and anti-platelet medications. Whether the Emergency Department had beds

available, as the affidavits describe, does not obviously bear on the staff's ability to provide medications to a patient in the waiting room. The affidavits explain that on the date of Mr. Price's visit, "ten employees were off due to actual or suspected COVID-19 infection," and the Emergency Department treated "7 patients . . . for COVID-19 or related medical complications." *Id.* at 78 ¶¶ 8-9. But again, no specific explanation is provided as to how the presence of a handful of COVID-19 patients in the Emergency Department directly "impacted" Mr. Price's care, and no allegation is made that the ten missing employees were Emergency Department personnel who would otherwise have been available to dispense medications. The Defendants' affidavits are thus quite like the affidavits submitted in the *Land* case, where the Court of Appeals of North Carolina concluded that "Defendants' affidavits fail to establish a causal link between the impact of COVID-19 and [the plaintiff's] care or treatment." *Land*, 898 S.E.2d at 25.

Mrs. Price readily disputes that Raleigh General's response to COVID-19 had any direct impact on her husband's care, and would have pursued discovery to that end had she been given the opportunity prior to the court's dispositive ruling. But that matter aside, the Defendants' own evidence failed to establish the requisite "impacted care." A small collection of conclusory affidavits was not sufficient to meet the Defendants' burden, and the court therefore erred once more in dismissing Mrs. Price's Complaint.

VIII. CONCLUSION

For these reasons, Mrs. Price respectfully requests that this Court reverse the circuit court's order dismissing her Complaint and remand for further proceedings.

Dated: May 28, 2024

Respectfully submitted,

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 24-ICA-68

Heidi Price, Administratrix of the Estate of Ellis Wayne Price,

Petitioner,

v.

DOCKET NO. 24-ICA-68

(Appeal from Order Entered by the Circuit Court of Raleigh County) Civil Action No. 23-C-331

Raleigh General Hospital, LLC, And Philip Bailey,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May 2024, I served a true and correct copy of the **PETITIONER HEIDI PRICE'S OPENING BRIEF** on the following individuals, via electronic mail:

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