IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 24-ICA-68

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

v.

Raleigh General Hospital, LLC and Philip Bailey,
Respondents.

RESPONDENT PHILIP BAILEY, PA-C'S BRIEF

Tamela J. White-Farrell, Esquire (W. Va. State Bar No. 6392)
J. Ben Shepard, Esquire (W. Va. State Bar No. 13261)
Robert E. White, Esquire (W. Va. State Bar No. 14503)
FARRELL & FARRELL PLLC
P.O. Box 6457
Huntington, WV 25772-6457
Phone: (304) 522-9100 / Fax: (304) 522-9162
tjw@farrell3.com / jbs@farrell3.com / rew@farrell3.com

Counsel for Respondent/Defendant-Below Philip Bailey, PA-C

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STATEMENT OF THE CASE

In this appeal from final judgment, Petitioner-Plaintiff Heidi Price ("**Petitioner**") challenges the Circuit Court's determination that the COVID-19 Jobs Protection Act, W. VA. CODE §§ 55-19-1 to -9 (eff. Mar. 11, 2021) (the "**Act**"), immunized Respondents-Defendants Philip Bailey, PA-C ("**Respondent Bailey**") and Raleigh General Hospital, LLC ("**Respondent RGH**") from liability arising from the medical care provided to her late husband, Ellis Wayne Price ("**Mr. Price**"), during the height of the COVID-19 pandemic. In the Act, the Legislature fashioned a nearly impregnable shield for "health care provider[s]" that protects them against, *inter alia*, "claims" involving "delayed" or "adversely affected" medical care "related to COVID-19 or the COVID-19 emergency." W. VA. CODE § 55-19-3(10). To effectuate this grant of "broad immunity from liability," *Eldercare of Jackson Cnty., LLC v. Lambert*, No. 22-0362, 2024 WL 2966171, at *8 (W. Va. June 12, 2024), the Legislature created a framework for resolving threshold immunity questions by adversarial evidentiary hearing, *see* W. VA. CODE § 55-19-3(10). By sparing providers like Respondent Bailey from "the burden of discovery," that framework safeguards the "very heart of the immunity defense" the Legislature created in response to the unprecedented public health crisis the COVID-19 pandemic occasioned. *Yoak v. Marshall Univ. Bd. of Governors*, 223 W. Va. 55, 59, 672 S.E.2d 191, 195 (2008) (per curiam) (citations omitted).

The Circuit Court below demonstrated respect not only for the Legislature's considered exercise of its near plenary policymaking powers, but also for Petitioner's right to fair notice and a meaningful opportunity to be heard. It held a full adversarial evidentiary hearing at which Petitioner and Respondents had the right to present written proof, elicit testimony, and compel the attendance of adverse witnesses. Respondents offered competent evidence that established the clear relationship between the COVID-19 emergency and the delayed care provided to Mr. Price, delayed care being the crux of Petitioner's Complaint. Petitioner failed to controvert the evidence

Respondents marshalled. Consistent with Rule 56 of the West Virginia Rules of Civil Procedure, the Circuit Court found Respondents were immune and entered judgment against Petitioner. This Court should affirm the judgment below because Respondent Bailey's entitlement to immunity is evident from the face of the Complaint and the well-developed record.

Factual Background

Mr. Price presented to the Emergency Department ("**ED**") of Raleigh General Hospital ("**RGH**") on the afternoon of December 10, 2021, complaining of chest pain. (J.A. 8, ¶ 13 [Compl.].) Initial testing and assessment indicated Mr. Price to be at "risk of an evolving myocardial infarction," i.e., a heart attack. (J.A. 8, ¶¶ 14–16.) Shortly following Mr. Price's arrival and while he was still in the ED waiting room, Respondent Bailey correctly diagnosed him as suffering from "an ST elevated myocardial infarction" and ordered Respondent RGH's nursing staff to administer the right medications ("including heparin, aspirin and Brilinta") to treat his condition. (J.A. 8, ¶ 20; *see also* J.A. 234–241 [Sealed Medical Records].) But RGH, overwhelmed by "a surge in COVID-19 patients," could not admit Mr. Price for further evaluation or administer treatment. (J.A. 78, ¶ 7 [Sealed Simmons Aff.]; J.A. 231, ¶ 10 [Sealed Hall Aff.].) Instead, he remained in the waiting room. (*See* J.A. 234–241.) RGH's nursing staff eventually administered some of the medications Respondent Bailey prescribed, but Petitioner alleges "delays" in treating Mr. Price caused him to experience "complications" that led to "his death on December 13, 2021." (J.A. 8–9, ¶¶ 17–23.)

The sworn testimony of Penni Hall, R.N. (the ED Charge Nurse) and Heather D. Simmons (RGH's Assistant Director of Quality and Risk Management) established Mr. Price's "alleged treatment delay . . . directly related to a census increase and staffing shortage caused by a surge in COVID-19 infection within Raleigh County." (J.A. 79, ¶ 15; J.A. 233, ¶ 19.) Between December

8 and December 12, 2021, when Mr. Price presented to the ED, the average turnaround time for an ED patient was 504 minutes, which represented an **18.87% increase** as compared to average turnaround time for 2021. (J.A. 228, ¶ 7 [Sealed Simmons Suppl. Aff.].) In the twenty-four months that followed the surge, the average turnaround time fell to 352 minutes—a **30.16% reduction** when compared to the turnaround time Mr. Price experienced. (J.A. 228, ¶ 7.)

As Director Simmons explained, on December 10, 2021, RGH had twenty-nine "admitted COVID-19 patients," plus an additional seven patients which RGH treated in the ED "on an urgent or emergent basis for COVID-19 or related medical complications." (J.A. 78, ¶ 8.) Nurse Hall specifically recalled that on December 10, "the waiting room was beyond its capacity, with **more than thirty (30) patients** waiting at a time." (J.A. 232, ¶ 16 (emphasis added).) RGH treated a total of **eighty-four patients** in the ED on December 10 alone. (J.A. 228, ¶ 10.) RGH's treatment space was "over capacity," and the surge forced providers to treat patients "in improvised spaces, including hallways." (J.A. 232, ¶ 17.) Eight patients "who had already been admitted for care from the [ED] were held in and treated by [ED] providers" while awaiting transfer to assigned units, "many of" which "were at or above capacity." (J.A. 228, ¶¶ 8–9.) In addition, ten of RGH's employees "were off" work on December 10 "due to actual or suspected COVID-19 infection," leaving RGH to face the surge with an acute "staffing shortage." (J.A. 78, ¶¶ 9–11.) Respondent Bailey cared for Mr. Price in the ED waiting room under these circumstances, waiting for a bed either in the hospital or in the ED itself to become available. (*See* J.A. 234–241.) This undisputed record testimony proved a clear relationship between the COVID-19 emergency and the inability of Respondents to treat Mr. Price without delay.

Procedural History

Notwithstanding the Act's broad immunity provision, Petitioner filed her Complaint against Respondents on October 6, 2023. (*See* J.A. 6–13.) The medical malpractice claims pled in the Complaint arise out of the aforementioned "delays" Respondents experienced in treating Mr. Price, which allegedly caused him to experience "complications" that led to "his death on December 13, 2021." (J.A. 8–9, ¶¶ 17–23.) On November 15, 2023, Respondent RGH moved the Circuit Court to stay the proceedings and dismiss the claims alleged against it, pursuant to the Act. (*See* J.A. 34–38 [RGH's Mot.].) A week later, Respondent Bailey moved the Circuit Court for the same relief. (*See* J.A. 65–70 [Bailey's Mot.].) On November 27, 2023, the Circuit Court entered a stay and directed the parties to schedule an evidentiary hearing to adjudicate Respondents' right to immunity "without further delay." (J.A. 72 [Order Staying Further Proceedings Pending Hr'g].)

The Circuit Court conducted a full adversarial evidentiary hearing on January 10, 2024. (*See* J.A. 269–309 [Hr'g Tr.].) Respondent RGH came forward with the competent record evidence above, upon which Respondent Bailey also relied, that proved the delay in providing care to Mr. Price "**related to** COVID-19 or the COVID-19 emergency." W. VA. CODE § 55-19-3(10) (emphasis added). Petitioner, on the other hand, failed to present testimony, subpoena witnesses, or otherwise controvert the evidence Respondents had marshalled. The Circuit Court entered judgment in Respondents' favor, finding the Act shielded them from liability. (*See* J.A. 243–247 [Order Dismissing Case].) This appeal followed.

SUMMARY OF ARGUMENT

The "immunity" our Legislature "afforded under" the COVID-19 Jobs Protection Act "is, by any measure, broad in scope." *Eldercare*, 2024 WL 2966171, at *9. The Act unambiguously declares "there is **no claim** against any person," including any "health care facility, [or] health care

provider, . . . from impacted care." W. VA. CODE § 55-19-4 (emphasis added). The very heart of this immunity is that it spares health care providers, like Respondent Bailey, from the most substantial burden of continued litigation—that being discovery. To defeat Respondent Bailey's right to this very broad immunity, Petitioner needed to prove the existence of a bona fide dispute over the "impacted" nature of Mr. Price's care. *See* W. VA. CODE § 55-19-3(10). Her Complaint failed to clear this "heightened pleading" threshold. Furthermore, Petitioner's inability to articulate any plausible basis to dispute the "impacted" quality of Mr. Price's care meant she had no right under the West Virginia Rules of Civil Procedure to embark on a fishing expedition. *See* W. VA. R. CIV. P. 56(f). Despite Petitioner's failings, the Circuit Court did not merely assume Respondent Bailey to be immune. Instead, the Circuit Court held a full adversarial evidentiary hearing at which Petitioner had the right to present written proof, elicit testimony, and compel the attendance of adverse witnesses. Respondents offered competent evidence that established the clear relationship between the COVID-19 emergency and the delayed care provided to Mr. Price. Meanwhile, Petitioner failed to controvert that evidence. The record confirms Respondent Bailey's right to the Act's broad protections, so the judgment below must be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Like Petitioner, Respondent Bailey requests the Court grant full oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure. Petitioner's assignments of error, while devoid of merit, still raise "issues of first impression" over the proper construction of the Act and involve "issues of fundamental public importance" arising from the tragic circumstances of the COVID-19 pandemic. W. VA. R. APP. P. 20(a)(1)–(2). Each Respondent should be permitted a full twenty (20) minutes to present oral argument, particularly in light of the multiple alternative grounds for affirmance identified in Respondent Bailey's Brief.

ARGUMENT

In March 2021, the West Virginia Legislature enacted the COVID-19 Jobs Protection Act, W. VA. CODE §§ 55-19-1 to -9 (eff. Mar. 11, 2021). It did so against the backdrop of "the COVID-19 pandemic" that singlehandedly pushed the health care system of this State and Nation to the brink of collapse. *See* W. VA. CODE § 55-19-2(a)(1), (3); *see also Bond v. United Physicians Care, Inc.*, No. 23-ICA-118, 2024 WL 2746084, at *4 (W. Va. Ct. App. May 29, 2024) ("The COVID-19 Act . . . was enacted in response to the novel coronavirus pandemic, which forever impacted the nation starting in early 2020."). The crisis—"unprecedented for all but those who were alive during the 1918 influenza epidemic," *Beshear v. Acree*, 615 S.W.3d 780, 828 (Ky. 2020)—prompted extraordinary action from all branches of this State's government. The Governor, in an effort "to ensure the health care system" remained "capable of serving" those West Virginians in need, ordered "all nonessential businesses" to "cease all activities except for minimum basic operations," W. VA. CODE § 55-19-2(a)(4), and directed all residents "to stay at home unless performing an essential activity," *id.* § 55-19-2(a)(5). Similarly, the Supreme Court of Appeals declared a state of judicial emergency "to protect the health and well-being of court employees, litigants, witnesses, jurors, attorneys, and the general public." *State v. Byers*, 247 W. Va. 168, 172 n.5, 875 S.E.2d 306, 310 n.5 (2022) (alterations omitted) (quoting W. VA. S. CT. APP., *Admin. Order Re: Judicial Emergency Declared* (Mar. 22, 2020)).

The global pandemic was just that—health care providers are people too, highly vulnerable to contracting the virus during or attendant with the delivery of health care. The pandemic overwhelmed "[h]ealth care providers" in this State, such as Respondents, who, despite unparalleled "shortages of medical personnel, equipment, and supplies," W. VA. CODE § 55-19-2(a)(6), risked their own health and safety to save the lives of their neighbors, and, more often,

complete strangers, *see id.* § 55-19-2(a)(10). Tragedies ensuing from delays in admission, diagnosis, and treatment proved all too common and unavoidable.

The Legislature saw how the COVID-19 crisis constrained the ability of overburdened health care facilities and underequipped providers not merely to offer prompt care—but even to offer care at all. *See id.* § 55-19-2(a)(6)–(7); *id.* § 55-19-3(10). It acknowledged the inequity that would result if the "health care providers and health care facilities" of this State were forced to face a flood of "[l]awsuits . . . associated with care [they] provided" during such extraordinary and trying times. *Id.* § 55-19-2(a)(10). It also recognized the "obstacle" even the "**threat** of liability pose[d]" to efforts "to continue to provide medical care to impacted West Virginians." *Id.* § 55-19-2(a)(11) (emphasis added). So, the Legislature adopted the Act in order to "**[e]liminate the liability**" of all "health care providers" and "health care facilities" and "to **preclude all suits** and claims against any person for loss, damages, personal injuries, or death arising from COVID-19" and the untenable climate it created. *Id.* § 55-19-2(b)(1) (emphasis added).

As this Court recently noted, the "COVID-19 Act embodies a very broad immunity provision." *Bond*, 2024 WL 2746084, at *4; *see also Eldercare*, 2024 WL 2966171, at *9 (same). In section 4 of the Act, the Legislature expressly preempted all "law[s] to the contrary" and immunized all "health care provider[s]" against all "claim[s] . . . for loss, damage, physical injury, or death . . . from **impacted care**."[1] W. VA. CODE § 55-19-4 (emphasis added). The Legislature expansively defined the term "impacted care" to include all "care offered, delayed, postponed, or otherwise adversely affected . . . from a health care provider" unless "**unrelated to** COVID-19 or the COVID-19 emergency." *Id.* § 55-19-3(10) (emphasis added). In operation, the Act affords

[1] Though West Virginia Code § 55-19-4 includes the phrase "arising from COVID-19," the word "arising" does not modify the phrase "from impacted care." The reason why is that "[a]rising from COVID-19" is a defined term-of-art as used in the Act. W. VA. CODE § 55-19-3(1).

near absolute immunity[2] whenever "the care offered, delayed, postponed, or otherwise adversely affected . . . from a health care provider was **related to** COVID-19 or the COVID-19 emergency." *Id.* (emphasis added).

Much of Petitioner's Opening Brief labors under the misconception that Respondent Bailey's immunity depended upon proof of "a **causal link** between the impact of COVID-19 and [Mr. Price's] care or treatment."[3] (Pet'r's Br. 18 (emphasis added) (quoting *Land v. Whitley*, 898 S.E.2d 17, 25 (N.C. Ct. App.), *cert. granted*, 900 S.E.2d 662 (N.C. 2024)).) She goes as far as to say that the Act required Respondent Bailey to prove the COVID-19 emergency had a "**direct** impact on [Mr. Price's] care." (*Id.* (emphasis added).) Nonetheless, Petitioner offers no textual or interpretative argument to support either assumption. (*See generally id.*) The reason why is because Petitioner's reading cannot be squared with the "plain" language of the Act or "the intent and purpose the Legislature in enacting" it. *Bond*, 2024 WL 2746084, at *4 (outlining controlling legal framework for issues of statutory construction).

The plain language of West Virginia Code § 55-19-3(10) affords immunity whenever "the care offered, delayed, postponed, or otherwise adversely affected . . . from a health care provider was **related to** COVID-19 or the COVID-19 emergency."[4] W. VA. CODE § 55-19-3(10) (emphasis

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[2] The Act includes just "two exceptions to the broad immunity provision listed above." *Bond v. United Physicians Care, Inc.*, No. 23-ICA-118, 2024 WL 2746084, at *7 (W. Va. Ct. App. May 29, 2024). West Virginia Code § 55-19-6, which provides an exception to immunity in the context of deliberate intent claims, is inapplicable here. Similarly, West Virginia Code § 55-19-7, which strips "any person, or employee or agent thereof, who engaged in intentional conduct with actual malice" of immunity, is not relevant because Petitioner did not plead "intentional conduct" or "actual malice" on the part of either Respondent.

[3] Even assuming, *arguendo*, that proof "of a causal link" is necessary for immunity to attach, Respondent Bailey still prevails because the uncontroverted record evidence established such a connection between the "delayed" care provided to Mr. Price and the ongoing COVID-19 emergency. *See infra* Argument III.

[4] Though West Virginia Code § 55-19-3(10) also uses the phrase "as a result of" once, the isolated use of that phrase must be interpreted in context with the Legislature's **repeated** use of the broader phrases "unrelated to" and "related to." *See W. Va. Health Care Cost Rev. Auth. v. Boone Mem'l Hosp.*, 196 W.

added). The Act does not define the phrasal verb "related to," so this Court must give the words "their common, ordinary, and accepted meaning." Syl. Pt. 2, in part, *CSX Hotels, Inc. v. City of White Sulphur Springs*, 217 W. Va. 238, 617 S.E.2d 785 (2005) (quoting Syl., *Miners in Gen. Grp. v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941)). The "ordinary meaning of 'relate to' . . . [is] '**deliberately expansive**' language," *D.C. v. Greater Washington Bd. of Trade*, 506 U.S. 125, 129 (1992) (emphasis added), which legislatures "characteristically employ[] . . . to reach **any subject** that has 'a connection with, or reference to,' the topics the statute enumerates," *cf. Coventry Health Care of Mo., Inc. v. Nevils*, 581 U.S. 87, 96 (2017) (emphasis added) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)).[5] "[R]elated to" is a "broad[] term[]" that is "not necessarily tied to the concept of a causal connection." *Teets v. Miller*, 237 W. Va. 473, 482 n.16, 788 S.E.2d 1, 10 n.16 (2016) (quoting *Smith v. Lucent Techs., Inc.*, No. CIV.A. 02-0481, 2004 WL 515769, at *8 (E.D. La. Mar. 16, 2004)). In construing a different statute, our Supreme Court of

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Va. 326, 338, 472 S.E.2d 411, 423 (1996) ("It is a fundamental principle of statutory construction that the meaning of a word cannot be determined in isolation, but it must be drawn from the context in which it is used." (citing *Randolph Cnty. Bd. of Educ. v. Adams*, 196 W. Va. 9, 16, 467 S.E.2d 150, 157 (1995); *Kittle v. Icard*, 185 W. Va. 126, 133, 405 S.E.2d 456, 463 (1991))). It also must be read in light of "the structure and purpose of the Act in which it" appears. *Id.* (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). To read the phrase "as a result of" to mandate a **direct** causal link would produce a result demonstrably at odds with the Legislature's expressed intent and its repeated use of significantly broader language in the operative parts of the statute. *See* Syl. Pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975) ("The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature."). As this Court recently noted, the "COVID-19 Act embodies a **very broad** immunity provision." *Bond*, 2024 WL 2746084, at *4 (emphasis added). To avoid the "absurdity" inherent in Petitioner's reading, this Court should construe the phrase "as a result of" to carry the same broad and expansive meaning as the plain language of the phrases "unrelated to" and "related to" require. Syl., *Click v. Click*, 98 W. Va. 419, 127 S.E. 194 (1925). In the alternative, should the Court find West Virginia Code § 55-19-3(10) to require proof of some causal link, then it should construe the phrase to require only proof that COVID-19 or the COVID-19 emergency "played any part, no matter how small, in bringing about" the delayed, postponed, or otherwise adversely affected care. *Cf. McClow v. Warrior & Gulf Nav. Co.*, 842 F.2d 1250, 1251 (11th Cir. 1988).

[5] Other reputable sources similarly interpret the phrasal verb "relate to" as meaning "to be connected with" or "to be about (someone or something)." *Relate To*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/relate%20to (last accessed July 10, 2024).

Appeals has found "the term 'related to'" to mean: "**to be connected to** or **associated with**." Syl. Pt. 5, in part, *W. Va. Consol. Pub. Ret. Bd. v. Weaver*, 222 W. Va. 668, 671 S.E.2d 673 (2008) (emphasis added). Such was the Legislature's design when it adopted the Act. *Cf.* Syl. Pt. 2, in part, *Stephen L.H. v. Sherry L.H.*, 195 W. Va. 384, 465 S.E.2d 841 (1995) ("When the Legislature enacts laws, it is presumed to be aware of all pertinent judgments rendered by the judicial branch [and] . . . presumably knows and adopts the cluster of ideas attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed."), *superseded by statute on other grounds as recognized in Rollins v. Ames*, No. 20-0149, 2022 WL 2093415, at *1 (W. Va. June 10, 2022) (memorandum decision).

I. The Circuit Court Did Not Err by Entering Judgment in Respondents' Favor Because Nothing Entitled Petitioner to Discovery Over the "Impact" the COVID-19 Emergency Had on Mr. Price's Care.

In her first assignment of error, Petitioner complains that the Circuit Court prematurely "ruled on the 'impacted care' question" because she had no opportunity to conduct discovery on that issue. (Pet'r's Br. 10.) She suggests the Circuit Court "must be reversed" as it "could not and should not have ruled on the 'impacted care' question in these circumstances." (*Id.*) For at least two independent reasons, she is wrong.

To overcome the "very broad immunity" afforded under the Act, *Bond*, 2024 WL 2746084, at *4, West Virginia law required Petitioner "to plead sufficient facts" to "defeat" Respondent Bailey's entitlement to the Act's "qualified immunity defense," *cf. W. Va. State Police v. J.H. ex rel. L.D.*, 244 W. Va. 720, 730, 856 S.E.2d 679, 689 (2021) (quoting *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012)). Here, the face of Petitioner's Complaint affirmatively established how the COVID-19 emergency "impacted" the "care" Respondents provided to Mr. Price—not *vice*

versa.[6] (*See* J.A. 8–9, ¶¶ 13–23 [Compl.].) Therefore, Petitioner demonstrated no need for, or entitlement to, discovery as a matter of law.

In the alternative, Petitioner failed to carry her burden under Rule 56(f) of the West Virginia Rules of Civil Procedure to establish any need for discovery concerning the impacted nature of Mr. Price's care. Respondent RGH came forward with competent record evidence,[7] upon which Respondent Bailey also relied, that proved the delay in providing care to Mr. Price "**related to** COVID-19 or the COVID-19 emergency." W. VA. CODE § 55-19-3(10) (emphasis added). Even before this Court, Petitioner utterly fails to "articulate some plausible basis for [her] belief that specified 'discoverable' material facts likely exist[ed]," or to demonstrate how those "material facts [would], if obtained, suffice to engender an issue both genuine and material." Syl. Pt. 1, in part, *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 474 S.E.2d 872 (1996). For that reason, too, the judgment of the Circuit Court must be affirmed.

A. Petitioner Failed to Satisfy the Heighted Pleading Standard Required Under Rule 12(b)(6) and Rule 12(c) to Overcome Respondent Bailey's Entitlement to Immunity.

In "civil actions where immunities are implicated," it has long been established that "the trial court must insist on heightened pleading by the plaintiff." *W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 660, 783 S.E.2d 75, 81 (2015) (quoting *Hutchison v. City of Huntington*, 198 W. Va. 139, 149, 479 S.E.2d 649, 659 (1996)). The rationale for this heightened pleading rule is sound:

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[6] Although the Circuit Court did not reach this issue (*see* J.A. 243–247 [Order Dismissing Case]), that is of no moment, particularly because Respondent Bailey pressed the point below (*see* J.A. 277–278 [Hr'g Tr.]). "This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965).

[7] *See* J.A. 77–79 [Sealed Simmons Aff.]; J.A. 227–229 [Sealed Simmons Suppl. Aff.]; J.A. 230–233 [Sealed Hall Aff.]; J.A. 234–241 [Sealed Medical Records].

> The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.

Syl. Pt. 1, *Hutchison*, 198 W. Va. 139, 479 S.E.2d 649. As this Court recently noted, the "COVID-19 Act embodies a very broad immunity provision." *Bond*, 2024 WL 2746084, at *4. To overcome Respondent Bailey's entitlement to such immunity, West Virginia law demanded Petitioner "plead sufficient facts" not only to establish Respondent Bailey's liability, but also to "defeat" his right to "qualified immunity" under the Act. *Cf. J.H.*, 244 W. Va. at 730, 856 S.E.2d at 689 (quoting *Backe*, 691 F.3d at 648).

The allegations of the Complaint established—rather than rebutted—the "impacted" nature of the care Respondent Bailey provided to Mr. Price. The most notable aspect of the Complaint is what it did not allege. Even viewed in the light most favorable to Petitioner, the Complaint does not fault Respondent Bailey for incorrectly diagnosing Mr. Price or for ordering the wrong medications to treat his condition. (*See generally* J.A. 6–13.) As the Complaint alleges, Respondent Bailey correctly diagnosed Mr. Price as suffering from "an ST elevated myocardial infarction" and timely ordered Respondent RGH's nursing staff to administer the right medications ("including heparin, aspirin and Brilinta") to treat his condition. (J.A. 8, ¶ 20.) Instead, the medical negligence claim against Respondent Bailey arises from the legally false premise[8] that he owed a duty to ensure that Respondent RGH's "nursing and ancillary staff" executed his orders without "**delay**[]." (J.A. 9, ¶ 23 (emphasis added); *see also* J.A. 8–9, ¶¶ 17–22.)

[8] The duty of care Respondent Bailey owed to Mr. Price only included the nondelegable obligation "to properly prescribe [Mr. Price's] mediation." *Est. of Johnson ex rel. Johnson v. Badger Acquisition of Tampa LLC*, 983 So. 2d 1175, 1188 (Fla. Dist. Ct. App. 2008). The "nondelegable duty" to "properly deliver said medication" fell "upon the nursing staff" of Respondent RGH—not Respondent Bailey. *Id.*

In that respect, the face of the Complaint unquestionably implicated the "very broad immunity provision" found in the Act. *Bond*, 2024 WL 2746084, at *4. Like the common-law doctrine of qualified immunity,[9] that statutory immunity "is an immunity **from suit** rather than a mere defense to liability." *J.H.*, 244 W. Va. at 730, 856 S.E.2d at 689 (emphasis added) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)); *see also Bond*, 2024 WL 2746084, at *4–6.

Here, the face of the Complaint established both conditions sufficient to bring Respondent Bailey—a "health care provider" within the meaning of the Act, *see* W. VA. CODE § 55-19-3(9)—under the umbrella of West Virginia Code § 55-19-3(10)'s grant of immunity. First, the claim pled against Respondent Bailey involved "care" he "offered" to Mr. Price that was "delayed." W. VA. CODE § 55-19-3(10). Second, the "delayed" care "related to" the "the COVID-19 emergency," *id.*, because there was a temporal "connect[ion]" or "associat[ion]" between the care that was delayed and the COVID-19 emergency that had been declared,[10] Syl. Pt. 5, in part, *Weaver*, 222 W. Va. 668, 671 S.E.2d 673. Contrary to Petitioner's misreading of the Act (*see* Pet'r's Br. 17–18), no part of West Virginia Code § 55-19-3(10) requires a causal link between the "delayed"

[9] By intentional legislative design, the immunity afforded under the Act is conceptually broader than even the immunity provided to government actors under the doctrine of qualified immunity. The latter immunity shields government officials "from personal liability for official acts" so long as their "conduct did not violate clearly established laws of which a reasonable official would have known" and the complained-of conduct was not "fraudulent, malicious, or otherwise oppressive." Syl., in part, *State v. Chase Sec., Inc.*, 188 W. Va. 356, 424 S.E.2d 591 (1992). In contrast, only "care" entirely "unrelated to COVID-19 or the COVID-19 emergency," W. VA. CODE § 55-19-3(10), and "intentional conduct with actual malice," *id.* § 55-19-7, fall outside the scope of the Act's sweeping immunity.

[10] It is settled that "Rule 12(b)(6) permits courts to consider matters that are susceptible to judicial notice" without converting the motion to one for summary judgment under Rule 56. *Forshey v. Jackson*, 222 W. Va. 743, 747–48, 671 S.E.2d 748, 752–53 (2008) (quoting Franklin D. Cleckley et al., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(6)[2], at 348 (3d ed. 2008)). This Court may appropriately take judicial notice of the fact that the "COVID-19 emergency," which the Governor declared "by proclamation on March 16, 2020," W. VA. CODE § 55-19-3(4), remained in effect until January 1, 2023, *see* W. VA. EXEC. DEP'T, *Proclamation by the Governor* (Nov. 12, 2022), *available at* https://governor.wv.gov/Documents/2022%20Proclamations/11%20NOV%202022/111222-Proclamation-Terminating-SOE.pdf (last accessed July 10, 2024).

care and the COVID-19 emergency. *See Teets*, 237 W. Va. at 482 n.16, 788 S.E.2d at 10 n.16 ("noting that the terms 'related to' and 'in connection with' are broader terms 'not necessarily tied to the concept of a causal connection'" (quoting *Smith*, 2004 WL 515769, at *8)). Had the Legislature intended that result, then it would have spoken expressly in terms of causation instead of using "the expansive phrase 'relate[d] to,'" which is known "to reach any subject that has 'a connection with, or reference to,' the topics the statute enumerates." *Cf. Coventry*, 581 U.S. at 96 (quoting *Morales*, 504 U.S. at 384).

Therefore, the Circuit Court committed no error when it faithfully applied the Act and entered judgment in Respondent Bailey's favor. Such a disposition was exactly what the Legislature intended in these circumstances. *See* W. VA. CODE § 55-19-2(a)(11) (recognizing how even the "threat of liability" posed an obstacle to providing "medical care to impacted West Virginians"); *id.* § 55-19-2(b)(1) (stating purposes of the Act included eliminating "the liability" of all "health care providers" and precluding "all suits and claims" against them). Only medical malpractice "claims" that "are **unrelated to**" the "COVID-19 emergency" fall outside the scope of the Act's sweeping immunity. *Id.* § 55-19-3(10) (emphasis added). The face of Petitioner's Complaint proved such a relationship.

Even putting the issue of the legislatively mandated stay on discovery aside,[11] to secure an entitlement to propound discovery, it was incumbent upon Petitioner to plead sufficient factual allegations to overcome that immunity. *See J.H.*, 244 W. Va. at 738–40, 856 S.E.2d at 697–99 (holding circuit court "erred in failing to determine that the WVSP was entitled to qualified immunity" and in allowing discovery where the plaintiff "failed to sufficiently plead allegations,

[11] Respondent Bailey addresses the Circuit Court's interpretation of the Act, and the purported constitutional issues Petitioner perfunctorily raises, in Argument I.B and II, *infra*, respectively.

that, if taken as true, would demonstrate" an exception to such immunity). Only after Petitioner pleaded "specific facts" to "defeat" Respondent Bailey's statutory "immunity" would she be entitled to "narrowly tailored" discovery "needed [for the Circuit Court] to rule on the immunity claim." *Id.* at 730, 856 S.E.2d at 689 (quoting *Backe*, 691 F.3d at 648). Petitioner failed to plead such facts here. As such, she had no right to conduct discovery, and the judgment of the Circuit Court must be affirmed.

B. Alternatively, Petitioner Failed to Demonstrate Any Legitimate Need for Discovery Over the "Impact" COVID-19 Had on Mr. Price's Care, as Rule 56(f) Required of Her.

The other flaw fatal to Petitioner's first assignment of error is her assumption that West Virginia law gave her the right to conduct discovery *carte blanche*. (*See* Pet'r's Br. 9–11.) Of course, a party has no absolute right to conduct discovery before, *see* W. VA. R. CIV. P. 56(b), or in opposition to, *see* Syl. Pt. 1, *Powderidge*, 196 W. Va. 692, 474 S.E.2d 872, a motion for summary judgment.[12] Each proposition rings all the more true where statutory immunities are implicated, for immunity delayed is immunity denied. *Cf. J.H.*, 244 W. Va. at 730–31, 856 S.E.2d at 689–90 (holding "deferring a ruling on qualified immunity acts as an effective denial of such protections").

Throughout Petitioner's Opening Brief, she relies upon general principles about the "overarching purpose of discovery," and general rules about how "summary judgment before discovery has been completed must be viewed as precipitous." (Pet'r's Br. 9–13 (citations omitted).) She fails to recognize that cases involving questions of "immunity are exceptions" to "general rule[s]." *Marque Motor Coach, LLC v. State of Nev. Dep't of Tax'n*, No.

[12] As discussed in the Statement of the Case, *supra*, the Circuit Court considered materials extraneous to the Complaint, thus converting Respondents' motions into those for summary judgment.

218CV00522GMNPAL, 2018 WL 4355220, at *1 (D. Nev. July 13, 2018).[13] In cases involving questions of statutory immunity, such as this one, the Supreme Court of Appeals has affirmatively prevented circuit courts from allowing discovery at all because "immunity" is not merely a defense, but "a bar to suit." *E.g.*, *State ex rel. Town of Pratt v. Stucky*, 229 W. Va. 700, 706–07, 735 S.E.2d 575, 581–82 (2012) (per curiam) (granting writ of prohibition and directing the circuit court to dismiss the complaint, even though "there had been no discovery conducted in the case," because "immunity" served "as a bar to suit"). The cases upon which Petitioner relies—*Evans*, *Vickers*, *Williams*, and *Board of Education of Ohio County*—are inapposite because none of them involved issues of immunity, which is squarely the issue presented here.

"The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case"—including "**the burden of discovery**." *Yoak*, 223 W. Va. at 59, 672 S.E.2d at 195 (emphasis added) (first quoting *Hutchison*, 198 W. Va. at 148, 479 S.E.2d at 658, then citing *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1185 (10th Cir. 2001)). One "of the most salient benefits of" statutory immunity, like "qualified immunity," is "protection from pretrial discovery, which is costly, time-consuming, and intrusive." *Cf. J.H.*, 244 W. Va. at 729, 856 S.E.2d at 688 (quoting *Backe*, 691 F.3d at 648). In the Act, the Legislature recognized the necessity of protecting health care providers not merely from liability itself, but also from burdensome and expensive discovery. It saw the "obstacle" even the "**threat** of liability pose[d]" to efforts "to continue to provide medical care to impacted West Virginians." W. VA. CODE § 55-19-2(a)(11) (emphasis added). To "**[e]liminate the liability**" of all "health care

[13] Indeed, "[t]he most notable and well-established exception to the general rule against staying a case exists when the party requesting stay has asserted absolute or qualified immunity through a dispositive motion. When this occurs, a stay of discovery is appropriate pending a ruling on the immunity issue." *Thompson v. Orunsolu*, No. 17-3203-HLT-KGG, 2018 WL 6602228, at *1 (D. Kan. Dec. 17, 2018) (cleaned up).

providers" and "health care facilities" and "to **preclude all suits**" related to the COVID-19 crisis are among the express purposes of the Act. *Id.* § 55-19-2(b)(1) (emphasis added). Thus, just as in cases where qualified immunity is involved, "rulings" on a health care provider's right to "immunity" should "be made as early in the proceedings as possible." *W. Va. Reg'l Jail & Corr. Facility Auth. v. Est. of Grove*, 244 W. Va. 273, 282, 852 S.E.2d 773, 782 (2020).

Here, the Circuit Court did just that. It recognized the question of Respondents' immunity merited a prompt answer and scheduled an evidentiary hearing to resolve that question "without further delay." (J.A. 72 [Order Staying Further Proceedings Pending Hr'g].) The stated purpose of that hearing was to decide if Respondents were immune from suit. (J.A. 72.) Though Petitioner tries to feign surprise now,[14] counsel for Petitioner certainly knew that each of Respondents' motions had been "converted to a motion for summary judgment." (J.A. 181, ¶ 6 [Hrko Aff.].) Why else would Petitioner have filed an "affidavit on behalf of Plaintiff pursuant to Rule 56(f) of

[14] In a dishonest attempt to manufacture reversible error, Petitioner falsely claims she "received neither the required 'notice of the changed status' [of Respondents' motions] nor any 'opportunity to present rebuttal evidence." (Pet'r's Br. 13 (quoting *Kopelman & Assocs., L.C. v. Collins*, 196 W. Va. 489, 494, 473 S.E.2d 910, 915 (1996)).) Of course, nothing could be further from the truth. The fact her counsel filed a Rule 56(f) affidavit (*see* J.A. 180–181) weeks before the hearing conclusively proves that Petitioner had been notified of the Circuit Court's decision to convert Respondents' motions. Similarly, counsel for Petitioner subjectively recognized the stated purpose of the hearing, including his right to subpoena witnesses and present proof to controvert the evidence Respondents previously introduced. (J.A. 302–304 [Hr'g Tr.].)

In addition, there is substantial record evidence to support the Circuit Court's finding that Petitioner's counsel "acknowledge[d] that the matter had been set for an evidentiary hearing, during which [Petitioner] could have subpoenaed witnesses to challenge the assertions contained in the affidavits and to challenge assertions of impacted care." (J.A. 246.) To cast doubt on that finding, Petitioner must prove the finding to be "clearly erroneous." Syl. Pt. 2, in part, *Walker v. W. Va. Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997); *cf.* Syl. Pt. 1, in part, *State v. Grimes*, 226 W. Va. 411, 701 S.E.2d 449 (2009) ("[W]here the circuit court conducts an evidentiary hearing upon the motion, this Court's 'clearly erroneous' standard of review is invoked concerning the circuit court's findings of fact."). "A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Syl. Pt. 1, in part, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). Petitioner has failed to acknowledge—much less carry—that burden here.

the West Virginia Rules of Civil Procedure" weeks before the hearing (J.A. 180, ¶¶ 2–3), or have offered medical records (*see* J.A. 280–281) into evidence during the hearing?

Notwithstanding Petitioner's misgivings, nothing in the West Virginia Rules of Civil Procedure "required" the Circuit Court "to afford [her] the opportunity to develop and present her own relevant evidence." (Pet'r's Br. 13.) Suing Respondents did not entitle Petitioner to embark on an unwarranted fishing expedition. Instead, Rule 56(f) required Petitioner to:

> **(1)** articulate **some plausible basis** for [her] belief that specified "discoverable" material facts likely exist which have not yet become accessible to [her]; **(2)** demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; **(3)** demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and **(4)** demonstrate good cause for failure to have conducted the discovery earlier.

Syl. Pt. 1, in part, *Powderidge*, 196 W. Va. 692, 474 S.E.2d 872 (emphasis added). In light of the stay on discovery, Petitioner could be forgiven for failing "to have conducted the discovery earlier." *Id.* Yet, the same cannot be said for Petitioner's failure to satisfy the remaining requisites of *Powderidge*.

To forestall the entry of judgment against her, Rule 56(f) obligated Petitioner "to identify **with reasonable specificity**" the "other facts to be discovered," and to offer some **plausible** explanation for "how the facts might show . . . a genuine issue of material fact that would defeat summary judgment." *Crum v. Equity Inns, Inc.*, 224 W. Va. 246, 255, 685 S.E.2d 219, 228 (2009) (per curiam). The affidavit Petitioner's counsel proffered to the Circuit Court proved inadequate to either task. Background aside, that affidavit read:

> 7. To determine whether, in fact, the care rendered by the Defendants was "impacted care" within the meaning of the COVID-19 Act, the Plaintiff requires the opportunity to conduct discovery on the attendant issues.
>
> 8. To date and given the pending motions and orders, no discovery has been allowed to proceed.

> 9. Specifically, the Plaintiff would request the opportunity to serve written discovery requests on the Defendants and to conduct depositions of Heather D. Simmons, Defendant Bailey, and other persons responsible for the care of Ellis Wayne Price on December 10, 2021.
>
> 10. The foregoing requested discovery is required to fully address the factual assertions made by the Defendants in their motion seeking dismissal of this action and to determine whether the COVID-19 Act applies to nullify any of the claims asserted.

(J.A. 181, ¶¶ 7–10.)

At no point did Petitioner identify "the attendant issues" for which she required discovery, nor did she explain how she would have used that discovery to controvert the competent record evidence upon which the Circuit Court relied to find the COVID-19 emergency impacted Mr. Price's care.[15] Instead, all that Petitioner's counsel offered were "very loose, generalized assertions" that the Circuit Court would be acting "prematurely" because Petitioner had not been afforded the opportunity to conduct discovery. *Crum*, 224 W. Va. at 255, 685 S.E.2d at 228. But "merely assert[ing] that additional discovery is required to demonstrate a factual dispute or that evidence supporting a party's allegation is in the opposing party's hands . . . is insufficient." *Gutierrez v. Cobos*, 841 F.3d 895, 908 (10th Cir. 2016) (quoting *Lewis v. City of Ft. Collins*, 903 F.2d 752, 754 (10th Cir. 1990)).

This Court's recent decision in *Nichols v. Maroney Williams Weaver & Pancake PLLC*, 895 S.E.2d 492 (W. Va. Ct. App. 2023), illustrates that point. There, this Court confronted an affidavit, "the relevant portions of" which stated: "I anticipate conducting additional discovery in [this] Civil Action, including depositions and the disclosure of experts, to be utilized in furtherance of Mr. Nichols's case. . . . I anticipate that such additional discovery will support Mr. Nichols's

[15] Respondent Bailey discusses this uncontroverted evidence and how the care he provided to Mr. Price was "related to COVID-19 or the COVID-19 emergency," W. VA. CODE § 55-19-3(10), in Argument III, *infra*.

case." *Id.* at 504 (alteration in original). This Court found that affidavit to be "woefully inadequate to explain what additional discovery needed to be done in connection with the" dispositive issue. *Id.* As Judge Scarr noted, "the evidence to establish the need for additional discovery cannot be '**conjectural**' or '**speculative**.'" *Id.* at 505 (emphasis added) (quoting *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 61 n.14, 459 S.E.2d 329, 339 n.14 (1995)). The affidavit Petitioner's counsel proffered in this case is no more specific or concrete than the one this Court rejected in *Nichols*.[16]

To the extent the record below was "incomplete" or "one-sided" (Pet'r's Br. 14), only Petitioner—not the Circuit Court—is to blame.[17] As previously discussed, counsel for Petitioner understood the Circuit Court had scheduled an evidentiary hearing to decide if Respondents were immune from suit. (J.A. 302–304 [Hr'g Tr.]; *see also* J.A. 181, ¶ 6 [Hrko Aff.].) He subjectively recognized the stated purpose of the hearing, including his right to subpoena witnesses and present proof to controvert the evidence Respondents had marshalled. (J.A. 302–304.) The actual reason why Petitioner failed to subpoena witnesses had nothing to do with what the Circuit Court did, but everything to do with her counsel's error in judgment:

> THE COURT: Are you telling me that you didn't believe you could call witnesses as part of this hearing?
>
> [PETITIONER'S COUNSEL]: Quite frankly, I believed, **maybe foolishly**, that beyond our affidavits, they were going to call witnesses. . . . And, quite frankly, I mean, I think the honest answer is "Could I have? I probably could have."

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[16] The reality is that Petitioner merely sought discovery for the improper purpose of bolstering her allegations of liability—not to controvert the record evidence that established how the "delayed" care provided to Mr. Price was "related to COVID-19 or the COVID-19 emergency." W. VA. CODE § 55-19-3(10). Months before the evidentiary hearing, Petitioner propounded interrogatories (*see* J.A. 310–317) and requests for production (*see* J.A. 318–326) to Respondent RGH. It is telling that none of that discovery sought information tailored to the dispositive question of whether "the care offered, delayed, or postponed" with respect to Mr. Price was "related to . . . the COVID-19 emergency." W. VA. CODE § 55-19-3(10).

[17] Similarly false is Petitioner's statement that the Circuit Court "ruled on the motions without allowing [her] the opportunity to present rebuttal evidence." (Pet'r's Br. 9–10.) The truth is that Petitioner did introduce rebuttal evidence, in the form of certain medical records, during the hearing. (*See* J.A. 280–281 [Hr'g Tr.].)

(J.A. 303–304 (emphasis added).)

Counsel for Petitioner tries to excuse that failure by feigning an "inability" to "identify potential witnesses or other relevant information" without the benefit of discovery. (Pet'r's Br. 13.) What counsel fails to mention is the mountain of medical records in his possession from which he could have readily identified relevant witnesses. (*See* Suppl. App. 10–994.[18]) Had Petitioner truly sought to controvert Respondent RGH's evidence, then she could have subpoenaed and cross-examined the affiants who offered sworn testimony in support of the motions. (*See* J.A. 77–79 [Sealed Simmons Aff.]; J.A. 227–229 [Sealed Simmons Suppl. Aff.]; J.A. 230–233 [Sealed Hall Aff.].) To state the obvious, nothing prevented Petitioner from ascertaining the identities of those witnesses or securing their attendance at the evidentiary hearing.

The fact the Circuit Court felt obligated—rightly or wrongly—by the Act to stay all discovery does not excuse Petitioner's failures to comply with Rule 56(f) or to elicit relevant proof during the evidentiary hearing on Respondents' motions. Even if the Circuit Court misconstrued the scope of the stay the Legislature designed in West Virginia Code § 55-19-3(10), as Petitioner tries to show here (*see* Pet'r's Br. 11, 14–15), the Circuit Court's error would still be harmless because it did not affect the outcome of the case. *See State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 215, 470 S.E.2d 162, 169 (1996) ("Even if error exists, we will not overturn a ruling or decision if we find the error was harmless."). "The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine." Syl. Pt. 1, in part, *Hutchison*, 198 W. Va. 139, 479 S.E.2d 649. Both Rule 56(f) and the Circuit Court's decision to hold an evidentiary hearing gave Petitioner the chance to demonstrate "a bona fide dispute as to

[18] Respondents' Joint Motion for Leave to Supplement the Record on Appeal and to File Supplemental Appendix was filed on July 11, 2024. Supplemental Appendix Volumes I–IV were filed as Exhibits A–D of the Joint Motion.

the foundational or historical facts that underlie[d] the immunity determination," but she failed to avail herself of either opportunity. *Id.* Therefore, Petitioner's first assignment of error is without merit.

Should this Court find it necessary to reach the statutory construction issue Petitioner raises, nothing Petitioner has said calls into question the Circuit Court's interpretation of the Act or its imposition of the limited stay our Legislature designed to accomplish the Act's substantive goals. First, the so-called "legislative history" Petitioner cites (*see* Pet'r's Br. 11) is irrelevant as a matter of law. "Judicial interpretation of a statute is warranted only if the statute is ambiguous . . . ." Syl. Pt. 1, in part, *Ohio Cnty. Comm'n v. Manchin*, 171 W. Va. 552, 301 S.E.2d 183 (1983); *see also Bond*, 2024 WL 2746084, at *6 (finding "the plain language of West Virginia Code §§ 55-19-3 and -4" to be "clear and unambiguous"). That West Virginia Code § 55-19-3(10) required the Circuit Court to stay all discovery is unambiguous. The plain language of the Act says: "If the issue of impacted care is raised . . . , the circuit court ***shall***, upon motion by the defendant, stay the proceedings, ***including any discovery proceedings*** . . . ." W. VA. CODE § 55-19-3(10) (emphasis added). Had the Legislature intended to allow discovery on the issue of impacted care, then it would have said that, but it did not. "Just as courts are not to eliminate through judicial interpretation words that were purposely included, [courts] are obliged not to add to statutes something the Legislature purposely omitted." *Banker v. Banker*, 196 W. Va. 535, 547, 474 S.E.2d 465, 477 (1996) (collecting cases).

Even if the Act were ambiguous, the "legislative history" to which Petitioner clings does not resolve the ambiguity. The only legislative history cited is a floor debate colloquy between Senators Lindsay and Trump. (Pet'r's Br. 11.) Petitioner distorts that colloquy through cherry-picking certain statements. (*Id.*; *see also* Suppl. App. 1–9 [Tr.].) However, "ambiguous legislative

history" cannot be used—as Petitioner tries here—"to muddy clear statutory language." *Azar v. Allina Health Servs.*, 587 U.S. 566, 579–80 (2019) (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011)). As the Supreme Court of Appeals has cautioned, "the understanding of one or a few members of the Legislature is not necessarily determinative of legislative intent," because there is no guarantee "that those who supported [a legislator's] proposal shared his view of its compass." *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 489, 647 S.E.2d 920, 925 (2007) (alteration in original) (first quoting *California Tchrs. Assn. v. San Diego Cmty. Coll. Dist.*, 621 P.2d 856 (Cal. 1981), then quoting *In re Marriage of Bouquet*, 546 P.2d 1371, 1374–75 (Cal. 1976)). What our Legislature "ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators." *N.L.R.B. v. SW Gen., Inc.*, 580 U.S. 288, 306 (2017) (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)). That is "why floor statements by individual legislators rank among the least illuminating forms of legislative history." *Id.* at 307 (citing *Milner*, 562 U.S. at 572).

The colloquy is even less relevant because neither Senator Lindsay nor Senator Trump were sponsors or authors of the Act. The Act had two sponsors: President Blair and Senator Baldwin. The architect of section 55-19-3(10)'s language was Delegate Capito—not Senators Lindsay or Trump. H. JOURNAL, 85TH LEGIS., FIRST REG. SESS. 495–97 (W. Va. 2021). In fact, Senator Lindsay—who is well known for representing plaintiffs in medical malpractice actions such as this one—was an avowed ***opponent*** of the Act. He voted ***against*** the Act ***twice***, and both of the amendments he attempted to offer were overwhelmingly ***rejected***. S. JOURNAL, 85TH LEGIS., FIRST REG. SESS. 14–16 (W. Va. Feb. 19, 2021); S. JOURNAL, 85TH LEGIS., FIRST REG. SESS. 6–7 (W. Va. Mar. 11, 2021). Thus, Senator Lindsay's questioning hardly reflected the intent of the twenty-six senators who voted in favor of the Act, or those in the House who crafted its language.

Second, the three nonbinding cases upon which Petitioner relies (*see* Pet'r's Br. 14–15) cast no doubt on the Circuit Court's faithful application of the Act. Start with *Blake v. Camden-Clark Memorial Hospital Corp.*, No. CC-54-2022-C-152 (W. Va. Cir. Ct. Jan. 1, 2023), in which the Circuit Court of Wood County allowed the plaintiff "to conduct limited discovery on the issue of 'impacted care.'" (J.A. 327, ¶ 2.) That decision is easily brushed aside because it contained no reasoning whatsoever. A nonbinding decision is only entitled to the weight its reasoning demands, so a decision devoid of the slightest hint of reasoning carries no weight. *See Griffin v. Fairmont Coal Co.*, 59 W. Va. 480, 53 S.E. 24, 31 (1905) (Cox, J., concurring) ("[D]ecisions . . . which are not said to be binding authority upon this court . . . should govern us so far, and only so far, as they appear to us to be founded upon correct principles."). The fact Petitioner relies on such trivial "authority" speaks volumes about the lack of support for Petitioner's reading of the Act.

Petitioner's reliance upon *Lambert v. Eldercare of Jackson County, LLC*, No. CC-18-2021-C-32, 2022 WL 21781398 (W. Va. Cir. Ct. Apr. 11, 2022), *aff'd in part, rev'd in part*, No. 22-0362, 2024 WL 2966171 (W. Va. June 12, 2024), similarly undermines her position. Although the Circuit Court of Jackson County permitted the parties in *Lambert* to conduct discovery, *Lambert* is patently distinguishable because, unlike the case below, *Lambert* did not involve immunity predicated upon a finding of "impacted care." The stay our Legislature designed in West Virginia Code § 55-19-3(10) only comes into play when "the issue of impacted care is raised by a defendant." W. VA. CODE § 55-19-3(10). Therefore, the course charted in *Lambert* is entirely unremarkable to the disposition of this appeal because the Circuit Court of Jackson County had no occasion in *Lambert* to address the part of the Act about which Petitioner complains here.

The same is true of *Land v. Whitley*, 898 S.E.2d 17 (N.C. Ct. App.), *cert. granted*, 900 S.E.2d 662 (N.C. 2024). *Land* is readily distinguishable because North Carolina's Emergency or

Disaster Treatment Protection Act, N.C. GEN. STAT. § 90-21.130 to .134 (the "**EDTPA**"), is markedly different from West Virginia's COVID-19 Jobs Protection Act in both its structure and language. The EDTPA shields a health care provider where he or she is "providing health care services in good faith" and his or her "provision" of such "services is impacted, directly or indirectly" by his or her "decisions or activities in response to or as a result of the COVID-19 pandemic." N.C. GEN. STAT. § 90-21.133(a)(2)–(3) (emphasis added). In contrast, the COVID-19 Jobs Protection Act's umbrella of "broad immunity" leaves no daylight. It immunizes a provider whenever "the care offered, delayed, postponed, or otherwise adversely affected . . . from a health care provider was **related to** COVID-19 or the COVID-19 emergency." W. VA. CODE § 55-19-3(10) (emphasis added). Similarly, the stay component of the Act finds no counterpart in the EDTPA—a fact that underscores the breadth of the Act's immunity. *Compare* N.C. GEN. STAT. § 90-21.133, *with* W. VA. CODE § 55-19-3(10). *Land*'s construction of the EDTPA cannot inform this Court's interpretation of the Act because the EDTPA does not reach nearly as far as the "broad immunity" provided in West Virginia Code § 55-19-3(10). Again, the Circuit Court correctly applied the Act, and Petitioner's first assignment of error is without merit.

II. The Circuit Court's Faithful Application of the Act Did Not Interfere With Petitioner's Right to Procedural Due Process or Violate the Separation-of-Powers Doctrine.

Petitioner complains, in a perfunctory manner, that her inability to propound discovery deprived her of "due process" in that "absolutely no rebuttal evidence [could] be gathered to challenge an outcome-determinative issue." (Pet'r's Br. 15.) In a similarly abbreviated fashion, Petitioner says the stay contemplated under the Act violates the separation-of-powers doctrine because it somehow "conflicts with West Virginia Rules of Civil Procedure 26 through 37." (*Id.* at 16.) But Petitioner merely pays lip service to both issues—devoting a meager ***four sentences***

to the first point (*see id.* at 15–16), and just ***six sentences*** (most of them legal boilerplate) to the second point (*see id.* at 16–17).

These "skeletal 'argument[s]'" are "really nothing more" than naked "assertion[s]" which are insufficient to "preserve" either issue for appeal. *State ex rel. Hatcher v. McBride*, 221 W. Va. 760, 766, 656 S.E.2d 789, 795 (2007) (per curiam) (quoting *State Dep't of Health & Hum. Res. v. Robert Morris N.*, 195 W. Va. 759, 765, 466 S.E.2d 827, 833 (1995)). It is Petitioner who "must carry the burden of showing error in the judgment of which [s]he complains." Syl. Pt. 5, in part, *Morgan v. Price*, 151 W. Va. 158, 150 S.E.2d 897 (1966). That error "will not be presumed," as "all presumptions" are drawn "in favor of the correctness of the judgment" below. *Id.* Here, Petitioner's entire second assignment of error "amounts to nothing more than general and bare allegations without any analysis" or meaningful explanation. *Hatcher*, 221 W. Va. at 766, 656 S.E.2d at 795. Her "assertions lack reasonable specificity and particularity" and are utterly conclusory. *Id.* Therefore, this Court should find Petitioner's second "assignment[] of error" has "been waived." *Cooper v. City of Charleston*, 218 W. Va. 279, 290, 624 S.E.2d 716, 727 (2005) (per curiam).

In the alternative, the second assignment of error, even if adequately preserved, is meritless. First, the *privilege* of propounding discovery is not a *right* that has been recognized as fundamental to the guarantees of procedural due process. "It is well settled that parties to judicial or quasi-judicial proceedings are not entitled to pre-trial discovery as a matter of constitutional right." *Cf. N.L.R.B. v. Interboro Contractors, Inc.*, 432 F.2d 854, 857–58 (2d Cir. 1970) (collecting cases); *accord, e.g.*, *City of Hampton v. Williamson*, 887 S.E.2d 555, 558–59 (Va. 2023) (holding "there is no common law right to discovery," nor "is there a general constitutional right to discovery" (citations omitted)). Second, the Act's stay component is a constitutional exercise of the

Legislature's policymaking powers. Petitioner does not even attempt to carry her burden of proving ***why*** the Act's stay component is "**substantially contrary** to provisions in" our Rules of Civil Procedure. *Teter v. Old Colony Co.*, 190 W. Va. 711, 726, 441 S.E.2d 728, 743 (1994) (emphasis added). She stands silent because the brief mandatory stay is clearly compatible with the West Virginia Rules of Civil Procedure. Plus, even if it could be described as procedural, "the stay provision is sufficiently intertwined with substantive provisions [of the Act] so that it is not an unconstitutional violation of separation of powers." *Cruz v. Cooperativa De Seguros Multiples De Puerto Rico, Inc.*, 76 So. 3d 394, 398 (Fla. Dist. Ct. App. 2011). Thus, the judgment of the Circuit Court must be affirmed.

A. The Circuit Court Afforded Petitioner Adequate Notice, the Opportunity to Be Heard, and the Right to Present Evidence.

The Due Process Clause of the West Virginia Constitution, *see* W. VA. CONST. Art. III, § 10, did not guarantee Petitioner the right to propound discovery on the "impacted care" question. Though "standards for procedural due process" depend somewhat "upon the particular circumstances of a given case," Syl. Pt. 2, in part, *North v. W. Va. Bd. of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977), the "essential due process requirements" are "notice and an opportunity to respond," *White v. Barill*, 210 W. Va. 320, 323, 557 S.E.2d 374, 377 (2001) (per curiam) (quoting *Fraley v. Civ. Serv. Comm'n*, 177 W. Va. 729, 732, 356 S.E.2d 483, 486 (1987)). Indeed, notice and the opportunity to be heard are the cornerstones of procedural due process. *E.g.*, *In re J.S.*, 233 W. Va. 394, 402, 758 S.E.2d 747, 755 (2014) ("The fundamental requirement of procedural due process in a civil proceeding is 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" (quoting *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976))).

The Circuit Court afforded Petitioner notice and the opportunity to be heard through conducting an evidentiary hearing. *Cf. Fraley*, 177 W. Va. at 732, 356 S.E.2d at 486 (holding that

a "pretermination hearing" for "a civil service classified employee" does "not need to be elaborate or constitute a full evidentiary hearing" to satisfy procedural due process safeguards). The evidentiary hearing provided Petitioner not only with the opportunity to be heard, but also to present evidence on her own behalf—just as Respondents and Petitioners did. (*See* J.A. 280–281.) Petitioner does not cite even a ***single*** authority—from West Virginia or elsewhere—holding that stays on discovery run afoul of procedural due process protections. (*See generally* Pet'r's Br.) The reason why is because they do not.

To support her claim that the Circuit Court's interpretation and application of the Act interfered with her right to due process, Petitioner characterizes the Circuit Court's decision as creating an absurd result. (*Id.* at 15–16.) Ironically, she relies on cases such as *Conseco Fin. Serv. Corp. v. Myers*—in which the Supreme Court of Appeals held: "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," Syl. Pt. 2, in part, 211 W. Va. 631, 567 S.E.2d 641 (2002) (emphasis added)—to support her point. But, as shown throughout this Brief, the Legislature's "true intent" in passing the Act is crystal clear: to "[e]liminate the liability of the citizens of West Virginia and all persons . . . , 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). The "very heart of the immunity defense" our Legislature created "is that it spares the defendant from . . . the burden of discovery." *Yoak*, 223 W. Va. at 59, 672 S.E.2d at 195 (first quoting *Hutchison*, 198 W. Va. at 148, 479 S.E.2d at 658, then citing *Overdorff*, 268 F.3d at 1185). Here, the Circuit Court's construction adhered to the true intentions of the Legislature: to protect health care providers like Respondent Bailey from the burden of an unwarranted and unnecessary fishing expedition.

Furthermore, Petitioner's argument (*see* Pet'r's Br. 15–16) that a literal reading of the Act produces an absurd result is without merit. As demonstrated *supra*, the Circuit Court provided Petitioner with the bedrock components of procedural due process—notice, an opportunity to be heard, and the right to present evidence. Indeed, the Circuit Court's findings reflect that Petitioner's counsel knew the case had been set for an evidentiary hearing. (J.A. 246.) Even Petitioner acknowledged she could have subpoenaed witnesses to dispute the affidavits on which Respondent Bailey relied to establish that the care at issue was in fact impacted by COVID-19. (J.A. 302–304.) Thus, the Circuit Court afforded Petitioner the chance to "challenge" this "outcome-determinative issue" (Pet'r's Br. 15)—she simply failed to do so. *Cf. Blackrock Cap. Inv. Corp. v. Fish*, 239 W. Va. 89, 104–05, 799 S.E.2d 520, 535–36 (2017) (rejecting argument that circuit court violated a litigant's procedural due process rights by shifting "the briefing deadlines and rul[ing] without the benefit of briefing and evidence" because actions of co-defendant in tendering evidence proved the litigant had the "ability to advise the circuit court of argument or evidence favorable to its case," but simply failed to do so). The first part of Petitioner's second assignment of error is without merit.

B. The Act's Stay Component Is a Constitutional Exercise of the Legislature's Policymaking Powers.

This Court need not reach the constitutionality of the mandatory stay contemplated in West Virginia Code § 55-19-3(10), not only because the issue has been waived, but also because it is unnecessary to resolve in light of Petitioner's failure to proffer an affidavit sufficient under Rule 56(f). Still, in the event the Court decides to reach the issue, the constitutionality of the mandatory stay should be affirmed for two independent reasons.[19]

[19] Significantly, Petitioner takes no issue with the constitutionality of the "broad immunity" the Legislature granted in West Virginia Code § 55-19-3(10). (*See generally* Pet'r's Br.) To the extent the mandatory stay component of the Act treads too close to the constitutional line, it is severable from that

1. The Stay Is Compatible with the West Virginia Rules of Civil Procedure.

Petitioner seems to challenge West Virginia Code § 55-19-3(10)'s mandatory stay component as an unconstitutional invasion of the Supreme Court of Appeals' rulemaking powers. (*See* Pet'r's Br. 16–17.) She neither explains nor grapples with the jurisprudential framework that controls "one of this Court's most weighty responsibilities," the preservation of "the separation of powers." *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 534, 782 S.E.2d 223, 229 (2016) (quoting *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 696 (2015) (Roberts, C.J., dissenting)). Instead, she ignores the controlling framework and offers only *ipse dixit*, claiming the Act, by "prohibiting discovery on the issue of 'impacted care,' . . . clearly conflicts with West Virginia Rules of Civil Procedure 26 through 37." (Pet'r's Br. 16.) She makes no effort to explain ***how*** the mandatory stay is "**substantially contrary** to provisions in" our Rules of Civil Procedure, *Teter*, 190 W. Va. at 726, 441 S.E.2d at 743 (emphasis added)—which, again, is why the issue has been forfeited, *see Hatcher*, 221 W. Va. at 766, 656 S.E.2d at 795. Petitioner cannot overcome the strong "presumption of constitutionality" afforded to the Act by offering nothing more than a skeletal and undeveloped argument. Syl. Pt. 6, in part, *Gibson v. W. Va. Dep't of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991). Unless the Legislature's encroachment "is **free from doubt**, it is the duty of courts to uphold legislative acts as constitutional." Syl., in part, *Booten v. Pinson*, 77 W. Va. 412, 89 S.E. 985 (1915) (emphasis added).

Petitioner's skeletal argument regarding separation-of-powers principles focuses solely on the powers of the judicial branch. (Pet'r's Br. 16–17.) She fails to recognize that separation-of-

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provision, *see* W. VA. CODE § 55-19-8, because the grant of immunity "is complete in itself, capable of being executed independently of the [stay component], and valid in all other aspects," *State ex rel. Loughry v. Tennant*, 229 W. Va. 630, 642, 732 S.E.2d 507, 519 (2012).

powers concerns flow in two directions, which is why our Supreme Court of Appeals has emphasized the importance of caution in determining the constitutionality of a statute:

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

Syl. Pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965). She also ignores the "presumption of constitutionality" that must be afforded to duly enacted "legislation." Syl. Pt. 6, in part, *Gibson*, 185 W. Va. 214, 406 S.E.2d 440.

In order for a legislative enactment to unconstitutionally encroach on the judiciary, the enactment must be "not compatible with those prescribed by the judiciary or with its goals." *State ex rel. Quelch v. Daugherty*, 172 W. Va. 422, 424, 306 S.E.2d 233, 235 (1983). In *Laxton v. Nat'l Grange Mut. Ins. Co.*, 150 W. Va. 598, 148 S.E.2d 725 (1966), for example, the Supreme Court of Appeals invalidated a statute requiring the affirmative defense of cancellation to be pled under oath because it directly and expressly conflicted with Rule 8(c) and Rule 11 of the West Virginia Rules of Civil Procedure, neither of which required pleadings to be made under oath. *Id.* at 600–01, 148 S.E.2d at 727, *overruled on other grounds by Smith v. Mun. Mut. Ins. Co.*, 169 W. Va. 296, 289 S.E.2d 669 (1982). Similarly, in *Hechler v. Casey*, 175 W. Va. 434, 333 S.E.2d 799 (1985), the Court invalidated a statute authorizing an award of costs for the State upon prevailing on a petition for an extraordinary writ because Rule 23(b) of the West Virginia Rules of Appellate Procedure outright precluded "an award of costs for the benefit of the State or an agency or officer thereof." Syl. Pt. 14, *id.*

In this case, Petitioner fails to demonstrate a direct conflict between the Act and the Rules of Civil Procedure like those present in *Laxton* and *Hechler*. At no point has she shown that West Virginia Code § 55-19-3(10) substantially contradicts our Rules of Civil Procedure or is incompatible with them. No part of the Rules of Civil Procedure expressly prohibits stays on discovery proceedings, nor do the Rules recognize an unconditional or unfettered right to discovery, as Rule 56(f) itself demonstrates. Accordingly, the Act's stay provision is a valid exercise of the Legislature's broad powers and is compatible with the Rules of Civil Procedure.

2. The Stay Accomplishes Real Policymaking Objectives That Predominate Over Incidental Procedural Impacts.

Had Petitioner truly sought to call the Legislature's considered policymaking judgment into question, then she needed to explain ***why*** West Virginia Code § 55-19-3(10) ran afoul of the Separation-of-Powers Clause, W. VA. CONST. art. V, § 1. Under "our republican form of government, the Legislature possesses the sole power to make laws, and it is, necessarily, invested with all the sovereign power of the people, within its sphere." *Booten*, 77 W. Va. at 423, 89 S.E. at 990. It alone is imbued with the near plenary "authority to enact **any measure**" the Constitution of West Virginia does not expressly prohibit. Syl. Pt. 1, in part, *Foster v. Cooper*, 155 W. Va. 619, 186 S.E.2d 837 (1972) (emphasis added). In contrast to the Legislature's expansive policymaking powers, the sole policymaking power entrusted to the Supreme Court of Appeals is that to "promulgate rules . . . for all of the courts of the state relating to . . . practice and procedure." W. VA. CONST. art. VIII, § 3 (emphasis added). The Legislature encroaches upon this limited "sphere of authority" only if it adopts legislation purely "procedural in nature." *Louk v. Cormier*, 218 W. Va. 81, 91 n.13, 622 S.E.2d 788, 798 n.13 (2005). Legislation that is "substantive" and which "operates in an area of legitimate legislative concern" is beyond constitutional reproach. *Id.*

(quoting *State v. Arbaugh*, 215 W. Va. 132, 138, 595 S.E.2d 289, 295 (2004) (Davis, J., dissenting)).

Petitioner's skeletal "argument" and apparent assumption that the mandatory stay is procedural elide the fact that the "distinction between substantive and procedural law is neither simple nor certain." *Caple v. Tuttle's Design-Build, Inc.*, 753 So. 2d 49, 53 (Fla. 2000). "Courts have long been befuddled by the task of differentiating substantive statutes from procedural statutes, because the boundary between the two is imprecise." *Adhin v. First Horizon Home Loans*, 44 So. 3d 1245, 1250 (Fla. Dist. Ct. App. 2010). Often times, statutes do not "fall exclusively into either a procedural or substantive classification," *Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008), particularly when, as in many cases, "a substantive right must be implemented procedurally," *Adhin*, 44 So. 3d at 1250 (citing James R. Wolf, *Inherent Rulemaking Authority of an Independent Judiciary*, 56 U. MIAMI L. REV. 507, 527 (2002)).

Unlike the judicial branch, the core function of our Legislature is "to consider facts, establish policy, and embody that policy in legislation." *Boyd v. Merritt*, 177 W. Va. 472, 474, 354 S.E.2d 106, 108 (1986). Out of respect for its specialized role and primacy in our constitutional order, "the Legislature has the constitutional authority to enact procedural provisions in statutes that are intertwined with substantive rights." *Love v. State*, 247 So. 3d 609, 611 (Fla. Dist. Ct. App. 2018) (citing *Caple*, 753 So. 2d at 54), *rev'd on other grounds*, 286 So. 3d 177 (Fla. 2019). "[W]here a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail." *Massey*, 979 So. 2d at 937 (citing *Caple*, 753 So. 2d at 54).[20]

[20] Similar to the Constitution of West Virginia, *see* W. VA. CONST. art. VIII, § 3, the Florida Constitution empowers the Florida Supreme Court to "adopt rules for the practice and procedure in all

The Act is a quintessential example of substantive legislative policymaking this Court is bound to presume—and, ultimately, hold—to be constitutional. By granting "broad immunity" to health care providers like Respondent Bailey, the Legislature unquestionably "create[d], define[d], and regulate[d] primary rights." *Louk*, 218 W. Va. at 91 n.13, 622 S.E.2d at 798 n.13 (quoting *Arbaugh*, 215 W. Va. at 139, 595 S.E.2d at 296 (Davis, J., dissenting)). The substantive nature of the immunity the Legislature bestowed in West Virginia Code § 55-19-3(10) is clear and undisputed. *Cf. Love*, 247 So. 3d at 611 (holding a statute that provides a criminal defendant with the "right to assert immunity from prosecution and to avoid being subjected to trial" is "substantive" for separation-of-powers purposes); *Wynn v. Earin*, 181 P.3d 806, 810–12 (Wash. 2008) (holding the separation-of-powers doctrine did not prevent the legislature from abrogating common law witness immunity). West Virginia Code § 55-19-3(10) "manifests the intent of the Legislature to create substantive law that there not be civil liability" related to the COVID-19 pandemic. *Reed v. Phillips*, 192 W. Va. 392, 397 n.8, 452 S.E.2d 708, 713 n.8 (1994).

Similarly, the mandatory stay, though not without some incidental procedural trappings, is a constitutional exercise of the Legislature's expansive policymaking powers because the stay is "intimately intertwined with the substantive right[]" to immunity "created by" the Act.[21] *Massey*,

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courts," FLA. CONST. art. V, § 2(a). While not binding on this Court, *Caple* and its progeny command this Court's respect, not only for the persuasive force of the Florida Supreme Court's reasoning, but also because our Supreme Court of Appeals has cited to *Caple* and adopted its "substance/procedure" framework for resolving separation-of-powers challenges arising from our Constitution's Rule-Making Clause. *Louk*, 218 W. Va. at 91 n.13, 622 S.E.2d at 798 n.13. In addition to endorsing *Caple* in *Louk*, our Supreme Court of Appeals has often looked to Florida's decisional law to inform its analysis in other Rule-Making Clause cases. *See, e.g.*, *State ex rel. Quelch v. Daugherty*, 172 W. Va. 422, 425, 306 S.E.2d 233, 236 (1983).

[21] In addition, the right to sue a health care provider for alleged malpractice is a *statutory* right arising from the Medical Professional Liability Act, W. VA. CODE §§ 55-7B-1 to -12. Considering the right to bring a medical malpractice claim is a creature of statute, the Legislature retains the constitutional prerogative to condition its vindication upon compliance with a framework designed to promote the Legislature's legitimate policy objectives. *Cf. Marrujo v. N.M. State Highway Transp. Dep't*, 887 P.2d 747, 755 (N.M. 1994) ("The right to sue the government is a statutory right and the legislature can reasonably restrict that right.").

979 So. 2d at 937 (citing *Caple*, 753 So. 2d at 54). In West Virginia Code § 55-19-3(10), the Legislature fashioned a framework to guarantee claims subject to the Act's sweeping immunity were adjudicated expeditiously and without undue expense or burden. Although the framework includes certain aspects that *appear* to be procedural, the framework is substantive for constitutional purposes because its mechanisms directly "give effect to the substantive right to immunity" enshrined in the Act. *Cf. Love*, 247 So. 3d at 611. In particular, the Act's mandatory stay component not only gives effect to, but also safeguards, "the very heart of the immunity defense," the entire purpose of which is to spare a "defendant from having to go forward with an inquiry into the merits of the case," including "**the burden of discovery**." *Yoak*, 223 W. Va. at 59, 672 S.E.2d at 195 (emphasis added) (first quoting *Hutchison*, 198 W. Va. at 148, 479 S.E.2d at 658, then citing *Overdorff*, 268 F.3d at 1185). The Act's framework similarly ensures that "rulings" on a health care provider's right to "immunity" will "be made as early in the proceedings as possible," *Grove*, 244 W. Va. at 282, 852 S.E.2d at 782, just as the Legislature—and our Supreme Court of Appeals—intended, *see Stucky*, 229 W. Va. at 706–07, 735 S.E.2d at 581–82 (granting writ of prohibition and directing the circuit court to dismiss the complaint, even though "there had been no discovery conducted in the case," because "immunity" barred the suit).

Cruz v. Cooperativa De Seguros Multiples De Puerto Rico, Inc., 76 So. 3d 394 (Fla. Dist. Ct. App. 2011), confirms that statutorily mandated stays do not offend the separation-of-powers doctrine. In *Cruz*, two homeowners challenged the constitutionality of a statute that required litigation over disputed sinkhole insurance claims to be stayed pending completion of a neutral evaluation process. *Id.* at 395–96. They argued "the automatic stay provision [was] a legislatively created procedural rule that [fell] within the exclusive province of the Florida Supreme Court's rulemaking authority." *Id.* at 398. The Florida District Court of Appeal rejected that argument

because it found "the stay provision" to be "sufficiently intertwined with substantive provisions [of the statute] so that it [was] not an unconstitutional violation of separation of powers." *Id.* (citing *Peninsular Properties Braden River, LLC v. City of Bradenton*, 965 So. 2d 160 (Fla. Dist. Ct. App. 2007)). The statute as a whole "reflect[ed] a legislative intent to encourage early resolution of a sinkhole claim where the parties disagree[d] on valuation," and "the automatic stay and other provisions of the statute combine[d] to facilitate" that legislative intent. *Id.*

Just like the statutory stay challenged in *Cruz*, the stay component of West Virginia Code § 55-19-3(10) "facilitate[s]" the accomplishment of the Legislature's substantive policy objectives. As already explained, the stay is "intimately intertwined" with the substantive right to immunity the Act created. It is therefore the "duty" of this Court "to uphold" the Act "as constitutional." Syl., in part, *Booten*, 77 W. Va. 412, 89 S.E. 985.

III. The Competent and Uncontroverted Record Evidence Upon Which the Circuit Court Relied Adequately Established the Existence of "Impacted Care."

Petitioner erroneously characterizes the competent record evidence introduced by Respondents as "wholly inadequate to establish that Mr. Price's medical care was, as a matter of law, 'impacted' by COVID-19." (Pet'r's Br. 17.) She is wrong. As Petitioner has conceded, the record below established "a temporal relationship between . . . the impacts that COVID-19 had on [RGH's] day-to-day operations . . . and the substandard care given to Mr. Price." (*Id.*) Standing alone, the undisputed existence of that temporal connection is sufficient to demonstrate Respondent Bailey's right to immunity. (*See supra* Argument I.A.) In the alternative, as explained more fully below, the uncontroverted evidence upon which the Circuit Court relied is sufficient to prove a causal link between the COVID-19 emergency and the delayed care provided to Mr. Price. For each independent reason, this Court must affirm the judgment below.

Despite Petitioner's attempts to nitpick the completeness of the record (*see* Pet'r's Br. 17–18), there is no genuine dispute of fact over the "impacted" nature of Mr. Price's care. In advance of the evidentiary hearing, Respondent RGH submitted three affidavits from two affiants explaining—in detail—precisely how the COVID-19 emergency impeded Respondents from providing more timely care to Mr. Price on December 10, 2021.[22] (*See* J.A. 77–79 [Sealed Simmons Aff.]; J.A. 227–229 [Sealed Simmons Suppl. Aff.]; J.A. 230–233 [Sealed Hall Aff.].) The competence of each affiant has not been and cannot be questioned because both possessed personal knowledge of the dire situation RGH faced on December 10, 2021. Both affiants expressed the uncontroverted opinion that Mr. Price's "alleged treatment delay . . . directly related to a census increase and staffing shortage caused by a surge in COVID-19 infection within Raleigh County." (J.A. 79, ¶ 15; J.A. 233, ¶ 19.)

The first affiant, Heather D. Simmons, as RGH's Assistant Director of Quality and Risk Management, was the person responsible for "tracking and coordinating responses to patient care trends and issues that [could] impact patient care and/or [RGH's] treatment capacity." (J.A. 227, ¶ 4.) According to Director Simmons, during "the afternoon of December 10, 2021, [RGH] was experiencing a surge in COVID-19 patients." (J.A. 78, ¶ 7.) She explained:

> On December 10, 2021, [RGH] treated or cared for 29 admitted COVID-19 patients. On that date, there were 2 patients admitted to inpatient care for COVID-19 or related medical complications from the Emergency Department. On that date, there were 7 patients treated in the Emergency Department on an urgent or emergent basis for COVID-19 or related medical complications.

(J.A. 78, ¶ 8.) Throughout December 10, 2021, "all available beds within [RGH's] emergency department were and remained full," which "extended" the "wait times for patients" like Mr. Price.

[22] Respondent RGH also presented—and Respondent Bailey relied upon—a collection of medical records that further established the "impacted" nature of Mr. Price's care, including how the influx of COVID-19 patients forced Respondent Bailey to provide initial treatment to Mr. Price in the waiting room of RGH's ED. (*See* J.A. 234–241 [Sealed Medical Records].)

(J.A. 79, ¶ 13.) On December 10 alone, RGH treated a total of **eighty-four patients** in the ED. (J.A. 228, ¶ 10.) Only complicating the situation, ten of RGH's employees "were off" work on December 10 "due to actual or suspected COVID-19 infection," leaving RGH to face the surge with an acute "staffing shortage." (J.A. 78, ¶¶ 9–11.) Director Simmons concluded the "alleged delay" in providing "care" to Mr. Price "was directly related to delays in transferring admitted patients from the emergency department to the appropriate in-patient setting." (J.A. 79, ¶ 14.)

Director Simmons pointed to two objective "indicia" of the "surge" RGH experienced "and its impact upon patient care." (J.A. 228, ¶ 6.) The first involved the number of ventilators in use on December 10, 2021. "Typically," she explained, "fewer than twelve of [RGH's] available ventilators" were utilized "at any one time." (J.A. 228, ¶ 6.) On December 10, however, "**nineteen** of [RGH's] twenty[-]four ventilators were in use." (J.A. 228, ¶ 6 (emphasis added).) Within forty-eight hours, the number of ventilators in use had increased to **twenty-three of the twenty-four** that were available—a clear indication of the COVID-19 surge RGH faced on the date of Mr. Price's admission. The second indicia is equally clear. Between December 8 and December 12, 2021, when Mr. Price presented to the ED, the average turnaround time for an ED patient was 504 minutes, which represented an **18.87% increase** as compared to average turnaround time for 2021. (J.A. 228, ¶ 7.) In the twenty-four months that followed the surge, the average turnaround time fell to 352 minutes—a **30.16% reduction** of that Mr. Price experienced. (J.A. 228, ¶ 7.)

The second affiant, Penni Hall, R.N., as one of the charge nurses in RGH's ED on December 10, 2021, witnessed firsthand the surge in COVID-19 patients that RGH experienced on the day of Mr. Price's admission. (J.A. 231, ¶ 8.) Nurse Hall was "directly involved in treating patients and managing the challenges associated with the limited space, staff, and resources available" in RGH's ED "on December 10, 2021." (J.A. 231, ¶ 11.) Like Director Simmons,

Nurse Hall confirmed that RGH had experienced "a surge in COVID-19 patients" during "the afternoon of December 10, 2021." (J.A. 231, ¶ 10.) She explained how the "emergency department census was much higher than usual" on account of "the recent rise in COVID-19 infection rates in the local community" (J.A. 232, ¶ 12), and why "patient acuity levels were higher than usual as patients waited until their conditions worsened before presenting to the emergency department," (J.A. 232, ¶ 15). Nurse Hall vividly recalled how "the waiting room was beyond its capacity" on December 10, "with **more than thirty (30) patients** waiting at a time." (J.A. 232, ¶ 16 (emphasis added).) When Mr. Price presented to the ED, RGH's treatment space was "over capacity," and the surge forced providers to treat patients "in improvised spaces, including hallways." (J.A. 232, ¶ 17.) Similar to Director Simmons, Nurse Hall opined that Mr. Price's "alleged treatment delay . . . directly related to a census increase and staffing shortage caused by a surge in COVID-19 infection within Raleigh County." (J.A. 233, ¶ 19.)

The aforementioned testimony provided a sufficient and uncontested evidentiary basis for the Circuit Court to find a causal link between Mr. Price's care and the COVID-19 emergency. To defeat Respondents' right to judgment, the law required Petitioner to "produce additional evidence showing the existence of a genuine issue for trial." Syl. Pt. 3, in part, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995). It is undisputed that Petitioner had not only a right, but also a meaningful opportunity to subpoena witnesses and present proof to controvert the evidence Respondents had marshalled. (J.A. 302–304.) However, she failed to present any "additional evidence" beyond a collection of medical records—materials that only further established Respondent Bailey's entitlement to immunity. Petitioner's failure to cast doubt on the competent evidence Respondents presented confirms that the Circuit Court correctly disposed of this case.

CONCLUSION

For the aforementioned reasons, each of Petitioner's assignments of error is without merit. Therefore, the judgment of the Circuit Court must be affirmed.

PHILIP BAILEY, PA-C,

By Counsel,

/s/ Tamela J. White-Farrell
Tamela J. White-Farrell, Esquire (WVSB No. 6392)
J. Ben Shepard, Esquire (WVSB No. 13261)
Robert E. White, Esquire (WVSB No. 14503)
FARRELL & FARRELL PLLC
P.O. Box 6457
Huntington, WV 25772-6457
Phone: (304) 522-9100 / Fax: (304) 522-9162
tjw@farrell3.com / jbs@farrell3.com / rew@farrell3.com

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 24-ICA-68

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

v.

Raleigh General Hospital, LLC and Philip Bailey,
Respondents.

CERTIFICATE OF SERVICE

I, the undersigned counsel for Respondent/Defendant-Below Philip Bailey, PA-C, do hereby certify that on **July 11, 2024**, a true and correct copy of the foregoing **Respondent Philip Bailey, PA-C's Brief** was electronically filed with the Clerk of the Court using the West Virginia E-Filing System, which will generate and transmit via e-mail a Notice of Electronic Filing to, and effectuating service upon, the following counsel of record:

P. Gregory Haddad, Esq.
Samuel A. Hrko, Esq.
BAILEY GLASSER LLP
209 Capitol Street
Charleston, WV 25301
Counsel for Petitioner

John T. Jessee, Esq.
Sarah C. Jessee, Esq.
LEWIS BRISBOIS BISGAARD & SMITH LLP
10 S. Jefferson Street, Suite 1100
Roanoke, Virginia 24011
Counsel for Respondent Raleigh General Hospital, LLC

/s/ Tamela J. White-Farrell
Tamela J. White-Farrell, Esquire (WVSB No. 6392)
J. Ben Shepard, Esquire (WVSB No. 13261)
Robert E. White, Esquire (WVSB No. 14503)
FARRELL & FARRELL PLLC
P.O. Box 6457
Huntington, WV 25772-6457
Phone: (304) 522-9100 / Fax: (304) 522-9162
tjw@farrell3.com / jbs@farrell3.com / rew@farrell3.com