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 RALEIGH GENERAL HOSPITAL, LLC'S BRIEF

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I. INTRODUCTION

This appeal arises out of the trial court's review of competent evidence that conclusively established that Petitioner Heidi Price's ("Petitioner") decedent, Ellis Wayne Price's ("Price") care was impacted by the COVID-19 emergency.

Petitioner alleges that Price suffered from a fatal myocardial infarction while waiting for emergency care in Respondent Raleigh General Hospital LLC's ("Respondent" and "Raleigh General") waiting room. Petitioner specifically alleges that Philip Bailey, PA-C ("Bailey") and various Does negligently delayed his care. Petitioner alleges that the delay in treating Price was unwarranted and "inexplicable."

In response to these allegations, Respondent clarified the reason for the alleged delay; resource strains caused by an ongoing surge in local COVID-19 infection rates. In light of Respondent's assertion of this immunity defense, the trial court properly stayed all proceedings until after this threshold issue had been resolved.

After adequate notice and full briefing, an evidentiary hearing was held. Respondent presented evidence showing that Price's care was impacted by the COVID-19 emergency. Importantly, while Petitioner also offered evidence at the hearing, she failed to offer any evidence that would contradict Respondent's showing.

In lieu of countering Respondent's evidence, Petitioner argued and sought to establish that discovery was needed in order to fairly resolve this issue. Petitioner essentially asserted- without support- that she was powerless to challenge Respondent's showing without first being given an opportunity to inquire into the accuracy of the asserted facts. However, Petitioner failed to show how additional discovery would change the result. Instead, she argued about the underlying merits of the case and speculated that the offered evidence was false or misleading. In

light of this insufficient showing, and the instructions of the West Virginia COVID-19 Jobs Protection Act (the "West Virginia Act") the trial court refused to permit discovery.

Confronted with conclusive and unrebutted evidence that Price's care was impacted by COVID-19, the trial court properly dismissed Petitioner's suit, providing Respondents with protection from the burden and cost of responding to claims for which it had been granted civil immunity.

This court should sustain the trial court's dismissal; ensuring that health care providers are protected from claims that challenge or question their decision making when striving to protect their communities and treat their patients in the midst of an unprecedent health emergency.

II. STATEMENT OF THE CASE

A. Facts of the case

For present purposes, Petitioner's account of the relevant pre-suit events is largely uncontested. While Respondent disagrees with Petitioner's characterization of some of Price's symptoms, lab results, and treatment along with their medical implications, it is agreed that early in the afternoon of December 10, 2021 Price presented to Raleigh General complaining of a recent history of chest pains. While Price was not actively in distress or complaining of active chest pain, he did complain of intermittent chest pain and his presentation was indicative of possible cardiac arrest. JA000234, JA000237.

Price was assessed and triaged as "urgent" and instructed to await further assessment and treatment in the waiting room. While Petitioner describes this decision as "inexplicable" the reality is that on December 10, 2021 the local community was in the midst of an ongoing

COVID-19 surge, attributable to the convergence of two COVID-19 variants, Delta and Omicron. *See* JA000039-000041.

On December 10, 2021, Raleigh General saw a precipitous increase in its emergency department and inpatient census. JA000078, ¶ 7; JA000227, ¶ 5; JA000231, ¶¶ 10-11. On that day Raleigh General was also facing staffing shortfalls due to staff testing positive for COVID-19, which further constrained the facility's operating capacity. JA000078, ¶ 9; JA000231, ¶ 11. For context, inpatient care facilities, like Raleigh General can only treat patients for which is has space, equipment, and staff. A deficit is any of these resources in one unit directly impacts the treatment capacity of related units. Notably, on that date, many of Raliegh General's inpatient units, including its cardiac unit, were operating above their capacities.

One of the most delicate pressure points in any in-patient facility is its emergency department. When in-patient units are operating at or above capacity, patients who present to the emergency department have to be held there for hours (or even days) where they are monitored and treated until they can either be admitted, treated and discharged, or transferred to another facility. The higher acuity those patients are, the more resources they divert. Importantly, patient thresholds cannot be exceeded. Therefore, until resources allow, patients of certain acuities cannot be treated.

This is precisely the challenge that was confronted by Raleigh General on December 10, 2021. On that date, eight patients were being cared for in the emergency department as they awaited transfer to in-patient care, including two patient suffering from COVID-19 related health complications. JA000228, ¶ 8. In total, the Raleigh General emergency department treated seven patients for emergent or urgent COVID-19 complications on December 10, 2021. JA000078, ¶ 8.

Furthermore, on that date Raleigh General had already admitted and was providing in-patient care to 29 COVID-19 patients.[1] JA000228, ¶ 8.

The impact of the surge in COVID-19 patients upon the Raleigh General emergency department was apparent. For one, the waiting room remained at or beyond capacity throughout most of the day. JA000232, ¶ 16. Additionally, all available treatment spaces were occupied by patients, with patients being treated in hallways and vestibules. Id. at ¶¶ 16-17. Finally, during the week that included December 10, 2021, the average emergency department patient wait time was five hundred and two (502) minutes, which is eighty (80) minutes higher than that year's average wait time and one hundred and fifty two (152) minutes higher than average wait time during the same week, two years later. JA000228, ¶ 7.

It is within this context that Price received care. Price's providers had to make a decision about how to treat him in spite of the their limited resources. However, this decision included balancing Price's medical needs against the medical needs of the eight four (84) other patients that presented at the Raleigh General emergency department that same day along with the eight patients who were being cared for in the emergency department as they awaited transfer to a higher level of in-patient care. JA000078, ¶ 8; JA000228, ¶¶8-10.

Whether Respondent's providers should have administered Price's prescribed medication earlier; reassessed Price earlier; transferred Price to a treatment room earlier; or referred Price for more specialized care earlier, is irrelevant. These issues are irrelevant because each of those decision had to be made because Price presented to the Raleigh General's emergency department in the midst of an ongoing COVID-19 emergency. In a cruel twist of fate, Price- like thousands

[1] It bears noting, COVID-19 patients require more space, staff, and resources than uninfected patients.

of other patient's like him- was a victim of COVID-19; not because he contracted the disease; but because of a confluence of timing and circumstances.

B. Procedural Facts

Notwithstanding, on October 6, 2023, Petitioner filed suit seeking to recover for the injuries caused by the delay in Price's treatment. JA0000006-JA000013. Given this COVID-19 related impact on care, when answering Petitioner's Complaint, Respondent moved to stayed the proceedings and asked the trial court to hold a hearing to determine whether Petitioners claims were barred by W. Va. Code § 55-19-4. JA000035-000037. The Motion was supported by a December 15, 2021 news article recounting the ongoing surge in COVID-19 infections rates and an Affidavit by Respondent's Assistant Director of Quality and Risk Management, Heather D. Simmons ("Simmons").[2] This motion was later joined by co-defendant Bailey. JA000066-000070.

On November 27, 2023, the trial court entered an order staying all proceedings and instructing the parties to schedule a date to be heard on whether "the care offered, delayed, postponed, or otherwise adversely affected at [the defendant] health care facility or from [the defendant] 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." JA000072.

On December 29 2023, Petitioner filed a Motion to Lift the Stay and Permit Discovery. JA000081-000113. In that Motion, Petitioner treated Respondent's Motion as one for summary judgment and argued, "[she] must be allowed to present her own evidence or assert that the

[2] The Affidavit, along with subsequent sensitive, private, and protected materials, were filed and maintained under seal. JA000046-000047, JA000076, JA000221-000222, JA000225.

factual determination as to whether the care at issue was 'impacted' by COVID- 19 which requires discovery[3] under Rule 56(f) of the West Virginia Rules of Civil Procedure." JA000085.

Petitioner also supplied an Affidavit of Samuel A. Hrko, wherein he stated, "To determine whether, in fact, the care rendered by the Defendants was "impacted care" within the meaning o the COVID-19 Act, the Plaintiff requires the opportunity to conduct discovery on the attendant issues." JA000094, ¶ 7. Petitioner indicated a desire to depose Simmons, Bailey, and each of Price's other care providers,[4] noting the discovery would be required "to determine whether the COVID-19 Act applies to nullify any of the claims asserted." *Id.* at ¶¶ 9-10. In other words, Petitioner sought to depose most if not all adverse witnesses, in order to determine whether her claims were barred as a matter of law.

On January 2, 2024, Respondent filed a Reply in Support of its Motion, outlining in greater detail various facts that compel a finding that Price's care was impacted by the ongoing COVID-19 emergency.[5] JA000114-000128. In support of this showing, Respondent submitted a supplemental affidavit of Simmons and an affidavit completed by a nurse who worked in the Raleigh General emergency department on December 10, 2021 and who was familiar with Price's care, including the reasons that his care was allegedly delayed. JA000227-JA000223. Respondent also provided several medical records in support is its position. JA000234-JA000241.

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[3] Petitioner served written discovery requests upon Respondent, none of these requests directly inquired into the basis for concluding that Price's care was impacted by the COVID-19 emergency. JA000310-JA000326.

[4] During the hearing, Petitioner also argued that one of Respondent's corporate designees should also be deposed. JA000290, lines 21-24.

[5] Bailey also filed a reply memo in support of dismissing Petitioner's asserted claims. JA000201-JA000209.

The next day, on January 3, 2024, Petitioner noticed a January 10, 2024 hearing during which the question of whether Price's care was impacted by the COVID-19 emergency would be resolved. JA000130-000131.

During the January 10, 2024, the trial court heard arguments and took evidence offered in support of the parties' respective positions. While Petitioner offered various medical records in support of her position, she did not subpoena any witness or present any countervailing testimony that would support a finding that Price's care was not impacted by the COVID-19 emergency.[6] Petitioner acknowledged that she could have called witnesses or submitted additional evidence to contradict Respondents' showing, but she opted to rely solely upon the "facts in the medical records". JA000301, lines 9-16.

Petitioner argued instead that Respondents presented evidence was insufficient to establish that Price's care was impacted by the COVID-19 emergency. JA000302-000303, lines 20-3; JA000288, lines 4-12; JA000289, lines 9-16, 19-20; JA000290, lines 6-17; JA000303, line 2-3; JA000304, lines 10-12. In the alternative, Petitioner argued that the offered evidence was conclusory and one-sided; therefore, she was entitled to discovery into the accuracy of the account. JA000271, line 1-6; JA000296, lines 2-8. Petitioner's counsel concisely summarized her position when he stated, "in this case, we are asking for nothing more than 'Let's do limited discovery on impacted care and let's find out if they're right or if they're wrong.'"JA000294, lines 8-11. However, Petitioner also conceded that she could have examined the accuracy of the affiants accounts through cross examination, but she opted against doing so reasoning that she

[6] While not in evidence, Price was accompanied by his family when he was treated at Raleigh General's emergency department.

would not be able to properly prepare for cross examination without discovery. JA000303-JA000304, lines 4-18.

After all parties had been given an opportunity to present their respective positions and evidence in support of the same, the trial court took the matter under advisement and several days later on January 25, 2024, entered an Order dismissing Petitioner claims on the grounds that Price's care was adversely impacted by the COVID-19 emergency. JA000243-JA000247.

On February 23, 2024, Petitioner noticed its appeal, enumerating the errors currently argued before this Court. JA000249-JA000259.

III. SUMMARY OF ARGUMENT

Petitioner's arguments can broadly be divided into two categories, one addresses the law as it is and the other addresses the law as Petitioner contends it should be. In the first category, Petitioner contends that the trial court misinterpreted or misapplied the West Virginia Act when it determined that his care was "impacted by" a COVID-19 emergency. In the second category, Petitioner contends the West Virginia Act is Constitutionally infirm because it deprives her of her due process rights and invades the court's constitutionally protected rule making authority.

However, each of these lines of attack are unsupported by West Virginia law. For one, the trial court acted in strict and appropriate conformity with the West Virginia Act's mandate and the applicable West Virginia Rules of Civil Procedure. Notwithstanding, Petitioner's arguments to the contrary, the West Virginia Act clearly describes the process to be employed when resolving whether medical care is impacted by the COVID-19 emergency. Moreover, upon such a showing- absent allegations of willful conduct- the nature or quality of the care provided is irrelevant.

After appropriate notice and subject to all parties' ability to present or proffer evidence and arguments in support of their respective positions, the trial court properly concluded that Petitioner's decedent, Price's care was impacted by the COVID-19 emergency. This finding was supported by both the pleadings and competent and unequivocal evidence. In fact, all of the submitted evidence compelled such a finding.

Importantly, Petitioner failed to either present or proffer any evidence that showed or would have shown the relevant care was not impacted by the COVID-19 emergency. Instead, Petitioner either speculated that Respondent's evidence may be misleading or challenged the decision making Respondent's providers made in light of the impacted care. Given the paucity of evidence or potential evidence sufficient to challenge the obvious conclusion that Price's care was impacted by the contemporaneous and unprecedented local surge in COVID-19 infection rates, the trial court's ruling was both warranted and proper.

Furthermore, the trial courts application of the West Virgina Act did not violate Petitioner's due process rights. While the trial court resolved the threshold question of whether Price's care was impacted by the COVID-19, it did so pursuant to appropriate notice and opportunity to be heard. Petitioner presented evidence and had an opportunity to present additional evidence from known and available witnesses. Moreover, Petitioner failed to make a showing that additional material evidence existed or may exist sufficient to compel a different result. Put simply, Petitioner failed to establish that additional evidence would show that Price's care was not impacted by the ongoing COVID-19 emergency.

Finally, the trial court's evidentiary hearing on the threshold issue of impacted care, is entirely consistent with West Virginia's procedural mandates. While summary judgment before discovery is typically regarded as precipitous, in cases such as this where the legislature has

resolved to make putative litigants immune from liability, discovery is not necessarily warranted or required. For one, Petitioner failed to assert or allege any facts that would show that discovery would or was likely to reveal any additional facts that would compel a contrary result. Moreover, West Virgina courts consistently address immunity early in legal proceedings in order to protect defendants from the cost and burden pre-trial process, including discovery.

It is clear that the trial court properly resolved that Price's care was impacted by the COVID-19 emergency. This finding was based upon a proper and uncontradicted evidence. Moreover, Petitioner failed to make a required showing that discovery into this threshold issue was warranted. Therefore, the trial court properly denied Petitioner's effort to manufacture a genuine dispute over material facts where no such dispute exists. For this reason, this Court should not permit Petitioner to revive a claim that is fatally barred based upon nothing more than irrelevant arguments and counter-factual speculation.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

While Respondent does not agree that this matter presents constitutional questions concerning the validity of a statute, it none the less agrees that under West Virginia Rule of Appellate Procedure 20 oral argument remains appropriate and warranted. This matter does involve issues of first impression along with issues of fundamental public importance. Respondent contends that this Court need not and should not resolve whether a trial court must always permit discovery in order to resolve whether care is "impacted" by COVID-19 or the COVID-19 under W. Va. Code § 55-19-3(10). Likewise, this Court need not and should not resolve whether a trial court is always barred from dismissing impacted care claims pursuant to W. Va. Code § 55-19-4, either at the pleading stage or before discovery. Notwithstanding, this

case presents an opportunity to address or clarify the West Virginia Act's impact and interaction with the West Virigina Rules of Civil Procedure.

V. STANDARD OF REVIEW

This matter was resolved under a converted Motion for Summary Judgment. Therefore, the trial court's determination that Petitioner has failed to demonstrate a genuine question of material fact should be reviewed by this Court *de novo*. *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994) ("A circuit court's entry of summary judgment is reviewed *de novo*."); *Hupp v. Monahan*, 245 W. Va. 263, 268, 858 S.E.2d 888, 893 (2021) (treating a motion to dismiss as a motion for summary judgment where a trial court clearly considered external evidence when ruling). Applying this standard, this Court should uphold the trial court's dismissal of this matter if it agrees, that "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." *Aetna Cas. & Sur. Co. v. Fed. Ins. Co.*, 148 W. Va. 160, 171, 133 S.E.2d 770, 777 (1963).

While, in this context, all reasonable inferences are to be resolved in the non-moving party's favor, reversal is warranted only when the dispute is genuine in light of admissible portions of the presented pretrial record. *Powderidge Unit Owners Ass'n v. Highland Props.*, 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (1996). Therefore, "unsupported speculation is not sufficient to defeat a summary judgment motion." *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987). Likewise, "the nonmoving party must offer 'concrete evidence' from which a reasonable fact-finder could return a verdict in its favor. Evidence sufficient to meet the nonmoving party's burden of proof is required; a mere 'scintilla' will not suffice. If the non-moving party's evidence is 'merely colorable . . . or is not sufficiently probative, . . . summary

judgment may be granted.'" *Gallagher v. Hamilton (In re Asbestos Litig.)*, 2014 W.V. Cir. LEXIS 422, *4 (internal citations omitted).

In contrast, the "trial court's decision not to allow further discovery under Rule 56(f) is reviewed on appeal for an abuse of discretion." *Drake v. Snider*, 216 W. Va. 574, 577, 608 S.E.2d 191, 194 (2004). Therefore, the trial court's decision not to grant Petitioner the requested discovery before ruling on Respondent's motion should be reversed only if its finding that additional discovery was not needed was clearly erroneous. *State v. Wetzel*, No. 22-685, 2024 W. Va. LEXIS 174, at *7 (Apr. 17, 2024).

VI. ARGUMENT

A. The trial court properly determined Price's care was impacted by the COVID-19 emergency.

The West Virgina Act provides complete immunity from liability for any "loss, damage, physical injury, or death […] from impacted care." W. Va. Code § 55-19-4.[7]

As Petitioner concedes, the only relevant question at this stage of the proceedings is whether Price's care was impacted by the ongoing COVID-19 emergency. *See generally*, Petitioner's Opening Brief, pp. 1-2, 6. In other words, if Price's death arose out of "impacted care" then his providers are protected from liability, whether their emergency response or treatment decisions were negligent or not.

Petitioner alleges Defendants improperly delayed Price's treatment. In fact, Petitioner's allegations draw a straight line from treatment delays to Price's alleged injuries. JA000008-JA000009, ¶¶ 14, 17-20, 23.

[7] The West Virginia Act defines losses from "impacted care" as distinct and separate from losses "arising from COVID-19" and from "COVID-19 care." *Compare* W. Va. Code § 55-19-3(1), W. Va. Code § 55-19-3(3), and W. Va. Code § 55-19-3(10).

Impacted care undeniably includes delayed care. "Impacted care" is defined 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." The definition however excepts claims "unrelated to COVID-19 or the COVID-19 emergency and the care provided." W. Va. Code § 55-19-3(10).

The central thrust of Respondent's assertion is that due to a surge in local COVID-19 infections, hospital census and patient acuity was higher than usual, especially relative to staffing resources. Because of this resources strain, the facility was challenged to timely treat and process emergency room patients, including Price. The trial court therefore properly delayed further proceedings to address whether Defendants were immune from liability and properly concluded that they were.

1. The trial court adhered to the West Virginia's COVID-19 Jobs Protection Act's mandate.

Relying upon a counter-textual reading of West Virginia's COVID-19 Jobs Protection Act, ("the Act") Petitioner asserts that the trial court erred by not permitting limited discovery into whether the "care at issue was 'impacted' by COVID-19 or the COVID-19 emergency." Petitioner assumes, in spite of clear statutory language to the contrary, that discovery should be permitted in anticipation of an evidentiary hearing intended to determine whether the Act applies to asserted claims.

W. Va. Code § 55-19-3(10), provides:

> If the issue of impacted care is raised by a defendant under §55-19-4 of this code, 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, delayed, postponed, or otherwise adversely affected at a health care facility or from a health care provider was related to

> COVID-19 or the COVID-19 emergency. If the circuit court determines that the care offered, delayed, postponed, or otherwise adversely affected at a health care facility or from a health care provider was related to COVID-19 or the COVID-19 emergency and the care provided, then the cause of action shall be dismissed under §55-19-4 of this code.

At the outset, when confronted with statutory language such as this, it is not the duty of the court to delve into vicissitudes of the legislative record or to infer legislative intent. A central premise of statutory construction is that plain and unambiguous statutory language shall be interpreted as written. In a case such as this, "it is the duty of the courts not to construe but to apply the statute." *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W.Va. 137, 107 S.E.2d 353 (1959).

Moreover, "Plain language should be afforded its plain meaning. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not for the purpose of creating it. *Crockett v. Andrew*s, 153 W. Va. 714, 719, 172 S.E.2d 384, 387 (1970). Put another way, "Where the language is unambiguous, no ambiguity can be authorized by interpretation." *Id.*

Consistent with these precepts, one need not carefully parse or dissect the language of W. Va. Code § 55-19-3(10) to understand it's meaning. Put simply, once a defendant has indicated that the Plaintiff's care was in any way adversely affected by COVID-19 or the COVID-19 emergency, the proceedings stop and the court is tasked with determining whether the care at issues was adversely affected by COVID-19 of the COVID-19 emergency.

Any confusion over whether the stay includes discovery was specifically addressed when the legislature clarified that the court shall also stay any discovery proceedings.[8] The court has

[8] As below, Petitioner relies upon a single legislator's statements on whether discovery would be permitted on the issue of impacted care. Petitioner's Opening Brief, p. 11. Perhaps upon a proper showing, that may be true. Regardless, whatever Senators Richard Lindsay or Charles Trump believe the West Virgina Act may mean is irrelevant when contradicted by clear and unambiguous language. *See generally*, *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W.

no discretion to continue some proceedings while discontinuing others. Applying the "usual rules of statutory construction, the word 'shall' is deemed to be mandatory and not directory." *Marion Cty. Bd. of Educ. v. Bonfantino*, 179 W. Va. 202, 204 n.6, 366 S.E.2d 650, 652 (1988).

Additionally, when used as a pronoun, as it is here, the word "any" means[9] "one or some of a thing or number of things, no matter how much or how many." In other words, **all** discovery proceedings, must be stayed. The word "proceedings" is also to be expansively interpreted to include, "any step or measure taken in either the prosecution or the defense of the action" *Taylor v. Smith*, 171 W. Va. 665, 667, 301 S.E.2d 621, 624 (1983). As such, discovery must be completely stayed. Not just as to select matters; but as to all matters.

The trial court also complied with the West Virginia Act's terms by expediently holding a hearing wherein it properly considered presented evidence on the limited issue of whether Price's care was impacted by the COVID-19 emergency. Furthermore, as discussed below, the trial court was justified in determining that Price's care was so impacted. After reviewing both the pleadings, submission, evidence, and proffers, the trial court determined Price's care had

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Va. 484, 489, 647 S.E.2d 920, 925 (2007) ("Courts should not be placed in the position of passing upon the credibility of legislators and ex-legislators. A court should also recognize that 'the understanding of one or a few members of the Legislature is not necessarily determinative of legislative intent.' […] '[N]o guarantee can issue that those who supported [a legislator's] proposal shared his view of its compass.'"). Regardless, The West Virigina Act clearly requires the trial court to stay discovery and conduct an evidentiary hearing into whether the care was impacted by COVID-19. *See W. Va. Dep't of Health & Human Res. ex rel. Wright v. David L.*, 192 W. Va. 663, 668, 453 S.E.2d 646, 651 (1994) ("When the statute is unambiguous on its face, there is no real need to consider its legislative history."); *Compare*, *Frazier v. McCabe*, 244 W. Va. 21, 28, 851 S.E.2d 100, 107 (2020) (wherein the court interpreted an ambiguous law that denied certain felons from obtaining a license to sell motor vehicles as imposing a civil as opposed to a criminal penalty).

[9] "In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." *Frazier v. Briscoe*, 248 W. Va. 638, 648, 889 S.E.2d 720, 730 (2023).

been delayed, postponed, or otherwise adversely affected by the COVID-19 emergency. This finding was warranted, respectful of the requirements or due process, and consistent with the West Virgina Rules of Civil Procedure. For each of these reasons, the trial court's ruling should be upheld.

2. Petitioner failed to present or proffer any evidence that would authorize the trial court to determine that Price's care was not impacted by the COVID-19 emergency.

For purposes of this appeal, Respondent will accept that the trial court resolved whether Price's care was impacted by the COVID-19 emergency via a converted motion for summary judgment. The question therefore becomes whether Respondent's evidence was sufficient to support that finding and whether Petitioner either sufficiently rebutted Respondent's showing or established why additional evidence would be sufficient in order to rebut that finding.

As an initial matter, while the trial court did not give formal notice that it was converting Respondents' Motion to Stay Proceedings into a Motion for Summary Judgment, this failure was clearly harmless error. Like the litigant in *Tuttle v. State Farm Mut. Auto. Ins. Co.*, No. 14-0427, 2015 W. Va. LEXIS 520, at *7 (Apr. 10, 2015), Petitioner was clearly on notice of the conversion; as she clarified in her own arguments that Respondent was in fact seeking summary judgment. *See* JA000086. Furthermore, Petitioner is the party that requested, scheduled, and noticed the hearing on the respective motions. *See* JA000130. Finally, Petitioner acknowledged that she could have brought additional evidence in opposition to the Motion, but opted instead to submit only medical records.[10] *See* JA000280-000281 at lines 12-22; JA000301 at lines 2-17. As

[10] Petitioner's assertion that she was not aware of the change status or that she was not given an opportunity to present rebuttal evidence, is directly contradicted by the record. *See* Petitioner's Opening Brief, p. 13; *Compare*, *Kopelman & Assocs., L.C. v. Collins*, 196 W. Va. 489, 494, 473 S.E.2d 910, 915 (1996) (wherein the non-movant asserted that "it never knew nor considered what was being heard was a motion for summary judgment and, therefore, it believed

such, the trial court's failure to formally announce that this matter was converted to a Motion for Summary Judgement is irrelevant.

After proper notice, briefing, and an opportunity for the parties to both present evidence and be heard, the trial court properly made the only relevant factual finding, namely "that the care provided to […] Price, or the alleged failure to provide care, was adversely impacted by the COVID 19 emergency." JAC 00247.

As recently confirmed by this Court, the West Virgina Act creates an immunity defense. Therefore, "'[t]he 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.'" *Bond v. United Physicians Care, Inc.*, 2024 W. Va. App. LEXIS 154, *7 *citing Burke v. Wetzel County Commission*, 240 W. Va. 709, 718, 815 S.E.2d 520, 529 (2018). As such, it is not enough for the party opposing a finding that care was impacted by the COVID-19 emergency to speculate as to whether the offered evidence may be insufficient. They must instead plead, present, or proffer facts or evidence that creates an actual and plausible dispute.

Notwithstanding being permitted an adequate opportunity to present competing evidence or proffer potential evidence that would change the result, Petitioner persisted in two equally insufficient arguments. First, Petitioner denied that COVID-19 related facility resource strains impacted Price's care. Arguing only that facility wide resource strains did not necessarily impact

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it was not required to make a record on the motion"); *Dantzic v. Dantzic*, 222 W. Va. 535, 540, 668 S.E.2d 164, 169 (2008) (noting that the non-moving party clearly treated a pending motion as a motion for summary judgment).

the emergency department, in spite of direct and unchallenged evidence that it did.[11] Petitioner then challenged Price's providers response to the resource strain. However, this distraction has no bearing upon the relevant legal inquiry. In fact, it is the very type of inquiry that West Virginia Act was enacted to avoid.

In spite of misplaced complaints of "conclusory" and "one sided" evidence, Petitioner has failed to establish the existence of a material dispute of fact. As such, the trial court's finding was both warranted and proper.

(a) Respondent's evidence was sufficient to establish that Price's care was impacted by the COVID-19 emergency.

A trial court correctly grants summary judgment where the moving party shows by, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, . . . that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992); See also, *Walters v. City of Kenova*, No. 17-0451, 2018 W. Va. LEXIS 347, at *8 (May 11, 2018). Summary judgment "is designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial," provided there "is no real dispute as to salient facts." *Painter*, 192 W. Va. at 192 n. 5.

Admittedly, any doubt as to the existence of any material issue of fact is resolved against the movant. *Justus v. Dotson*, 161 W. Va. 443, 242 S.E.2d 575, 1978 W. Va. LEXIS 291 (1978); *Thomas v. Goodwin*, 164 W. Va. 770, 266 S.E.2d 792, 1980 W. Va. LEXIS 507 (1980).

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[11] Moreover, one can naturally understand that hospital resources are part of a interrelated system, with discrete disruptions impacting related care. As the source for unscheduled admissions, the Raleigh General Emergency Department is uniquely vulnerable to these "knock on" effects. Therefore, if a unit does not have bed space for admitted patient's requiring a higher level of care, the emergency department cannot transfer those patients, freeing up bed space (and more importantly reducing staffing ratios).

However, the trial court should warrant only disputes as to material facts. Therefore, disputed facts that will not sway the outcome of the litigation under the applicable law." *Jividen v. Law*, 194 W. Va. 705, 714, 461 S.E.2d 451, 460 (1995). Put another way, "[f]actual disputes that are irrelevant or unnecessary will not be counted." *Id. quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

Many of the central facts are clearly undisputed. In fact, Petitioner alleges that Price's only injury arose out an alleged delay in care. As discussed above, Petitioner takes issue only with the providers' delay in administering prescribed care. As the allegations confirm, Price "was inexplicably[12] directed to sit in the waiting room where he languished for hours." JA000008, ¶ 14. During this alleged delay in treatment it is alleged Price's "condition deteriorated into a full-blown myocardial infarction." *Id.* at ¶ 19.

Petitioner's argument (as opposed to her evidence) in opposition to the finding that Price's care was impacted by COVID-19 has consistently centered upon her assertion that Raleigh General failed to "describe in any meaningful detail about whether or to what extent those alleged matters had anything to do with the deficient care received by Mr. Price." JA000087. Respondent argues that Raleigh General has instead done nothing more "than point out the temporal relationship between the existence of the COVID-19 emergency and their lack of proper care for Mr. Price." JA000088.

In addition to being an inaccurate characterization of the presented evidence, Petitioner utterly fails to acknowledge the direct relationship between the facts described within the affidavits and Petitioner's own allegations.

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[12] As Petitioner's own allegations admit, she does not know what caused his delay. She assumes it is neglect or inattention. Respondents evidence fills in this gap, explaining why Price was "directed to sit in the waiting room."

Naturally, when resources are strained by a once in a lifetime health emergency, providers have to exercise their judgment when deciding how to proceed. The undisputed evidence confirms, Price was not further assessed or treated because of resource strains caused by the local surge in COVID-19 infections. His providers exercised their judgment about how to proceed when their ability to timely assess and treat patients was adversely impacted.

Petitioner never denies that at the time of Price's admission, the nation was in the midst of a significant increase in COVID-19 infection rates.[13] Petitioner also does not deny that Raleigh General's census was higher than usual and that increase was due to COVID-19 admissions. *See* Petitioner Opening Brief, p. 17 (conceding that the affidavits "broadly describe the impacts that COVID-19 had on Raleigh General's day-to-day operations in December 2021" and noting the existence of "logistical difficulties experienced at Raleigh General"). Petitioner instead contends there is no evidence that Price's providers were unable to timely administrator prescribed medication. However, this ignores the unequivocal sworn declarations that affirm that "logistical difficulties" impacted Price's care.

Simmons, Raleigh General's Director of Quality Control and Risk Management laid out various facts that established that on the relevant date "Raleigh General was experiencing a surge in COVID-19 patients." JA000077-JA000079, ¶ 7. Simmons further affirmed that because of this surge and related staffing shortages the hospital was operating over its "typical patient capacity." *Id.* at ¶¶ 8-11. As a result, emergency bed space "were and remained full" with patient treatment wait times "extended". *Id.* at ¶ 13. Simmon's offered objective evidence that showed that the

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[13] Regardless, the trial court was authorized in taking judicial notice of this "current events of a public nature." *Appalachian Mt. Advocates v. W. Va. Univ.*, No. 19-0266, 2020 W. Va. LEXIS 394, at *8 (June 18, 2020) *quoting State ex rel. City of Charleston v. Sims*, 132 W. Va. 826, 847, 54 S.E.2d 729, 741 (1949).

facility wide patient surge was atypical and directly related to COVID-19 infections. See JA000228, ¶ 6 (demonstrating atypical COVID-19 admissions and related resource strains); *Id*. at ¶ 7 (demonstrating higher than usual turnaround times); *Id*. at ¶ 9 (noting the facility's cardiac unit was operating "at or above capacity").

Simmons's affidavit did not stand alone, however. Charge Nurse Penny Hall's ("Hall") affidavit confirms- in additional detail- how the surge in COVID-19 infections impacted care within the emergency department. Hall's affidavit lays out specific facts that confirm the December 10, 2021 surge resulted in "limited space, staff, and resources available to treat patients in [Respondent's] emergency department." JA000231, ¶ 11. Hall further affirmed, on that date, the local rise in COVID-19 infections caused Respondent's emergency department census to be "much higher than usual." JA000232, ¶ 12. Hall also noted that because of the increased census combined with staffing shortages, "it took longer than usual to treat patients after arrival to the emergency department." *Id.* at ¶ 14. She also observed, on the date of Price's admission, the waiting and treatment areas were "over capacity" and patient care was "substantially slowed"; tying both of these impacts to "the surge in COVID-19 infection rates and related hospital admissions." *Id.* at ¶¶ 16-18. Finally, Hall affirmed that these conditions directly impacted Price's care. JA000233, ¶ 19.

Respondent's evidence is direct, unequivocal, and corroborated. Petitioner- heedless of the irony- frequently pronounces the affidavits as "conclusory" *See*, *e.g.*, Petitioner's Opening Brief, p. 7; JA000085; JA000087; JA000139; JA000257; JA000258; JA000283 at line 4-5; JA000284 at lines 2-4, JA000239 at lines 15-18. However, nothing could be further from the truth. Simmons and Hall both described their observations and personal experience, providing a factual predicate for each of their conclusions. JA000077, ¶ 1, JA000230, ¶ 2.

Importantly, absent a showing that an affidavit is directly contradicted by prior testimony assertions contained within the affidavit must be warranted as true, at least until opposed.[14] *See W. Va. Employers' Mut. Ins. Co. v. Bunch Co.*, 231 W. Va. 321, 331, 745 S.E.2d 212, 222 (2013) (criticizing a trial court that failed to credit as accurate an affidavit that was admitted without objection and was otherwise unopposed); *Atl. Credit & Fin. Special Fin. Unit, LLC v. Stacy*, No. 17-0615, 2018 W. Va. LEXIS 654, at *21 (Oct. 26, 2018) (holding that rejection of accounts described within affidavit as untrustworthy absent a submission of evidence sufficient to challenge the affidavit account is improperly based upon mere speculation). Petitioner merely speculates that the affiants are falsely reporting that patient levels, resource availability, patient acuity, and treatment delays were higher than usual. *See*, *e.g.*, JAC000291 at lines 5-12, JAC000292 at lines 12-17. These unsupported attacks upon the affidavits are insufficient to manufacture a question of fact.

To the contrary, Respondents offered evidence that was sufficient to establish that any alleged delay in Price's care was clearly and uncontrovertibly a result of the ongoing COVID-19 emergency.

Petitioners' cites to *Land v. Whitley* to argue that Respondent has not adequately established that Price's care impacted by the COVID-19 emergency. However this reliance is misplaced. For one, North Carolina's Emergency or Disaster Treatment Protection Act ("North Carolina Act") does not provide that whether care was "impacted by" a COVID-19 emergency should resolved as a threshold issue.[15] Additionally, the North Carolina Act requires a showing

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[14] Additionally, Petitioner has not, as she must, assigned error to the court's reliance upon the proffered affidavits. *Id.* at *18 n.6 (Oct. 26, 2018).

[15] The West Virgina Act is unique in this regard. No other state's COVID-19 civil liability protection statute instructs the trial court to resolve the question of impacted care as a threshold issue.

that care was provided in good faith, making the issues of the quality of the care relevant, even for otherwise covered treatment. As the *Land* court noted, unlike the West Virgina Act, "the [North Carolina] Act is not intended to give a health care provider blanket immunity from every claim of civil liability arising during the COVID-19 pandemic. *Id.* at 24.

More importantly however, the nature of the alleged neglect and the evidence offered to establish that the care was impacted by COVID-19 in the two cases is materially different. In *Land*, it was alleged that the physician defendant failed to perform a specific procedure and related follow up care competently. However, the affidavit offered in support of dismissal explained only how COVID-19 impacted the decisions to perform a specific procedure, not why the procedure and related follow up care did not comply with the applicable standard of care.

Here, in contrast, the alleged deviation from the standard of care **was** the treatment delay, not a dispute about the quality of the actual treatment. Additionally, here the local increase in COVID-19 infection rates was directly related to the resource strains that caused the alleged delay. In spite of Petitioner's speculation that census and emergency department patients wait times were not higher than usual, as discussed above, the uncontroverted evidence clearly establishes both were. Moreover, the evidence confirmed that the increased census and related resource strain was related to an ongoing COVID-19 emergency. Finally, unlike the plaintiff in *Land*, Petitioner did not allege any facts sufficient to except Price's treatment delays the West Virgina Act's terms.

Judge Dyer's holding in *Lambert v. Eldercare of Jackson County, LLC*, is also inapposite.[16] No. CC-18-2021-C-32, 2022 WL 21781398, at *6 (W.Va.Cir.Ct. Apr. 11, 2022). In

[16] Petitioner also refers to the Honorable Jason A. Wharton's Order in the matter of *Blake v. Camden-Clark Memorial Hospital, Corp*, Action No. CC54-2022-C-152 (W. Va. Cir. Ct. Jan. 3, 2023), as support for her assertion that the West Virgina Act requires discovery as a precondition

Lambert, the provisions of W. Va. Code § 55-19-3(10) were never invoked or challenged.[17] Therefore, since impacted care[18] was not in dispute, discovery was not stayed and a hearing as to whether the challenged care was related to or impacted by COVID-19 or the COVID-19 emergency was neither noticed nor held.

Respondent adequately established the absence of any genuine issue of fact as to the threshold issue of whether Price's care was impacted by the COVID-19 emergency. Therefore, unless Petitioner could either counter this showing or establish why additional discovery would reveal sufficient evidence to do the same, dismissal of Petitioner's claims was both warranted and proper.

(b) Petitioner failed to contradict or challenge Respondent's evidence. Because of this, the trial court properly summarily adjudicated Petitioner's claims in conformity with West Virginia's Rules of Civil Procedure and Petitioner's due process rights.

"If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either: (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue

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to resolving whether care in a matter was impacted by COVID-19. However, knowing nothing about the allegations, facts, arguments, or evidence makes this two page Order hardly instructive and largely irrelevant.

[17] Furthermore, the *Lambert* trial court's ruling was recently overturned in *Eldercare of Jackson Cty., LLC v. Lambert*, No. 22-0362, 2024 W. Va. LEXIS 302, at *29 (June 12, 2024). There the West Virgina Supreme Court of Appeals affirmed "immunity afforded under the [West Virgina] Act is, by any measure, broad in scope." The court further affirmed that in order to prevail, litigants confronted with a COVID-19 immunity defense must satisfy a heightened pleading standard. *Id.* at *19.

[18] The *Lambert* court noted the West Virgina Act's broad application, stating "Based upon existing West Virginia law and the principles of statutory construction, this Court finds the only avenue for a lawsuit to survive under COVID 19 Act is for Plaintiff to prove 'actual malice'." *Id.*

for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in [Rule 56(f)].” *Evans v. Mutual Mining*, 199 W. Va. 526, 485 S.E.2d 695 (1997). When rehabilitating or submitting countervailing evidence, “the nonmovant must go beyond the pleadings and contradict the showing by pointing to specific facts demonstrating a “trial worthy” issue. *Id.*

General assertions or hypothetical counterfactuals typically will not suffice, instead the non-movant must point to specific facts that would support a contrary finding. *Powderidge*, 196 W. Va. at 699. “Unsupported speculation is not sufficient to defeat a summary judgment motion.” *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987); *See also*, *Hicks v. Brickstreet Mut. Ins. Co.*, No. 11-0923, 2012 W. Va. LEXIS 130, at *10 (Mar. 12, 2012) (noting that a challenge to summary judgment “must be grounded on more than flights of fancy, speculations, hunches, intuition or rumors”).

Likewise, possibilities or irrelevant disputes of fact are not sufficient, the challenge must support a contrary finding of material fact. *Williams v. Precision Coil*, 194 W. Va. 52, 61, 459 S.E.2d 329, 338 (1995) *citing Anderson*, 477 U.S. at 248 (“If the evidence favoring the nonmoving party is ‘merely colorable . . . or is not significantly probative, . . .summary judgment may be granted.’”). “A party may not oppose summary judgment by alleging the *mere existence* of a factual dispute, but must instead point to specific facts demonstrating a genuine issue of material fact worthy of being tried. *Reed v. Orme*, 221 W. Va. 337, 344, 655 S.E.2d 83, 90 (2007) (*emphasis* in original).

“The non-moving party ‘cannot create a genuine issue of fact through mere speculation or the building of one inference upon another. Inferences and opinions must be grounded on more than flights of fancy, speculations, hunches, intuition, or rumors.’” *Wrisren v. Raleigh*

County Emergency Services Authority, 205 W. Va. 409, 518 S.E.2d 650, 652 (1999). Therefore, only *bona fide* disputes over facts that might affect the outcome of the suit will properly preclude the entry of summary judgment. *Tolley v. Carboline Co.*, 217 W. Va. 158, 166, 617 S.E.2d 508, 516 (2005).

Petitioner's argument and offered evidence in opposition to the evidence that established that Price's care was impacted by the COVID-19 emergency was either irrelevant or based upon nothing more than speculation and conjecture.

Petitioner frequently focuses upon the irrelevant question of Price's quality of care. Throughout her brief Petitioner challenges the way that Price was treated in light of the challenges presented by the COVID-19 emergency. Petitioner first contends that Price should have been treated immediately after his initial assessment, reasoning that if the resources existed to assess Price, then they existed to treat him. *See generally*, JA000287, lines 2-3. Petitioner then contends that the providers that did interact with Price should have spent more time committed to his care. JA000288, lines 17-20. Next, Petitioner speculates that lower acuity patients were treated before Price. JA000289, lines 9-16. Finally, Petitioner contends that strained staffing resources should have been diverted to the emergency department. JA000291, lines 12-17.

However, these arguments miss the point. Once it is shown that care has been impacted, how the provider responds to that impact is irrelevant. In fact, the trial court recognized and rejected the line of reasoning. JA000305, lines 2-9.

A provider's ability to provide some care is not inconsistent with impacted care. Just because Price was briefly seen and assessed does not mean his care was not "impacted". It does not require a inferential leap to conclude that had there been adequate space and available resources, Price would not have been directed to the waiting room to await additional care.

Because of COVID-19 related strains upon space and resources, a decision was made. While Petitioner argues that decision is wrong or ill-advised, this argument is irrelevant. The court properly declined to consider what could have been done or what should have been done. Petitioner sought to conflate quality of care with impacted care. JA000286-000287, lines 3-19. The trial court however, limited its examination to the sole relevant inquiry, namely whether Price's care was impacted by COVID-19. *Compare Painter*, 192 W. Va. at 193 (wherein the court properly ignored as irrelevant arguments of further settlement negotiations upon a showing that a settlement check offered as "for full settlement of all claims" had been offered and cashed).

In response to Respondent's evidence, Petitioner also speculates that the number of patients treated on December 10, 2021 was not higher than usual. JA000292, lines 12-17. However, Ms. Simmons and Ms. Hall both affirmed, it was. JA000078, ¶¶ 8-9; JA000227, ¶ 5; JA000231, ¶¶ 10-12. Petitioner speculated that the average wait time was not higher than usual. JA000288-000289, lines 23-4. However, Ms. Simmons and Ms. Hall both affirmed, it was. JA000228, ¶ 7; JA000232, ¶¶ 15-18. Petitioner speculated that absent employees did not limit the emergency department's ability to timely treat patients. JA00291, lines 9-24. However, Ms. Simmons and Ms. Hall both affirmed, it did. JA000078, ¶ 11; JA000231, ¶¶ 11, 18-19.

Petitioner utterly ignored or mischaracterized clear and direct evidence that affirmed that Price's care was impacted by the ongoing COVID-19 emergency. W. Va. R.C.P., Rule 56(e) provides, an adverse party may not merely " rest upon the mere allegations or denials of the adverse party's pleading." This is precisely what Petitioner has done; made broad unsubstantiated denials of the accuracy of Respondent's offered affidavits. *Compare*, *J.C. v. Pfizer, Inc.*, 240 W. Va. 571, 586, 814 S.E.2d 234, 249 (2018) (upholding a grant of summary

judgment where a plaintiff failed to present expert testimony necessary to convert his theories as to the import and meaning of certain deposition testimony from speculation to a genuine factual dispute).

Put simply, Petitioner did little or nothing to challenge or counter Respondent's clear, and conclusive evidence that Price's care was impacted by the COVID-19 emergency. Petitioner was and remains unable to offer any evidence that would refute this finding.

(c) Petitioner failed to establish that "discoverable" material facts exist sufficient to create a genuine and material question of fact. Because of this, the trial court did not err in denying Petitioner discovery into whether Price's death was the product of impacted care.

W. Va. R.C.P., Rule 56(f) provides that, "[s]hould it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

However, as clarified by the Court in the matter of *Powderidge*, 196 W. Va. at 702, when confronted by a motion for summary judgment, supported by affidavits, an opponent to the motion cannot simply complain that additional discovery might reveal evidence sufficient to challenge the motion. "At a minimum, the party making the motion for a continuance must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the movant; (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." As noted by the Court in the matter of *Wilcox v. City of Sophia*, No. 13-0763, 2014 W. Va. LEXIS 274, at *6 (Mar. 28, 2014), bald assertion that additional discovery is needed will not suffice, instead a 56(f) affidavit must specifically set out reasons for the needed discovery. *citing Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir.1995); *See also*, *Crum v. Equity Inns, Inc.*, 224 W. Va. 246, 255, 685 S.E.2d 219, 228 (2009) (holding that "loose, generalized assertions that summary judgment was granted prematurely because discovery was still pending" were insufficient to avoid summary judgement).

Petitioner's attorney affidavit and his arguments below fail to satisfy the requirements warranting a continuance and additional discovery. Petitioner failed to demonstrate the existence of any material facts that if obtained would suffice to engender an issue both genuine and material to the contested factual inquiry, namely that Mr. Price's care was "adversely affected" by the COVID-19 emergency. To the contrary, Petitioner's counsel merely speculated as to what additional discovery might reveal. Petitioner's counsel candidly conceded that discovery was needed "to determine whether the COVID-19 Act applies to nullify any of the claims asserted." JA000093-94, ¶¶ 7, 10.

Petitioner fails to properly allege or point to how additional discovery would reveal any facts to change the finding. Petitioner's insufficient showing is not unlike the showing offered and rejected by this Court in *Rector v. Rector*, No. 16-0867, 2017 W. Va. LEXIS 342, at *9 (May 19, 2017). There, a plaintiff sought to avoid summary judgment and affirmed that additional discovery was "necessary to afford [him] a fair and reasonable opportunity to respond to the motion for summary judgment" and that "the deposition of [his wife] will be scheduled regarding [a disputed fact]." The court held that these assertions "failed to identify, in any fashion, the basis for plaintiff's belief that additional discovery would yield genuinely disputed

issues of material fact, or to articulate how further discovery, such as deposing his wife, would create a dispute of material fact." *See also*, *Hicks v. Brickstreet Mut. Ins. Co.*, No. 11-0923, 2012 W. Va. LEXIS 130, at *10 (Mar. 12, 2012) (noting that a challenge to summary judgment "must be grounded on more than flights of fancy, speculations, hunches, intuition or rumors").

Petitioner's 56(f) affidavit is similarly deficient. Like the *Rector* plaintiff, Petitioner baldly asserts that she needs discovery to fairly respond to Respondent's motion stating, "The [requested] 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." JA000094, ¶ 10. Also like the *Rector* Plaintiff, Petitioner identified the desired discovery without identifying how that discovery would create a dispute of material fact by asserting. *Id.* at ¶ 9.

In the matter of *Conley v. Stollings*, 223 W. Va. 762, 768, 679 S.E.2d 594, 600 (2009), the trial court upheld a grant of summary judgment entered before the close of discovery. In that matter, the Court noted that the Plaintiff was unable to make sufficient showing that additional discovery was needed in order to create a material and genuine issue of fact.

Conley involved a wrongful death suit arising out of an ATV accident wherein a juvenile motorist was fatally injured when he ran into a cable that crossed over a private right of way. The Court granted one of the defendant's motion for summary judgement upon its showing through an affidavit that it did "not own, possess a leasehold interest, or possess the mineral rights to the property which is the situs of the accident giving rise to [the] litigation." *Id*. at 768. The Court granted another of the defendant's motion for summary judgement upon that a showing they had conveyed their interest in this subject property before the relevant injury occurred.

In response to these arguments, the plaintiff asserted that party depositions would show that the relevant defendants either had access or control of the road where the injury occurred or owned mineral rights over the same. *Id.* The plaintiff also filed a 56(f) asserting that additional discovery would be needed to obtain evidence sufficient to challenge the defendant's assertions. *Id.* at fn. 9. The Court noted however that while discovery had been stayed by the trial court, the plaintiff had access to land records that could have been used (had they existed) to challenge the defendant's showing. *Id.* at 768. More relevantly, the Court also noted that had the plaintiff been permitted, "additional time for discovery, she would not be able to produce any evidence to support her assertions." *Id.*

In much the same way, Petitioner had access to all of the relevant medical records, which reflected both the alleged delay and the specifics of Price's treatment. While Petitioner did not have access to Raleigh General's staffing records, turnaround time analysis, or historical treatment records; there are no indications and Petitioner pointed to no evidence that would support a finding that any of these records would have contradicted the affiants' sworn testimony. Furthermore, Petitioner did not allege that this data was inaccurate, only that it was not probative of emergency department delays. Finally and most importantly, Petitioner did not make a showing that would support a finding that additional discovery would reveal that care was not impacted, only that he was entitled to independently confirm whether "the care rendered by the Defendants was 'impacted care' within the meaning of the COVID-19 Act."

Put simply, Petitioner failed to establish that "discoverable" material facts exist sufficient to create a genuine and material question of fact.

Importantly, as discussed above, this Court recently held a finding of impacted care renders a litigant immune from civil liability. *Bond*, 2024 W. Va. App. LEXIS 154 at *7. As

West Virginia jurisprudence clarifies, early summary adjudication of immunity defenses is preferred. Where facts sufficient to establish immunity are adequately proven, "even such pretrial matters such as discovery are to be avoided if possible." *Helms v. Carpenter*, No. 16-1070, 2017 W. Va. LEXIS 938, at *13 (Nov. 17, 2017) *quoting Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

As noted in the matter of *Hutchison v. City of Huntington*, 198 W.Va. 139, 147-48, 479 S.E.2d 649, 657-58 (1996), "[t]he very heart of the immunity defense[19] is that it spares the defendant from having to go forward with an inquiry into the merits of the case." *See also*, *Helms*, 2017 W. Va. LEXIS 938 at *13 (holding that the circuit court did not err in ruling on respondents' motion for summary judgment without first permitting petitioner to depose relevant witnesses). As has been observed, "[o]ne of the most salient benefits of qualified immunity is protection from pretrial discovery, which is costly, time-consuming, and intrusive." *Hobbs v. Warren*, 838 F. App'x 881, 883 (5th Cir. 2021); *See also*, *Yoak v. Marshall Univ. Bd. of Governors*, 223 W. Va. 55, 59, 672 S.E.2d 191, 195 (2008) ("We are persuaded that 'sparing the defendant from having to go forward with an inquiry into the merits of the case' includes the burden of discovery.").

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[19] The policy reasons for granting immunity to certain actors informs why summary adjudication in these circumstances is appropriate. In *Crouch v. Gillispie*, 240 W. Va. 229, 236, 809 S.E.2d 699, 706 (2018), the Court states, "We have further explained that '[t]he purpose of such official immunity is not to protect an erring official, but to insulate the decision making process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make officials unduly timid in carrying out their official duties.'" While *Crouch* involved discretionary immunity enjoyed by state actors, the rationale applies equally in this setting. To require health responders providing care under the strain created by an unprecedent historical health emergency to second guess their treatment decisions would adversely impact public health. Like government actors, these providers would be unduly timid in carrying out their professional duties.

In light of the fact that this matter involves an immunity defense, Petitioner's unsupported and imprecise 56(f) is especially insufficient. Petitioner should not be permitted to subject Respondent and its employees to unwarranted, intrusive, and ultimately fruitless discovery based upon nothing more than a unsubstantiated hope that discovery might reveal Respondents affidavits are false or misleading.

B. The trial court's summary adjudication of Petitioner's claims complied with West Virginia Rule of Civil Procedure 56. As such, resolution without permitting Petitioner requested discovery did not violate Petitioner's due process rights or raise separation of power concerns.

This matter was resolved on a converted motion for summary judgment. Petitioner's Opening Brief, pp. 12-13. As such, the question becomes not whether the West Virginia Act **could** run afoul of applicable Constitutional precepts, but whether the trial court's application of the West Virigina Act **did**.

As clarified in *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 747, 143 S.E.2d 351, 357 (1965), "[i]f a statute is susceptible of two constructions, one of which would render the statute valid and the other of which would render it invalid, a court must adopt the construction which upholds its constitutionality. Every reasonable construction must be resorted to by a court in order to sustain constitutionality and any doubt must be resolved in favor of the constitutionality of the legislative enactment in question."

While the trial court might have felt constrained to permit additional discovery, the fact remains Petitioner failed to both challenge the evidence that established the Price's care was impacted by the COVID-19 emergency of proffer any heretofore undiscovered evidence that would have changed the result. In other words, Respondent met its burden and Petitioner did not.

Petitioner argues that the Rules of Civil Procedures, "allow – and indeed require – the parties to an action in meaningful discovery" before ruling on questions of fact. Petitioner

Opening Brief, p. 10. Notwithstanding this unsubstantiated assertions to the contrary, civil litigants are not necessarily entitled to discovery when confronted by "outcome determinative issues." Petitioner's Opening Brief, p. 15.

As described above, the trial court was warranted in awarding Respondent's motion for summary judgment. As noted in *Barazi v. W. Va. State Coll.*, 201 W. Va. 527, 531, 498 S.E.2d 720, 724 (1997), "due process in the civil context 'is a flexible concept which requires courts to balance competing interests in determining the protections to be accorded one facing a deprivation of rights.'" *quoting Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 710, 279 S.E.2d 169, 175 (1981); *See also*, *Blackrock Capital Inv. Corp. v. Fish*, 239 W. Va. 89, 105, 799 S.E.2d 520, 536 (2017) (upholding a grant of summary judgment entered without a hearing or notice absent a "showing that the [trial court] prevented [the non-movant] from expressing some meaningful legal argument, or prevented it from revealing evidence of a genuine issue of material fact").

As relates to threshold issues, trial courts do not abuse their discretion by not permitting discovery where the non-movant fails "to make a showing of what discovery they needed and how they believed that discovery would contradict […] affidavits" offered in support of a dispositive motion. *See Bowers v. Wurzburg*, 202 W. Va. 43, 49, 501 S.E.2d 479, 485 (1998) (upholding dismissal of a motion to dismiss for a lack of personal jurisdiction supported by affidavits without permitted discovery into this discrete issue). As recently noted by the Fourth Circuit Court of Appeals,[20] *Williams v. Md. Dep't of Health*, No. 22-1074, 2024 U.S. App.

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[20] Noting that "[b]ecause the West Virginia Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure, [West Virginia courts] often refer to interpretations of the Federal Rules when discussing [its] own rules." *Penn-America Ins. Co. v. Osborne*, 238 W. Va. 571, 575 n.5, 797 S.E.2d 548, 552 (2017) *citing Hardwood Group v. LaRocco*, 219 W. Va. 56, 61 n.6, 631 S.E.2d 614 n.6 (2006)

LEXIS 12850, at *14 (4th Cir. May 29, 2024), "a court need not allow discovery 'when the information sought would not by itself create a genuine issue of material fact sufficient for the nonmovant to survive summary judgment.'" *quoting Hodgin v. UTC Fire & Security Americas Corp.*, 885 F.3d 243, 250 (4th Cir. 2018).

Petitioner failed to make the required showing. Due process does not require the trial court to permit parties to engage in irrelevant[21] or unwarranted discovery. *See generally*, *State ex rel. 3M Co. v. Hoke*, 244 W. Va. 299, 313, 852 S.E.2d 799, 813 (2020); *State ex rel. Town of Pratt v. Stucky*, 229 W. Va. 700, 707, 735 S.E.2d 575, 582 (2012). That is precisely what Petitioner asked the trial court to do; permit her to engage in fruitless discovery in the empty hope that she would be able to reveal irrelevant information. Petitioner hoped to show that turnaround times were occasionally as high or higher than those experienced on December 10, 2022. JA000289, lines 1-3; JA000291, lines 5-7. Petitioner hoped to establish that COVID-19 related employee call outs were not in the in the emergency department. JA000288, lines 4-8; JA000291, lines 9-22. Petitioner hoped to establish that lower acuity patients were treated before Price. JA000289, lines 9-16; JA000291, lines 7-9. Petitioner hoped to learn that the Raleigh General waiting a treatment rooms had been over capacity at other times. JA000292, lines 8-17. However, the answer of all of those questions is, "Who cares?"

The impact doesn't have to be historical. The impact doesn't need to be unprecedented. The impact need only be actual and related to the COVID-19 emergency. So, what came before and what came after is irrelevant. The impact doesn't have to emanate from a specific department. So, whether staffing was limited in the emergency department or the departments to

[21] Notably, aside from inquiring about the basis of Respondent's affirmative defenses, none of Petitioner's propounded discovery requests inquire into whether Price's care was impacted by COVID-19. *See* JA000310-JA000316.

which patients were to be admitted is irrelevant. The way in which the providers responded to the impact is irrelevant. So, who was treated first or last is irrelevant.

Therefore, even if the facts were as Petitioner imagined, the result would be the same. Additional discovery would merely impose additional burdens upon the parties and the court, and all for naught. Simply put, in spite of conclusive evidence to the contrary, Petitioner argues that Price was required to wait for care, not because facility resources were strained to their breaking point but because his care provider's just did not want to deal with him. This counterfactual version of events is not warranted and should not be permitted to salvage a deficient claim under the guise of an imagined deprivation of procedural due process.

Petitioner cites to *North v. W. Va. Bd. of Regents*, 160 W. Va. 248, 257, 233 S.E.2d 411, 417 (1977), as support of the proposition that she has an unqualified due process right "to take discovery on a fact-intensive and outcome determinative issue." However, that case categorically does not stand for or support that proposition. In that matter, which involved a student's expulsion for allegedly falsifying application information, the court did not provide that discovery was required in that, much less all matters. In fact, at no point did to court mention or address pre-hearing discovery.

The holding in *Evans*, 199 W. Va. at 529, does not support this assertion either. In *Evans* the plaintiffs alleged that various pieces of personal property were damaged by flooding that they attributed to the defendant's neglect. During discovery the plaintiff prepared a summary of the value of the damaged property. When the defendant opposed the list as unresponsive, the trial court instructed the plaintiff to supply a replacement list. The defendant eventually opposed the replacement list as well and moved to preclude the plaintiff from admitting or relying upon the values supplied in the list at trial. That matter did not deal with the a motion for summary

judgment or the proper scope of permitted discovery, but instead the court's authority to exclude evidence based upon discovery disputes.

Notably, the court in *Precision Coil*, 194 W. Va. at 57, ruled in the defendant's favor on a motion for summary judgment that was filed early in the proceedings and before the completion of discovery. While the *Precision Coil* Court noted that discovery is typically required as an antecedent to a grant of summary judgment, it also acknowledged that discovery is only required where the non-movant has in good faith satisfied the requirements of Rule 56(f). *Id.* at 61.

Not unlike the plaintiff in *Precision Coil*, this matter involved a discrete and uncontested question of fact. In *Precision Coil* the plaintiff alleged he was entitled to job protection due to terms contained within an employment handbook. The court noted however that the plaintiff failed to establish that additional discovery would change the outcome since the evidence confirmed the plaintiff was not aware of the employment handbook's existence during his work tenure.

Similarly, in this matter the trial court was not asked to resolve disputed questions of negligence or compliance with the applicable standard or care. It was instead asked to resolve a discrete threshold issue; whether Price's care was impacted by the COVID-19 emergency.

From the outset, Plaintiff concedes both that Price's care was delayed and that this delay was the cause of is alleged injuries. *See*, *e.g.*, JA000008, ¶¶ 14, 16, 19-23. Likewise, the fact that the local community was in the midst of a historically significant surge in COVID-19 infections was neither contested nor properly subject to dispute. It also could not be denied that Raleigh General was operating over its typical patient capacity due to an increase in admitted COVID-19 patients. JA000078, ¶ 10; JA000227, ¶ 5; JA000231, ¶¶ 10-12. The only purported dispute was over whether a surge in admitted COVID-19 patients caused emergency department treatment

delays on the afternoon of December 10, 2022. However, as detailed above that dispute was pretextual. Petitioner failed to point to any facts that would or could contradict this finding. Therefore, she has no due process right to additional, unnecessary discovery.

In the same regard, ruling on a matter without allowing for requested discovery does not run afoul of the Rules Clause of the West Virginia Constitution. As discussed above, an immunity defense "is an immunity from suit rather than a mere defense to liability[.]" *W. Va. State Police v. J.H.*, 244 W. Va. 720, 729, 856 S.E.2d 679, 688 (2021). Where the foundational facts sufficient to render a defendant immune from suit cannot be plausibly disputed, dismissal of a claim on immunity ground is warranted. *State ex rel. Town of Pratt*, 229 W. Va. at 706. While qualified immunity is distinct, in some regards, to immunity extended to private actors; summary pre-trial adjudication is proper in both instances, when the facts warrant. *See generally*, *Mooney v. Frazier*, 225 W. Va. 358, 370, 693 S.E.2d 333, 345 (2010) (holding private attorneys appointed to provide criminal defense to indigent clients are absolutely immune from liability arising out of the relationship); *State ex rel. Gallagher Bassett Servs. v. Webster*, 242 W. Va. 88, 829 S.E.2d 290, 2019 W. Va. LEXIS 350 (W. Va. 2019) (reversing a trial court's denial of a motion to dismiss claim seeking to recover from an immune carrier and its employees for alleged workers' compensation discrimination); *Wilson v. Bernet*, 218 W. Va. 628, 634, 625 S.E.2d 706, 712 (2005) (holding, absent allegations of criminal conduct, expert witnesses are immune from liability for opinion rendered in the course of judicial process); *Mahmoodian v. United Hosp. Ctr., Inc*., 185 W. Va. 59, 66, 404 S.E.2d 750, 757 (1991) (holding that hospital facilities enjoy broad immunity in connection their peer review function and noting "an awareness that courts should allow hospitals, as long as they proceed fairly, to run their own business"); *Gooch v. W. Virginia Dep't of Pub. Safety*, 195 W. Va. 357, 369, 465 S.E.2d 628, 640 (1995) (granting

summary judgment in a facility's favor for its alleged failure to diagnosis or treat a fatal infection in the course of administering a drug test because of the immunity provided by W. Va. Code, § 17C-5-6).

For the reasons previously discussed, when confronted with evidence that the delay in Price's care was the result of an ongoing COVID-19 emergency, Petitioner failed to counter with the required showing. As the trial court clarified, Petitioner was obligated to either challenge Respondent's showing or establish that specific undisclosed facts would materially change the result. JA000302-000304, line 14-18. Petitioner failed to make such a showing. Therefore, the trial court's dismissal of Petitioner's suit did not conflict with the West Virgina Rule of Civil Procedure. *See generally*, S*tate ex rel. Frazier v. Meadows*, 193 W. Va. 20, 26, 454 S.E.2d 65, 71 (1994) (explaining that were a rule of court and a statute can be reconciled the later is not constitutionally infirm).

Because the trial court's award of summary judgment was consistent with the due process protection and relevant Rules of Civil Procedure there is no basis for concluding that W. Va. Code § 55-19-3(10) violates relevant constitutional principles.

VII. CONCLUSION

For the reasons stated above, and as may be later argued before this Court, Respondent respectfully request that this Court uphold the trial court's ruling and sustain its dismissal of Petitioner's legally and factually insufficient claims.

Dated: July 11, 2024.

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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.

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that *Respondent Raleigh General Hospital, LLC's Brief* has been served this 11th day of July, 2024, via the West Virginia E-Filing System, upon the following counsel of record:

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