IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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No. 24-ICA-68

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

Petitioner,

v.

DOCKET NO. 24-ICA-68

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

Raleigh General Hospital, LLC, And Philip Bailey,

Respondents.

PETITIONER HEIDI PRICE'S REPLY BRIEF IN SUPPORT OF APPEAL

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I. INTRODUCTION

Rather than address the patent procedural errors in the circuit court's ruling that dismissed Plaintiff Heidi Price's Complaint, the Defendants' response briefs mischaracterize the sum and substance of the proceedings below, suggesting that this appeal arises from a run-of-the-mill summary judgment ruling made after fulsome discovery. As the Defendants would have it, Mrs. Price was equipped with all the evidence she needed to dispute the Defendants' assertions that her late husband's medical care was "impacted" by the COVID-19 pandemic, and she simply failed to carry her burden to rebut the defense evidence.

As Mrs. Price explained at length in her opening brief, this is hardly what occurred below. After the Defendants contended for the first time in their motions to dismiss that the deficient medical care given to Mr. Price at Raleigh General Hospital in December 2021 was "impacted care" within the meaning of West Virginia's COVID-19 Jobs Protection Act, W. Va. Code §§ 55-19-1, *et seq.* (the "Act"), the circuit court stayed Mrs. Price's case and all discovery. Mrs. Price was, from then on, without any ability to gather information about what "impacts" the hospital's responses to the COVID-19 pandemic may or may not have had on her husband's care. Indeed, citing the court's stay order, the Defendants outright refused to respond to Mrs. Price's lone set of discovery requests (which were served *before* the Defendants unexpectedly raised their "impacted care" affirmative defense, and thus did not seek information relative to the Act's defense).

The circuit court then conducted a hearing to determine whether the defense applied to Mrs. Price's claims, concluding that the hospital's response to Mr. Price's heart attack was indeed "impacted" by COVID-19. By relying on the Defendants' self-serving affidavits and, at the same time, denying the Plaintiff the right to discovery and the underlying data allegedly relied on by the affiants, the court made a summary judgment ruling — as the Defendants now acknowledge — without affording Mrs. Price the opportunity to develop and present her own evidence concerning

"impacted care," as required by the Rules of Civil Procedure. Instead, Mrs. Price was left only with her husband's medical records to present at the hearing — records that the Defendants make much of in their briefs, but that were of no use in challenging purported connections between the hospital's operations during the COVID-19 emergency and the treatment Mr. Price received. And without the benefit of any written discovery or depositions, Mrs. Price was without ability to effectively dispute the representations of the Defendants' affiants and other hospital personnel by way of cross-examination. In short, Mrs. Price was made to defend against the Defendants' allegations empty-handed, and has now been cast as being negligent in the prosecution of her own case.

As explained below and in Mrs. Price's opening brief, the circuit court's summary judgment ruling was in error in a host of ways. It improperly made a factual determination — an outcome-determinative one, no less — based on a one-sided record, failing to allow the non-moving party to gather and present rebuttal evidence. It dismissed Mrs. Price's Complaint under the Act, which, as applied, denied to Mrs. Price the due process of a meaningful opportunity to be heard and interfered with the courts' authority to promulgate procedural rules. And, at bottom, it was premature, resting on insufficient evidence — the Defendants' barebones affidavits hardly established that Mr. Price's **specific** care was "impacted" by COVID-19. The fact-bound question of whether the Act bars Mrs. Price's claims should be resolved only once all the parties have assembled what they need to present their respective cases, and Mrs. Price respectfully requests that this Court allow as much.

II. ARGUMENT

A. The Circuit Court Erred in Summarily Resolving a Dispositive, Fact-Bound Affirmative Defense Without the Benefit of any Discovery.

In each of their response briefs, the Defendants concede that by affirmatively relying on the affidavits submitted in support of their "Motions to Stay Proceedings," the circuit court converted the motions into — and granted — motions for summary judgment. *See* Resp. Raleigh General's Br. 11, 16; Resp. Bailey's Br. 15 & n.12. Yet by and large, the Defendants do not reckon with the fact that, in so doing and in neglecting to allow the nonmovant, Mrs. Price, to prepare and present her own evidence on the question presented, the court departed from the requirements of the West Virginia Rules of Civil Procedure that govern converted summary judgment motions. *See* W. Va. R. Civ. P. 12(b)(7), (12)(c) (providing that if, in considering a motion to dismiss or for judgment on the pleadings, a court is presented with and considers extrinsic evidence like the Defendants' affidavits, it must treat the pending motion "as one for summary judgment" and afford the non-moving party "reasonable opportunity to present all material made pertinent to such a motion by Rule 56"). In awarding summary judgment to the Defendants here, the circuit court turned a blind eye to "the general principle that summary judgment is appropriate only after the opposing party has had '*adequate time for discovery*.'" *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 61, 459 S.E.2d 329, 338 (1995) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

Mrs. Price's case is an acute example of a premature summary judgment ruling, in that she was afforded *no* discovery. The Defendants first raised their novel, fact-based "impacted care" contentions in their respective motions to dismiss. At that time, they asserted that Mrs. Price's claims were barred by Act's provisions stating that there is "no claim against" any health care provider for losses stemming from medical care "impacted" by COVID-19 and that, upon a defendant's invocation of the "impacted care" issue, the court is to "stay the proceedings," consider

the affirmative defense, and dismiss the case if it is able to conclude that "the care . . . was related to COVID-19." W. Va. Code §§ 55-19-3(10), -4. The circuit court obliged, staying the case and immediately cutting off Mrs. Price's ability to take discovery.

Aware that she would be unable to contest the Defendants' motions with the information she had, Mrs. Price sought leave to conduct limited discovery confined to the "impacted care" question. The court denied her request. Instead, the court proceeded to rule on the affirmative defense based solely on the Defendants' three affidavits and "without permitting the adverse party a reasonable opportunity to submit pertinent material." *Kopelman & Assocs., L.C. v. Collins*, 196 W. Va. 489, 494, 473 S.E.2d 910, 915 (1996). "The 'reasonable opportunity' language of Rule 12(c) is designed to prevent unfair surprise to the parties," *id.* at 495, 473 S.E.2d at 916, and while the Defendants submit that Mrs. Price could have suffered no such surprise given her awareness of the court's hearing and her counsel's submission of a Rule 56(f) affidavit, the "unfair surprise" she was met with was of a different variety — seeing her opponent submit substantive evidence for the court's consideration while being prohibited from garnering her own. Ultimately, the court resolved Mrs. Price's case by way of a finding of fact rendered at summary judgment and premised on a record that was not just lopsided, but completely one-dimensional — far from the circumstances in which the Supreme Court of Appeals will deem summary judgment appropriate. *See Board of Ed. of Ohio Cnty. v. Van Buren & Firestone, Architects, Inc.*, 165 W. Va. 140, 143-44, 267 S.E.2d 440, 443-44 (1980); *Hatfield v. Ellis*, 167 W. Va. 213, 215, 279 S.E.2d 414, 415 (1981); *Coleman Estate ex rel. Coleman v. R.M. Logging, Inc.*, 222 W. Va. 357, 364-65, 664 S.E.2d 698, 705-06 (2008).

In an effort to rewrite the procedural history of this case, the Defendants maintain that Mrs. Price *did* have the requisite evidence to challenge their "impacted care" defense, and simply did

not do so *well enough*, failing to meet her burden at summary judgment despite being equipped with all the material and information she needed to do so. The Defendants describe the circuit court's hearing as an ordinary summary judgment proceeding, occurring after all necessary discovery was completed — Defendant Bailey, for his part, repeatedly speaks of a "full adversarial evidentiary hearing." Resp. Bailey's Br. 1, 4, 5. Like the circuit court, the Defendants accuse Mrs. Price of "fail[ing] to controvert the evidence [Defendants] marshalled," *id.* at 1-2; "fail[ing] to either present or proffer any evidence . . . opt[ing] instead to submit only medical records," Resp. Raleigh General's Br. 9, 16; and "fail[ing] to counter with the required showing," *id.* at 39. They cite summary judgment standards and rely on cases decided at summary judgment following robust discovery in order to suggest that, here, Mrs. Price simply dropped the ball. Defendant Raleigh General, for example, insists that, in the summary judgment posture, Mrs. Price should have been able to "rehabilitate" her own evidence after it was "attacked by" the Defendants, to "produce additional evidence" establishing a dispute of fact concerning the "impacted care" question, and to "contradict the [Defendants'] showing by pointing to specific facts demonstrating" such a dispute of fact. *See id.* at 24-25 (quoting Syl. Pt. 4, *Evans v. Mut. Mining*, 199 W. Va. 526, 485 S.E.2d 695 (1997) and *Powderidge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W. Va. 692, 699, 474 S.E.2d 872, 879 (1996)).

Mrs. Price, of course, could not *do* any of those things in light of being prohibited from obtaining from the Defendants any affirmative evidence or "specific facts" concerning the "impacted care" issue. A "full adversarial evidentiary hearing" of the sort Defendant Bailey imagines in his brief was simply outside the realm of possibility. Recognizing the Defendants' attempt to secure a pre-discovery dispositive ruling, Mrs. Price sought to "forestall[] the swinging of the summary judgment axe" and utilize the "procedural escape hatch" provided in Rule 56(f)

for "a party who genuinely requires additional time to marshal material facts to contest a summary judgment motion." *Powderidge*, 196 W. Va. at 701-02, 474 S.E.2d at 881-82. Her counsel properly submitted a Rule 56(f) affidavit to the circuit court alongside her motion seeking leave to conduct limited discovery, explaining that, by providing the court with evidence beyond the four corners of the Complaint, the Defendants appeared to seek summary resolution of their fact-based affirmative defense. *See* J.A. 93-94. Mrs. Price's counsel's affidavit underscored that, "[t]o date . . . no discovery has been allowed to proceed," and in order for Mrs. Price to capably respond to the Defendants' assertions and "determine whether, in fact, the care rendered by the Defendants was 'impacted care,'" "discovery on the attendant issues" (including relevant written discovery requests and depositions of the Defendants' affiants) would be necessary. *Id.* Notwithstanding the Supreme Court of Appeals' declaration that "[a]n opponent of a summary judgment motion need not follow the exact letter of Rule 56(f) in order to obtain its benefits," *Powderidge*, 196 W. Va. at 702, 474 S.E.2d at 882, Defendant Raleigh General nitpicks Mrs. Price's Rule 56(f) submission, contending she made only a "bald assertion" that "additional discovery *might* reveal evidence sufficient to challenge the motion," Resp. Raleigh General's Br. 28-29 (emphasis added). Raleigh General's complaints aside, Mrs. Price's affidavit did all that Rule 56(f) requires, explaining that she was left without *any* "facts essential to justify the party's opposition" and seeking "a continuance to permit . . . discovery to be had." W. Va. R. Civ. P. 56(f).

The Defendants return time and again throughout their briefs to Mrs. Price's reliance on her husband's medical records, suggesting that those records should have been sufficient to rebut the defense evidence of "impacted care," and that, if nothing else, Mrs. Price should have cross-examined witnesses at the court's summary judgment hearing. In essence, the Defendants' contention is that the circuit court's denial of discovery to Mrs. Price was, at worst, harmless error.

But without written discovery responses or deposition testimony to rely upon, Mrs. Price was unable to prepare cross-examinations of any of the Defendants' witnesses. And her husband's medical records were all but useless in beating back the allegations of "impacted care" — they could not shed light on what policies and procedures were in place at Raleigh General in December 2021, reveal how COVID-19 protocols and infections among staff members impacted the staff's ability to carry out their duties, or show where the hospital's resources were being directed when Mr. Price sought treatment for his heart attack. As Raleigh General itself admits in its brief, "[Mrs. Price] did not have access to Raleigh General's staffing records, turnaround time analysis, or historical treatment records." Resp. Raleigh General's Br. 31. Mrs. Price was compelled to attend the court's summary judgment hearing empty-handed, and the Defendants' repeated suggestions otherwise are disingenuous.

Evidently recognizing this, Defendant Bailey — notably not joined by Defendant Raleigh General in this regard — makes a brazen final attempt to cast the blame on Mrs. Price and to shift the defense burden concerning the "impacted care" issue onto her. According to Defendant Bailey, the Act somehow imposes a "heightened pleading rule" under which all medical malpractice plaintiffs must "plead sufficient facts" in their complaint to create a "bona fide dispute as to . . . the 'impacted' nature of the care" at issue, so as to "defeat [the defendant's] right to *qualified immunity*" and "to secure an entitlement to propound discovery." Resp. Bailey's Br. 11-12, 14 (emphasis added) (internal quotation marks omitted) (quoting Syl. Pt. 1, *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996) and *W. Va. State Police v. J.H. ex rel. L.D.*, 244 W. Va. 720, 730, 856 S.E.2d 679, 689 (2021)). In Defendant Bailey's expansive view, any plaintiff pursuing claims for medical negligence must *affirmatively* plead around the Act's provisions before being permitted to engage in discovery. *See id.* at 14-15.

Unsurprisingly, this "heightened pleading" standard appears nowhere in the text of the Act, nor anywhere else that Defendant Bailey points to. It is made up entirely out of whole cloth — Defendant Bailey's only supposed source for this "pleading threshold" is in *qualified immunity* cases brought against State officials who enjoy immunity from suit by virtue of the offices they hold, like *West Virginia Board of Education v. Marple*, 236 W. Va. 654, 783 S.E.2d 75 (2015) and *West Virginia State Police v. J.H. el rel. L.D.*, 244 W. Va. 720, 856 S.E.2d 679 (2021). This case, of course, has nothing to do with qualified immunity, involving instead a statutory affirmative defense not immunity, that turns on a unique factual determination. Defendant Bailey asserts that this case, like the qualified immunity decisions he presents, is one where "immunities are implicated" by the very nature of the suit — purportedly because "[t]he face of [Mrs. Price's] Complaint proved . . . a relationship" between Mr. Price's care and the COVID-19 pandemic. Resp. Bailey's Br. 11, 14 (quoting *Marple*, 236 W. Va. at 660, 783 S.E.2d at 81). But nothing about Mrs. Price's claims invoked the protections of the Act. The Defendants raised the "impacted care" issue for the first time well *after* the Complaint was filed, and Mrs. Price had no reason to know they would do so — her husband's heart attack and ensuing death, to her knowledge, had *nothing* to do with COVID-19. The Act cannot be read to make it "incumbent upon [plaintiffs] to plead sufficient factual allegations to overcome" the "impacted care" affirmative defense, and this Court should reject Defendant Bailey's efforts to have it do so. *Id.* at 14.

The Defendants spend much time in their briefs describing the details of Raleigh General's emergency department operations in December 2021, explaining the policy goals that undergird the Act and its provisions, and illustrating the breadth of the defense that the Act affords to certain health care providers. Mrs. Price takes no issue with any of the Defendants' detailed background information, and of course does not dispute that the Act does afford a defense to health care

providers for losses that are, in fact, brought about by "impacted care." The issue at the heart of this appeal, where Mrs. Price parts ways with the Defendants, is whether it was possible or appropriate for the circuit court below to make such a determination. The court summarily ruled that the care given to Mr. Price was "impacted" by the COVID-19 pandemic, with only nine pages of generic allegations from the Defendants' affidavits before it — and without having allowed Mrs. Price any opportunity to challenge the Defendants' bald assertions in discovery. The court's ruling was premature and out of step with the Supreme Court of Appeals' recognition of "broad discovery" as being "essential to the fair disposition" of cases like Mrs. Price's. *State ex rel. W. Va. State Police v. Taylor*, 201 W. Va. 554, 565 n.16, 499 S.E.2d 283, 294 n.16 (1997). The ruling should be reversed, and the case returned to the circuit court, so that the parties may fairly adjudicate the issues raised by the Defendants.

B. As Interpreted and Applied by the Circuit Court, the Act Abridges Medical Malpractice Plaintiffs' Due Process Rights and Separation-of-Powers Principles.

The circuit court's dismissal of Mrs. Price's Complaint was principally in error owing to its failure to permit Mrs. Price to take the necessary discovery, as explained above — but the court's ruling also poses significant constitutional concerns.

As explained in Mrs. Price's opening brief, if the circuit court correctly interpreted and applied the relevant provisions of the Act, it erred in applying a statute that, by cutting off litigants' ability to conduct any discovery and in turn compelling a finding of fact on a dispositive issue, deprives medical malpractice plaintiffs of due process. Defendant Bailey dismisses Mrs. Price's due-process concerns are "perfunctory" and "skeletal," Resp. Bailey's Br. 25, 26, but the issue is straightforward — under the West Virginia Constitution's Due Process Clause, W. Va. Const. art. III, § 10, Mrs. Price was entitled to, but did not receive, the "essential due process requirement" of

a meaningful opportunity to be heard. *Fraley v. Civil Serv. Comm'n*, 177 W. Va. 729, 732, 356 S.E.2d 483, 486 (1987).

Mrs. Price does not claim, as Defendant Bailey suggests, any absolute constitutional right to discovery, and recognizes there is no such universal entitlement. But as the Defendants acknowledge, what constitutes procedural due process necessarily "depend[s] upon the particular circumstances of a given case." Syl. Pt. 2, *North v. W. Va. Bd. of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977). And the circumstances here compelled that Mrs. Price be afforded the opportunity to conduct at least limited discovery on the matter of "impacted care" — without it, she was wholly unable to rebut the Defendants' own evidence and to defend against their outcome-determinative claims. The Supreme Court of Appeals has repeatedly explained that "due process requires a degree of flexibility in its application to various circumstances," and that ultimately, the "fundamental requirement of due process" is "the opportunity to be heard at a meaningful time *and in a meaningful manner*." *Stull v. Firemen's Pension & Relief Fund*, 202 W. Va. 440, 447, 504 S.E.2d 903, 910 (1998) (emphasis added) (citing *Hutchison*, 198 W. Va. 139, 479 S.E.2d 649). To be sure, Mrs. Price was afforded notice of the court's hearing, was well able to attend it and to appear by counsel, and was permitted to make her case — but she could not *meaningfully* do so, as the court had forestalled her ability to develop any case against the "impacted care" issue in the first instance. A litigant's ability to present evidence relevant to the issue at hand prior to any ruling on the issue is baked into the Constitution's conception of due process, and the court's application of the Act in this case effectively denied Mrs. Price that right. *See Marcus v. Holley*, 217 W. Va. 508, 527, 618 S.E.2d 517, 536 (2005); *Menon v. Davis Mem'l Assocs., Inc.*, 160 W. Va. 453, 454-55, 235 S.E.2d 817, 818 (1977).

In similar fashion, by requiring circuit courts to stay any medical malpractice action that arose during the COVID-19 emergency when a defendant invokes the "impacted care" defense and to immediately resolve the defense's applicability, the Act effectively imposes on the circuit courts a specialized set of rules of procedure for a subset of those courts' dockets. The West Virginia Constitution vests the Supreme Court of Appeals with exclusive rulemaking powers, W. Va. Const. art. VIII, § 3 — the "authority to promulgate administrative rules for the effective management of the judicial system," which rules "have the force and effect of statutory law and operate to supersede any law that is in conflict with them," rests solely with the Supreme Court. *State ex rel. Workman v. Carmichael*, 241 W. Va. 105, 132, 819 S.E.2d 251, 278 (2018). By crafting a specialized set of procedures for the disposition of cases that apply only to a handful of medical malpractice actions, the Legislature enacted a policy that is indeed "substantially contrary to provisions in" the Rules of Civil Procedure — the Act's "stay" provisions operate to fully displace and supersede the Rules governing discovery, providing instead that there shall be *no* discovery upon a defendant's raising of the "impacted care" defense. *Teter v. Old Colony Co.*, 190 W. Va. 711, 726, 441 S.E.2d 728, 743 (1994). Legislative enactments like the Act "which are not compatible with those prescribed by the judiciary or with its goals are unconstitutional violations of the separation of powers." *State ex rel. Quelch v. Daugherty*, 172 W. Va. 422, 425, 306 S.E.2d 233, 235 (1983).

Defendant Bailey, for his part, attempts to wave away separation-of-powers issues by explaining that the Supreme Court of Appeals is permitted to promulgate rules that relate only to "practice and procedure," such that the Legislature may intrude upon the Supreme Court's turf only by enacting purely procedural legislation. W. Va. Const. art. VIII, § 3. Defendant Bailey seeks to muddy the waters as to what is substance and what is procedure, suggesting that the Act

primarily creates "substantive rights" in an effort to distract from what he concedes are "procedural trappings." Resp. Bailey's Br. 34. But the thrust of the Act is obviously procedural — to carry out its stated legislative purpose of "preclud[ing] all suits . . . for loss, damages, personal injuries, or death arising from COVID-19," the statute directs courts to stay litigation upon the presentation of a particular affirmative defense, to convene a hearing, and to issue a ruling on the applicability of the defense. The Act modifies, in the simplest of terms, the procedure a circuit court is to use in overseeing a medical malpractice case that arose during the COVID-19 emergency. It wrongly interferes with the Rules of Civil Procedure in that sense, overstepping the bounds of the Legislature's authority. *See Louk v. Cormier*, 218 W. Va. 81, 91 n.13, 622 S.E.2d 788, 799 n.13 (2005).

C. The Defendants Failed to Establish that Mr. Price's Medical Care Was "Impacted By" COVID-19.

Putting aside the foregoing problems with the circuit court's dismissal of Mrs. Price's case, the court's specific ruling — that COVID-19 and its presence at Raleigh General "impacted" Mr. Price's care — was founded on insufficient evidence. The Defendants engage in a longwinded defense of the merits of the court's determination, insisting that there was a substantial body of "competent evidence" put before the court that supported the finding of "impacted care." *See* Resp. Raleigh General's Br. 1; Resp. Bailey's Br. 36, 39. But there was hardly the sort of well-developed record that the Defendants conjure — as they acknowledge, the universe of evidence in support of their affirmative defense was limited to three affidavits from two affiants, consisting of a total of nine pages of general statements about the pandemic's effects on the hospital, alongside a handful of Mr. Price's medical records that did not explain why any COVID-19-related disruptions prevented administering the necessary medications to Mr. Price. *See* Resp. Bailey's Br. 11 n.7 & accompanying text. All told, there was not substantial record evidence supportive of the court's

finding of fact, making it clearly erroneous — the dearth of evidence underlying the court's determination leaves "the definite and firm conviction that a mistake has been committed." Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). Further factual development was needed to make *any* finding concerning "impacted care," making a resolution of that issue in the summary judgment posture inappropriate.

Mrs. Price does not, to be clear, contend that the circuit court should have made a ruling that Mr. Price's medical care was *not*, in fact, "impacted by" COVID-19 — she maintains only that the body of evidence before the court was insufficient to arrive at any conclusion, positive or negative. Mrs. Price disagrees that "unequivocal evidence" "compelled . . . a finding" of "impacted care," that it was an "obvious conclusion that Price's care was impacted by the . . . surge in COVID-19," and certainly that the Defendants established that Mr. Price was a "victim of COVID-19." *See* Resp. Raleigh General's Br. 5, 9. As explained in Mrs. Price's opening brief, the Defendants' affidavits described in general terms how the pandemic affected hospital operations, but fully failed to bridge the gap between those effects and the substandard care that Mr. Price received — regardless of whether a full causal link or a mere "connection" or "association" of the type Defendant Bailey focuses on is required to establish "impacted care."

The Defendants' affidavits, again, list off a series of challenges faced at Raleigh General as a result of the pandemic — Defendant Bailey's brief highlights many of them in bolded and underlined text, speaking to the number of beds available when Mr. Price arrived at the emergency department, the number of ventilators the hospital was using on COVID-19 patients, and increased wait times for patients. And Defendant Bailey suggests that Mrs. Price has "conceded . . . a temporal relationship between" these challenges and Mr. Price's care, Resp. Bailey's Br. 36 — perhaps so, but "[i]nferring causation from the timing is an example of the classical logical fallacy,

post hoc, *ergo propter hoc* — it is illogical to infer that event A caused condition B simply because A preceded B." *San Francisco v. Wendy's Int'l, Inc.*, 221 W. Va. 734, 757, 656 S.E.2d 485, 508 (2007) (Benjamin, J., dissenting). Explaining that "A preceded B" is all the Defendants' affidavits do — as Defendant Raleigh General details, the affidavits "la[id] out specific facts that confirm[ed] . . . limited space, staff, and resources available to treat patients," and in conclusion "affirmed that these conditions directly impacted Price's care." Resp. Raleigh General's Br. 21. The divide is never bridged; no explanation is offered as to how Mr. Price's specific care would have been different in the absence of COVID-19, and no link is established between the hospital's staffing and logistical challenges and its failure to simply deliver a handful of medications to Mr. Price. Further "inquiry concerning the facts," in these circumstances, was obviously "desirable to clarify the application of the law" — the Defendants' deficient evidence of "impacted care" left a classic dispute of material fact on the table. Syl. Pt. 2, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). The court prematurely made a finding of fact that it used to award the Defendants summary judgment, and its ruling must be reversed to allow for proper development of the evidence.

III. CONCLUSION

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

Dated: July 30, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July 2024, I served a true and correct copy of the **PETITIONER HEIDI PRICE'S REPLY BRIEF IN SUPPORT OF APPEAL** on the following individuals, via electronic mail:

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