No. SC-2023-0601

IN THE SUPREME COURT OF ALABAMA

EX PARTE JACKSON HOSPITAL & CLINIC, INC.,

Petitioner.

(IN RE: THERESA JOHNSON, INDIVIDUALLY, AND AS EXECUTOR OF THE ESTATE OF NATHANIEL JOHNSON,

Plaintiffs,

v.

JACKSON HOSPITAL & CLINIC, INC., ET AL.,

Defendants)

Amended Petition for Writ of Mandamus to the Circuit Court of Montgomery County (Hon. Jimmy Pool, CV-2021-900980)

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

This case involves legal error by the trial court in interpreting and applying the Alabama Covid Immunity Act. Though the issues can be resolved through the straightforward application of settled principles of statutory interpretation, this case raises an issue of first impression because the Court has not yet interpreted the Covid Immunity Act. Oral argument is requested.

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INTRODUCTION

The Alabama Legislature recognized that the COVID-19 pandemic posed extraordinary challenges to Alabama's healthcare providers. Healthcare workers had to operate under rapidly changing alternative care plans to cope with higher volumes of patients, limited resources, and incomplete knowledge about a novel virus. In passing the Alabama Covid Immunity Act ("ACIA"), the Legislature noted that the pandemic had caused "significant strain on health care facilities" and had "undermined . . . the ability to deliver patient care in the traditional, normal, or customary manner." Ala. Code § 6-5-790. And it concluded that "health care facilities, health care professionals, and their supporting workers need[ed] protection to respond to this pandemic and to do what they can do to continue to provide treatment and services for the people of Alabama." *Id.* The ACIA thus granted broad legal immunity to businesses and healthcare providers operating on the frontlines of the pandemic. It immunized healthcare providers like Jackson Hospital & Clinic, Inc. ("JHC") from civil suits relating to their conduct fighting the pandemic, with narrow exceptions. For such suits to survive, claimants

must show by "clear and convincing evidence" that a covered entity engaged in wanton, reckless, willful, or intentional misconduct.

When Plaintiff Theresa Johnson, individually and as Executor of the Estate of Nathaniel Johnson ("Johnson") sued JHC over care provided during the COVID-19 pandemic, JHC sought summary judgment in accordance with the ACIA's broad immunity. Tab 3. The trial court initially granted summary judgment in JHC's favor. Tab 6. Later, at Johnson's request, the trial court reopened discovery for the limited purpose of allowing Johnson to depose three affiants who had supported JHC's motion for summary judgment. Tab 20 at 1. After the deponents testified consistent with their affidavits, Johnson filed a last-ditch motion challenging the legality of ACIA—and JHC's immunity defense. Tab 18 at 4-14. In that motion Johnson argued for the first time—more than eight months after the trial court granted summary judgment to JHC—that the ACIA was unconstitutional.

On July 12, 2023, the trial court reversed course. It denied JHC's previously granted motion for summary judgment—but not for the reasons argued by Johnson. Tab 25. The court did not acknowledge the general immunity provisions of the ACIA, declining to say one way or

another whether Johnson's claims against JHC were abrogated by the immunity provisions. It did not address any of the other state or federal defenses offered by JHC in its motion for summary judgment. Nor did it reach the constitutional questions Johnson raised. Instead, without determining whether Johnson's claims were covered by the immunity provisions in the first place, the trial court located an "exception" to the immunity provisions elsewhere in the ACIA—the public health guidance safe harbor provision—and held that JHC triggered it.

The plain text of the ACIA cannot support the trial court's interpretation. First, the trial court declares that JHC is excepted from the ACIA's several immunity provisions without clarifying which of those provisions are applicable. Second, the court's construction of the ACIA's public health guidance safe harbor provision increases covered entities' exposure to liability rather than limiting it as the Act was designed to do. The safe harbor is an independent and alternative basis for legal immunity—not an exception to the ACIA's general immunity provisions. Accordingly, JHC asks the Court to issue a writ of mandamus directing the trial court to (1) vacate its July 12, 2023, Order, and (2) issue an order

granting summary judgment for JHC based on immunity under the ACIA.

STATEMENT OF THE CASE AND THE FACTS

Johnson's claims stem from JHC's treatment of her husband, Nathaniel Johnson (also referred to as "Johnson" herein for convenience), for COVID-19. Her claims arise from events that occurred when JHC's respiratory therapists and nurses carried out a doctor's order to move Johnson from one floor of the hospital to another that provided a higher level of care. The relevant facts are as follows.

A. JHC adopted alternative standards of care due to the COVID-19 pandemic

In December 2020, JHC was operating under alternative standards of care due to COVID-19, a fact reflected in the Governor's emergency declarations and guidance from the CDC. Tab 26, Ex. 3, at 22-23. Dr. Shane Cunningham, who served as JHC's Chief of Medicine during the relevant period and provided care to Johnson, testified that changes to the applicable standard of care were made "to hinder COVID from spreading" and were aimed at "trying not to expose staff members and other patients to the COVID-19 virus." *Id.* at 16. Dr. Cunningham confirmed that changes included new procedures for transferring

COVID-19 patients within the hospital. He testified that the treatment Johnson received—including removing him from BiPap before moving him from one floor to another—was typical of what JHC did for all COVID-19 patients at this time. *Id.* at 24; Tab 27 at 4-5.

B. Johnson is admitted to JHC

Johnson was admitted to JHC with COVID-19 on November 26, 2020. Tab 27 at 1, 4-5. After testing positive for COVID-19, Johnson was placed in a room on the sixth floor. Tab 26, Ex. 1, at 27, 40; Ex. 2. at 66-67, 75, 109, 120-121; Ex. 3 at 15. All patients on the sixth floor were COVID-19 patients. *Id.*, Ex. 2 at 75, 120-121.

C. A physician orders that Johnson be transferred

After JHC admitted Johnson, a doctor ordered that Johnson be transferred to the third floor of the hospital. *Id.* at 110. The third floor operated as a "med-surg" unit, which would allow Johnson to be monitored more closely. *Id.* at 75-76. The respiratory therapists and nurses involved in transferring Johnson were acting under the doctor's transfer order. *Id.* at 121; Tab 27 at 12.

The respiratory therapists and nurses who transferred Johnson followed the patient transfer procedures in place at the time. Tab 26, Ex.

2 at 121. Respiratory Therapists Sharpe and King testified that, under those procedures, Johnson could not be transferred to a new floor on a BiPap machine. *Id.* at 78; Ex. 1 at 40. Regan Sullivan, JHC's Director of Respiratory Care, confirmed that COVID-19 patients were removed from BiPaps for transport within the hospital. *Id.*, Ex. 4 at ¶6. This requirement existed because the BiPap machines available at the time lacked an expiratory filter, and expelled unfiltered air breathed out by the patient. *Id.* at ¶¶6-8. Accordingly, JHC considered transporting COVID-19 patients hooked to a BiPap to be unsafe. *Id.* This view reflected the recommendations of the CDC and other sources of medical literature. *Id.*

Instead, transfer procedures required COVID-19 patients to be removed from the BiPap, placed on an OxyMask, and then to have another protective mask applied over their face. Tab 26, Ex. 2 at 79, 81. An OxyMask can deliver the same percentage of oxygen as a BiPap. *Id.* at 51. The only difference is a BiPap delivers "a little bit more pressure." *Id.* at 52, 72.

As of December 6, 2020, the date of Johnson's death, BiPap circuits with adapters for expiratory filters were unavailable for JHC to acquire.

Tab 26, Ex. 4 at ¶¶8-9. JHC did not receive its first such circuits until after Johnson died. *Id.*

Under transfer procedures then in place, nurses transported the patient while respiratory therapists transported medical equipment to a patient's new room. *Id.*, Ex. 1 at 43; Ex. 2 at 84-85. Respiratory therapists would first retrieve the patient's oxygen equipment from the existing room, including the BiPap, and transport it to the new room for installation. *Id.*, Ex. 4 at ¶¶10-11. This allowed the BiPap to be ready for the patient upon arrival to the new room, minimizing time off the machine. *Id.* While the equipment was being set up, the patient would be placed in an OxyMask and would remain on it until the completion of the transfer. *Id.*, Ex. 2 at 84-85.

D. Johnson is placed on a BiPap and prepared for transfer

On December 6, 2020, hospital staff placed Johnson on a BiPap machine. Tab 27 at 11, 14, 21. Later, RT Sharpe was called to help move Johnson from the sixth to the third floor. Tab 26, Ex. 2 at 74. RT Sharpe asked RT King to assist her with transporting Johnson's respiratory equipment (a BiPap and a high-flow nasal cannula). *Id.* at 41-43; Ex. 1 at 22, 24, 39.

When RTs Sharpe and King arrived at Johnson's old room, RT Sharpe removed the BiPap and immediately placed Johnson on an OxyMask, meaning Johnson was never without supplemental oxygen. *Id.*, Ex. 2 at 79, 81, 83, 92-93, 96, 98, 121; Ex. 1. at 22, 26, 29, 30, 32, 34, 40, 58; *see also* Tab 27 at 25.[1] The OxyMask provided Johnson with the very same percentage of oxygen that his BiPap was providing. Tab 26, Ex. 2 at 51. RT Sharpe monitored Johnson for several minutes to ensure he was stable. *Id.*, Ex. 2 at 83, 91-92, 113-114; Ex. 1 at 28, 33-34. In this case, Johnson's oxygen level never dropped, his heart rate was fine, and he was responsive. *Id.*, Ex. 2 at 91-92, 121; Ex. 1 at 28-29, 35, 44.

[1] The only evidence to the contrary is Johnson's affidavit, submitted after summary judgment was entered for JHC, disputing whether Johnson was placed on an OxyMask by RT Sharpe after coming off the BiPap. Tab 18, Ex. A. The affidavit is inadmissible. *See Thomas v. Swindle*, 676 So.2d 333, 335 (Ala. 1996) ("A trial court may not consider newly presented evidence on a Rule 59(e) motion, absent a showing by the party of circumstances that prevented [her] presenting that evidence to counter that offered in support of the motion for summary judgment.") (citing *Moore v. Glover*, 501 So.2d 1187 (Ala. 1986))). Further, for medical malpractice claims, plaintiffs must present *expert* testimony showing a causal connection between the defendant's conduct and the injury. She may not proceed solely on her own testimony. *Breland ex rel. Breland v. Rich*, 69 So. 3d 803, 814 (Ala. 2011) (emphasis added) (citing *Sorrell v. King*, 946 So.2d 854, 862 (Ala.2006)). Finally, as stated above, the affidavit is outweighed by overwhelming evidence that when Johnson was removed from the BiPap, he was immediately placed on an OxyMask.

RT Sharpe then told Johnson that she and RT King were taking the respiratory equipment to his new room, to which he nodded his head in response. *Id.*, Ex. 2 at 83-84, 92, 124-125. RT Sharpe stopped at the nurse's desk on the way and informed the nurse that Johnson was ready for transport. *Id.*, Ex. 2 at 84, 95-96. RTs Sharpe and King pushed the respiratory equipment to the new room. *Id.*, Ex. 2 at 84. Nursing notes confirm that Johnson was wearing the OxyMask when the nurse entered his room after RTs Sharpe and King had left to take the equipment to the new room. *Id.*, Ex. 2 at 92-93, 121, 124-125; *see also* Tab 27 at 25.

E. Johnson goes into distress

RTs Sharpe and King arrived at the new room on the third floor, setup the equipment, and immediately heard calls for an "ICE team" to Johnson's room, indicating Johnson was in distress. Tab 26, Ex. 2 at 87, 90-91. RTs Sharpe and King immediately responded to Johnson's room. A "Code 99" had been called before they arrived, indicating Johnson was unresponsive. *Id.*, Ex. 2 at 87, 91; Ex. 1 at 22-23, 49. Johnson never recovered after going into distress. He died on December 6, 2020. Tab 27 at 25.

No evidence in the record suggests that Johnson's death was caused in any degree by him being on an OxyMask instead of a BiPap. Dr. Cunningham did not believe the death was caused by an oxygenation issue at all, but likely resulted from a clot. Tab 26, Ex. 3 at 29. He based his opinion on the sudden onset of Johnson's distress and the right thigh pain he was experiencing. *Id.* at 30-31; Tab 27 at 13, 15. He also based it on the fact that COVID-19 patients had a higher risk of thrombotic events and noted that Johnson was already on an anti-clotting drug as of that morning. Tab 26, Ex. 3 at 35-37; Tab 27 at 4-5, 13, 15, 16.

F. Procedural Posture

Theresa Johnson filed her complaint against JHC on or about September 9, 2021. Tab 1. She asserts four claims against JHC, all related to JHC's treatment of Nathaniel Johnson for COVID-19: negligence/wantonness under the Alabama Medical Liability Act ("AMLA"), negligent/wanton hiring/training/supervision, loss of consortium, and wrongful death. All claims stem from JHC's decision to remove Johnson from the BiPap to move him to a new room.

JHC asserted immunity under the ACIA and several other state or federal immunity defenses in response. Tab 2. After discovery, JHC

sought summary judgment on similar grounds. Tab 3. In support, JHC presented the affidavits of RTs Sharpe (Tab 3, Exhibit A) and King (Tab 3, Exhibit B)—the only two people referenced in Johnson's Complaint—and Dr. Cunningham (Tab 3, Exhibit C), who confirmed that JHC was operating under alternative standards of care at the time due to the pandemic. On June 14, 2022, the trial court granted summary judgment for JHC. Tab 6.

Johnson then requested and was granted leave to depose the three witnesses whose affidavits JHC relied on at summary judgment. Tabs 11 & 12. The parties completed the depositions, which confirmed the written statements already in the record. Tab 16 at 1-8. Johnson then filed yet another opposition to summary judgment, asserting for the first time in the case that the ACIA's immunity provisions were unconstitutional. Tab 18. JHC offered an initial response in opposition that same day, Tab 19, and later replied in full. Tab 22. JHC argued first that the undisputed facts in the record required granting its motion for summary judgment regardless of any immunity. *Id.* at 2-6. It also argued that the ACIA and other pandemic-related immunity provisions were clearly constitutional and shielded JHC from Johnson's claims. *Id.*

at 6-22. Governor Kay Ivey and the Business Council of Alabama both filed amicus briefs supporting the constitutionality of Alabama's COVID immunity laws. Tabs 23 & 24.

On July 12, 2023, the trial court reversed its earlier judgment and denied JHC's motion for summary judgment. Tab 25. The trial court did not rule on the constitutionality of Alabama's COVID immunity laws. Nor did it rule on whether JHC is covered under the ACIA's general immunity provisions, or any of the other state or federal immunity defenses JHC raised in its answer. Instead, the court concluded (1) that JHC's respiratory therapists did not comply with either public health guidance or the alternative standards of care in place during the pandemic, and (2) that those findings excepted JHC from any immunity protection under any provision of the ACIA. JHC filed a motion requesting the trial court vacate or clarify its summary judgment order and/or to certify the immunity issues to this Court for an interlocutory appeal under Rule of Appellate Procedure 5. Tab 26. To date, the trial court has taken no action on that motion.

ISSUE PRESENTED

Do the general immunity provisions in Alabama Code Section 6-5-792 and Section 6-5-794 or the public health guidance safe harbor provision of Alabama Code 6-5-793 bar Johnson's claims against JHC?

STATEMENT OF JURISDICTION

Mandamus requires a showing that "there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court." *Ex parte Edgar*, 543 So. 2d 682, 684 (Ala. 1989). This Court has held that a petition for a writ of mandamus is the proper device by which to challenge the denial of a motion for summary judgment grounded in a claim of legal immunity. *Ex parte Purvis*, 689 So.2d 794, 795 (Ala. 1996). *See also Ex parte Kelley*, 296 So. 3d 822, 826 (Ala. 2019) (issuing writ of mandamus after the trial court denied motion for summary judgment based on parental-immunity against negligence claims).

"[W]hether review of the denial of a summary-judgment motion is by a petition for a writ of mandamus or by permissive appeal, the appellate court's standard of review remains the same." *See Ex Parte City*

of Montgomery, 272 So. 3d 155, 159 (Ala. 2018) (quoting *Ex parte Wood*, 852 So.2d 705, 708 (Ala. 2002)). "If there is a genuine issue as to any material fact on the question of whether the movant is entitled to immunity, then the moving party is not entitled to a summary judgment." *Id.* (citing Rule 56, Ala. R. Civ. P.). In determining whether issues of fact exist, this Court views the record in the light most favorable to the non-moving party, drawing all reasonable inferences for the non-movant. *Id.*

This petition is timely because it was filed within 42 days of the trial court's July 12, 2022, order. Ala. R. App. P. 4, 21.

REASONS WHY THE WRIT SHOULD ISSUE

This Court should issue a writ of mandamus directing the trial court to (1) vacate its July 12, 2023, Order, and (2) issue an order granting summary judgment for JHC based on immunity under the ACIA.

JHC is twice immunized from Johnson's claims under the general immunity provisions of the ACIA. JHC is first immunized as a healthcare provider sued over treatment that "resulted from" or was "done in response to" the COVID-19 pandemic. Ala. Code § 6-5-794(a). JHC is also immunized because Johnson brings a "health emergency

claim" against a "covered entity." Ala. Code § 6-5-791(a)(5); Ala. Code § 6-5-792(a). Either way, Johnson's claims against JHC are abrogated by the ACIA's general immunity provisions.

Alternatively, JHC is immune from Johnson's claims under the ACIA's public health guidance safe harbor provision. The ACIA provides that covered healthcare providers like JHC are not liable "for negligence, premises liability, or for any non-wanton, non-willful, or non-intentional civil cause of action . . . unless the claimant shows by clear and convincing evidence that the covered entity did not reasonably attempt to comply with the then applicable public health guidance." Ala. Code § 6-5-793(b)(1). The record shows that JHC and its staff made reasonable attempts to comply with applicable public health guidance, and Johnson has offered no contrary evidence. Thus, JHC is also immunized from Johnson's claims under this independent and alternative basis for immunity.

The trial court's failure to extend immunity to JHC was based on a misinterpretation of the ACIA. First, rather than recognize that the ACIA has both general immunity provisions and an additional safe harbor provision, the trial court limited its analysis to the safe harbor.

As a result, the trial court never addressed the ACIA's general immunity provisions in Sections 6-5-792 and 6-5-794. Second, the trial court misinterpreted the ACIA's public health guidance safe harbor provision to create *exceptions* to the ACIA's general immunity provisions even though the safe harbor was designed to offer *additional* liability protections to healthcare providers. Compounding the error, the trial court wrongly concluded that JHC falls outside the safe harbor by interpreting the safe harbor provision inconsistently with its plain language.

This Court has held that summary judgment is appropriate where the movant is immune from liability for the alleged conduct, and the nonmovant raises no genuine issue of fact that such immunity is inapplicable. *See Estes v. Stepping Stone Farm, LLC*, 160 So. 3d 299, 305 (Ala. Civ. App. 2014). In denying summary judgment, the trial court denied JHC the benefit of legal immunity to which it is entitled under the ACIA. *See Ryan v. Hayes*, 831 So. 2d 21, 31 (Ala. 2002) ("One of the purposes of immunity… is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed on those defending a long drawn out lawsuit.") (citation omitted).

This Court should issue the writ.

I. The Alabama Covid Immunity Act creates broad legal immunity for healthcare providers and covered entities

The ACIA immunizes both healthcare providers and other "covered entities." The ACIA defines "covered entities" to include healthcare providers, among many others. Ala. Code § 6-5-791(5). The ACIA extends immunity to healthcare providers and covered entities in several ways. First, the ACIA contains two "general" immunity provisions: Section 6-5-792 and Section 6-5-794. Section 6-5-792 immunizes any covered entity from liability in connection with a "health emergency claim" absent a showing that it engaged in wanton, reckless, willful, or intentional misconduct. Ala. Code § 6-5-792. The ACIA defines a "health emergency claim" as "any claim that arises from or is related to the Coronavirus." Ala. Code § 6-5-791(13). Section 6-5-794 immunizes healthcare providers from liability in connection with claims based on the "performance or provision of health care services" related to the pandemic, absent a showing that the provider engaged in wanton, reckless, willful, or intentional misconduct. Ala. Code § 6-5-794.

The ACIA also contains a separate immunity provision based on one's attempted compliance with applicable public health guidance. For

claims not already abrogated by Section 6-5-792 or Section 6-5-794, the public health guidance "safe harbor" provision states that covered entities are not liable "for any non-wanton, non-willful, or non-intentional civil cause of action to which this section applies" unless the claimant "shows by clear and convincing evidence that the covered entity did not reasonably attempt to comply with the then applicable public health guidance." Ala. Code § 6-5-793.

Finally, these immunity provisions are retroactive. Ala. Code § 6-5-795. They apply to lawsuits filed on or after March 13, 2020, when the Governor declared a state of emergency as authorized by the Alabama Emergency Management Act ("AEMA"). *See* Ala. Code § 31-9-8.

JHC is both a healthcare provider and a "covered entity" under the ACIA. Furthermore, Johnson's claims against JHC indisputably stem from care provided during the pandemic to treat Nathaniel Johnson for COVID-19. Accordingly, JHC may seek legal immunity under either the general immunity provisions or the public health guidance safe harbor provision.

II. JHC is entitled to summary judgment under the ACIA's general immunity provisions

Johnson's claims against JHC stem from alternative standards of care adopted by medical providers during the pandemic to cope with staff and supply shortages. They are exactly the kind of claims abrogated by the ACIA. Furthermore, Johnson raises no genuine issue of fact as to whether JHC was either negligent or wanton—it was not. Accordingly, JHC is entitled to immunity under the ACIA and summary judgment in its favor.

A. Johnson's Claims are covered by the ACIA's general immunity provisions

As explained above, the ACIA's general immunity provisions immunize two types of entities: (1) "covered entities"—including healthcare providers and other businesses—defending against "health emergency claim[s]," *see* Ala. Code § 6-5-792(a); and (2) healthcare providers providing care related to the pandemic, *see* Ala. Code § 6-5-794(a).

JHC is shielded from Johnson's claims under either category of ACIA immunity. Johnson brings four claims against JHC, all related to the treatment of Nathaniel Johnson for COVID-19:

negligence/wantonness under the Alabama Medical Liability Act ("AMLA"), negligent/wanton hiring/training/supervision, loss of consortium, and wrongful death. Johnson alleges that JHC, in treating Johnson for COVID-19, breached its duty of care by removing Johnson from a BiPap machine while preparing to move him to a new room. Throughout Johnson's treatment, JHC was operating under an alternative standard of care plan due to the pandemic, and Johnson was treated under that plan. Accordingly, Johnson's claims are abrogated because Johnson is suing a healthcare provider over treatment that "resulted from" or was "done in response to" the pandemic. Ala. Code § 6-5-794(a). Alternatively, they are abrogated because Johnson is bringing a "health emergency claim" against a "covered entity." Ala. Code § 6-5-791(a)(5); Ala. Code § 6-5-792(a). Either way, Johnson's claims are abrogated by the ACIA's general immunity provisions.

B. Johnson cannot show that JHC engaged in wanton conduct

Because Johnson's claims against JHC are covered by the plain text of the general immunity provisions, JHC cannot be held liable "for any damages, injury, or death alleged to have been caused by an act or omission" unless Johnson can show "by clear and convincing evidence"

that JHC engaged in "wanton, reckless, willful, or intentional misconduct." *See* Ala. Code § 6-5-792(b); Ala. Code § 6-5-794(a). This Court has defined wantonness as acting or failing to act "with reckless indifference to the consequences" of one's conduct. *Armstrong Bus. Servs., Inc. v. AmSouth Bank*, 817 So. 2d 665, 679–80 (Ala. 2001) (quoting *Weatherly v. Hunter*, 510 So.2d 151, 152 (Ala.1987)). Wantonness means that "the party acting or failing to act is conscious of his conduct, and even though without any actual intent to injure is aware from his knowledge of existing circumstances and conditions that his conduct would probably result in injury to another[.]'" *Id.*

Johnson has not shown—nor can she show—any evidence that JHC engaged in wanton conduct. The trial court already held that Johnson failed to make that showing when it once granted summary judgment. Tab 6. And nothing revealed during the added discovery period challenges the undisputed facts the trial court relied on in doing so: Johnson was being treated for COVID-19 at JHC; a physician ordered Johnson to be transferred to another floor; transporting Johnson required removing him from the BiPap machine; respiratory therapists removed Johnson from the BiPap to move it to his new room and avoid spreading

COVID-19; staff immediately placed Johnson in an OxyMask to provide supplemental oxygen following his removal from the BiPap; but Johnson crashed before the transfer could be completed. Tab 3 at 2-3. The respiratory therapists acted quickly and diligently.[2] The only reason JHC switched Johnson from a BiPap to an OxyMask is because the protocols in place did not permit transporting patients on BiPap.

The uncontradicted record shows that the actions taken by those caring for Johnson do not rise to the level of wantonness required to defeat immunity under the ACIA. Because Johnson cannot show a genuine issue of fact as to whether JHC was at least wanton, her claims fail on summary judgment based on JHC's clear grant of immunity.

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[2] The timeline of events from December 6, 2020 shows just how quickly JHC staff responded: at 5:08 p.m. RT Sharpe received word that the new room was ready for Johnson; at 5:10 p.m. RTs Sharpe and King entered Johnson's room to initiate the transfer; at 5:15 p.m. RT Sharpe told Johnson's nurse that they would be leaving for the new room soon; at 5:20 p.m. Johnson's nurse went into his room and documented that the respiratory therapists had left for the new room and that Johnson was on a 15L OxyMask; at 5:26 p.m. Johnson went into distress while the nurse was in the room prepping him for transfer and an ICE team was called; at 5:30 p.m. a Code 99 was called. Tab 27 at 23-25.

III. JHC is immune under the ACIA's public health guidance safe harbor

Even if JHC were not immune under the ACIA's general immunity provisions, the ACIA provides another layer of protection in its safe harbor provision. Under that provision, covered healthcare providers like JHC are not liable "for any non-wanton, non-willful, or non-intentional civil cause of action . . . unless the claimant shows by clear and convincing evidence that the covered entity did not reasonably attempt to comply with the then applicable public health guidance." Ala. Code § 6-5-793(b)(1). Such guidance includes any proclamation, order, or rule issued by the Governor, State Health Officer, or State Board of Health related to COVID-19. Ala. Code § 6-5-791(a)(1). The burden is on Johnson to show that JHC falls outside of the safe harbor—she cannot make that showing. At all relevant times, JHC made reasonable attempts to comply with ever-changing public health guidance during the pandemic. Johnson has not even attempted to provide the "clear and convincing" evidence required to clear this hurdle. Accordingly, JHC is independently and alternatively entitled to immunity under the ACIA's public health guidance safe harbor provision, and to summary judgment in its favor.

A. JHC made a reasonable attempt at complying with applicable public health guidance

The record shows that JHC made reasonable attempts to comply with the constantly changing public health guidance during the pandemic. Again, the undisputed facts that the trial court relied on when it entered summary judgment are: Johnson was treated for COVID-19 at JHC; a physician ordered Johnson to be transferred to another floor; transporting Johnson required removing him from the BiPap machine; respiratory therapists removed Johnson from the BiPap to avoid spreading COVID-19 during the transfer; staff immediately placed Johnson in an OxyMask to provide supplemental oxygen; but Johnson crashed before the transfer could be completed. At no point was Johnson without supplemental oxygen. Tab 3 at 2-3.

Johnson does not—because she cannot—explain how these facts reveal a "clear and convincing" failure at "reasonabl[y] attempt[ing]" to follow public health guidelines. Johnson does not identify any proclamation, order, or rule issued by any state official recommending a course of treatment that JHC failed to follow while treating Johnson for COVID-19. Even after briefing summary judgment and additional discovery, Johnson offers no admissible evidence that JHC failed to make

reasonable attempts at complying with public health guidance. The only conceivable support for that position would come from Johnson's self-serving affidavit (Tab 18, Ex. A), which is due to be disregarded for the reasons identified above and which, in any case, the trial court apparently did not rely on when it issued its July 2023 order denying JHC's motion for summary judgment. Johnson has therefore raised no genuine issue of material fact as to whether JHC made a reasonable attempt at complying with then-applicable public health guidance.

Because Johnson has not provided clear and convincing evidence that JHC failed to make a reasonable attempt at complying with public health guidance, JHC is immune from any claims for conduct that is non-wanton, non-willful, or non-intentional. And again, Johnson has failed to raise a genuine issue of fact as to whether JHC's conduct rises to the level of wantonness required to defeat immunity—it does not. Thus, because JHC reasonably attempted to comply with the constantly evolving public health guidance while treating Johnson, it is immune from Johnson's claims and is entitled to summary judgment on that basis alone.

B. The ACIA's public health guidance immunity provision does not create "exceptions" to the general immunity provisions

In its July 2023 order, the trial court held that JHC's respiratory therapists did not make a reasonable attempt at complying with then-applicable public health guidance. For the reasons discussed above, that finding is erroneous and unsupported by all relevant evidence. The respiratory therapists exercised the requisite care in preparing to transport Johnson. But the trial court compounds its error by holding that its finding triggers an "exception" to the ACIA's general immunity provisions. The trial court would hold that, if healthcare providers do not reasonably attempt to comply with then-applicable public health guidance, then not only are they ineligible for immunity under the public health guidance safe harbor, but they are also ineligible for any immunity under the ACIA and instead are subject to liability in the normal course. That view misreads the ACIA's public guidance safe harbor and turns the ACIA on its head, re-imposing the very standard of care that the Alabama Legislature suspended.

First, the Legislature enacted the public health guidance safe harbor provision to *increase* the protective immunity available under the

Act, not limit it. Safe harbors exist precisely for that purpose—they create a "zone of safety," *Chrysler Corp. v. Schiffer*, 736 So. 2d 538, 548 (Ala. 1999), shielding those that comply with their requirements from liability, *Ex parte Hubbard*, 321 So. 3d 70, 101 (Ala. 2020) (Parker, C.J., concurring). Section 6-5-793(b) states that "[n]otwithstanding any other provision of law," covered entities like JHC "shall not be liable for negligence, premises liability, or for any non-wanton, non-willful, or non-intentional civil cause of action . . . unless the claimant shows by clear and convincing evidence that the covered entity did not reasonably attempt to comply with the then applicable public health guidance." Ala. Code § 6-5-793(b)(1). Section 6-5-793 does not include any language suggesting that the Legislature intended the safe harbor to create exceptions to immunity, and the trial court erred by purporting to find any. *See Bean Dredging, L.L.C. v. Alabama Dep't of Revenue*, 855 So.2d 513, 517 (Ala. 2003) ("[W]e must give the words in a statute their plain, ordinary, and commonly understood meaning, and where plain language is used we must interpret it to mean exactly what it says.") (citations omitted).

Second, the safe harbor operates in tandem with and in addition to the ACIA's general immunity provisions, like those contained in Section 6-5-792(a). Whereas the ACIA's general immunity provisions bar liability for certain pandemic-related negligence claims, the safe harbor independently bars such claims against entities trying to comply with applicable public health guidance. The ACIA specifies that the safe harbor applies when the general immunity provisions do not, creating an extra layer of immunity for such entities. Ala. Code § 6-5-793(a)(1)-(2). Even where the general immunity provisions do not otherwise shield a defendant from suit, plaintiffs must still *clearly* and *convincingly* show that the defendant failed to reasonably attempt to follow public health guidance. Ala. Code § 6-5-793(b)(1). Conversely, the fact that a defendant fails to qualify for safe harbor protection alone does not defeat immunity under the ACIA's general immunity provisions.

Third, the trial court's reading of the safe harbor cannot be correct because it would reimpose the ordinary negligence standard that the ACIA suspended. The trial court's order would subject JHC to liability for conduct in which it "did not reasonably attempt to comply with the then applicable public health guidance." Ala. Code § 6-5-793(b)(1). That

interpretation effectively subjects JHC to liability for conduct that is not "reasonabl[e]," which is another way to say "negligent." *See* Sources and extent of duty—Duty imposed by statute, 1 Ala. Pers. Inj. & Torts § 1:6 (2023 ed.) ("Negligence is the failure to use reasonable care to prevent harm to oneself or others."). That reading cannot be correct because the Legislature wrote the ACIA specifically to abrogate negligence claims against covered entities. Affirming such a reading would violate the presumption against ineffectiveness. *See Druid City Hosp. Bd. v. Epperson*, 378 So. 2d 696, 699 (Ala. 1979) ("Where one interpretation of a statute would defeat its purpose that interpretation will be rejected if any other reasonable interpretation can be given it."). It would also violate the presumption of validity. *See Ex parte Hayes*, 405 So. 2d 366, 370 (Ala. 1981) ("If a statute is susceptible of two constructions, one of which is workable and fair and the other unworkable and unjust the court will assume that the legislature intended that which is workable and fair.") (citations omitted).

Finally, even if the Court's interpretation of the public health guidance safe harbor provision were correct—which, for the reasons outlined above, it cannot be—Johnson still has not made the necessary

showing to trigger the provision, because she has not provided clear and convincing evidence that JHC failed to make a reasonable attempt at complying with applicable public health guidance. As shown above, JHC's employees made reasonable efforts to comply with constantly changing public health guidance to care for patients during the pandemic. Because JHC reasonably attempted to comply with the constantly evolving public health guidance while treating Johnson, it is shielded from any non-wanton, non-willful, or non-intentional civil cause of action. Ala. Code § 6-5-793(b)(1).

CONCLUSION

For these reasons, this Court should issue a writ of mandamus directing the trial court to (1) vacate its July 12, 2023, Order, and (2) issue an order granting summary judgment for JHC based on immunity under the ACIA.

Dated: August 29, 2023

Respectfully submitted,

/s/ J. Thomas Richie

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the font and word limitations set out in Rules 21 and 32 of the Alabama Rules of Appellate Procedure. The font and font size used herein is 14-Point Century Schoolbook. This document contains 5,999 words, not counting items excluded from length under Rule 32.

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2023, I electronically filed the foregoing petition and attached appendix and served the following counsel by electronic mail and/or United States Mail:

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