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)

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

Robert E. Poundstone IV
BRADLEY ARANT BOULT CUMMINGS LLP
445 Dexter Avenue, Suite 9075
Montgomery, AL 36104
(334) 956-7645
bpoundstone@bradley.com

J. Thomas Richie
Evan A. Ward
Anna-Katherine Bowman
BRADLEY ARANT BOULT CUMMINGS LLP
1819 Fifth Avenue North
Birmingham, Alabama 35203
(205) 521-8000
trichie@bradley.com
eward@bradley.com
abowman@bradley.com

Attorneys for Petitioner

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

SUMMARY OF THE ARGUMENT

Johnson does not dispute that, if the ACIA's general immunity provisions apply, then JHC is immune. In fact, they do not meaningfully engage with JHC's discussion of those provisions at all, devoting much of their brief to issues not addressed in the trial court's order and thus outside the scope of JHC's petition. Johnson argues that JHC is not entitled to ACIA immunity because: (1) the trial court correctly found an "exception" to the general immunity provisions in Section 6-5-793, (2) JHC engaged in wanton conduct sufficient to defeat immunity under the ACIA, and (3) the ACIA's grant of legal immunity is unconstitutional. Each of these reasons fails, and we address each in turn.

ARGUMENT

I. JHC is Entitled to Immunity Under the Plain Text of the ACIA

The trial court wrongly identified an "exception" to the general immunity provisions of the ACIA, and Johnson's defense of that exception fails. Respondent's Br. at 21–24. Johnson argues first that Section 6-5-793 is not a safe harbor but strips JHC of ACIA immunity if Johnson can show by "clear and convincing" evidence that JHC did not "reasonably attempt" to comply with then-applicable public health

guidance. She then asserts that the testimony of Dr. Cunningham establishes JHC's failure to comply with said guidance. Johnson is wrong on both counts.

First, the safe harbor provision does not create an exception to the general immunity provisions. Johnson's position is that JHC is ineligible for ACIA immunity if it did not reasonably attempt to comply with applicable health guidance. That view misreads the ACIA's safe harbor and turns the provision from a shield into a sword against the very entities the statute was written to protect. The safe harbor commands that, even if the ACIA's immunity provisions do not otherwise shield a defendant from suit, prospective plaintiffs must still show, clearly and convincingly, that the defendant failed to reasonably attempt to follow public health guidance before liability can attach. It gives an extra layer of liability protection whether or not the defendant is entitled to general ACIA immunity.

Second, Johnson erroneously relies on Dr. Cunningham's testimony to assert that JHC had "an alternative standard of care for moving BiPap patients which mandated that respiratory therapists were to stay with a patient during transport between rooms," and that JHC "did not follow

either the then applicable public health guidance or Jackson Hospital's alternative standard of care" when it transported Johnson. Respondent's Br. at 23. Dr. Cunningham's testimony cannot support this conclusion because he expressly disclaimed any knowledge of the standard of care applicable to respiratory therapists. Dr. Cunningham testified generally that JHC adopted an alternative standard of care under which patients could not be transported on a BiPap due to the potential to spread COVID-19. But he explicitly disclaimed any ability to opine on the standard of care governing respiratory therapists. *See* Tab 16, Ex. C at 21–22, 25. In any event, Johnson cannot rely on Dr. Cunningham to establish a breach of the standard of care for respiratory therapists because Alabama Code § 6-5-548 provides that only a "similarly situated health care provider," i.e., another respiratory therapist, can provide that testimony.

Further, Johnson conflates *JHC's* alternative standard of care (which Johnson has not shown required accompaniment by a respiratory therapist) with relevant *public health* guidance, arguing that by violating the former JHC necessarily violates the latter. This argument is logically unsound, and it also ignores the plain language of the ACIA. Under the

ACIA, JHC does not lose safe harbor protection for failing to *comply* with public health guidance. It only loses safe harbor protection for failing to *reasonably attempt* to comply with that guidance. JHC reasonably attempted to comply with applicable guidance here. *See* Amended Petition at 7–9; 20–22.

In fact, the record shows that JHC complied with applicable public health guidance when transporting Mr. Johnson. The action at the very heart of Johnson's claims—removing Mr. Johnson from a BiPap for transport—was taken specifically to comply with public health guidance against transporting BiPap patients without using in-line filters, since doing so could expose the entire hospital to COVID-19. Tab. 16 at 6.

II. JHC'S Conduct was Not Wanton

Johnson argues that JHC engaged in wanton conduct sufficient to defeat immunity under the ACIA. Johnson asserts that JHC was wanton because staff allegedly removed Mr. Johnson from his BiPap and left him without supplemental oxygen.

Johnson is simply wrong. The record establishes that when Mr. Johnson was removed from the BiPap, he was immediately placed on an Oxymask and was never without supplemental oxygen. *See* Amended

Petition at 7–9; 20–22; *see also* Sharpe Dep. p. 81, 83, 92–93, 96, 121; King Dep. p. 22, 26, 29, 30, 32, 34, 40, 58. Johnson provides no evidence to the contrary other than her self-serving affidavit, which JHC has already shown is inadmissible. *See* Amended Petition at 8 n.1.

Accordingly, Johnson cannot show that JHC was wanton—or even negligent. But, as this Court has recently and repeatedly held, the existence of a wantonness claim does not affect JHC's entitlement to mandamus on its claim for ACIA immunity right now. *See Ex parte Kelley*, 296 So. 3d 822 (Ala. 2019) (granting mandamus relief on claim to immunity against negligence claims while remanding the case for litigation over whether the petitioners were wanton); *Ex parte Lincare Inc.*, 218 So. 3d 331 (Ala. 2016) (granting mandamus relief on claim to statutory immunity against various tort claims while severing a separate workers' compensation claim which remained to be litigated in the trial court).

III. Immunity is Consistent with the Alabama Constitution

A. Johnson's constitutionality arguments are not properly raised.

The trial court's decision takes the ACIA as valid, and it expressly left undecided the validity questions to which Johnson dedicates most of

her brief. Tab 25 at 3. Importantly, Johnson submitted the proposed order eventually signed by the trial court, meaning Johnson asked the court ***not*** to decide questions of validity. *See* Tab 28 at 3. Litigants cannot ask a trial court to do one thing and then complain on appeal that the trial court agreed. *See Thompson v. Magic City Trucking Serv.*, 154 So. 2d 306, 310 (Ala. 1963) (appellants may not "complain of a ruling of the trial [court] favorable to them"). Johnson had the chance to push for a decision on validity in the trial court, but she instead specifically asked the trial court to duck that issue. Johnson does not include unconstitutionality in her statement of issues. She has not served the Attorney General in accordance with Alabama Rule of Appellate Procedure 44(a).

Important questions like the constitutionality of a statute should be squarely presented, and those who would raise them should not lay behind the log. This rule is a necessary extension of the strongest possible presumption of the constitutionality of statutes. *See*, *e.g.*, *Glass v. Montgomery*, 360 So. 3d 1021, 1023–24 (Ala. 2022) (collecting cases). Here, had the trial court held the ACIA, and by extension, the Governor's Emergency Proclamations invalid, both the Attorney General and

Governor would have a far more direct basis for participating in this appeal. The trial court made no such holding—in part because Johnson herself asked it to avoid the issue. The statutory interpretation question, not validity, was the basis for the trial court's order. And that is the primary question raised by JHC's Amended Petition. The Court should thus decline to reach the constitutionality questions. *See Robbins v. Cleburne Cnty. Comm'n*, 300 So. 3d 573, 576 (Ala. 2020) ("A court has a duty to avoid constitutional questions unless essential to the proper disposition of the case.") (quoting *Chism v. Jefferson Cnty.*, 954 So. 2d 1058, 1063 (Ala. 2006)).

B. Johnson's constitutionality arguments are substantively wrong.

Even if the Court were inclined to address the constitutional issues, Johnson's arguments fall far short of carrying her heavy burden of establishing both the unconstitutionality of the ACIA and the Governor's Emergency Proclamations.

Johnson asserts that she had a vested right to bring her claim before the ACIA was executed (thereby rendering the ACIA's retroactivity provision unconstitutional as applied to her), but that assertion itself depends on Johnson proving that the Governor's

Emergency Proclamations were not valid. If they were, she has no vested claim because the Governor's proclamations predate Mr. Johnson's death by months. As the BCA established in its amicus brief in the circuit court (Tab 24 at 6–13), the retroactivity provision of the ACIA could survive independently of the Governor's proclamations. But Johnson cannot prevail in her challenge to the ACIA unless she also prevails in her challenge to the Governor's proclamations. In neither instance is she correct.

1. <u>The Governor's Emergency Proclamations are authorized by the AEMA.</u>

Johnson's first argument—that the Governor was not authorized to immunize JHC in the face of a pandemic—lacks a textual basis. Decades before the pandemic, the Legislature passed the Alabama Emergency Management Act of 1955 ("AEMA"). Ala. Code §§ 31-9-1 to -25. It authorizes the Governor to declare a state of emergency, § 31-9-8(a), and to issue orders "necessary" to address that emergency, § 31-9-6(1) and -8. The Legislature provided that the Governor's emergency orders have the "force and effect of law" and that other laws conflicting with those orders "shall be suspended" while the emergency lasts. Ala. Code § 31-9-13. The Legislature also required that the AEMA's provisions "shall be construed

liberally in order to effectuate its purpose." Ala. Code § 31-9-23. The AEMA contains the Legislature's determination that the Governor is best positioned to respond quickly and marshal resources to respond to an emergency like the pandemic or other disasters. This was especially true during the pandemic, where the Legislature's ability to meet was limited due to COVID-19 quarantines.

The Governor's Proclamation of May 8, 2020 is exactly the kind of emergency order authorized by the AEMA. Early in the pandemic, the Governor recognized that healthcare providers and other businesses were subject to various state orders setting out COVID-19 protocols, including those approving the use of "alternative standards of care" by healthcare providers, Ala. Gov. Emerg. Procl. (March 13, 2020), and modifying out-of-state licensing requirements to allow healthcare workers from other states to work in Alabama, Ala. Gov. Emerg. Procl. (April 2, 2020). Given the situation—with normal operating procedures suspended, higher volumes of patients seeking treatment, and health resources spread thin—the Governor acted to reduce the risk of a flood of pandemic-related litigation aimed at healthcare providers and other businesses operating under extraordinary conditions. These actions

allowed healthcare providers and other businesses to remain open, serve customers, pay employees, and serve the public. The Proclamation was necessary to meet the challenges posed by an emergency and was effective only during that emergency.

This Court has never limited the Governor's authority under the AEMA, and that is why Johnson relies exclusively on irrelevant cases addressing legislative delegations to agencies in the absence of a declared emergency. *See Jefferson Cnty. v. Ala. Crim. Justice Info. Ctr. Comm'n*, 620 So. 2d 651, 658 (Ala. 1993); *Ex Parte Jones Mfg. Co.*, 589 So. 2d 208, 210 (Ala. 1991); *Ex parte Florence*, 417 So. 2d 191, 193 (Ala. 1982). Far from an agency pushing the limits of its granted authority at the expense of the Legislature, this case involves the Governor and Legislature coordinating the state's emergency response to the pandemic together, operating within well-established, legislatively defined limits. *See Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity") (cleaned up).

Indeed, under the *Youngstown* framework, an executive's authority is at its apex when used in a manner authorized by the legislature. *See*

Zivotofsky ex rel. Zivotofsky v. Kerry, 576 U.S. 1, 10 (2015) ("[W]hen 'the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum . . .'") (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)). Justice Jackson's concurrence in *Youngstown* considers three situations. First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum," and his action presumptively valid. *Id.* at 635–37. Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers," and his authority to act is less certain. *Id.* at 637. Third, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb," and presumptively invalid. *Id.* at 637–38.

This Court has applied the *Youngstown* framework. *See Ex parte Jenkins*, 723 So. 2d 649, 654 (Ala. 1998); *Fed'n of City Employees v. Arrington*, 432 So. 2d 1285 (Ala. 1983).

Under these hornbook principles, the Governor's Proclamation was lawful. First, the Proclamation was issued with *express* legislative authorization given by the AEMA. When the Legislature passed the

AEMA, it gave authority to issue emergency proclamations to the Governor and preemptively suspended other laws that conflicted with those orders. And it defined the outer bounds of that delegation—empowering the Governor to issue necessary, temporary orders to combat the emergency. Second, the Legislature *expressly ratified* the relevant terms of the Governor's Proclamation when it passed the ACIA. The ACIA adopted the Proclamation's language granting broad legal immunity to healthcare providers like JHC, affirming the Proclamation's validity, and made the protections retroactive. The Governor could not have had clearer authorization from the Legislature: it authorized her emergency response before the fact and ratified it after the fact. The Legislature and Governor worked hand-in-glove. Because the Proclamations were lawful uses of emergency power, Johnson lacked a vested right to bring a negligence action against JHC when the ACIA was passed. And because she lacked a vested right, the ACIA applies to her claims against JHC.

2. The Governor has worked in concert with the Legislature, not in opposition to the Legislature.

Johnson misses the mark badly to suggest that the Governor has crossed into the exclusive purview of the Legislature through her Emergency Proclamations.

Under the AEMA, the Legislature, not the Governor, suspends laws. By enacting the AEMA, the *Legislature* has determined that the Governor's proclamations have the force and effect of law and has preemptively suspended laws conflicting with them. Ala. Code § 31-9-13 ("All existing laws . . . inconsistent with . . . any order, rule, or regulation issued under the authority of this article, shall be suspended during the period of time . . . that such inconsistency exists."). The Attorney General has emphasized this very distinction. Ala. Op. Att'y Gen. No. 2020-020 (Mar. 17, 2020) ("Should the Governor exercise her authority to postpone [an election due to the pandemic], any existing law setting a contrary date for the primary runoff election would be suspended by the AEMA."). Accordingly, because the Governor acted under her AEMA powers, it was the Legislature, not the Governor, that suspended general tort law standards. And that change was effective only to the degree and for the time needed to respond to a declared emergency.

And Johnson cannot justify her blanket assertion that determining negligence standards is "inescapably legislative" because Alabama's negligence doctrine is judge-made and not embodied in a statute. *Ghee v. USAble Mut. Ins. Co.*, No. 1200485, 2023 WL 2720996, at *11 (Ala. Mar. 31, 2023) (the AMLA "does not create a cause of action; rather, AMLA regulates certain existing common-law causes of action in tort or contract"); *Collins v. Ashurst*, 821 So. 2d 173, 176–77 & n.1 (Ala. 2001) ("[W]e find that the AMLA . . . contemplated the maintenance of more than one type of action by referring to actions 'based on contract or tort' in § 6–5–482(a)."). There is no negligence statute to be abrogated and no Legislative pronouncement to be suspended.

The cases that Johnson relies on are far afield. She relies on *Opinion of the Justices*, 345 So. 2d 1354 (Ala. 1977). That decision held that a bill authorizing the Governor to issue orders suspending utility rates would violate Article I, Section 21. The bill stated that "[t]he Governor of Alabama shall, at any time when in his considered opinion extraordinary action in the matter of utility rates is called for, by Executive Order freeze a utility rate or rates . . . at the then existing level or may roll said rate or rates back[.]" *Opinion of the Justices*, 345 So. 2d

at 1355. Under the AEMA, the Legislature, not the Governor, suspends laws conflicting with the state's emergency response. Ala. Code § 31-9-13. Furthermore, the delegation in *Opinion of the Justices* was a blanket delegation of power to Governor, untethered to any official declaration of a statewide emergency. Here, the Governor's emergency powers are limited in scope (only what is necessary to respond to the emergency) and duration (only during the emergency).

Johnson also relies on *Hawkins v. James*, 411 So. 2d 115 (Ala. 1982), which held that an executive memorandum directing state department heads not to recommend a waiver for employees who wanted to work past age seventy without approval of the state finance director violated Alabama's Constitution. But *Hawkins* is distinguishable in several ways. First, *Hawkins* did not involve a declared emergency. Second, the statute at issue in *Hawkins*, which outlined the waiver process for employees seeking to work beyond age seventy, did not empower the Governor to make orders affecting the waiver process. Here, the Governor acted in the context of a declared emergency, and was authorized by the AEMA to issue orders whose effectiveness are limited by the scope and duration of the emergency.

CONCLUSION

For all of 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: November 13, 2023

Respectfully submitted,

/s/ J. Thomas Richie

J. Thomas Richie
Evan A. Ward
Anna-Katherine Bowman
BRADLEY ARANT BOULT CUMMINGS LLP
1819 Fifth Avenue North
Birmingham, Alabama 35203
(205) 521-8000
trichie@bradley.com
eward@bradley.com
abowman@bradley.com

Robert E. Poundstone IV
BRADLEY ARANT BOULT CUMMINGS LLP
445 Dexter Avenue, Suite 9075
Montgomery, AL 36104
(334) 956-7645
bpoundstone@bradley.com

Attorneys for Petitioner

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, and this document contains 2,992 words.

/s/ J. Thomas Richie
One of the Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2023, I electronically filed the foregoing reply brief and served the following counsel by electronic mail and/or United States Mail:

Circuit Court Judge
Hon. Jimmy Pool
Montgomery County Courthouse
P.O Box 1667
Montgomery, AL 36102

Attorneys for Plaintiffs

Robert E. LeMoine
D. Brett Turnbull
TURNBULL, HOLCOMB & LEMOINE, P.C.
2101 6th Ave., Suite 1100
Birmingham, AL 35203

Attorneys for Amicus Curiae Business Counsel of Alabama
Edgar R. Haden
Connor W. Herfurth
BALCH & BINGHAM LLP
1901 6th Ave. N, Suite 1500
Birmingham, AL 35203
ehaden@balch.com
cherfurth@balch.com

Attorneys for Amicus Curiae Governor Kay Ivey
John C. Neiman
Mary K. Mangan
MAYNARD NEXSEN P.C.
1901 6th Ave. N, Suite 1700
Birmingham, AL 35203
jneiman@maynardnexsen.com
mmangan@maynardnexsen.com

/s/ J. Thomas Richie
Of Counsel

Tab 28

Doc. 203, Plaintiff's Proposed Order

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ESTATE OF NATHANIEL JOHNSON THERESA JOHNSON, INDIV, Plaintiff,	)	
V.	) Case No.:	CV-2021-900980.00
JACKSON HOSPITAL & CLINIC, INC., Defendant.	)	

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court is Jackson Hospital's Motion for Summary Judgment. Jackson Hospital seeks summary judgment based upon a defense of immunity under the Alabama Covid Immunity Act (ACIA). Plaintiff responded to Jackson Hospital's motion by challenging the constitutionality of the ACIA as well as citing exceptions to the ACIA which Plaintiff asserts she has proven. As to exceptions to the ACIA, Plaintiff specifically alleges that the conduct at issue was wanton, and that Jackson Hospital's respiratory therapists did not reasonably attempt to comply with then applicable public health guidance.

The Court has reviewed the well written briefs of the Parties, as well as the amicus briefs submitted by Governor Kay Ivey and the Business Council of Alabama. After careful review of the facts and arguments before the Court, the Court finds that Defendant Jackson Hospital's Motion for Summary Judgment should be, and is hereby, DENIED.

More specifically, the Court finds that Plaintiff has shown through the testimony of Jackson Hospital's respiratory therapists, King and Sharp, and its Chief of Medicine Dr. Shane Cunningham, that King and Sharp did not comply with either CDC Guidelines or Jackson

Hospital's "alternative standard of care", thus establishing an exception to immunity under the ACIA.

> Code of Ala. 6-5-793 reads as follows:
>
> (a) This section applies to both of the following causes of action that accrue before the effective date of this article:
> …
> (2) Any cause of action relating to an act or omission of the health care provider during the performance or provision of health care services or treatment that resulted from, was negatively affected by, was negatively impacted by a lack of resources caused by, or was done in response to the Coronavirus pandemic or the state's response to the pandemic, for which a court holds that neither Section 6-5-794 nor the liability limiting provisions of any gubernatorial emergency order applies.
> …
> (b) For any health emergency claim or cause of action under subsection (a), the following provisions shall apply:
> (1) Notwithstanding any other provision of law, as a matter of law, a covered entity shall not be liable for negligence, premises liability, or 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.**
> …

Jackson Hospital's witnesses testified that applicable CDC guidelines at the time of Mr. Johnson's death required that an inline filter be used on BiPAP machines when moving patients who might have COVID. (Ex. B. King Dep. p. 40; Ex. C. Sharp Dep. p. 78). However, these witnesses also testified that this procedure was not being followed because Defendant did not have the proper equipment, (i.e., the filter), so the hospital was following an "alternate standard of care" that involved removing the BiPAP machine prior to moving a patient. (Ex. B. King Dep. p. 40; Ex. C. Sharp Dep. p. 79). Dr. Shane Cunningham, Defendant's Chief of Medicine at the time of Mr. Johnson's death, testified that under this alternative standard of care, the BiPAP was removed and "respiratory therapists would accompany [patients] along with the nurse that was taking care of the patient to transport them if they were moving from one floor to another." (Ex.

E. Cunningham Dep. p. 18). However, both respiratory therapists testified that they left Mr. Johnson for the nurse to move and that they were not present to accompany him as he was moved between floors. (Ex. B. King Dep. p. 22, 43; Ex. C. Sharpe Dep. p. 84).

This testimony is clear and convincing. Then applicable public health guidance called for an inline filter on BiPAP machines when moving patients who might have COVID. Jackson Hospital did not have these filters, so it came up with an alternative standard of care for moving BiPAP patients which mandated that respiratory therapists were to stay with a patient during transport between rooms. Both King and Sharp testified that they left Mr. Johnson after removing his BiPAP and were not present to accompany him as he moved between floors. Thus, King and Sharp, by their own admission, did not follow either the then applicable public health guidance or Jackson Hospital's alternative standard of care developed to address this issue.

Because the Court finds that Plaintiff has proven an exception to ACIA immunity by showing that Jackson Hospital's respiratory therapists did not reasonably attempt to comply with then applicable public health guidance or Jackson Hospital's alternative standard of care, the Court need not, and does not hereby, rule on the constitutional issues or wantonness exception raised by the Plaintiff.

Summary Judgment is DENIED.

DONE this[To be filled by the Judge].

/s/[To be filled by the Judge]
CIRCUIT JUDGE