

Circuit Court for Anne Arundel County
Case No. C-02-CV-21-001264

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND

No. 2132

September Term, 2022

CRYSTAL RENAE CONSTANTINE

v.

BALTIMORE WASHINGTON
EMERGENCY PHYSICIANS, INC.

Nazarian,
Zic,
Robinson, Jr., Dennis M.
(Specially Assigned),

JJ.

Opinion by Robinson, Jr., J.

Filed: February 28, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

Appellant, Crystal Renae Constantine, presented to the emergency department at Baltimore Washington Medical Center (“BWMC”) twice in early 2020 at the beginning of the COVID-19 pandemic. The first time was on April 22, 2020 (the “April 22 ED Visit”). The second time was three days later on April 25, 2020 (the “April 25 ED Visit”). During the April 22 ED Visit, Constantine reported a fever, muscle aches, chills, nausea, mild cough and diarrhea. According to medical records, Constantine also told health care providers at the emergency department that “a bunch of people at her work were sick and suspected COVID-19 positive[.]” Health care providers at the emergency department assessed her as having “suspected COVID-19,” but did not test her for COVID-19 because she did not meet the testing criteria in effect at the time.

Three days later, she returned to the BWMC emergency department by ambulance with knee and back pain, sweats, chills and a cough. She informed emergency department personnel that she had increasing knee pain and that “she was diagnosed as suspected COVID [t]here on April 22, 2020.” Health care providers at the emergency department diagnosed her as “suspected COVID-19 virus infection” and “knee effusion,” discharged Constantine again without testing for COVID-19, and instructed her to return if she had “difficulty breathing.” She presented to another emergency department on April 30, 2020, where she was determined to be septic and was diagnosed with Group A streptococcus and vegetation consistent with endocarditis. She did not test positive for COVID-19 on April 30, 2020.

Constantine filed a lawsuit for alleged medical malpractice against Baltimore Washington Emergency Physicians, Inc. (“BWEP”), the physician group that staffs the emergency department at BWMC. Although this appeal involves an underlying claim for alleged medical malpractice, the primary focus of the appeal is whether BWEP is entitled to statutory immunity. Constantine’s amended complaint includes the following allegations:

11. That in light of **CRYSTAL RENAE CONSTANTINE’S** risk factors, and in light of her markedly elevated white blood count (including elevated bands indicating a more serious infection), and her abnormal vital signs, the agent of Baltimore Washington Emergency Physicians, Inc. found Ms. Constantine to have COVID, despite no testing done for this and was again discharged and did nothing to rule out an infectious process.

BWEP moved for summary judgment based on statutory immunity pursuant to § 14-3A-06 of the Public Safety Article (“PS”). Constantine filed an opposition to BWEP’s motion for summary judgment. After a hearing, the circuit court granted BWEP’s motion based on the statutory immunity provided by PS § 14-3A-06. Constantine filed this appeal and argues that the circuit court erred as a matter of law when it granted summary judgment in favor of BWEP.

BACKGROUND

On March 5, 2020, at the beginning of the COVID-19 pandemic, former Governor Lawrence J. Hogan, Jr. declared a state of emergency and the existence of a catastrophic health emergency pursuant to his executive powers and Title 14 of the Public Safety Article. Governor Hogan specifically declared, “ an outbreak of disease (COVID-19)

caused by the novel coronavirus,” which is a “severe respiratory disease, resulting in illness or death,” and “poses an immediate danger to public safety.” Off. of the Gov. of Md., Proclamation, *Declaration of State of Emergency and Existence of Catastrophic Health Emergency – COVID-19* (Mar. 5, 2020). Therefore, “in an effort to control and prevent the spread of COVID-19 within the State,...effective immediately...a state of emergency and catastrophic health emergency exist[ed] within the entire State of Maryland.” *Id.* The declaration of a state of emergency was issued pursuant to PS § 14-303 *et seq.*, which controls the Governor’s emergency powers. The specific declaration of a catastrophic health emergency was issued pursuant to PS § 14-3A-02 *et seq.*, which controls the Governor’s health emergency powers.

According to PS § 14-3A-01(b), a “catastrophic health emergency” is defined as, “a situation in which extensive loss of life or serious disability is threatened imminently because of exposure to a deadly agent.” A “deadly agent” includes, a “viral agent” or “other biological agent capable of causing extensive loss of life or serious disability.” PS § 14-3A-01(c)(1). “Exposure to a deadly agent” is defined as, “a threat to human health caused by the release, distribution, or transmission of a deadly agent” in the State. PS § 14-3A-01(d)(1). “If the Governor determines that a catastrophic health emergency exists, the Governor may issue a proclamation under [the] subtitle.” PS § 14-3A-02. After declaring the existence of a “catastrophic health emergency,” the Governor has the authority to issue orders to manage the catastrophic health emergency. PS § 14-3A-03.

Governor Hogan proceeded to issue a series of executive orders, with the Maryland Department of Health issuing various directives pursuant to PS §§ 14-3A-03–14-3A-05.

With respect to the statutory immunity at issue in this appeal, PS § 14-3A-06 provides that “[a] health care provider is immune from civil or criminal liability if the health care provider acts in good faith and under a catastrophic health emergency proclamation.” Governor Hogan issued an executive order on March 16, 2020, an amended proclamation on March 17, 2020, an executive order on March 20, 2020, an executive order on March 30, 2020, and an amended proclamation on April 10, 2020. The first of the Governor’s executive orders or proclamations to specifically address statutory immunity pursuant to PS § 14-3A-06 was the third Amended Proclamation, titled “Renewal of Declaration of State of Emergency and Existence of Catastrophic Health Emergency — COVID-19” on May 6, 2020. *See* Off. of the Gov. of Md., Proclamation, *Renewal of Declaration of State of Emergency and Existence of Catastrophic Health Emergency – COVID-19* (May 6, 2020).

Consistent with prior proclamations, the May 6, 2020, proclamation reiterated the March 5, 2020, declaration of a state of emergency and catastrophic health emergency, “in an effort to control and prevent the spread of COVID-19, ...within the entire State of Maryland.” *Id.* In section II of the May 6, 2020, proclamation Governor Hogan stated for the first time in a proclamation:

Health care providers who act in good faith under this catastrophic health emergency proclamation, including orders issued under the proclamation by the Governor and by other State officials acting at the direction of or under delegated

authority from the Governor, have the immunity provided by §14-3A-06 of the Public Safety Article of the Maryland Code.

Id.

On May 6, 2020, Governor Hogan also issued an executive order titled “Amending and Restating the Order of March 30, 2020, Prohibiting Large Gatherings and Events and Closing Senior Centers, and All Non-Essential Businesses and Other Establishments, and Additionally Requiring All Persons to Stay at Home.” *See* Exec. Order No. 20-05-06-01 (2020). Section I(b) of the May 6, 2020, executive order reaffirmed the Secretary of Health’s power to issue directives under the order, “to monitor, treat, prevent, reduce the spread of, and suppress COVID-19 in relation to any activity permitted under th[e] Order[.]” *Id.*

On May 6, 2020, the same day Governor Hogan issued another proclamation and executive order, Maryland Department of Health Secretary Robert Neall issued his fourth directive, titled, “Amended Directive and Order Regarding Various Healthcare Matters.” Md. Dep’t of Health, *Amended Directive and Order Regarding Various Healthcare Matters* (May 6, 2020). The directive was divided into four sections: 1) “COVID-19 Testing & Reporting,” 2) “Healthcare Provider Matters,” 3) “Healthcare Facility Matters,” and 4) “Other Healthcare Matters.” *Id.* Under the heading “Healthcare Provider Matters,” in paragraph 5, entitled, “Elective and Non-Urgent Medical Procedures – Licensed Healthcare Facilities and All Healthcare Providers” there was a provision offering interpretive guidance regarding the immunity provision in PS § 14-3A-06. *Id.* The interpretive provision in part C, labeled, “Certification and Other Matters,” subpart

III stated: “MDH does not construe the immunity provisions in Pub. Safety Art. § 14-3A-06 or Health Gen. Art. § 18-907 to apply to a healthcare provider or facility performing non-COVID-19 related procedures or appointments.” *Id.*

DISCUSSION

This appeal presents the following question: Did the circuit court err as a matter of law when it granted BWEP summary judgment based on the immunity provision in PS § 14-3A-06?¹ For the reasons explained below, we affirm the circuit court's granting of summary judgment based on the specific facts and circumstances of this appeal.

We review a trial court’s grant of summary judgment without deference. *Myers v. Kayhoe*, 391 Md. 188, 203 (2006). Our review involves a determination of (1) “whether a dispute of material fact exists,” and (2) “whether the trial court was legally correct.” *Frederick Rd. Ltd. P’ship v. Brown & Sturm*, 360 Md. 76, 93 (2000) (internal quotations and citation omitted); *see also* Md. Rule 2-501(f). For the purposes of summary judgment, “[a] material fact is ‘a fact the resolution of which will somehow affect the outcome of the case.’” *USA Cartage Leasing, LLC v. Baer*, 202 Md. App. 138, 174 (2011) (quoting *Barbre v. Pope*, 402 Md. 157, 171–72 (2007)), *aff’d*, 429 Md. 199

¹ Constantine presented the question for review as follows:

Whether the Circuit Court erred as a matter of law when it granted summary judgment, after holding BWEP was immune from civil liability under Md. Code Ann., Pub. Safety § 14-3A-06, despite undisputed evidence BWEP was not carrying out any of Governor Hogan’s orders issued during the catastrophic health emergency, when it provided non-COVID related medical care to Appellant on April 25, 2020?

(2012). “[W]e independently review the record to determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law.” *Myers*, 391 Md. at 203 (citing *Livesay v. Baltimore*, 384 Md. 1, 9-10 (2004)). “We view the record in the light most favorable to the non-moving party and construe any reasonable inferences that may be drawn from the facts against the moving party.” *Rhoads v. Sommer*, 401 Md. 131, 148 (2007) (internal citations omitted).

We begin our discussion with the principles of statutory construction that guide our analysis. Our objective in interpreting any statute is to understand and implement the General Assembly’s intent. *See, e.g., Stoddard v. State*, 395 Md. 653, 661 (2006). We start with the statute’s plain language which, if clear and unambiguous, will be enforced as written. *Id.* “We pay attention to the statute’s grammar and sentence structure” and “avoid constructions that are illogical, unreasonable, or inconsistent with common sense.” *Bartenfelder v. Bartenfelder*, 248 Md. App. 213, 235 (2020) (internal citations omitted). If the words are ambiguous, we look at the statute’s structure (including, in some instances, its title), context, relationship with other laws, and legislative history, among other indicia of intent. *Stoddard*, 395 Md. at 662-63.

Not surprisingly, Constantine urges this Court to adopt a narrow interpretation of PS § 14-3A-06. According to Constantine, PS § 14-3A-06 does not provide health care providers, such as BWEP, with blanket immunity for all forms of medical care performed in good faith during a catastrophic health emergency declared by the Governor to control, prevent and treat COVID-19. Rather, Constantine argues that PS § 14-3A-06 only

provides health care providers immunity while they are carrying out “specific orders of the Governor, or Secretary of Health, during the catastrophic health emergency.” As Constantine sees it, “[a]ll other actions, such as BWEP’s actions [related to this appeal], are not included in the scope of the immunity provided by [PS § 14-3A-06].”

BWEP, on the other hand, encourages this Court to adopt a more expansive reading of PS § 14-3A-06. According to BWEP, PS § 14-3A-06 provides health care providers with “broad immunity from the moment that an emergency is proclaimed and until it ends.” BWEP also accused Constantine of improperly adding new language to PS § 14-3A-06, specifically the phrase “while carrying out specific orders of the Governor during a catastrophic health emergency[.]” The more reasonable and legally sound interpretation of PS § 14-3A-06 seems to lie somewhere between the parties’ respective positions.

PS § 14-3A-06 provides that “[a] health care provider is immune from civil or criminal liability if the health care provider acts in good faith and under a catastrophic health emergency proclamation.” We start with the fundamental and incontrovertible premise that there was a “catastrophic health emergency proclamation” in effect at the time of the April 22 ED Visit and the April 25 ED Visit as a result of Governor Hogan’s March 5, 2020, proclamation that “in an effort to control and prevent the spread of COVID-19 within the State,...effective immediately... a state of emergency and catastrophic health emergency exist[ed] within the State of Maryland.” Off. of the Gov. of Md., Proclamation, *Declaration of State of Emergency and Existence of Catastrophic*

Health Emergency – COVID-19 (Mar. 5, 2020). The record before us does not include any indication that Constantine alleges that any actions on the part of BWEP personnel were not in good faith. That leaves us with the portion of PS § 14-3A-06 that is the primary focus of this appeal—whether BWEP health care providers acted “under a catastrophic health emergency proclamation” when they assessed, treated and diagnosed Constantine during the April 22 ED Visit and the April 25 ED Visit, with the key word being “under.”

Constantine focuses on the word “under” and argues that PS § 14-3A-06 is ambiguous because “under” is subject to multiple reasonable interpretations in the context of the statute. BWEP argues that Constantine impermissibly raises the issue of ambiguity for the first time on appeal. The issue of potential ambiguity is embedded in the established principles of statutory construction to which this Court must adhere to in order to analyze and apply the statute at issue in this appeal. Consideration of potential ambiguities are, indeed, necessary to decide this appeal regardless of whether a party raised the issue in the circuit court.

Constantine points out that Merriam-Webster defines “under” as “subject to the authority, control, guidance, or instruction of.” *Under*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/under> (last visited Feb. 27, 2024). Constantine also relies on the legislative history of PS § 14-3A-06 to support her position. PS § 14-3A-06, which was first enacted as Md. Code Ann. 41 § 2-202(g), included the following language: “A health care provider acting in good faith and in

accordance with a catastrophic health emergency proclamation is immune from civil or criminal liability related to those actions, unless the health care provider acts with willful misconduct.” In 2004, this provision was revised and renumbered as PS § 14-3A-06 to read: “A health care provider is immune from civil or criminal liability if the health care provider acts in good faith and under a catastrophic health emergency proclamation.” The revisor’s notes indicated that “[t]his section is new language derived without substantial change from Former Art. 41 § 2-202(g)” and that “[t]he former reference to liability ‘related to those actions’ is deleted as implicit in the structure of the revision.” As Constantine sees it, if PS § 14-3A-06 was enacted without “substantive change” from the prior version of the statute, the Court should construe “under” to be consistent with “in accordance with.” Merriam-Webster defines “accordance” as “agreement, conformity.” *Accordance*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/accordance> (last visited Feb. 27, 2024). According to Constantine’s interpretation, health care providers are only immune from liability based on PS § 14-3A-06 when acting in good faith “in accordance with,” meaning “in an agreement or conformity with a specific order issued by the Governor or Secretary [of] Health during a catastrophic health emergency proclamation, rather than simply providing health care of any nature during a catastrophic health emergency.”

Any perceived distinction between “under” and “in accordance with” is inconsequential under the specific facts and circumstances of the appeal before us. The health care providers at BWEP were not simply providing health care of *any* nature

during a catastrophic health emergency as Constantine suggests. When Constantine presented to the emergency department for the April 22 ED Visit, she reported fever, muscle aches, chills, nausea, mild cough and diarrhea. She also told health care providers at the emergency department that “a bunch of people at her work were sick and suspected COVID-19 positive.” Health care providers at the emergency department assessed her as having “suspected COVID-19,” but did not test her for COVID-19 because she did not meet the testing criteria in effect at the time. Three days later, she returned to the BWMC emergency department by ambulance with knee and back pain, sweats, chills and a cough. She informed health care providers that she had increasing knee pain and that “she was diagnosed as suspected COVID [t]here on April 22, 2020.” Health care providers at the emergency department diagnosed her as “suspected COVID-19 virus infection” and “knee effusion.” Health care providers at the emergency department discharged her again without testing for COVID-19, and instructed her to return if she had “difficulty breathing.” By any rational measure, BWEP provided COVID-related care to her during the April 25 ED Visit, even while not providing the care she alleges she required for her knee. Indeed, she made that very connection in her complaint: the failure of care, she alleged, occurred when BWEP discharged her “and did nothing to rule out an infectious process.” Complaint, ¶ 11.

Whether viewed individually or collectively, the April 22 ED Visit and the April 25 ED Visit were sufficiently related to the COVID-19 catastrophic health emergency proclamation for the healthcare providers from BWEP to be entitled to immunity

pursuant to PS § 14-3A-06. The records related to the April 22 ED Visit and the April 25 ED Visit do not simply make passing references to COVID-19. Indeed, the records demonstrate that the health care providers at the emergency department were assessing her reported symptoms to determine whether it was likely that she had COVID-19 and then provided her with instructions specific to her potential COVID-19 diagnosis. The circuit court did not err in granting summary judgment pursuant to the immunity provision in PS § 14-3A-06.

We recognize the reality that there are numerous fact-specific circumstances that could arise in the context of medical malpractice claims during the COVID-19 pandemic and that there are several potential questions surrounding the scope of immunity for health care providers during the COVID-19 pandemic. Those questions include when health care providers first became entitled to immunity based on PS § 14-3A-06 during the COVID-19 pandemic, the parameters of the statutory immunity, what type of medical care is sufficiently related to COVID-19 for the statutory immunity to apply, whether officials of the executive branch have the authority to define the scope of immunity through executive orders, proclamations or other guidance, and when health care providers were no longer entitled to statutory immunity. At oral argument, the Court endeavored to articulate principles to define the precise bounds of the statutory immunity afforded by PS § 14-3A-06 in the context of the COVID-19 catastrophic health emergency proclamation. Those precise bounds proved to be elusive though, which is

understandable given the rapidly evolving nature of the COVID-19 pandemic, especially in the early stages when the April 22 ED Visit and April 25 ED Visit occurred.

Although there may be other cases pending in trial courts and this Court that require courts to engage in a different line-drawing exercise to define the limits of the immunity provided to health care providers based on PS § 14-3A-06, that exercise is not necessary for purposes of this appeal because the April 22 ED Visit and April 25 ED Visit involved COVID-related care at a time when the bounds of the immunity afforded to health care providers based on PS § 14-3A-06 were clearly established. It is also not necessary to address in the appeal what effect, if any, the May 6, 2020, guidance from the Maryland Department of Health indicating that the Department “d[id] not construe the immunity provisions in Pub. Safety Art. § 14-3A-06 or Health Gen. Art. § 18-907 to apply to a healthcare provider or facility performing non-COVID-19 related procedures or appointments” has on the immunity provided based on PS §14-3A-06 because the Department of Health issued that guidance after the April 22 ED Visit and the April 25 ED Visit. Md. Dep’t of Health, *Amended Directive and Order Regarding Various Healthcare Matters* (May 6, 2020). To be clear, we hold that BWEP was entitled to statutory immunity for the health care provided to Constantine during the April 22 ED Visit and the April 25 ED Visit, but offer no other views on the scope of the immunity to which BWEP or other providers might be entitled under different circumstances.

CONCLUSION

We affirm the judgment of the circuit court granting summary judgment in favor of BWEP because BWEP was entitled to statutory immunity pursuant to PS § 14-3A-06 for the care it provided to Constantine at the April 22 ED Visit and the April 25 ED Visit.

**JUDGMENT OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
AFFIRMED. APPELLANT TO PAY
COSTS.**